Chapter CLXXXIX.[1]

INQUIRIES OF THE EXECUTIVE.

404. A resolution of inquiry when reported either favorably or unfavorably is privileged for immediate consideration.

A privileged resolution is reported from the floor and not by filing with the clerk.

A privileged resolution of inquiry, on which the question of consideration has been raised and decided adversely, is placed on the calendar although under section 2 of Rule XIII it is not otherwise eligible for reference to the calendar.

A Member may demand the question of consideration; although the Member in charge may demand the floor for debate.

On January 8, 1910,[2] Mr. James R. Mann, of Illinois, from the Committee on Interstate and Foreign Commerce, reported adversely a privileged resolution requesting certain information from the Secretary of Agriculture, with the recommendation that it lie on the table.

Mr. Halvor Steenerson, of Minnesota, made the point of order that under the rule the report should be referred at his request to the calendar as an adverse report.

The Speaker[3] held that the rule applied to nonprivileged reports only, and as the pending report was privileged it did not come within the rule and was not eligible for reference to the calendar except as unfinished business. The Speaker further ruled that privileged reports were made from the floor and not by filing with the clerk.

[1] Supplementary to Chapter LVII.
[2] Second session Sixty-first Congress, Record, p. 412.
[3] Joseph G. Cannon, of Illinois, Speaker.

Mr. Marlin E. Olmsted, of Pennsylvania, proposed to raise the question of consideration, and the Speaker said:

Consideration on the merits not having begun, the question of consideration may be raised, and if the House, on the question of consideration, declines to consider it, it must be somewhere. It can not remain with the committee, because the committee has reported it. If the House should decline to consider it, then, it seems to the Chair, it would go to the calendar.

Mr. John J. Fitzgerald, of New York, raised the point of order that he did not have the floor.

The Speaker, however, recognized Mr. Olmsted to raise the question of consideration, and the question being put was decided in the negative.

Thereupon the Speaker referred the resolution to the calendar.

405. The motion to discharge a committee from further consideration of a resolution of inquiry is not privileged after its report to the House.

The time of delivery of reports to the clerk fixes the time at which such reports are made and a motion to discharge a committee comes too late after a report has been filed regardless of whether it has been printed.

On May 27, 1926,[1] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary, submitted the report of that committee on the resolution (H. Res. 225) directing the Secretary of the Treasury to furnish certain information.

Immediately thereafter Mr. Fiorello H. LaGuardia, of New York, moved to discharge the Committee on the Judiciary from the further consideration of the resolution.

Mr. Graham made the point of order that, the committee having reported, it was too late to move its discharge.

Mr. LaGuardia took the position that the report had not yet been printed as required by paragraph 2 of Rule XVIII and until so printed it was not on the calendar and the motion to discharge the committee from its further consideration was in order.

The Speaker[2] ruled:

The Chair thinks it would be a highly technical ruling to hold that this bill, which has been reported, is still in the committee.

It is going to be printed. The sole question, as it appears to the Chair, is that the gentle from New York moves to discharge the committee from the consideration of this resolution, and that presupposes that the resolution is still in the custody of the committee, which is not the fact, for it has been reported.

The Chair sustains the point of order.

406. Only resolutions of inquiry addressed to the heads of executive departments are privileged.

The term "Heads of Executive Departments" refers exclusively to members of the President's Cabinet.

A resolution of inquiry addressed to the Federal Reserve Board is not privileged.

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[1] First session Sixty-ninth Congress, Record, p. 10211.

[2] Nicholas Longworth, of Ohio, Speaker.

On February 18, 1929,[1] Mr. Loring M. Black, jr., of New York, moved to discharge the Committee on Banking and Currency from the further consideration of the resolution of inquiry (H. Res. 313) requesting certain information of the Federal Reserve Board, and referred to that committee on February 9.

Mr. Bertrand H. Snell, of New York, made the point of order that the resolution was not privileged because not addressed to the head of an executive department.

The Speaker[2] held:

The question presented is, Is the motion of the gentleman from New York to discharge the Committee on Banking and Currency from consideration of a resolution addressed to the Federal Reserve Board in compliance with clause 5 of Rule XXII privileged as addressed to the head of a department?

The Chair thinks there is no question whatever about the rule. There are a number of precedents. The first one that the Chair recalls is found in Volume III, section 1863, of Hinds' Precedents.

Then in Hinds' Precedents, volume 5, section 7283, occurs the following sentence:

"The words 'heads of departments' is construed to mean the members of the President's Cabinet as is evident from the fact that in 1886 the House did not agree to a proposition to add such offices as the Commissioners of Patents, Internal Revenue, Pensions, etc."

The rule with regard to the privilege of the House floor is also very clear. It provides that among those entitled to the privilege of the House floor are heads of departments, and this has been repeatedly held to refer only to members of the Cabinet.

Under the circumstances, the rule being so absolutely clear and the precedents undeviating, the Chair sustains the point of order made by the gentleman from New York.

407. A resolution of inquiry retains its privilege after reference to the calendar.

On June 21, 1919,[3] Mr. Leonidas C. Dyer, of Missouri, proposed to call up from the calendar a resolution of inquiry directed to the Secretary of War.

Mr. John N. Garner, of Texas, raised the point of order that such resolutions ceased to be privileged when referred to the calendar.

The Speaker[4] ruled that reference to the calendar did not affect the privilege of the resolution, and recognized Mr. Dyer to call up the resolution.

408. On January 4, 1923,[5] Mr. Gilbert N. Haugen, of Iowa, from the Committee on Agriculture, reported as privileged a resolution of inquiry addressed to the President and asking for facts concerning the United States Sugar Equalization Board, which was referred to the House Calendar.

On the following day,[6] the resolution was called up as privileged by Mr. Haugen, and after brief debate was agreed to by the House.

409. A privileged resolution of inquiry is in order on days on which it is in order to move to suspend the rules, and takes precedence of a call of the Unanimous Consent Calendar.

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[1] Second session Seventieth Congress, Record, p. 3667.

[2] Nicholas Longworth, of Ohio, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 1508.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

[5] Fourth session Sixty-seventh Congress, Record, p. 1272.

[6] Record, p. 1308.

While the motion to discharge a committee is not debatable, the motion to discharge a committee and pass a measure before them is subject to debate if undivided.

On March 15, 1920,[1] the Speaker pro tempore, Mr. Joseph Walsh, of Massachusetts, had directed the Clerk to call the Calendar for Unanimous Consent, when Mr. Thomas W. Harrison, of Virginia, moved to discharge the Committee on Interstate and Foreign Commerce from the further consideration of a privileged resolution of inquiry relative to the distribution and consumption of print paper, and pass the resolution.

Mr. Warren Gard, of Ohio, rose to a parliamentary inquiry and asked if the motion was in order on the day set apart for the consideration of bills on the Unanimous Consent Calendar.

The Speaker pro tempore ruled that the motion was privileged.

Mr. Harrison then demanded recognition to debate the motion and the Speaker pro tempore held that the motion was debatable and recognized him for one hour.

410. A resolution of inquiry, though adversely reported, is privileged if on the calendar.

An inquiry for "complete information" when only partial information was available, held not to constitute a request for an investigation, and to be privileged under the rule.

On April 21, 1910,[2] Mr. Thomas D. Nicholls, of Pennsylvania, called up from the Calendar, to which it had been referred through error after being adversely reported, the following:

Resolved, That the Attorney-General of the United States be requested, if not incompatible with the public interest, to furnish the House of Representatives with complete information regarding the arrest, indictment, trial, and conviction in the cases of Antonio I. Villarrel, R. Flores Magon, and Liberado Rivera, now in prison at Florence, Ariz., convicted of violating the neutrality laws, as between the United States and Mexico; also as to whether any other charges against the prisoners are pending, or whether they will regain their freedom at the end of the present term of imprisonment, and when such term in each case will expire.

Mr. Sereno E. Payne, of New York, made the point of order that—

It asks what is not in the hands of the Attorney-General, namely, a complete report with reference to the indictment, the trial, and the arrest. The Attorney-General only has memoranda; and a complete report of the trial would need an investigation. Our report also states that the gentleman was asked by the chairman of the committee to go with him and get what was in the hands of the Attorney-General, and it was ascertained that he did not want what was in the hands of the Attorney-General, but that he wanted an investigation which would disclose all those facts—the complete report of the trial. And we therefore, under those circumstances, regarded it as not a privileged resolution because it asked an investigation.

The Speaker[3] overruled the point of order and said:

The Attorney-General may or may not have that information, but it seems to the Chair that the House is entitled to call for that information; and if he does not have it, he can so respond. Again, also as to whether any other charges against the prisoners are pending, that is a question

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[1] Second session Sixty-sixth Congress, Record, p. 4338.

[2] Second session Sixty-first Congress, Record, p. 5135.

[3] Joseph G. Cannon, of Illinois, Speaker.

of fact. It is true the Attorney-General may not have the information, but he may have, and that is as susceptible of an answer according to the facts as it would be if he did not have the knowledge.

411. The rule authorizing reference to the Calendar of Adverse Reports, on request, does not apply to privileged resolutions of inquiry.

Clause 2 of Rule XIII applies to nonprivileged reports only.

A resolution of inquiry adversely reported to the House and undisposed of becomes unfinished business and may be called up at the will of the House.

The Member presenting a committee report from the floor is entitled to prior recognition.

On January 8, 1910,[1] Mr. James R. Mann, of Illinois, from the Committee on Interstate and Foreign Commerce, presented the adverse report of that committee on a resolution of inquiry authorizing the Secretary of Agriculture to inform the House if Executive orders had been issued suspending the operations of the pure food and drugs act, with the recommendation that the resolution lie on the table.

Thereupon, Mr. Halvor Steenerson, of Minnesota, the author of the resolution, requested that the report be referred to the calendar under clause 2 of Rule XIII.

The Speaker[2] held: said:

The gentleman, the Chair presumes, relies—and the Chair proceeds without objection from the gentleman from Illinois—on Rule XIII, clause 2, which as is follows:

"All reports of committees, except as provided in clause 61 of Rule XI"—

That refers to privileged reports, and this is a privileged report—

"together with the views of the minority, shall be delivered to the Clerk for printing and reference to the proper calendar under the direction of the Speaker."

Then, on the next page:

"Provided, That bills reported adversely shall be laid on the table, unless the committee reporting a bill, at the time, or any Member within three days thereafter, shall request its reference to the calendar to which it shall be referred, as provided in clause 1 of this rule."

Now, this rule applies to nonprivileged matter; but under another rule this is a privileged report, and the Chair thinks it does not come within the rule just read, being privileged.

The report now being made on a privileged resolution, whether it was made in time or not, the matter is before the House, and may not be sent to the calendar under the rule relating to adverse reports or reports not privileged.

But in privileged matters there is a distinction, the Chair will state, between Rule XIII and Rule XI. The rule that the gentleman has in mind applies to nonprivileged matters and does not apply to privileged matters, which is provided for in another rule. *It can go on the calendar as unfinished business, subject to be called up when the House desires to consider it.*

Mr. Steenerson then proposed to proceed in debate when the Speaker ruled:

The rule is well established in the practice of the House that the Member reporting a resolution from the committee is entitled to recognition.

412. A resolution of inquiry undisposed of at adjournment retains its privilege and is the unfinished business when that class of business is again in order under the rules.

While the motion to lay on the table is not debatable, the chairman of a committee reporting a proposition to the House with the recommen-

[1] Second session Sixty-first Congress, Journal, p. 137. Record, p. 412.

[2] Joseph G. Cannon, of Illinois, Speaker.

dation that it be laid on the table is entitled to recognition for debate before moving to lay on the table.

While members of the committee are entitled to priority of recognition for debate, a motion to lay a proposition on the table is in order before the Member entitled to prior recognition for debate has begun his remarks.

On July 2, 1913,[1] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, submitted as privileged a report on the following resolution with the recommendation that it lie on the table:

Resolved, That the Attorney General be, and he is hereby, instructed to transmit to the House of Representatives copies of all correspondence and other papers and memoranda on file in the office of the Attorney General or referred by the President to the Attorney General relating to the prosecution or trial of Maury Diggs and Drew Caminetti, or either of them, for violation of the Mann White Slave Act.

Mr. James R. Mann, of Illinois, asked time for debate, when Mr. Clayton took the position that the request could not be granted as the motion to lay on the table was not debatable.

The Speaker[2] ruled that while the motion to lay on the table is not debatable the chairman having reported a privileged resolution with the recommendation that it lie on the table, was entitled to an hour or any part thereof before offering the motion to lay on the table.

Debate continued until adjournment, and on July 15,[3] during a call of the committees, Mr. Mann demanded the regular order and said:

Then I will take the liberty of reminding the Chair that a highly privileged matter was pending before the House and is still pending before the House as the unfinished business, and hence is the regular order; namely, a report from the Committee on the Judiciary recommending that the resolution offered by the gentleman from California, Mr. Kahn, lie on the table.

The Speaker said:

If the gentleman makes such a demand, then it is the regular order.

Debate was resumed on July 18,[4] when Mr. Clayton, having withdrawn his motion to lay on the table in order to permit further debate, Mr. Joseph W. Byrns, of Tennessee, demanded recognition to offer the motion. Mr. Mann made the point of order that the chairman of the committee, having withdrawn his motion, was entitled to prior recognition to debate the resolution. The Speaker held that the chairman was entitled to priority of recognition for debate, but a motion to lay a proposition on the table is in order before the Member entitled to prior recognition for debate has begun his remarks, and recognized Mr. Byrns.

413. A resolution of inquiry may be reported at any time, and, when reported, remains privileged until disposed of.

No objection having been made to the reference of a resolution of inquiry adversely reported, it was held on one occasion that it could then

[1] First session Sixty-third Congress, Record, p. 2311.

[2] Champ Clark, of Missouri, Speaker.

[3] Record, p. 2442; Journal, p. 213.

[4] Record, p. 2538.

be called up from the calendar only by authorization of the committee reporting it.

A resolution of inquiry, to enjoy its privilege, should caR for facts rather than opinions and should not require an investigation.

A special order providing certain business "Shall be in order for consideration" does not preclude consideration of other privileged business which the House may prefer to consider.

A request in a resolution of inquiry for "The reason why" is a request for an opinion, and destroys its privilege.

On December 13, 1924,[1] Mr. Fiorello H. LaGuardia, of New York, claimed the floor to call up for consideration the following resolution of inquiry which had been reported adversely by the Committee on the Judiciary and by his request referred to the calendar in the absence of a point of order against such reference:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to inform the House of Representatives, if not incompatible with the public interest, as follows:

1. The reason and cause for the dismissal of Robert J. Owens, a prohibition agent, assigned to the prohibition office, New York City, and the facts and evidence upon which such dismissal was based.

2. Whether or not the said Robert J. Owens was given a hearing; and if so, when and where such hearing was held.

3. The disposition of a certain amount of liquor seized by said agent, Robert J. Owens, on or about August 1, 1924, in the premises known as 142 East Fifty-fourth Street, Borough of Manhattan, city of New York, State of New York.

4. Whether or not a hearing was held before a United States commissioner or other officer authorized by law to determine the legality of the possession of the said liquor.

5. Facts, evidence, and proof of the legality of the possession of the said liquor.

6. Such other information in the possession of the department or any bureau thereof concerning the seizure and disposition of said liquor and the dismissal from the service of the said Robert J. Owens.

Mr. L. C. Dyer, of Missouri, made the point of order that Mr. LaGuardia was not authorized by the committee reporting the bill to call up the resolution for consideration.

Mr. Nicholas Longworth, of Ohio, made the further point of order that the resolution was not privileged in that it called for an opinion rather than for facts.

Mr. Everett Sanders, of Indiana, submitted the additional point that by special order the day had been set apart for the consideration of certain bills on the Private Calendar, and consideration of the resolution of inquiry was not in order until they were disposed of.

In discussing the point of order presented by Mr. Dyer, Mr. Louis C. Cramton, of Michigan, said:

Mr. Speaker, I am not interested in the subject matter of the resolution. I am, however, somewhat jealous of the protection of the rights of Members and the protection of the rights of minorities with reference to resolutions of inquiry. If it should be held that the point of order is correct, it means to do away with the right which a minority heretofore has had with reference to resolutions of inquiry. I do not believe that is desirable.

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[1] Second session Sixty-eighth Congress, Journal, p. 49; Record, p. 604.

The point of order is that a report having been made upon the resolution, that report having been adverse, that no one now can call up that resolution and the report on it except a member of the committee. All that the rule definitely requires is that the committee shall report, but the report of the committee is an idle ceremony unless it does lead to possible consideration by the House. If it is to be held that the resolution itself when reported has no privilege, then it is easy to see how a majority in this House can entirely put the lid on resolutions of inquiry. The majority in the House having control of the Rules Committee, having a majority on the committees, can secure an adverse report, upon a resolution of inquiry. Is it to be understood that that adverse report absolutely prevents the getting up of a resolution for a vote by the House? It would be strange, indeed, if a man who introduces a resolution shall be held to lose the right to call it up in this House—a right equal to that of any other Member—unless there is something explicit in the rules to that effect, and there is not.

Whether it is a favorable or adverse report is immaterial. But if it should be held that a privileged right to consideration does not exist, then why should there be, first, a provision in the rule to require a report which could not be brought before the House? And, secondly, if it is not privileged, how could a joint motion to discharge the committee and call up a bill for consideration, to have both joined in one privileged motion, and both when joined together repeatedly sustained as privileged? The resolution of inquiry, from its very nature, is to be used by the minority. The majority in harmony with the administration can generally get their information, but if you are to hold that an adverse decision of a committee of this House shall prevent the House itself from having the right to decide the question, then you have done away with the resolution of inquiry.

The Speaker [1] said:

Three points of order are made. As to the day, the Chair finds that the order yesterday was simply that bills on the Private Calendar, reported from the Committee on Claims, be in order for consideration to-morrow. It seems to the Chair that does not prevent the consideration of other privileged business, if the House so desires.

The second point of order is: Can it be brought up by the gentleman from New York [Mr. LaGuardia], he not being a member of the committee which made the report? This rule was adopted in 1880, and when it was first reported by Mr. Randall it simply provided that any motion of inquiry should be referred to a committee. Then it was contended by some Members that there should be some constraint on that committee, and, therefore, the addition was made that such committee should report within one week, and since then, without any special provision in the rule, it has been held that if the committee did not report within that week the Member who offered the resolution should have the right to bring it up as a matter of privilege. There is no special reason, given in any decision the Chair has been able to find, for establishing that right but the Chair supposes it is to compel the committee to do its duty. It is logical, if the committee does not do its duty, that the House should have the right, without the action of the committee, to immediately proceed to consider the subject. But there is nothing in the rule which provides what shall be done when the committee does report, and consequently it has been held that such a report is privileged, and, it seems to the Chair, it must stand just like any other privileged report of a committee. The Chair can see no reason for any difference in the privilege, whether it is adverse or whether it is favorable. But the Chair is unable to see any reason why this case should be held by decision to be different from all other cases. It is always held that the only person who can bring up a bill is the Member authorized by the committee. There are some privileged bills now on the calendar which are subject to be brought up, but nobody can bring them up except the member of the committee authorized to do so, and in the absence of any expression in the rules or of any precedents by a decision the Chair does not feel authorized to hold that there is any different right in this case than in any other case.

Then as to the point that is made by the gentleman from Ohio [Mr. Longworth], the rulings have been continuous that such a resolution must call simply for the facts and not for opinions. It does seem to the Chair that calling for the reason why the act was done is calling for an opinion

[1] Frederick H. Gillett, of Massachusetts, Speaker.

by the official who performed that act. It is asking his motive. Of course, the language could be drawn so as to ask the facts on which he based his action, but to ask the motive and the reason of his action, it seems to the Chair, also makes this resolution subject to the point of order. So the Chair sustains the point of order.

414. Resolutions of inquiry when reported from the committee to which referred are privileged.

Instance wherein an amendment was recommended to protect the confidential files of the department.

In response to a request for information "not incompatible with the public interest," the head of a department replied that it would be incompatible with the public interest to submit the information requested.

On May 14, 1932,[1] Mr. Charles R. Crisp, of Georgia, from the Committee on Ways and Means, submitted, as privileged, a report on a resolution requesting certain information from the Secretary of the Treasury and asked for its immediate consideration.

The committee in reporting the bill recommended that it be amended by incorporating the following:

If not incompatible with the public interest.

Mr. Carl R. Chindblom of Illinois, in discussing the resolution explained that the reason for incorporating the amendment was that the inquiry related to—

the production to the House of all the testimony, evidence, exhibits, documents, and records, matters very clearly of a confidential nature, which have come to the Treasury Department in the course of an investigation. In my opinion, if this shall become anything like a common practice, it will utterly destroy the possibility of the Treasury Department and of the Tariff Commission securing evidence from outside sources, because, if these matters can not be treated confidentially by the representatives of the Government who obtain this information from manufacturers, producers, and tradesmen, then, of course, we will never get the information. The committee amendment, reading "if not incompatible with the public interest," will, in my opinion, protect the Government as well as private interests.

After brief debate, the resolution was agreed to, and on May 31, the Speaker[2] laid before the House a communication from the Secretary of the Treasury reading in part as follows:

TREASURY DEPARTMENT,
Washington, May 26, 1932.

DEAR MR. SPEAKER: I am in receipt of House Resolution 213, dated May 14, 1932, requesting that if not incompatible with the public interest I submit to the House of Representatives, as soon as practicable, all the testimony, evidence, exhibits, documents, and records presented in or pertaining to the investigation conducted under the authority of the antidumping act, 1921, relating to the importation of ammonium sulphate.

In passing the antidumping act the Congress decided to provide that the initial decisions as to the existence of dumping should be made by the Secretary of the Treasury in accordance with administrative procedure. It has been the practice of the department in acting under this statute to treat all information furnished by interested persons as confidential and not to disclose it unless such persons consent to the disclosure. This practice is founded upon the necessity for the department to obtain complete information concerning manufacturers' and importers' business transactions which it would be practically impossible to obtain if those furnishing the infor-

[1] First session Seventy-second Congress, Record, p. 10207.

[2] John N. Garner, of Texas, Speaker.

mation did not understand it would be treated as confidential and not divulged without their consent.

As consent has not been given to the disclosure of the information contained in the record before the Treasury Department, I am of the opinion that it would be incompatible with the public interest to comply with the request contained in the resolution.

Very truly yours,

OGDEN L. MILLS,
Secretary of the Treasury.

415. The motion to discharge a committee is not debatable, and the proposition to lay on the table a motion to discharge a committee from the consideration of a resolution of inquiry is in order and takes precedence even though the proponent of that motion demands the floor.

The motion to lay on the table is not debatable.

On the recapitulation of a yea-and-nay vote a proposition to correct a vote is not in order until the recapitulation has been concluded.

A motion to discharge a committee from consideration of a resolution of inquiry, when privileged, is not debatable.

On February 1, 1919,[1] Mr. Halvor Steenerson, of Minnesota, as a privileged question, moved to discharge the Committee on Agriculture from the consideration of a resolution of inquiry, requesting of the President information relative to action toward putting into effect the guaranteed price of wheat. This motion had not been reported within the time prescribed by the rule.

Mr. Asbury F. Lever, of South Carolina, made the point of order that the motion was not privileged which was overruled by the Speaker.[2] Mr. Lever then proposed to yield time for debate, when the Speaker held that the motion was not debatable.

415a. On April 8, 1908,[3] Mr. Sereno E. Payne moved to lay on the table a motion by Mr. Dorsey W. Shackleford, of Missouri, to discharge the Committee on Ways and Means from the further consideration of a privileged resolution of inquiry.

Mr. Shackleford made the point of order that he was entitled to recognition as the proponent of the motion to discharge the committee, and Mr. Payne did not have the floor to offer a motion.

The Speaker[4] said:

The motion to lay on the table takes precedence, even extending to the recognition that is given to the gentleman. The Chair has verified his recollection. Under the rule a motion to discharge the committee is not debatable, and a motion to lay on the table takes precedence. Neither motion is debatable, so far as that is concerned.

The question being taken, the yeas were 126, and the nays were 123.

Mr. John Sharp Williams, of Mississippi, demanded a recapitulation of the vote, which was ordered.

During the recapitulation Mr. Dorsey W. Shackleford, of Missouri, addressed the chair and proposed to challenge the correctness of the vote.

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[1] Third session Sixty-fifth Congress, Journal, p. 141. Record, p. 2522.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixtieth Congress, Record, p. 4516.

[4] Joseph G. Cannon, of Illinois, Speaker.

The Speaker said:

After the recapitulation is completed corrections can be made.

416. A committee having been discharged from the further consideration of a resolution of inquiry, debate is in order under the hour rule unless the previous question is ordered.

On February 26, 1919,[1] the House agreed to a motion offered by Mr. Albert Johnson, of Washington, to discharge the Committee on Military Affairs from the further consideration of a privileged resolution of inquiry relating to charges of malfeasance against certain Army officers.

Thereupon Mr. Finis J. Garrett, of Tennessee, inquired if debate was then in order.

The Speaker[2] replied that discussion was then in order and a Member recognized was entitled to one hour.

417. The motion to discharge a committee from the consideration of a resolution of inquiry is not debatable, but the motion having been agreed to, the resolution is before the House and subject to debate under the hour rule.

The House having agreed to a motion to discharge a committee from further consideration of a resolution, the proponent of the motion was recognized to debate the resolution.

On June 5, 1919,[3] Mr. Thomas L. Blanton, of Texas, moved to discharge the Committee on Expenditures in the Department of Agriculture from consideration of a resolution of inquiry which had been referred to the committee more than a week previous.

Mr. J. Hampton Moore, of Pennsylvania, addressed the chair, when Mr. Blanton made the point of order that the motion to discharge a committee was not debatable.

The Speaker[4] sustained the point of order.

The motion was agreed to and the question recurring on the adoption of the resolution, Mr. Moore arose and asked if debate was in order.

The Speaker replied that the question was debatable and recognized Mr. Blanton.

418. A point of order may be raised against a substitute reported by committee, although the original resolution may have been privileged.

A resolution calling for "reasons which make it inexpedient" to take specified action was held to ask for opinions rather than facts, while a resolution asking "what facts make expedient" such action was admitted under the rule.

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[1] Third session Sixty-fifth Congress, Record, p. 4350.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-sixth Congress, Record, p. 696.

[4] Frederick H. Gillett, of Massachusetts, Speaker.

On April 14, 1910,[1] Mr. Ebenezer J. Hill, of Connecticut, from the Committee on Expenditures in the Treasury Department, submitted as privileged the following report:

The Committee on Expenditures in the Treasury Department, to which was referred House resolution 480, respectfully report that they have had the same under consideration, and recommend the adoption of the following substitute:

Resolved, That the President be, and he is hereby, requested to inform the House if there still exist any reasons which make it inconvenient or inexpedient that a thorough examination at this time be made by the House of Representatives of the frauds in the customs service mentioned by the President in his annual message to the Congress at this session.

Mr. John J. Fitzgerald, of New York, made the point of order that the substitute in asking for reasons was not entitled to privilege.

The Speaker[2] ruled:

The substitute reported for this resolution is the same as the resolution, striking out the words "what facts which make it inexpedient" and inserting "what reasons which make it inexpedient."

Now, the Chair thinks it very likely that the condition may or may not have changed since the sending of the annual message. The Chair, of course, is not informed, but thinks the annual message referred to a condition, to facts in esse, in general terms. The substitute asks an expression of opinion—it might fairly be so construed—as to the reasons that exist, and so forth. This rule has been strictly construed. If this resolution or substitute is not privileged it would go upon the calendar, to be disposed of in the future as business not privileged. If it be privileged, it can be disposed of at this time.

The Chair is inclined to sustain this point of order; perchance there may be reasons other than the facts. The Chair therefore sustains the point of order.

Thereupon, Mr. Fitzgerald moved to discharge the committee from the consideration of the original resolution which was as follows:

Resolved, That the President be, and he is hereby, requested to inform the House what facts, if any, now exist which make inexpedient a thorough examination at this time by the House of Representatives of the frauds in the customs service mentioned by the President in his annual message to the Congress at this session.

Mr. Hill made the point of order that the original resolution in calling for facts which made the examination inexpedient asked for an opinion and was therefore without privilege.

The Speaker said:

Now, the resolution asks the President to inform the House of the facts, if any now exist, which make inexpedient a thorough examination at this time by the House of Representatives of the frauds in the customs service mentioned by the President in his annual message to the Congress at this session. The President, in the annual message just read, said that it would be embarrassing in the administration of justice to disclose the hand of the Department of Justice and of the Executive, and that it might give immunity, perchance, as well as embarrass the administration. Now, the resolution wants to know whether the condition has passed that was referred to by the President in his annual message. It is that which the House calls for, and the Chair overrules the point of order.

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[1] Second session Sixty-first Congress, Record, p. 4689.

[2] Joseph G. Cannon, of Illinois, Speaker.

419. A resolution of inquiry asking "why" certain action had not been taken was held to be a request for facts and not for opinions, and therefore to be privileged.

A privileged resolution should be reported from the floor and, if reported through the basket, loses its privilege, but if ruled out of order on that ground may be immediately submitted from the floor without loss of privilege.

On April 19, 1910,[1] Mr. John H. Stephens, of Texas, from the Committee on Indian Affairs, reported as privileged a resolution addressed the Secretary of the Interior making inquiries regarding certain cases pending before the department involving the citizenship of various Indians, and concluding as follows:

Third. Whether the said cases were considered with the same deliberation and with the average expenditure of time thereon as had been the practice of the department for several years prior thereto; and if not, why not.

Mr. Sereno E. Payne, of New York, made the point of order that the phrase "if not, why not" called for an opinion.

Mr. James R. Mann, of Illinois, made the further point of order that the bill had been reported through the basket instead of from the floor, thus precluding the reservation of points of order and was therefore deprived of any privilege to which it might have been entitled.

The Speaker[2] said:

Under the rule, this being a privileged report, the report should be made by the committee from the floor of the House, and not by dropping it in the basket. The Chair has a precedent in a ruling Mr. Speaker Reed on March 26, 1890. The report was at once made from the floor, as the gentleman might do now.

The Chair sustains the point of order.

Whereupon, Mr. Stephens forthwith submitted the report from the floor, and the Speaker continued:

Now, the Committee on Indian Affairs giving the gentleman authority to make the report, and it having been made not upon the floor of the House, the gentleman from Texas, from the Committee on Indian Affairs, makes the report on the resolution which he claims to be privileged. As to the point of order made by the gentleman from New York, Mr. Payne, to the following language: And if not, why not—

It seems to the Chair that this does not call for an expression of an opinion, but for a statement of fact; therefore the Chair overrules the point of order.

420. A resolution asking "the cause of delay" was held to be a request for facts and not a request for an opinion, and therefore privileged under the rule.

On June 25, 1910,[3] Mr. Eugene F. Kinkead, of New Jersey, called up, as privileged, the following resolution of inquiry:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to report to the House of Representatives the cause or causes of delay in the Auditor's Office of the War Depart-

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[1] Second session Sixty-first Congress, Record, p. 4987.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Second session Sixty-first Congress, Record, p. 9106.

ment in the matter of the adjudication of claims filed by veterans of the civil war for back pay, bounty, and so forth.

Mr. James R. Mann, of Illinois, made the point of order that the resolution called for an expression of opinion rather than facts and was therefore not privileged.

The Speaker [1] overruled the point of order.

421. A resolution asking for the "cost" of an extended undertaking, an audit of which might give rise to a difference of opinion, was construed as a request for facts and not for opinions.

On August 19, 1911,[2] Mr. James M. Cox, of Ohio, offered a motion to discharge the Committee on Expenditures in the War Department from consideration of the following resolution which had been referred to the committee more than one week previously.

Resolved, That the President of the United States be, and he is hereby, requested to submit a statement to the House showing the cost which has accrued to the Government of the United States from the beginning of, and as the result of, the occupation of the Philippine Islands by the United States.

Mr. James R. Mann, of Illinois, raised a question of order and said:

That is a mere matter of opinion. No two persons, with the same set of books before them, would arrive at the same results as to the cost resulting from the occupation of the Philippine Islands. The resolution does not ask for the cost in the Philippine Islands. No one knows whether you could differentiate this cost from the cost of the Boxer revolution in China.

We had troops in the Philippine Islands at the time of the Boxer revolution. Who will say whether the cost of sending those troops there should be charged to the Philippine occupation or to our protecting our interests in China? Who will say whether the cost of fortifying Pearl Harbor after our annexation of Hawaii was a result of our occupation of the Philippine Islands? Already two reports have been asked for and made. The gentleman criticizes those reports because they are fragmentary and not complete, and the only effect of the passage of this resolution, and of obtaining the information which in the opinion of the President should be sent under it, would be to criticize somebody because that information did not include something that somebody thought it ought to include, or did include something that someone thought it ought to not include.

The rule is, Mr. Speaker, that a resolution is not privileged which calls upon a department of the Government to exercise its judgment as to what should be done. All you can call for is specific information. Here is a resolution requiring the President to indicate his judgment as to what are the costs resulting from the occupation of the Philippine Islands. I do not think we ought to pass a resolution asking the President for his opinion on a subject for the purpose of criticizing that opinion because it does not happen to agree with our opinion.

The Speaker [3] ruled:

Finding out how much the Philippine Islands cost is purely a question of arithmetic, and the point of order is overruled.

422. A resolution of inquiry to enjoy its privilege should call for facts rather than opinions.

The privilege of a resolution of inquiry may be destroyed by a preamble.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] First session Sixty-second Congress, Record, p. 4201.

[3] Champ Clark, of Missouri, Speaker.

A resolution of inquiry should not require an investigation, but if on its face it calls for facts, the chair is not required to investigate the probability of the existence of those facts.

A request for facts "on which he based" certain charges was held not to constitute a request for an opinion.

If a portion of a resolution of inquiry is without privilege the entire resolution is without privilege.

On August 12, 1913,[1] Mr. Frank W. Mondell, of Wyoming, moved to discharge the Committee on Ways and Means from the further consideration of the following resolution referred to that committee more than a week previously:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to transmit to the House of Representatives the facts in his possession on which he based the charge recently made by him that the recent decline in the price of United States 2 per cent bonds is due "almost wholly to what appears to be a campaign waged with every indication of concerted action on the part of a number of influential New York City banks to cause apprehension and uneasiness about these bonds in order to help them in their efforts to defeat the currency bill."

That the Secretary of the Treasury is also hereby directed to inform the House as to the facts on which he based his statement, as follows: "That nothing has occurred to impair the value of the 2 per cent bonds, but the amendment already adopted by the Banking and Currency Committee of the House enhances their intrinsic value," together with a copy of the amendment thus referred to by him.

Mr. Oscar W. Underwood, of Alabama, made the point of order that the resolution was a request for an opinion and was based on statements the authenticity of which could be ascertained only by an investigation.

After extended debate the Speaker[2] ruled:

The practice in regard to a resolution of this kind is this, that it is in order if it calls for facts only or information only. It does not make any difference which one of the two words is used. But it is out of order if it calls for an opinion or an investigation. If part of the resolution is bad, it is all bad.

It may be that the Secretary of the Treasury used the language quoted here. The Chair does not know, and it is none of his business to inquire. The Secretary may not have had any facts whatever as to the second proposition. The Chair does not pronounce an opinion whether he had or had not any facts on which to base the statement—

That nothing has occurred to impair the value of the 2 per cent bonds, but the amendment already adopted by the Banking and Currency Committee of the House enhances their intrinsic value if the Chair undertook to make up his own mind about the question whether the Secretary of the Treasury had facts on which to base an opinion he would have to go on an exploring expedition to find out what the Secretary was talking about.

All that the Chair is required to pass on is this: Is this resolution in proper form and language in the light of the rules, practices, and precedents of the House? The Chair thinks it is, because on its face it simply calls for facts—merely that and nothing more. Therefore the Chair is constrained to overrule the point of order made by the gentleman from Alabama.

423. A resolution inquiring as to the "result" of certain proceedings was held to be a request for facts and therefore entitled to privilege.

On January 28, 1919,[3] Mr. Norman J. Gould, of New York, moved to discharge the Committee on the Judiciary from the further consideration of the following resolution, which had been referred to the committee more than one week previously:

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[1] First session Sixty-third Congress, Record, p. 3315; Journal, p. 371.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session Sixty-fifth Congress, Record, p. 2216.

Resolved, That the President is hereby requested to inform the House of Representatives of the result, in detail, of his administration of the provisions of the so-called Overman Act, approved May 20, 1918, entitled "An act authorizing the President to coordinate or consolidate executive bureaus, agencies, and offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government."

Mr. Edwin Y. Webb, of North Carolina, made the point of order that the resolution was not privileged for the reason that it called upon the President to express an opinion as to the result in question.

The Speaker [1] overruled the point of order.

424. The report of the committee on a resolution of inquiry does not affect its privileged status, and such resolution is privileged for consideration from the time it is placed on the calendar.

An inquiry as to whether "facts exist to justify" a course of procedure was held to be a request for opinions rather than for facts and therefore not within the rule.

On February 20, 1919,[2] Mr. Charles E. Fuller, of Illinois, proposed to call up as a privileged resolution of inquiry the following:

Resolved, That the President, if not incompatible with the public interest, be requested to communicate to the House what, if any, facts exist to justify the War Trade Board in refusing license to American manufacturers to export manufactured goods to citizens of neutral countries with which we are not and have not been at war; and what, if any, facts exist to justify the refusal of the said War Trade Board to permit American manufacturers to communicate with their customers in such countries in regard to future business.

Mr. Thetus W. Sims, of Tennessee, made the point of order that the resolution having been reported by the committee and being on the calendar, was no longer entitled to a privileged status.

The Speaker [1] held that the committee could not by reporting a resolution of inquiry destroy its privilege as such, and overruled the point of order.

Mr. Sims then made the further point of order that the resolution, in asking for facts justifying the refusal of licenses, asked for opinions.

The Speaker sustained the point of order.

425. A resolution of inquiry asking for a citation of "the authority" under which certain action had been taken was held to call for facts rather than opinions.

On January 27, 1921,[3] Mr. Julius Kahn, of California, by direction of the Committee on Military Affairs, reported as privileged a resolution of inquiry asking for "the authority" under which the Postmaster General, the Secretary of War, and the Secretary of the Navy had purchased for their respective departments certain German airplanes.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution was not privileged for the reason that in asking for a citation of authority it called for opinions rather than for facts.

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[1] Champ Clark, of Missouri, Speaker.

[2] Third session Sixty-fifth Congress, Record, p. 3867.

[3] Third session Sixty-sixth Congress, Record, p. 2127.

The Speaker [1] said:

The Chair thinks that the authority upon which the Secretary acted is a matter of fact, and therefore the Chair overrules the point of order.

426. A resolution inquiring "Under the authority of what law" certain actions were taken, was construed to ask for facts rather than opinions.

On February 16, 1923,[2] Mr. Louis C. Cramton, of Michigan, moved to discharge the Committee on the Judiciary from the further consideration of a resolution in part as follows:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to inform the House of Representatives, if not incompatible with the public interest, as follows:

* * * * * * * *

3. If any such rules or regulations have been so adopted or put in force, or any such liquors have been so imported since January 17, 1920, under the authority of what law, if any, the Treasury Department acted in adopting or putting in effect such rules or regulations or in permitting such importations.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution asked for an opinion rather than for facts in that it required a construction of law, and was therefore a request for an opinion.

The Speaker [1] overruled the point of order.

427. The privilege of a resolution of inquiry is destroyed by a preamble reciting an assertion of fact.

Resolutions the adoption of which would commit the House to an assertion of fact do not come within the privilege.

A resolution requiring an investigation is not privileged under the rule.

The privilege of a resolution of inquiry, when in question, is strictly construed.

On March 14, 1908 [3] Mr. Thomas W. Hardwick, of Georgia, offered, as privileged, a motion to discharge the Committee on Interstate and Foreign Commerce from the further consideration of a resolution, asking for data reported to the President under a provision of law professed to be quoted in a preamble prefacing the resolution.

Mr. William P. Hepburn, of Iowa, made the point of order that the preamble destroyed the privilege.

The Speaker [4] quoted the rule relating to resolutions of inquiry and said:

There is nothing specific in the rule that makes the resolution privileged, but there has been a long line of decisions respecting resolutions of this kind that fairly well settle this point of order, and it has been held in the rulings of the Chair from time to time that if there is anything in the resolution, or in the preamble, for that matter, because the resolution and the preamble would have to be voted upon separately, which is aside from the purposes of a resolution of inquiry, then that destroys the privilege.

If the resolution itself were adopted, it identifies nothing. In the opinion of the Chair it would be unavailing. But suppose the resolution is adopted, and then the vote comes upon the

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] Fourth session Sixty-seventh Congress, Record, p. 3788.

[3] First session Sixtieth Congress, Record, p. 3315.

[4] Joseph C. Cannon, of Illinois, Speaker.

preamble, which professes to recite the law in part and in part not to recite the law. Let us assume that the preamble is voted down, as it might or might not be. The House would then be in the condition of having adopted a resolution that is unavailing. The value of the resolution is to call for information, and it should be strictly construed in the interests of the privileges of the House in order that the rule may be preserved. Therefore the Chair is of opinion, for the reasons assigned, that the preamble destroys the privilege of the resolution.

This preamble throws the burden upon the House to make an investigation of facts for itself as to whether the preamble correctly recites the law or as to whether the words not in quotations heretofore read by the Chair, are a part of the law or whether they are aliunde to the law, and such an investigation, whether it be little or much, is a distinct matter to which the House should not be brought in considering a privileged resolution of inquiry. Therefore the Chair sustains the point of order.

428. A resolution of inquiry asking "why" a certain course of action has been followed is a request for reasons and is without privilege.

On January 29, 1917,[1] Mr. Edward Keating, of Colorado, moved, as a privileged motion, to discharge the Committee on Reform in the Civil Service from the consideration of a resolution of inquiry requesting the President to inform the House "why," in the administration of the civil-service law, women were "denied appointment or promotion."

Mr. John J. Fitzgerald, of New York, having raised a question of order against the privilege of the resolution, the Speaker[2] said:

It destroys the privilege. You might just as well ask him in so many words to give his reasons. The rule is too well settled to warrant hunting up decisions on it.

429. A resolution of inquiry to be privileged as such should not ask for opinions or require an investigation.

A resolution inquiring whether certain agencies "Claim exemption" was held to require an investigation.

On September 29, 1917,[3] Mr. Halvor Steenerson, of Minnesota, moved to discharge the Committee on Agriculture from the further consideration of a resolution inquiring of the President of the United States whether the United States Food Administration in attempting to control the price of wheat and establish a fixed price "claims exemption from the antitrust laws of the United States."

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution not only asked for an opinion but in inquiring whether exemption was claimed required an investigation.

The Speaker[2] sustained the point of order on the ground that the resolution both called for an expression of opinion and required an investigation, either of which was sufficient to destroy the privilege claimed.

430. A resolution of inquiry asking for for "reasons" was held to be a request for an opinion rather than for facts and therefore not entitled to privileges.

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[1] Second session Sixty-fourth Congress, Record, p. 2188.

[2] Champ Clark, of Missouri, Speaker.

[3] First session Sixty-fifth Congress, Journal, p. 426; Record, p. 7470.

On February 11, 1919,[1] Mr. Charles E. Fuller, of Illinois, offered, as privileged, a motion to discharge the Committee on Interstate and Foreign Commerce from the further consideration of the following:

Resolved, That the President, if not incompatible with the public interest, be requested to communicate to the House what, if any, reasons exist for the War Trade Board to refuse license to American manufacturers to export manufactured goods to citizens of neutral countries with which we are not and have not been at war; and what, if any, reasons exist for the refusal of the said War Trade Board to permit American manufacturers to communicate with their customers in such countries in regard to future business.

Mr. John N. Garner, of Texas. made the point of order that the resolution called for an expression of opinion.

The Speaker[2] sustained the point of order.

431. A resolution of inquiry asking for facts justifying a specified action was held to ask for an opinion and therefore to be without privilege.

The reference to the calendar of a resolution of inquiry does not operate to deprive it of any privilege it may possess.

On February 20, 1919,[3] Mr. Charles E. Fuller, of Illinois, called up as privileged the following resolution:

Resolved, That the President, if not incompatible with the public interest, be requested to communicate to the House what, if any, facts exist to justify the War Trade Board in refusing license to American manufacturers to export manufactured goods to citizens of neutral countries with which we are not and have not been at war; and what, if any, facts exist to justify the refusal of the said War Trade Board to permit American manufacturers to communicate with their customers in such countries in regard to future business.

Mr. John N. Garner, of Texas, made the point of order that the resolution, having been reported by the committee and placed on the calendar, was no longer privileged.

The Speaker[2] overruled the point of order.

Mr. Henry D. Flood, of Virginia, then raised the question of order that in calling for facts justifying an action the resolution asked for an expression of opinion.

The Speaker sustained the point of order.

432. While Cabinet officers are frequently summoned to testify before committees either voluntarily or by subpoena, they are no longer called to give information on the floor of the House.

A resolution of inquiry to enjoy its privileges should not require an investigation.

Instance wherein the Speaker, desiring further time for consideration of a point of order, reserved his decision until the following day.

A resolution calling upon an executive officer to give his reasons for pursuing any certain course of action is out of harmony with the principles governing the use of privileged resolutions of inquiry.

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[1] Third session Sixty-fifth Congress, Record, p. 3140.

[2] Champ Clark, of Missouri, Speaker.

[3] Third session Sixty-fifth Congress, Record, p. 3867.

A resolution of inquiry asking "why" certain action has been taken is a request for opinions and is not admissible under the rule.

On February 11, 1908,[1] Mr. George Edmond Foss, of Illinois, from the Committee on Naval Affairs, reported as privileged the following resolution:

Resolved, That the Secretary of the Navy inform the House of Representatives why a considerable reduction is being made in the skilled labor force employed at the Washington Navy Yard and at other navy yards of the country.

Mr. James R. Mann, of Illinois, submitted the point that the resolution, in asking for reasons, failed to come within the rule.

After debate, the Speaker[2] said:

Without intimating an opinion as to whether the point of order is or is not well taken, the Chair would prefer that the matter go over until tomorrow morning.

On the following day,[3] after the reading and approval of the Journal, the Speaker announced.

Yesterday, just before adjournment, a point of order was made to a resolution reported from the Committee on Naval Affairs, which was briefly argued. The Chair sustains the point of order, and it is proper, very briefly, to assign the reasons therefor.

The provision of the resolution offered by the gentleman from Illinois, calling upon the Secretary of the Navy to state his reasons for the action referred to, presents a new aspect of a principle already settled. The House from its earliest history has exercised and cherished its prerogative of calling on the Executive for information and documents. In 1792, at the very beginning of the Government, the House decided that the Secretaries of the President's Cabinet should not be called personally to the floor of the House to give information, and concluded that written information should be furnished instead. From that time until this no Cabinet officer has given information on the floor of the House, although they have been frequently called before committees to testify, either voluntarily or by subpoena.

Resolutions calling for written information and for documents have in the later years of the House been given a privileged status, but the precedents show that this privilege has been confined within somewhat strict lines. It is allowable to call upon the head of a Department for a statement of facts within the knowledge of his Department, but whenever an attempt has been made to call for opinions or to direct the officer to make an investigation, it has been held that these provisions destroy the privilege of the resolution of inquiry.

It is not necessary to cite here the precedents in these cases, as they are well known to the membership of the House.

The Chair is of the opinion that a call upon an executive officer for a statement of his reasons is likewise out of harmony with the principles governing the use of these resolutions. It would tend to create discussion and debate between the executive and legislative branches and would not assist in the orderly and proper transaction of the public business.

433. The President declined to submit to the Senate in response to its request certain papers touching the London Naval Treaty of 1930 on the ground that such compliance would be incompatible with the public interest.

A resolution addressed to the President requesting the transmission of papers having been offered, the Senate modified it by incorporation of the clause "if not incompatible with the public interest."

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[1] First session Sixtieth Congress, Record, p. 1793.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Record, p. 1829.

On July 10, 1930 [1] (legislative day of July 8), in the Senate, Mr. Kenneth McKellar, of Tennessee, moved this resolution:

Whereas on June 12, 1930, the Senate Committee on Foreign Relations by resolution requested the Secretary of State to send it the letters, minutes, memoranda, instructions, and dispatches which were made use of in negotiations prior to and during the sessions of the recent conference at London; and

Whereas that committee received only a part of such documents; and

Whereas the Secretary of State, by direction of the President, denied a second request from the Foreign Relations Committee for the papers above described, and in his letter to the chairman of that committee the Secretary of State has apparently attempted to establish the doctrine that the treaty of London must be considered by the Senate "from the language of the document itself and not from extraneous matter"; and

Whereas that committee dissented from such doctrine and regarded all facts which enter into the antecedent or attempted negotiation of any treaty as relevant and pertinent when the Senate is considering a treaty for the purpose of ratification; and

Whereas that committee continued to assert its rights as the designated agent of the Senate to have full and free access to all records, files, and other information touching the negotiation of the treaty, such right being based on the constitutional prerogative of the Senate in the treaty-making process; and

Whereas the chairman of that committee transmitted a copy of those resolutions to the President and Secretary of State; and

Whereas the President and Secretary of State refused to submit the papers and documents requested by the Foreign Relations Committee: Now, therefore, be it

Resolved, That the President be, and he is hereby, requested, if not incompatible with the public interest, to submit to the Senate, with such recommendation as he may make respecting their use, all letters, cablegrams, minutes, memoranda, instructions, and dispatches and all records, files, and other information touching the negotiations of said London naval treaty, to the end that the Senate may be able to do and perform its constitutional obligations with respect to advising and consenting to and ratifying such treaty or rejecting same.

On motion of Mr. Joseph T. Robinson, of Arkansas, an amendment inserting the clause "if not incompatible with the public interest" was agreed to and the resolution as amended was adopted.

On July 11, the President [2] replied by message [3] as follows:

I have received Senate Resolution No. 320, asking me, if not incompatible with the public interest, to submit to the Senate all letters, cablegrams, minutes, memoranda, instructions, and dispatches, and all records, files, and other information touching the negotiations of the London naval treaty.

This treaty, like all other international negotiations, has involved statements, reports, tentative and informal proposals as to subjects, persons, and governments given to me in confidence. The Executive, under the duty of guarding the interests of the United States, in the protection of future negotiations, and in maintaining relations of amity with other nations, must not allow himself to become guilty of a breach of trust by betrayal of these confidences. He must not affront representatives of other nations, and thus make future dealings with those nations more difficult and less frank. To make public in debate or in the press such confidences would violate the invariable practice of nations. It would close to the United States those avenues of information which are essential for future negotiations and amicable intercourse with the nations of the world. I am sure the Senate does not wish me to commit such a breach of trust.

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[1] Second session Seventy-first Congress, Record, p. 88.

[2] Herbert Hoover, of California, President.

[3] Senate Doc. No. 216.

I have no desire to withhold from the Senate any information having even the remotest bearing upon the negotiation of the treaty. No Senator has been refused an opportunity to see the confidential material referred to, provided only he will agree to receive and hold the same in the confidence in which it has been received and held by the Executive. A number of Senators have availed themselves of this opportunity. I believe that no Senator can read these documents without agreeing with me that no other course than to insist upon the maintenance of such confidence is possible. And I take this opportunity to repeat with the utmost emphasis that in these negotiations there were no secret or concealed understandings, promises, or interpretations, nor any commitments whatever except as appear in the treaty itself and in the interpretive exchange of notes recently suggested by your Committee on Foreign Affairs, all of which are now in the hands of the Senate.

In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest.

On receipt of the message Mr. George W. Norris, of Nebraska, proposed the following reservation:

Reservation proposed by Mr. Norris to the treaty for the limitation and reduction of naval armament signed at London on April 22, 1930, by the plenipotentiaries of the President of the United States of America; the President of the French Republic; His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Italy; and His Majesty the Emperor of Japan, submitted to the Senate by the President of the United States on the last day of May, 1930.

Whereas in the consideration of said treaty the Senate, on the 10th day of July, 1930, requested the President of the United States to submit to the Senate all letters, cablegrams, minutes, memoranda, instructions, and dispatches and all record files and other information touching the negotiations of said treaty; and

Whereas the President of the United States has declined to comply with said request, and the Senate therefore, in acting upon said treaty, has been compelled to do so without any opportunity to give consideration to the letters, memoranda, and other documents and communications leading up to the drafting of said treaty or in negotiating the same: Therefore be it

Resolved by the Senate, That in ratifying said treaty the Senate does so with the distinct and explicit understanding that there are no secret files, documents, letters, understandings, or agreements which in any way, directly or indirectly, modify, change, add to, or take away from any of the stipulations, agreements, or statements in said treaty; and that the Senate ratifies said treaty with the distinct and explicit understanding that there is no agreement, secret or otherwise, expressed or implied, between any of the parties to said treaty as to any construction that shall hereafter be given to any statement or provision contained therein.

This reservation, with the preamble omitted, was agreed to by the Senate on July 21,[1] in the following form:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive I, Seventy-first Congress, second session, a treaty for the limitation and reduction of naval armament, signed at London on April 22, 1930.

Resolved further, That in ratifying said treaty the Senate does so with the distinct and explicit understanding that there are no secret files, document, letters, understandings, or agreements which in any way, directly or indirectly, modify, change, add to, or take away from any of the stipulations, agreements, or statements in said treaty; and that the Senate ratifies said treaty with the distinct and explicit understanding that, excepting the agreement brought about through the exchange of notes between the Governments of the United States, Great Britain, and Japan having reference to Article XIX, there is no agreement, secret or otherwise, expressed or implied, between any of the parties to said treaty as to any construction that shall hereafter be given to any statement or provision contained therein.

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[1] Record p. 390.

434. Instance wherein the Secretary of War declined to respond to an inquiry of the House on grounds of incompatibility with the public interest.

The Speaker may not treat as confidential official communications received from the heads of executive departments.

While a rule of the House provides for secret sessions, it is long obsolete, and the convening of the House in secret session is a procedure unprecedented for more than a century.

On June 25, 1910,[1] the House agreed to the following resolution:

Resolved, That the Secretary of War be, and he is hereby, directed, if not incompatible with the public interest, to submit to this House, with the least practicable delay, a report showing in detail—

First. The condition of the military forces and defenses of the Nation, including the Organized Militia.

Second. The state of readiness of this country for defense in the event of war, with particular reference to its preparedness to repel invasion if attempted (a) on the Atlantic or Gulf coasts, or (b) on the Pacific coast.

Third. The additional forces, armaments, and equipments necessary, if any, to afford reasonable guaranty against successful invasion of United States territory in time of war.

In response to this resolution the Secretary of War, on December 14, addressed to the Speaker a communication for presentation to the House, a portion of which was marked "Confidential."

To this communication the Speaker replied:

SPEAKER'S ROOM,
HOUSE OF REPRESENTATIVES,
Washington, D.C., December 14, 1910.

SIR: I herewith return your communication of December 14, in order that you may consider it in the light of the condition which arises in the House of Representatives. You have marked a portion of it confidential.

Rule XXX of the House provides:

"SECRET SESSION.

"Whenever confidential communications are received from the President of the United States, or whenever the Speaker or any Member shall inform the House that he has communications which he believes ought to be kept secret, the House shall be cleared of all persons except the Members and officers thereof, and so continue during the reading of such communications, the debates and proceedings thereon, unless otherwise ordered by the House."

Another rule of the House (Rule XLII) provides:

"EXECUTIVE COMMUNICATIONS.

Estimates of appropriations and all other communications from the executive departments, intended for the consideration of any committees of the House, shall be addressed to the Speaker, and by him referred as provided by clause 2 of Rule XXIV."

And still another rule of the House (sec. 1 of Rule XLV) provides:

"PRINTING.

"1. All documents referred to committees or otherwise disposed of shall be printed unless otherwise specially ordered."

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[1] Second session Sixty-first Congress, Record, p. 9105.

In view of the above rules it is practically impossible for the Speaker to treat this matter as "confidential," if it is to be brought to the attention of the House. I therefore respectfully return it to you.

This is done in view of the fact that your communication must be printed under the rules, and it is returned to you for such action as you may deem necessary, having in mind the language of the resolution as to the public welfare and in view of the fact that your communication can not be made confidential under our system without submitting it to a secret session, which would be a procedure unprecedented for nearly a century, and would probably result in at once bringing the matter into great publicity.

I am, with respect, etc.,

Yours truly,

J. G. CANNON.

Hon. J. M. DICKINSON,
Secretary of War, Washington, D. C.

On December 17,[1] 1910, the Speaker laid before the House the following:

WAR DEPARTMENT,
Washington, December 17, 1910.

SIR: In reply to your letter of December 14, returning my report of that date on House resolution No. 707, I beg to say that all of the facts which it is deemed proper should at this time proceed from the Secretary of War and be made public appear in the reports of the Secretary of War already submitted to Congress and the reports accompanying them. Inasmuch as you have returned to me my reply of December 14, 1910, with the appendices thereto attached, marked "Confidential," with the advice that it is practically impossible for you to treat the matters therein contained as confidential, by direction of the President, I respectfully say that it is not compatible with the public interest for me at this time to make a report answering in detail the questions embodied in the resolution.

Very respectfully,

J. M. DICKINSON,
Secretary of War.

Hon. J. G. CANNON,
Speaker of the House of Representatives.

435. The head of a department having failed to respond to a resolution of inquiry, the House transmitted a further resolution.

A resolution of inquiry, to enjoy its privilege, should call for facts rather than for opinions.

Discussion of the right of the House to send for original papers from the files of the department.

Instance wherein a resolution held to be without privilege was altered to conform to the requirements of the rule.

On August 1, 1919,[2] Mr. Thomas L. Blanton, of Texas, moved to discharge the Committee on Labor from the consideration of the following resolution which had been referred to the committee more than a week before, a previous resolution of similar tenor having been denied by the Secretary of Labor on the ground that transmission of the information was not deemed compatible with the public interest:

Resolved, That the Secretary of Labor be, and he is hereby, directed to report forthwith to the House of Representatives of the United States of America the following facts:

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[1] Third session Sixty-first Congress, Record, p. 448; Journal, p. 91.

[2] First session Sixty-sixth Congress, Record, p. 3524.

(1) What fact or facts, if any there are, have caused him to fail to comply with the request of the House of Representatives made upon him by H. Res. 128 passed by the House of Representatives on June 27, 1919, of the following tenor:

"Resolved, That the Secretary of Labor be, and he is hereby, requested to promptly report to the House of Representatives at the earliest date practicable the following facts:

"(1) What connection in behalf of the Department of Labor, if any, has John B. Densmore, now Director of the United States Employment Service, had with the case of Thomas J. Mooney, convicted in California of crime, stating in detail the activities of said Densmore concerning said case, and the expenses of same itemized that were paid by the Government, and upon what authority of law, attaching copies of all reports concerning same made to the Department of Labor by said John B. Densmore.

"(2) What connection in behalf of the Department of Labor, if any, since the punishment of said Thomas J. Mooney was commuted to life imprisonment, has any employee of said Department of Labor had with the said case of Thomas J. Mooney, stating such activities in detail, the purposes thereof, the expense itemized in connection therewith that has been paid or is to be paid by the Government, and upon what authority of law, attaching copies of all reports made to the Department of Labor concerning said case.

"(3) What requests on the Department of Labor, if any, have been made by a grand jury or a court in California for said John B. Densmore to appear in California to give evidence, and what action concerning same was taken by the Department of Labor."

(2) *Resolved further,* That said Secretary of Labor be, and he is hereby, directed to furnish forthwith to the House of Representatives the facts called for in the said H. Res. 128, set forth above, as passed June 27, 1919.

Mr. Finis J. Garrett, of Tennessee, made the point of order that the resolution was a request for reasons and not for facts.

The Speaker [1] said:

The Chair thinks it is a close question whether by verbally asking for only facts one does comply with the rule of the House, which says that the House can always ask for facts and nothing but facts. The Chair is disposed to think that, while in language a strict compliance with the rule, it really does ask for the reasons and opinion of the Secretary of Labor, and the Chair sustains the point of order.

On August 12, 1919,[2] Mr. Blanton moved to discharge the same committee from the consideration of a further resolution relating to the same subject, which had been referred more than a week previously:

Resolved, That the Secretary of Labor be, and he is hereby, directed to report forthwith to the House of Representatives of the United States of America the following facts:

(1) Copies of all such instructions mentioned by John B. Densmore as having been received by him during the months of May, June, July, August, September, and October, 1918.

(2) The names of all persons who, under the direction of any branch of the Department of Labor, had anything to do with the investigation of Thomas J. Mooney, charged with and convicted for heinous crime in California, stating in detail their respective activities, the amount of compensation paid them respectively, and the expenses of such investigation itemized in detail during the six months between May 1 and November 1, 1918.

(3) What connection in behalf of the Department of Labor, if any, since the punishment of said Thomas J. Mooney was commuted to life imprisonment, and since November 1, 1918, has any employee of the Department of Labor had with said case of Thomas J. Mooney, stating such activities in detail, the expense of same itemized in detail, and upon what authority of law, attaching copies of all reports made thereunder to the Department of Labor.

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[1] Frederick H. Gillett, of Massachusetts, Speaker.

[2] Record, p. 3802; Journal, p. 376.

(4) What activities, if any, are now being conducted in behalf of Thomas J. Mooney.

(5) Attach copies of vouchers of McPherson, Kelly, and Kilmer for July, 1918, covering their trip from San Francisco to Los Angeles, the purpose of such trip and expense of same itemized.

(6) Attach copy of letter of instructions sent by John B. Densmore to H. L. Cobb after Cobb was sent to Texas on propaganda trip for Employment Bureau and expense of trip itemized in detail.

(7) Attach all reports of Gallagher and Martin for their six weeks spent in Philadelphia, spring of 1919, investigating F.R. Welsh, with statement of expenses fully itemized in detail.

Mr. Joseph Walsh, of Massachusetts, made a point of order against the privilege of the resolution on the grounds that the phrases "what activities, if any" and "the purpose of such trip" called for an expression of opinion, and also that the phrase "in behalf of" involved an interpretation on the part of the Secretary of Labor.

Mr. Philip P. Campbell, of Kansas, raised the further point that under the law original copies from the files of the departments were not subject to requisition and certified copies only might be requested.

The Speaker said:

No authority has been cited to show that the House has not the right to order originals sent here. While it might be wise to amend the resolution, the Chair does not see how that question affects his decision.

These resolutions of inquiry are part of the privileges of the House. A resolution of inquiry is an engine which the House has to extort information from an administration, and it always indicates that the administration is unwilling to communicate certain facts which the House wishes to have; and so it seems to the Chair that the Chair ought, as a rule, in his decisions to lean in favor of the privileges of the House. The only privilege that this resolution has now is because the committee has failed to report it within seven days.

Now, the point of order which has been raised is that this resolution asks for an opinion rather than for facts.

The Chair thinks that while the language here and there throughout the resolution is inaccurate, as evidenced, for example, in the objection to section 6, to attach copies of letters sent "after Cobb was sent to Texas"—which is somewhat indefinite and vague—yet after all when the House asks for instructions from the department it is not presumed to know the exact facts and can not be precise in its averments, because otherwise there would be no reason for asking for the information, and therefore all that the House can do in the resolution is make its inquiry so definite that the department shall know what is intended and be able to determine whether the House is acting within its rights.

The only clause which gives the Chair any serious difficulty is clause 4. To clause 5, to be sure, the objection is made that the purpose of such a trip involves the expression of an opinion. But the Chair thinks it pretty clear that what is intended there is not the purpose in the mind of the man who made the trip, but the purpose of the department in sending him, and the Chair thinks that is a proper fact for Congress to ask for.

The fourth paragraph is "what activities, if any, are now being conducted in behalf of Thomas J. Mooney." That is vague. If it said, "What activities, if any, are now being conducted by the Department of Labor," the Chair thinks it would be very clear. But inasmuch as in the previous paragraphs it speaks of the activities of the Department of Labor, and inasmuch as the whole resolution is directed to the Department of Labor and the inquiry is made of that department, the Chair thinks it is not stretching the language but is a reasonable and fair interpretation to say that that means "what activities, if any, are now being conducted by the Department of Labor in behalf of Thomas J. Mooney"; and therefore the Chair overrules the point of order, and decides that the resolution is privileged.

Adjournment intervening, the resolution was agreed to on a subsequent day.[1]

[1] Record, p. 3869; Journal, p. 380.

436. While it is customary to use the clause "If not incompatible with the public interest" in resolutions of inquiry addressed to the President and to the State Department, it is not ordinarily used in resolutions addressed to other executive departments.

On March 1, 1910,[1] Mr. George E. Foss, of Illinois, from the Committee on Naval Affairs, submitted as privileged a report on a resolution requesting certain information from the Secretary of the Navy, with the following amendment:

Line 1, after "navy," insert "if not incompatible with the public interests."

Mr. James R. Mann, of Illinois, said:

Mr. Speaker, may I ask what is the object of putting in that provision, "if not incompatible with the public interest?"

It is usual in addressing the President and is usual in addressing the State Department on diplomatic matters, but it is not the usual form in addressing an ordinary department asking for information. We direct the department to send us information. We determine whether we want it or not, where it does not affect our diplomatic relations, and I hope the gentleman will not insist upon that amendment.

Where we want simply some plain information which the department has, it does not seem to me dignified for the House to insert that saving clause when directing information to be sent here which it knows the department has and of which we can judge just as well as the department as to whether it is incompatible with the public interests; it certainly is not the custom of the House to put those words in, and the Senate is extremely particular about striking them out.

Thereupon the amendment was rejected, and the resolution was agreed to without amendment.

437. Executive departments in response to resolutions of inquiry may not comment on debate in the House, include explanations tending to vindicate action by the department or enter into argument not specifically requested.

The House declines to receive from executive departments communications reflecting upon the House or any Member thereof.

On April 11, 1918,[2] the Speaker laid before the House a communication from the Postmaster General reflecting upon the Member introducing the resolution of inquiry in response to which the communication was written.

Mr. Clarence B. Miller, of Minnesota, moved that the House decline to receive the communication.

A motion by Mr. Finis J. Garrett, of Tennessee, to table Mr. Miller's motion was rejected, yeas 165, nays 165.

Mr. Miller then withdrew his motion and offered in lieu thereof a motion, that the communication be referred to a committee of five to be appointed by the Speaker. A motion by Mr. Garrett to lay on the table was rejected, yeas 172, nays, 175, and the motion to refer having been agreed to, the Speaker appointed the committee, which submitted the following report on April 19: [3]

Mr. CARAWAY, from the special committee appointed by the Speaker on the 11th day of April, 1918, in response to a resolution adopted by the House of Representatives to inquire into

[1] Second session Sixty-first Congress, Record, p. 2596.

[2] Second session Sixty-fifth Congress, Record, p. 4974.

[3] Record, p. 3363, Journal, p.305.

certain remarks alleged to have been included in a letter addressed to the Postmaster General by the chairman of the Committee on Public Information and by the Postmaster General transmitted to the House of Representatives on April 10, 1918, which language so complained of is as follows: "When Mr. Treadway stated in the House that he was 'reliably informed that there has been a very large amount of that class of mail matter sent over,' and 'it is a well-known fact that great quantities of that class of matter have been placed in their hands overseas,' he made assertions the absolute baselessness of which could have been ascertained by a telephone inquiry," begs leave to make the following report:

After a careful search of the precedents, the committee finds that the House of Representatives has uniformly refused to receive and make a part of its records communications reflecting upon the House as a whole or any Member thereof.

December 14, 1842, the Speaker laid before the House a communication from S. Pleasonton, Fifth Auditor of the Treasury Department, which was as follows:

"TREASURY DEPARTMENT,
"FIFTH AUDITOR'S OFFICE,
"December 14, 1842.

"SIR: In a report of a debate in the House of Representatives on Monday last, contained in the National Intelligencer of yesterday, it is stated that Mr. Sprigg, among other things, observed: 'He remembered, too, that the House at this instance had made a call upon the department (Treasury) for full and detailed information as to the whole system of managing the lighthouses of the United States, the contracts for buildings, for supplying oil, paying inspectors, etc., but no answer had ever been obtained, notwithstanding the clerks which the House had voted them and notwithstanding numerous and repeated promises made to him personally.'

"It was with extreme surprise I read this statement, as I had a perfect recollection that it was wholly erroneous; and as it is calculated, uncorrected, to injure the Treasury Department unjustly in the public estimation, I hope you and the House will excuse me for setting the Member right.

"It is sufficient to state that the whole of the information called for by the House in relation to lighthouses on Mr. Sprigg's motion was transmitted, as required by the resolution, partly to the Committee on Commerce on the 8th of March last and is contained in their printed report, No. 811, and partly to the House of Representatives direct by the Secretary of the Treasury on the 11th of March last, and by the House ordered to be printed, and will be found in Document No. 140 of the last session. These two documents contain all the information which was called for by the House.

"Mr. Sprigg individually called for the cessions of jurisdiction by the States over all the lighthouse sites, from the adoption of the Constitution; and, although so much labor and time as it required might have been declined on his individual call, yet, as I was desirous of furnishing all the information in my power to every person who sought it, the information was prepared and furnished as far as it was to be found in the office.

"I have the honor to be, very respectfully, your obedient servant,

"S. PLEASONTON.

"Hon. JOHN WHITE,
"Speaker of the House of Representatives."

The communication was by the House, after full consideration, adjudged objectionable and a resolution adopted as follows:

"Resolved, That the communication addressed to the Speaker of this House by S. Pleasonton on the 14th instant in relation to some remarks made in the House before that time by Mr. Sprigg, a Member from Kentucky, which paper was received by the Speaker and laid before the House without knowledge of its contents, was not such a communication as ought to have been received and presented to the House; that the same be withheld from the Journal and files of the House and the original be returned to the writer." (See Congressional Globe, 3d sess. 27th Cong., p. 101.)

In 1848 Mr. Medill, the Commissioner of Indian Affairs, addressed the following communication to the House of Representatives:

"To the honorable the House of Representatives of the United States:

"During the debate which took place in the House of Representatives on an amendment made by the Senate to the civil and diplomatic bill allowing to David Taylor the sum of $12,800 for a certain reservation claimed by him under the treaties of 1817 and 1835 with the Cherokees, as reported in the National Intelligencer of this morning, I find the following, viz:

"Mr. Clinman supported the claim and took occasion to warn the committee against any opposition which might have been made to it by Mr. Medill, the Commissioner of Indian Affairs, who, he understood, had endeavored to prejudice the claim because the agents of the claimant peremptorily refused to make an allowance for his favoring the claim. Mr. C. denounced the Indian Bureau as thoroughly corrupt. He had been credibly informed that the books in that bureau had been altered and falsified for corrupt purposes (though this, he believed, had been done during the incumbency of Mr. Crawford, the predecessor of the present commissioner). He had no confidence in Mr. Medill, nor would he believe any statement he should make. An application had been made to the department to have the books taken out of his office and deposited in some place where they would be safe from alterations."

"It is seldom that a public officer is justified in noticing attacks of this kind, but the above charges are of so grave and specific a character and so seriously reflect not only upon myself, personally and officially, but upon the administration of the whole of that branch of the public service entrusted to my charge that a different course on this occasion seems to be called for."

The House on the same day it was read adopted the following resolution:

"Resolved, That the communication of the Commissioner of Indian Affairs be returned to that officer, and that he be informed that this House considers the language thereof as offensive and indecorous."

This appears in a report of the second session of the Thirtieth Congress, date August 12, 1848, page 1070 of the Congressional Globe.

On the 3d day of February, 1865, the Senate adopted a resolution requesting the Secretary of the Navy for certain information. In answer to the resolution the Secretary of the Navy transmitted a letter from the Assistant Secretary of the Navy in which the Assistant Secretary undertook to reply to a speech that had before that time been made by Senator Hale on the floor of the Senate. This communication from the Secretary of the Navy was referred to the Committee on the Judiciary of the Senate for its consideration. On March 4, 1865, the committee reported as follows:

"The only information that the Secretary was instructed to give was in relation to the particular matters mentioned in the resolution. What may have been said by Senators, while it was under consideration, was not submitted to him either for approval or censure, nor was he called upon or authorized to vindicate himself or any person in his department from allegations made or supposed to have been made in the Senate. However, the person supposing himself assailed is not without redress; he may appeal to the public judgment through the press or request the Senate to constitute a committee of inquiry as to the truth of the charges; but there exists no right in an officer of the Government, in answer to specific inquiries, to comment on the debates of the body nor to vindicate his conduct, either individually or officially, in any matters not called for in the inquiries of the Senate. If differences exist between any member of the Senate and a citizen not a member, it is not the proper province of the body to settle them. Their duties are limited to matters proper for legislation or to such as refer to the public good and require investigation.

"With these views it is the opinion of your committee that the letter of the Assistant Secretary of the Navy, as accompanying the communication of the Secretary, should not have been sent to the Senate by the latter officer:

"1. Because the first part of it does not profess to relate to the Senate resolution but to be in response to the allegations of Hon. John P. Hale against the writer.

"2. Because the remainder of it merely gives a history of his conduct in attempting to relieve the garrison of Fort Sumter in 1861, an attempt worthy of praise, but which has not the most remote connection with a single inquiry embraced by the resolution.

"The committee therefore recommend the adoption of this resolution.

"'*Resolved,* That the letter to the Secretary of the Navy from the Assistant Secretary should not have been communicated in answer to the Senate resolution of February 3, 1865, and that the Secretary of the Senate be directed to return the same to the Secretary of the Navy.'"

The resolution was adopted and the communication returned to the Secretary of the Navy.

These proceedings are reported in the second session of the Thirty-eighth Congress on page 1365 of the Congressional Globe.

The House likewise refused to receive a message of Mr. Roosevelt, the President of the United States, in which there were statements calculated to reflect upon Members of Congress, and adopted the following resolution:

"Resolved, That the House in the exercise of its constitutional prerogatives declines to consider any communication from any source which is not in its own judgment respectful; and be it further

"Resolved, That the special committee and the Committee of the Whole House on the state of the Union be discharged from any consideration of so much of the President's annual message as relates to the Secret Service and is above set forth, and that the said portion of the message be laid on the table."

The language contained in the communication to the Postmaster General and attributed to the chairman of the Committee on Public Information is, in the opinion of the committee, impertinent and not respectful. In the language of the report of the Committee on the Judiciary in the Hale case, "there exists no right in an employee of the Government in answer to specific inquiries to comment on the debates of the body nor to vindicate his conduct, either individually or officially, in any matters not called for in the inquiries."

With these views it is the opinion of this committee that the letter of the chairman of the Committee on Public Information should not be received by the House. Therefore be it

"Resolved, That the Clerk of the House is hereby directed to respectfully return the communication containing the same to the Postmaster General."

The report was agreed to without division or debate:

Chapter CLXXXV.[1]

PUNISHMENT OF WITNESSES FOR CONTEMPT.[2]

335. A statute penalizes recalcitrancy of witnesses summoned to testify before either House or any committee of either House.

Witnesses summoned to testify may not excuse themselves under the plea that their testimony would compromise them.

Sections 192–194 of title 2 of the United States Code provide:

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

Whenever a witness summoned as mentioned fails to testify, and the facts axe reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

336. The case of Harry F. Sinclair, a recalcitrant witness, in 1924.

Counsel for a contumacious witness, present at the examination and transgressing the bounds of propriety, was admonished.

For declining to testify or to obey a subpoena duces tecum commanding him to produce certain papers, Harry F. Sinclair was certified to the district attorney for contempt.

Form of subpoena duces tecum issued by order of the Senate.

A committee in reporting the recusancy of a witness, included a transcript of the testimony, so as to show in what the contempt consisted.

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[1] Supplementary to Chapter LIII.

[2] See also the case of Marshall, sections 350–354, Chapter CCII, in this volume; also section 542 of the same chapter.

While certification of a contumacious witness to the district attorney for contempt is administrative, a motion authorizing certification has been admitted.

Discussion of the remedies open to the Senate under the statute.

On March 24, 1924,[1] in the Senate, Mr. Edwin F. Ladd, of North Dakota, presented a report from the Committee on Public Lands and Surveys, stating that the committee was charged under a resolution of the Senate adopted April 29, 1922, with the duty of making inquiry into the entire subject of leases upon naval oil reserves, and under a further resolution, adopted June 5, 1922, was authorized to require the attendance of witnesses and the production of books, papers, and documents, with the further authorization under resolutions adopted April 21, 1922, and May 15, 1922, to sit either en banc or by subcommittee during the sessions or the recesses of the Senate until otherwise ordered by the Senate. Pursuant to power thus conferred, the committee had entered upon this investigation, and had on March 22, 1924, caused to be served upon Harry F. Sinclair, the following subpoena duces tecum:

UNITED STATES OF AMERICA,
Congress of the United States.

To HARRY F. SINCLAIR,
Sinclair Consolidated Oil Co., New York City.

Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Senate Committee on Public Lands and Surveys of the Senate of the United States on Friday, March 21, 1924, at 10 o'clock a. m., at their committee room in the Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee, and bring with you all the books and records of the Hyva Corporation.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To David S. Barry, Sergeant at Arms of the Senate of the United States, to serve and return.

Given under my hand, by order of the committee, this 19th day of March, in the year of our Lord, one thousand nine hundred and twenty-four.

(Signed) E. F. LADD,
Chairman, Committee on Public Lands and Surveys.

(Indorsed on the reverse by signature of David S. Barry, Sergeant at Arms of the Senate of the United States.)

On being called to the stand as a witness before the committee Harry F. Sinclair refused, by advice of counsel, to answer any question propounded to him by the committee or to produce the books and records required in the subpoena, duces tecum.

Questions pertinent to the inquiry and which had been addressed by the committee to the witness and which the witness had severally declined to answer were appended to the report. The report concluded:

And now your committee reports to the Senate that the said Harry F. Sinclair, having appeared as a witness before your said committee, refused to answer questions pertinent to the question under inquiry, and is in contempt of the said committee and of the Senate.

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[1] Second session Sixty-eighth Congress, Record, p. 4785.

In the transcript appended the following appears:

Mr. LITTLETON. If I have any rights at all here—I am counsel for the witness—I certainly object to your putting into this record what you imagine the witness would have answered when he has claimed his rights here under the law. I protest most earnestly against it as an outrage.

Senator WALSH of Montana. I protest, Mr. Chairman, against any such remarks from counsel as an abuse of his privilege. Counsel yesterday, here by the courtesy of this committee, said that certain things that this committee propose to do were monstrous, and now we are told this morning that what I offered to do, with the privilege of the committee, is an outrage. That is an abuse of the privilege of counsel, and I desire the chairman to admonish counsel to that effect.

The CHAIRMAN. It is the opinion of the Chairman that counsel went, beyond his rights, both yesterday and to-day, in his statements.

On motion of Mr. Thomas J. Walsh, of Montana, the report of the committee was adopted and the President of the Senate was by the Senate directed to certify to the district attorney for the District of Columbia the facts as reported in the report of the Committee on Public Lands and Surveys.

In presenting the report, Mr. Walsh cited [1] sections 101, 102, 103, and 104 of the Revised Statutes providing penalties for refusal of witnesses to testify when summoned by the authority of either House of Congress, and said:

Mr. President, in view of the recusancy of the witness shown by the report just submitted, there are two questions open to the Senate, either to bring the witness before the bar of the Senate and, persisting in his contumacy, to commit him to the custody of the Sergeant at Arms for imprisonment until he shall consent to answer, or to report the matter, as contemplated by the statute which I have just read, for appropriate action by the district attorney of the District of Columbia and a grand jury.

I am sure that either of the remedies is exclusive of the other as matter of law, but as matter of practice they become practically so. The situation would be this: If the witness were brought before the bar of the Senate and an order, after his commitment, were made to the effect that he should stand committed until he should answer—I assume that he is in perfect good faith in the objection that he makes and in the position that he takes—he would, of course, then sue out a writ of habeas corpus, and he would be held under that writ. If the court should decide against him, that his objection is not well taken, he would be remanded to the custody of the Sergeant at Arms. He would then sue out a writ of error, and he would be entitled to bail under that writ of error.

In speaking to the motion, Mr. Walsh added: [2]

Mr. President, this is one of the gravest matters that can possibly have the attention of this body, affecting, as it does, the power to proceed in an orderly way to secure such information as it may need to aid it in the all-important task confided to this body by the Constitution and by the people. A contempt of a court, however humble that court may be, is always a matter of supreme importance. A contempt of this high tribunal can not be measured by any words.

An effort has been made, Mr. President, to impress the public mind with the idea, in the first place, that the power of the Senate of the United States to require witnesses to attend before it or before its committees in connection with matters of legislation, and particularly to require from such witnesses, as it is said, information of a "private" character and in relation to the "private" business of the witness is involved in "very grave doubt"; that it is a matter that requires the adjudication of the courts and of the highest tribunal of the Nation. I do not think, Mr. President, that either of the questions suggested, or any of those which have been raised as a ground for the refusal of the witness to testify are involved in this "serious doubt." I can

[1] Record, p. 4725.

[2] Record, p, 4789.

not read the decisions touching the power of either branch of Congress to compel the attendance of witnesses and to compel witnesses to testify as suggesting in any way that the question is one of "grave doubt" that can justify anyone in attempting, as a speculative matter, to secure an adjudication upon the subject. I think it involves the very life of the effective existence of the House of Representatives of the United States and of the Senate of the United States.

337. The case of Harry F. Sinclair, continued.

A witness refusing to testify before a committee of the Senate was indicted and tried in the district court.

Decision of the district court on the right of the Senate to compel testimony and the production of papers and records.

Pursuant to the order of the Senate [1] a formal certificate was issued, signed by the acting President pro tempore, and transmitted to the district attorney. A grand jury returned an indictment on March 31, 1924, and the case was tried in the Supreme Court of the District of Columbia.

338. The case of Harry F. Sinclair, continued. While emphasizing the importance of protecting the individual from unreasonable and arbitrary disclosures of his private affairs, the court holds that either House of Congress is authorized to require testimony in aid of legislation.

The fact that testimony sought by a committee of the House might militate against the interest of the witness in a pending suit was held not to excuse him from supplying information properly within the scope of the inquiry.

The trial resulting in a conviction and a sentence of imprisonment and fine having been imposed, the case was carried to the appellate court, which requested the United States Supreme Court to instruct it on certain points of law involved in the case. The Supreme Court, however, elected to consider the entire record and pass on all phases of the appeal instead of answering the specific questions.

Mr. Justice Pierce Butler delivered the opinion of the court on April 8, 1929. After citing the statute [2] under which indictment was returned, and reviewing the history of the case, the opinion thus outlines the contention of the appellant:

> Appellant contends that his demurrer to the several counts of the indictment should have been sustained and that a verdict of not guilty should have been directed. To support that contention he argues that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, and that the committee avowedly had departed from any inquiry in aid of legislation.
>
> He maintains that there was no proof of any authorized inquiry by the committee or that he was legally summoned or sworn or that the questions propounded were pertinent to any inquiry it was authorized to make, and that because of such failure he was entitled to have a verdict directed in his favor.
>
> He insists that the court erred in holding that the question of pertinency was one of law for the court and in not submitting it to the jury and also erred in excluding evidence offered to sustain his refusal to answer.

The court first considers the contention of the appellant as to the limitations upon the power of Congress to inquire into private affairs and the importance of

[1] Second session Sixty-eighth Congress, Record, p. 4791.

[2] 279 U.S. 263, 749.

protecting the individual from unreasonable and arbitrary disclosures of purely personal matters:

It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary, or unreasonable inquiries and disclosures in respect of their personal and private affairs.

The opinion, however, holds that the issues in the pending case do not relate merely to private or personal affairs and says:

But it is clear that neither the investigation authorized by the Senate resolutions above mentioned nor the question under consideration related merely to appellant's private or personal affairs. Under the Constitution (Art. IV, sec. 3) Congress has plenary power to dispose of and to make all needful rules and regulations respecting the naval oil reserves, other public lands and property of the United States. And undoubtedly the Senate had power to delegate authority to its committee to investigate and report what had been and was being done by executive departments under the leasing act, the naval oil reserve act, and the President's order in respect of the reserves and to make any other inquiry concerning the public domain.

While appellant caused the Mammoth Oil Company to be organized and owned all its shares, the transaction purporting to lease to it the lands within the reserve can not be said to be merely or principally the personal or private affair of appellant. It was a matter of concern to the United States. The title to valuable Government lands was involved. The validity of the lease and the means by which it had been obtained under existing law were subjects that properly might be investigated in order to determine what if any legislation was necessary or desirable in order to recover the leased lands or to safeguard other parts of the public domain.

Neither Senate Joint Resolution 54 nor the action taken under it operated to divest the Senate or the committee of power further to investigate the actual administration of the land laws. It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.

The record does not sustain appellant's contention that the investigation was avowedly not in aid of legislation. He relies on the refusal of the committee to pass the motion directing that the inquiry should not relate to controversies pending in court and the statement of one of the members that there was nothing else to examine appellant about. But these are not enough to show that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable. It is plain that investigation of the matters involved in suits brought or to be commenced under Senate Joint Resolution 54 might directly aid in respect of legislative action.

The court holds that the resolution empowering the committee to conduct the investigation was ample authorization for summoning witnesses and eliciting testimony:

There is some merit in appellant's contention that a verdict should have been directed for him because the evidence failed to show that the committee was authorized to make the inquiry, summon witnesses, and administer oaths. Resolutions 282 and 294 were sufficient until the expiration of the Sixty-seventh Congress during which they were adopted, but it is argued that Resolution 434 was not effective to extend the power of the committee. As set out in the indictment and shown by the record, Resolution 434 does not mention 294 or refer to the date of its adoption. The former so far as material follows: "Resolved, That Senate Resolution 282, agreed to April 21, 1922, and Senate Resolution 292, agreed to May 15, 1922, authorizing and directing the Committee on Public Lands and Surveys to investigate the entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the

preservation of its natural resources, and to report its findings and recommendations to the Senate * * * be * * * continued in full force and effect until the end of the Sixty-eighth Congress. The committee * * * is authorized to sit * * * after the expiration of the present Congress until the assembling of the Sixty-eighth Congress and until otherwise ordered by the Senate."

There is enough in that resolution to show that where "292" appears 294 was meant. The subject of the investigation is specifically mentioned. That is the only matter dealt with. The sole purpose was to authorize the committee to carry on the inquiry. It would be quite unreasonable, if not indeed absurd, for the Senate to direct investigation by the committee and to allow its power to summon and swear witnesses to lapse. The context and circumstances show that Resolution 294 was intended to be kept in force.

The court then rules that the questions propounded were within the scope of this authorization:

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation. Appellant makes no claim that the evidence was not sufficient to establish the innuendo alleged in respect of the question; the record discloses that the proof on that point was ample.

Congress, in addition to its general legislative power over the public domain, had a the powers of a proprietor and was authorized to deal with it as a private individual may deal with lands owned by him. The committee's authority to investigate extended to matters affecting the interest of the United States as owner as well as to those having relation to the legislative function.

Before the hearing at which appellant refused to answer, the committee had discovered and reported facts tending to warrant the passage of Senate Joint Resolution 54 and the institution of suits for the cancellation of the naval oil reserve leases. Undoubtedly it had authority further to investigate concerning the validity of such leases, and to discover whether persons, other than those who had been made defendants in the suit against the Mammoth Oil Company, had or might assert a right or claim in respect of the lands covered by the lease to that company.

The contract and release made and given by Bonfils and Stack related directly to the title to the lands covered by the lease which had been reported by the committee as unauthorized and fraudulent. The United States proposed to recover and hold such lands as a source of supply of oil for the Navy. (S. J. Res. 54.) It is clear that the question so propounded to appellant was pertinent to the committee's investigation touching the rights and equities of the United States as owner.

Moreover, it was pertinent for the Senate to ascertain the practical effect of recent changes that had been made in the laws relating to oil and other mineral lands in the public domain. The leases and contracts charged to have been unauthorized and fraudulent were made soon after the Executive order of May 31, 1921. The title to the lands in the reserves could not be cleared without ascertaining whether there were outstanding any claims or applications for permits, leases, or patents under the leasing act or other laws. It was necessary for the Government to take into accounts the rights, if any there were, of such claimants. The reference in the testimony of Bonfils to the contract referred to in the question propounded was sufficient to put the committee on inquiry concerning outstanding claims possibly adverse and superior to the Mammoth Oil Company's lease. The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged.

The opinion concludes:

The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under section

102. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury.

The conviction was accordingly affirmed.

339. The case of M. S. Daugherty, in the Senate, in 1924.

A witness having declined to attend and produce documents, the Senate by resolution ordered his arrest.

A witness in the custody of the Sergeant at Arm having procured a writ of habeas corpus, the Senate requested the President to direct the Attorney General to defend the suit.

On April 26, 1924 [1] (legislative day of April 24), the Senate agreed to the following:

Whereas the select committee of the Senate, elected pursuant to Senate Resolution 157, Sixty-eighth Congress, first session, has submitted a report to the Senate; and

Whereas it appears from such report that M. S. Daugherty, as president of the Midland National Bank, Washington Court House, Ohio, was on March 22, 1924, duly served with a subpoena to appear forthwith before such committee in Washington, D. C., and then and there to testify relative to subject matters and to produce specified files, records, and books pertinent to the matter under inquiry, and was on April 11, 1924, duly served with a subpoena to appear forthwith before the committee in Washington Court House, Ohio, and then and there to testify relative to subject matters pertinent to the matter under inquiry; and

Whereas it appears from such report that the said M. S. Daugherty has, in disobedience of such subpoenas, failed so to appear or answer, or to produce such files, records, and books; and

Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

Resolved, That the President of the Senate pro tempore issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate.

On May 1 [2] (legislative day of April 24), the President pro tempore laid before the Senate a communication from the Sergeant at Arms in which the latter reported to the Senate that in pursuance to this resolution M. S. Daugherty has been arrested and taken into custody but had been released on writ of habeas corpus granted by the United States District Court of the Southern District of Ohio, Western Division, at Cincinnati.

Whereupon the Senate passed the following resolution:

Whereas under Senate Resolution No. 157 the special committee appointed to investigate the conduct of the office of Attorney General Harry M. Daugherty and his assistants did summon M. S. Daugherty to appear before it in person and to produce certain books and papers at room 410, Senate Office Building, Washington, D. C., which summons he disregarded, and the Senate thereupon ordered the arrest of said M. S. Daugherty, which order was executed by the Deputy

[1] First session Sixty-eighth Congress, Record, p. 7217.

[2] Record, p. 7592.

Sergeant at Arms. Thereupon the said M. S. Daugherty procured a writ of habeas corpus in the United States District Court of the Southern District of Ohio, the same being assigned for hearing at Cincinnati, Ohio, on May 10, 1924; and

Whereas the said committee did summon said M. S. Daugherty to appear before a subcommittee in person at Washington Court House, Ohio, which summons he disregarded, and thereupon brought an injunction suit in the Ohio court of common pleas in said city against Smith W. Brookhart and Burton K. Wheeler, said subcommittee, requiring them to answer on May 10, 1924:

Resolved, therefore, That the President of the United States be respectfully requested to direct the Attorney General to defend said suits on behalf of the Senate of the United States.

340. The case of M. S. Daugherty, continued.

A recalcitrant witness having been released from the custody of the Sergeant at Arms by judgment of a district court, the Senate authorized an appeal to the Supreme Court.

M. S. Daugherty was permanently discharged from the custody of the Sergeant at Arms on May 31,[1] by the district court, which pointed out that the investigation by the committee was on the initiative of the Senate only and not of both Houses of Congress; that the authorizing resolution failed to set forth the purpose of the investigation and gave no intimation that it was in aid of legislation; that the investigation committee was without warrant of law to exercise a judicial function, and the effort to compel attendance of witnesses and production of documents was under the circumstances an infringement on the rights of a citizen under the Constitution.

An appeal to the Supreme Court was authorized by the following resolution agreed to June 5,[2] S. Res. 247 (legislative day of June 3):

Whereas in a proceeding in the United States District Court for the Southern District of Ohio, western division, entitled "In the matter of the application of Harry S. Daugherty for writ of habeas corpus," an opinion has been handed down and judgment entered by the judge hearing said cause, which seriously affects the constitutional rights and power of the Senate of the United States and of the Congress; and

Whereas it is believed that said opinion and judgment are erroneous; and

Whereas it is highly desirable to have the law in the matter settled by the Supreme Court: Therefore be it

Resolved, That the Attorney General, on behalf of the Senate and the respondent in said cause, be requested to have the proper officials of his department, including counsel heretofore designated in the cause, take the necessary steps for a prompt review and determination thereof by the Supreme Court.

And the special committee appointed under Senate Resolution No. 157 is hereby authorized and empowered to secure the services of such other counsel, to act in conjunction with the Attorney General, as to it may seem necessary and advisable.

341. The case of M. S. Daugherty, continued.

Decision by the Supreme Court on the power of Congress to compel testimony.

Deputies with authority to execute warrants may be appointed by the Sergeant at Arms under a standing order of the Senate.

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[1] Record, p. 10480.

[2] Record, p. 10635.

Subpoenas issued by a committee of the Senate summoning witnesses to testify in an investigation authorized by the Senate are as if issued by the Senate itself.

At the January term of 1927,[1] Justice Van Devanter delivered the opinion of the Supreme Court.

As to the authority of deputies appointed by the Sergeant at Arms to execute warrants under a standing order of the Senate the court finds its validity established by long practice and ample provision of law, and says:

The witness challenges the authority of the deputy to execute the warrant on two grounds—that there was no provision of law for a deputy, and that, even if there were such a provision, a deputy could not execute the warrant because it was addressed simply to the Sergeant at Arms. We are of opinion that neither ground is tenable.

The Senate adopted in 1889 and has retained ever since a standing order declaring that the Sergeant at Arms may appoint deputies "to serve process or perform other duties" in his stead, that they shall be "officers of the Senate," and that acts done and returns made by them "shall have like effect and be of the same validity as if performed or made by the Sergeant at Arms in person." In actual practice the Senate has given full effect to the order; and Congress has sanctioned the practice under it by recognizing the deputies—sometimes called assistants—as officers of the Senate, by fixing their compensation and by making appropriations to pay them. Thus there was ample provision of law for a deputy.

The Court further finds that such warrants may be addressed to the Sergeant at Arms only, in pursuance of a Senate resolution contemplating service by either and holds:

The fact that the warrant was addressed simply to the Sergeant at Arms is not of special significance. His authority was not to be tested by the warrant alone. Other criteria were to be considered. The standing order and the resolution under which the warrant was issued plainly contemplated that he was to be free to execute the warrant in person or to direct a deputy to execute it. They expressed the intention of the Senate; and the words of the warrant were to be taken, as they well could be, in a sense which would give effect to that intention. Thus understood, the warrant admissibly could be executed by a deputy if the Sergeant at Arms so directed, which he did.

The requirement of the fourth amendment that a warrant for arrest be supported by oath is held to be complied with on the committee's report under the sanction of their oaths of office as follows:

The witness points to the provision in the Fourth Amendment to the Constitution declaring "no warrants shall issue but upon probable cause supported by oath or affirmation" and contends that the warrant was void because the report of the committee on which it was based was unsworn. We think the contention overlooks the relation of the committee to the Senate and to the matters reported, and puts aside the accepted interpretation of the constitutional provision.

The committee was a part of the Senate, and its members were acting under their oath of office as senators. The matters reported pertained to their proceedings and were within their own knowledge. They had issued the subpoenas, had received and examined the officer's returns thereon (copies of which accompanied the report), and knew the witness had not obeyed either subpoena or offered any excuse for his failure to do so.

The constitutional provision was not intended to establish a new principle but to affirm and preserve a cherished rule of the common law designed to prevent the issue of groundless warrants. In legislative practice committee reports are regarded as made under the sanction of the oath of office of its members; and where the matters reported are within the committee's knowledge and

[1] McGrain *v.* Daugherty, 273 U. S. 135.

constitute probable cause for an attachment such reports are acted on and given effect without requiring that they be supported by further oath or affirmation. This is not a new practice but one which has come down from an early period. It was well recognized before the constitutional provision was adopted, has been followed ever since, and appears never to have been challenged until now. Thus it amounts to a practical interpretation, long continued, of both the original common law rule and the affirming constitutional provision, and should be given effect accordingly.

The principle underlying the legislative practice has also been recognized and applied in judicial proceedings. This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowledge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served. A further illustration is found in the rulings that grand jurors, acting under the sanction of their oaths as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation; and still another is found in the practice which recognizes that where grand jurors, under their oath as such, report to the court that a witness brought before them has refused to testify, the court may act on that report, although otherwise unsworn, and order the witness brought before it by attachment.

We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement.

As to whether subpoenas issued by a committee of the Senate possess the validity of subpoenas issued by the Senate itself and whether in event of disobedience the act that the contumacy related only to testimony sought by a committee is a valid objection the opinion continued:

The witness also points to the provision in the warrant and in the resolution under which it was issued requiring that he be "brought before the bar of the Senate, then and there" to give testimony "pertinent to the subject under inquiry," and contends that an essential prerequisite to such an attachment was wanting, because he neither had been subpoenaed to appear and testify before the Senate nor had refused to do so. The argument in support of the contention proceeds on the assumption that the warrant of attachment "is to be treated precisely the same as if no subpoena had been issued by the committee, and the same as if the witness had not refused to testify before the committee." In our opinion the contention and the assumption are both untenable. The committee was acting for the Senate and under its authorization; and therefore the subpoenas which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction it was at liberty to do so.

342. The case of M. S. Daugherty, continued.

Each House of Congress has power through its own process to summon a private individual before one of its committees to give testimony which will enable it the more efficiently to exercise its constitutional legislative function.

A witness may rightfully refuse to answer where the committee exceeds its power or where questions submitted are not pertinent to the matter under inquiry.

It is to be presumed that the object of the Senate in ordering an investigation is to secure information which will aid it in legislating

In a resolution ordering an inquiry it is not necessary for the House or Senate to specify its legislative purposes; for inasmuch as this is the only legitimate purpose under which such investigations may be conducted, in the absence of evidence to the contrary, such purpose is presumed.

The doctrine that the Houses of Congress are empowered to require the testimony of individuals in the exercise of their legislative functions is thus established:

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with "all legislative powers" granted to the United States, and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any department or officer thereof. (Art. I, secs. 1, 8.) Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently. (Art. I, secs. 2, 3, 5, 7.) But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the State legislatures.

The court, however, recognizes the restrictions which govern, the Houses in the exercise of such powers and the limitations upon their right to inquire into purely personal affairs. After citing a number of cases confirming that opinion the court says:

While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and the other, that neither house is invested with "general" power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied.

When such limitations are exceeded the right of a witness to decline to answer is thus upheld by the court:

We come now to the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative and put its decision largely on this ground, as is shown by the following excerpts from its opinion:

"It will be noted that in the second resolution the Senate has expressly avowed that the investigation is in aid of other action than legislation. Its purpose is to 'obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This indicates that the Senate is contemplating the taking of action other than legislative, as the outcome of the investigation, at least the possibility of so doing. The extreme personal cast of the original resolutions; the spirit or hostility toward the then Attorney General which they

breathe; that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged; and that the avowal then was coupled with an avowal that other action was had in view—are calculated to create the impression that the idea of legislative action being in contemplation was an afterthought."

"That the Senate has in contemplation the possibility of taking action other than legislation as an outcome of the investigation, as thus expressly avowed, would seem of itself to invalidate the entire proceeding. But, whether so or not, the Senate's action is invalid and absolutely void, in that, in ordering and conducting the investigation, it is exercising the judicial function, and power to exercise that function, in such a case as we have here, has not been conferred upon it expressly or by fair implication. What it is proposing to do is to determine the guilt of the Attorney General of the shortcomings and wrongdoings set forth in the resolutions. It is 'to hear, adjudge, and condemn.' In so doing it is exercising the judicial function."

"What the Senate is engaged in doing is not investigating the Attorney General's office; it is investigating the former Attorney General. What it has done is to put him on trial before it. In so doing it is exercising the judicial function. This it has no power to do."

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes.

The court then applies the rule to the pending case as follows:

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress axe needed from year to year.

The court accordingly deduces:

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable.

343. The case of M. S. Daugherty, continued.

It is not a valid objection to such investigation that it might disclose wrongdoing by a public official named in the resolution.

The Senate as a continuing body may continue its committees through the recess following the expiration of a Congress.

Jefferson's Manual and Hinds' Precedents are cited by the Supreme Court as authorities in parliamentary procedure.

As to the objection advanced by the appellee that information elicited in such an interrogatory might incriminate a public official, the opinion declares:

Of course, our concern is with the substance of the resolution and not with any nice questions of propriety respecting its direct reference to the then Attorney General by name. The resolution, like the charges which prompted its adoption, related to the activities of the department while he

was its supervising officer; and the reference to him by name served to designate the period to which the investigation was directed.

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part.

The corroborative effect of a resolution directing the arrest of a witness in supplementing the inference of the earlier resolution that the information desired was sought as a basis for legislative action regardless of the suggestion of "other action" is thus set out in the opinion:

The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment.

The right of the Senate as a continuing body to continue its committees through the recess following the expiration of a Congress is affirmed as follows:

Another question has arisen which should be noticed. It is whether the, case has become moot. The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee, to sit at such times and places as it might deem advisable or necessary. It is said in Jefferson's Manual: "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it can not well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress"; and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress." So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect,

and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case can not be said to have become moot in the ordinary sense. Our judgment may yet be carried into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the habeas corpus proceedings.

The final order of the lower court in discharging the witness from custody is therefore reversed.

344. The case of Robert W. Stewart.

A witness having refused to answer questions the committee of inquiry reported to the Senate which issued a warrant for his arrest and directed the Sergeant at Arms to take him into custody.

Instance wherein the courts denied an application for writ of habeas corpus asked by a recusant witness and remanded the petitioner to the custody of the Senate.

Contention that the Senate is without power to arrest a witness while in attendance in obedience to a subpoena was characterized by the courts as frivolous.

A contention that the Senate may not inquire into private and personal affairs of a witness was overruled by the court on the ground that the Houses of Congress are authorized to call for information essential for the exercise of their power of legislation.

On February 1[1] (calendar day, February 3, 1928), in the Senate Mr. Thomas J. Walsh, of Montana, from the Committee on Public Lands and Surveys, authorized by resolution[2] to inquire into the disposition of certain Liberty bonds acquired by the Continental Trading Co., reported that one Robert W. Stewart summoned as a witness had declined to answer certain questions propounded by the committee.

By direction of the Senate a warrant[3] was issued, and the recusant witness having been apprehended and detained in the custody of the Sergeant at Arms of the Senate, petitioned the Supreme Court of the District of Columbia for a writ of habeas corpus.

Mr. Justice Jennings Bailey in delivering the opinion of the court denying the petition first considered the issue raised by the petitioner as to the power of the Senate to arrest witnesses:

> The warrant was issued and executed and the petitioner now claims that he is being unlawfully detained by the respondents, the Sergeant at Arms of the Senate and his deputy. He rests his claim upon three propositions.
>
> First:
>
> "The Senate is without power to arrest and attach petitioner for the purpose of compelling him to attend as a witness before the Senate when at the time of the arrest the witness was in attendance before the Senate committee under and in obedience to a subpoena, issued by it."
>
> If the committee was seeking information as a basis for legislation by Congress and if the questions asked the petitioner were pertinent to such inquiry and did not invade any of his constitutional rights, it was his duty to answer, and his refusal to do so could be treated as an act of contempt of the Senate. The Senate might thereupon have had him attached to be brought before

[1] First session Seventieth Congress, Senate Report No. 229.

[2] Senate Resolution No. 101.

[3] Record, p. 2440.

the bar of the Senate to answer for his contempt, as has been done in several cases, but instead took a more lenient course in having him brought before the bar of the Senate to answer such pertinent questions as might be asked him there. There was no question but that he had refused to answer as reported by the committee, and he has no ground to complain that he was to be given an opportunity to purge himself of his contempt by giving his testimony before the Senate instead of being brought before its bar for punishment. The attachment could properly be based on his recalcitrant conduct as a witness before the committee. The Senate is not necessarily controlled by the practice of the courts in similar cases.

The contention of the petitioner that the Senate was not authorized to inquire into the personal affairs and private affairs is thus treated by the court:

Petitioner's second and third propositions are:

"Resolution 101 does not call for information essential for the exercise of the power of legislation, but is an attempt at exercising judicial function, beyond the powers of the Senate, and authorizes an inquiry into the private affairs of individuals."

"Petitioner answered every question put to him of public interest with respect to the disposition of the bonds held by the Continental Trading Co. The questions he refused to answer dealt with private and personal matters, the answers to which could in no way furnish information essential to the efficient performance of any legislative function of the Senate."

Resolution 101 authorizes an investigation supplementary to one theretofore authorized, and of which the committee had made no final report. The former investigation had resulted in legislation directing the prosecution of suits, one of which had resulted in the recovery of valuable property of the Government, and in other legislation, and it may be assumed that the Senate had in mind the possibility of the need of further legislation when the latest resolution was passed. The failure to specify such purpose is not fatal to the inquiry. Where the particular investigation has already formed the basis of legislation, the court will not assume that some particular phase of a later investigation supplementary to the former can not be made for the purpose of legislation and that the Senate is transcending its functions under the Constitution.

The petitioner states that he appeared voluntarily before the committee to give his testimony. He took an oath to tell "the truth, the whole truth, and nothing but the truth." He raised no general objection to the scope of the inquiry, but after he had proceeded to answer numerous questions he finally refused to answer as to his knowledge of anyone who received the Liberty bonds mentioned in the resolution or whether he had discussed any of the bond transactions with Sinclair, and other questions of similar character. He voluntarily testified in part, but refused to tell the whole truth, and a partial truth may be as misleading as a falsehood. These questions were clearly relevant to the inquiry and involved no question of privilege. They did not involve the private affairs of the witness, and the witness can not make such a claim on behalf of others when he does not appear to be acting in a representative capacity. But even such a ground would not be an excuse for failure to answer questions relevant to any matters which were the subject of proper inquiry.

The opinion concludes:

In my opinion the grounds upon which the petitioner refused to testify were frivolous and without legal bases and his attachment was justified.

The writ of habeas corpus will be discharged and the petitioner remanded to the custody of the respondents.

The witness appealed from the order of the court but pending the appeal elected to appear before the committee [1] and answer the questions from which he had previously excused himself.

The Senate accordingly adopted the following resolutions vacating the order of arrest.

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[1] Senate Report No. 897.

Resolved, That the order of the Senate heretofore made on the 3d day of February, 1928, directing the Sergeant at Arms to take into custody one Robert W. Stewart and bring him before the bar of the Senate is hereby vacated.

This order shall not be construed as any intimation on the part of the Senate that the indictment heretofore returned against the said Robert W. Stewart for refusal to answer questions propounded to him by the Committee on Public Lands and Surveys should be dismissed.

Simultaneously, the Senate—

Ordered, That the Secretary of the Senate be, and he is hereby, directed to transmit a copy of the report submitted this day by the Committee on Public Lands and Surveys to the United States district attorney for the District of Columbia with a view to having said district attorney determine whether Robert W. Stewart should not be presented to a grand jury for indictment on the charge of perjury.

345. The case of Robert W. Stewart, continued.

A witness giving contradictory testimony while under order for arrest for refusing to answer questions propounded by a committee of inquiry, the Senate vacated the order and referred the case to the district attorney.

In order to support a charge of perjury it must be shown that a quorum of the committee of investigation was present at the time the offense was committed.

The recording of members of a committee as present on their telephonic request does not constitute attendance and physical presence is necessary to make a quorum for the transaction of business.

If a quorum be present and subsequently Members leave temporarily or otherwise a quorum is presumed to be present until and unless the question of no quorum is raised.

A rule adopted by a Senate committee providing that the presence of six Senators should constitute a quorum of the committee was held by the courts to be invalid because adopted at a meeting at which less than a quorum of the committee was present.

The witness was indicted for perjury and tried in the Supreme Court of the District of Columbia and acquitted on the ground that a quorum of the committee was not present on the occasion of the inquiry which resulted in the indictment.

Justice Jennings Bailey in charging the jury said in part:

The first thing that must be proved in this case is that the defendant was sworn to testify before a competent tribunal. If the tribunal before which he testified was not a competent tribunal, he can not be convicted of perjury, no matter how false his testimony may have been. The indictment alleges that he testified before a meeting of the Committee on Public Lands and Surveys of the Senate. To constitute a meeting of a committee, there must be present a majority of the committee, and by "present" I mean actually, physically present. You have heard the testimony as to marking certain members as present with the word quorum after their names when they were not actually, physically present, but when the Senator or his secretary had telephoned the clerk of the committee to mark him as present. That is not such a presence as would be sufficient, even if a majority of such members so telephoned, to constitute a meeting of the committee.

A meeting means a meeting of at least a majority of the committee. In this case, the committee being composed of fifteen, before there could be a meeting of the committee, there must have been present at least eight members of that committee physically in the committee room.

If such a committee so met; that is, if eight members, did meet, and thereafter during the progress of the hearing some of them left temporarily or otherwise and no question was raised as

to the lack of a quorum, then the fact that the majority did not remain there would not affect, for the purposes of this case, the existence of that committee as a competent tribunal, but before the oath was administered, and before the testimony of the defendant was given, there must have been as many as eight members of that committee present.

346. The case of Thomas W. Cunningham, recusant witness.

A witness having refused to answer certain questions propounded to him by a special committee of the Senate duly authorized to investigate the subject of inquiry, the Senate issued a warrant for his arrest and certified its committee's report of the circumstances to the district attorney.

Decision of the Supreme Court on the right of the Senate to subpoena witness and compel testimony.

On March 22, 1928,[1] Mr. William H. King of Utah, on behalf of the special committee authorized to investigate expenditures in senatorial primaries and elections, submitted the report [2] of that committee setting forth the refusal of a witness, Thomas W. Cunningham, to answer certain questions pertinent to the matter under inquiry. Whereupon the Senate agreed to a resolution directing the President of the Senate to issue his warrant to the Sergeant at Arms commanding him to apprehend and detain the witness in custody to await the further order of the Senate.

Subsequently,[3] the Sergeant at Arms having made his return showing the arrest of the witness and his release on a writ of habeas corpus under bail, the Senate certified to the United States District attorney its committee's report of the circumstances.

The witness was indicted by the grand jury in the Supreme Court of the District of Columbia and the case reached the United States Supreme Court and was finally passed on at the May term, 1929.[4]

347. The case of Thomas W. Cunningham, recusant witness, continued.

In providing for the arrest of a recalcitrant witness it is unnecessary for the Senate in inditing the resolution to determine whether the testimony sought and refused was pertinent to the inquiry.

The exercise by the Senate of its judicial powers to judge election returns and the qualifications of its members necessarily involves the power to compel testimony.

In the exercise of its right to pass on the eligibility of its members the Senate may act directly or through a committee.

It is presumed that in the eliciting of testimony the Senate will observe all constitutional restraints.

Mr. Justice Sutherland delivered the opinion of the Court. The opinion refers specifically to the following resolution [5] of the Senate:

Whereas it appears from the report of the Special Committee Investigating Expenditures in Senatorial Primary and General Elections that a witness, Thomas W. Cunningham, twice called before the committee making inquiry as directed by the Senate under Senate Resolution 195 of

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[1] First session Seventieth Congress, Record, p. 5144.

[2] Senate report No. 604.

[3] Record, p. 5353.

[4] Barry *v.* U. S. Ex rel Cunningham, 279 U. S. 597.

[5] S. Res. No. 179.

the Sixty-ninth Congress, declined to answer certain questions relative and pertinent to the matter then under inquiry:

Resolved, That the President of the Senate issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of said Thomas W. Cunningham wherever found, and to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate.

The court construes this resolution as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at its bar and holds that in deciding whether the witness must attend it is not material to consider whether the information sought to be elicited from him by the committee is pertinent to the inquiry which it has been directed to make. The court says:

The correct interpretation of the Senate's action is that given by the district judge and by Judge Woolley. It is true the special committee in its report to the Senate recited Cunningham's contumacy and recommended that he be adjudged in contempt, but the resolution passed by the Senate makes it entirely plain that this recommendation of the committee was not followed. The Senate resolution, after a recital of Cunningham's refusal to answer certain questions, directs that he be attached and brought before the bar of the Senate, not to show cause why he should not be punished for contempt, but "to answer such questions pertinent to the matter under inquiry as the Senate through its said committee or the President of the Senate may propound. * * *" We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial.

The court holds that the exercise by the Senate of its Constitutional power to judge the election and qualification of its members necessarily involves the ascertainment of facts, the attendance of witnesses and the power to compel answers to pertinent questions, and says:

Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own Members. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review.

As to the latitude allowed the Senate in taking testimony itself or through its committees the opinion continues:

In exercising this power, the Senate may, of course, devolve upon a committee of its Members the authority to investigate and report; and this is the general, if not the uniform practice. When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so determine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the Senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit.

The court holds, however, that in the interrogation of witnesses by the Senate it is assumed that all constitutional restraints will be observed. The opinion proceeds:

In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution. We can not assume, in advance of Cunningham's interrogation at the bar of the Senate, that these restraints will not faithfully be observed. It sufficiently appears from the foregoing that the inquiry in which the Senate was engaged, and in respect of which it required the arrest and production of Cunningham, was within its constitutional authority.

It is said, however, that the power conferred upon the Senate is to judge of the elections, returns, and qualifications of its "Members," and, since the Senate had refused to admit Vare to a seat in the Senate or permit him to take the oath of office, that he was not a Member. It is enough to say of this, that upon the face of the returns he had been elected and had received a certificate from the governor of the State to that effect. Upon these returns and with this certificate he presented himself to the Senate, claiming all the rights of membership. Thereby, the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of section 5 of Article I of the Constitution.

348. The case of Thomas W. Cunningham, recusant witness, continued.

Whether inquiry into the qualifications of a Senator-elect shall be made prior or subsequent to the administration of the oath is within the discretion of the Senate.

Refusal by the Senate to seat a claimant pending an investigation does not deprive the State of its "equal suffrage in the Senate," within the purview of the Constitution.

The power of the Senate to require testimony of witnesses is in no wise inferior to that exercised by a court of justice and includes under comparable circumstances the power to compel attendance.

A warrant for the arrest of a recalcitrant witness may issue without previous subpoena where service on the witness is a question of doubt.

The mooted question of whether inquiry into the qualifications of a Senator-elect shall be made prior to or subsequent to his admission to membership is thus decided:

Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate was a matter within the discretion of the Senate. This has been the practical construction of the power by both Houses of Congress, and we perceive no reason why we should reach a different conclusion. When a candidate is elected to either House, he of course is elected a Member of the body; and when that body determines, upon presentation of his credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "Member" has not been adjudged. To hold otherwise would be to interpret the word "Member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership who either had not been elected or, what amounts to the same thing, had been elected by resort to fraud, bribery, corruption, or other sinister methods having the effect of vitiating the election.

The contention that the refusal to sweax a claimant pending an investigation of his qualifications served to deprive a State of its "equal suffrage in the Senate" is thus disposed of:

Nor is there merit in the suggestion that the effect of the refusal of the Senate to seat Vare pending investigation was to deprive the State of its equal representation in the Senate. The equal representation clause is found in Article V, which authorizes and regulates amendments to the Constitution, "provided, * * * that no State, without its consent, shall be deprived of its equal suffrage in the Senate. This constitutes a limitation upon the power of amendment and has nothing to do with a situation such as the one here presented. The temporary deprivation of equal representation which results from the refusal of the Senate to seat a Member pending inquiry as to his election or qualification is the necessary consequence of the exercise of a constitutional power and no more deprives the State of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting Member or a vote of explusion.

The opinion thus compares the power of the Senate with that exercised by a court of justice and its authority to issue warrants of arrest to compel attendance of witnesses:

In exercising the power to judge of the elections, returns, and qualifications of its Members, the Senate acts as a judicial tribunal, and the authority to require the attendance of witnesses is a necessary incident of the power to adjudge, in no wise inferior under like circumstances to that exercised by a court of justice. That this includes the power in some cases to issue a warrant of arrest to compel such attendance, as was done here, does not admit of doubt. (McGrain *v.* Daugherty, 273 U. S. 135, 160, 180.) That case dealt with the power of the Senate thus to compel a witness to appear to give testimony necessary to enable that body efficiently to exercise a legislative function; but the principle is equally, if not a fortiori, applicable where the Senate is exercising a judicial function.

That such warrants may issue without previous subpoena when there are reasons to doubt the appearance of the witness the opinion agrees:

The real question is not whether the Senate had power to issue the warrant of arrest but whether it could do so under the circumstances disclosed by the record. The decision of the court of appeals is that, as a necessary prerequisite to the issue of a warrant of arrest, a subpoena first should have been issued, served, and disobeyed. And undoubtedly the courts recognize this as the practice generally to be followed. But undoubtedly also a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena, when there is good reason to believe that otherwise the witness will not be forthcoming. A statute of the United States (U. S. C., title 28, sec. 659) provides that any Federal judge, on application of the district attorney, and being satisfied by proof that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed for the purpose of giving his testimony, or until he gives the recognizance required by said judge. The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the States and have been enforced without question.

The rule is stated by Wharton, 1 Law of Evidence, section 385, that where suspicions exist that a witness may disappear, or be spirited away, before trial, in criminal cases, and when allowed by statute in civil cases, he may be held to bail to appear at the trial and may be committed on failure to furnish it, and that such imprisonment does not violate the sanctions of the Federal or State constitutions.

349. The case of Thomas W. Cunningham, recusant witness, continued. The Senate having sole authority under the Constitution to judge of the election returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute.

The same presumption of regularity attaches to action by the Senate in directing the arrest of a recusant witness that applies to the proceedings of the courts.

It is assumed that the Senate will deal with a witness in accordance with recognized rules and discharge him from custody upon proper assurance that he will appear to testify when required.

A witness in custody for refusing to testify may invoke the action of the courts only on a clear showing of arbitrary and improvident use of the power amounting to a denial of due process of law.

The court interprets the Constitution as conferring on the Senate sole authority to judge of the elections and qualifications of its Members and the incidental power of compelling the attendance of witnesses without the aid of a statute. The opinion deduces:

> The validity of acts of Congress authorizing courts to exercise the power in question thus seems to be established. The Senate, having sole authority under the Constitution to judge of the elections, returns, and qualifications of its Members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute. The following appears from the report of the committee to the Senate upon which the action here complained of was taken: "A subpoena was issued for his appearance early in June. A diligent search failed to locate him. Finally, Representative Golder, of the fourth district of Pennsylvania, communicated with the committee, stating that Cunningham would accept service. His whereabouts was disclosed and he was served." Upon examination by the committee he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

That the act of the Senate in issuing warrants for the arrest of witnesses is attended by all the presumption of regularity applying to the proceedings of the courts the opinion affirms:

> It is not necessary to determine whether the information sought was pertinent to the inquiry before the committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original, and unqualified power conferred by the Constitution. If the Senate thought so, and, from the facts before it reasonably believing that this or other important evidence otherwise might be lost, issued its warrant of arrest, it is not for the court to say that in doing so the Senate abused its discretion. The presumption in favor of regularity, which applies to the proceedings of courts, can not be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority.

And that in dealing with witnesses the Senate will conform to well-established usage:

> It fairly may be assumed that the Senate will deal with the witness in accordance with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. This is all he could properly demand of a court under similar circumstances.

As to the invocation of judicial interference by a person arrested by the Senate the opinion concludes:

> Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing

of such arbitrary and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case.

The judgment of the court of appeals holding the arrest void and the witness to be justified in refusing to testify was therefore reversed.

350. The case of Thomas W. Cunningham, recusant witness, continued. Further decision of the Supreme Court with particular reference to the relation of the question of pertinency of interrogatories propounded by the committee.

A resolution of the Senate giving the chronology of the case.

On May 13, 1930,[1] Mr. George W. Norris, of Nebraska, in the Senate, moved this resolution:

Whereas on the 19th day of May, 1926, the Senate of the United States by resolution created a committee of five members and authorized and directed said committee "to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made, or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a Member of the United States Senate"; and

Whereas in pursuance of its duty under said resolution the committee held a meeting at Washington, in the District of Columbia, on February 21, 1927, at which meeting Thomas W. Cunningham, in obedience to the subpoena of said committee, appeared as a witness; and

Whereas the said Thomas W. Cunningham refused to answer certain pertinent questions propounded to him by said committee; and

Whereas said Thomas W. Cunningham, by virtue of said refusal, violated section 102 of the Revised Statutes of the United States; and

Whereas the said Thomas W. Cunningham was thereafter, to wit, on April 20, 1928, indicted by a grand jury in the Supreme Court of the District of Columbia for refusing to answer the questions so propounded to him by said committee; and

Whereas the said Thomas W. Cunningham was afterwards, by virtue of a warrant issued on account of said indictment, arrested in the city of Philadelphia; and

Whereas the said Thomas W. Cunningham swore out a writ of habeas corpus in the District Court of the United States for the Eastern District of Pennsylvania; and

Whereas upon the hearing in said district court the said Thomas W. Cunningham was remanded to the custody of the United States marshal for removal to the District of Columbia; and

Whereas the said Thomas W. Cunningham appealed from said order of the district court of the United States to the Circuit Court of Appeals for the Third Circuit; and

Whereas upon such appeal the said circuit court of appeals, by a divided opinion reversed the said district court and ordered the said Thomas W. Cunningham discharged from custody; and

Whereas on the same state of facts and on account of the refusal of the said Thomas W. Cunningham to answer said questions as above set forth, the Senate of the United States issued its warrant directed to the Sergeant at Arms of the Senate, commanding the Sergeant at Arms to bring the said Thomas W. Cunningham before the Senate to answer the questions which he had refused to answer before said committee; and

Whereas in said case arising out of the same condition and the same state of facts, the said Thomas W. Cunningham in like manner swore out a writ of habeas corpus in the same courts above named and with like result; and

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[1] Second session Seventy-first Congress, Record, p. 8834.

Whereas in said last-mentioned case the Senate of the United States directed the committee to take an appeal to the Supreme Court of the United States, and the Supreme Court, upon the hearing of said appeal, reversed the order of the said Circuit Court of Appeals for the Third Circuit and reinstated the judgment of the district court, thereby holding that the said Thomas W. Cunningham was in contempt of the Senate for refusing to answer the questions above referred to and in effect holding that the circuit court of appeals in ordering the discharge of the said Thomas W. Cunningham was in error, and in effect reversing said decision (279 U.S. 597); and

Whereas after said decision of the Supreme Court of the United States the United States attorney filed a motion for a rehearing in the case above referred to wherein the Circuit Court of Appeals for the Third Circuit had ordered the discharge of said Thomas W. Cunningham; and

Whereas the said Thomas W. Cunningham has never been tried upon the indictment above referred to and there exists under the decision of the Supreme Court of the United States above referred to no reason why the said Thomas W. Cunningham should not be brought to trial in the Supreme Court of the District of Columbia upon said indictment: Therefore be it

Resolved, That the Hon. Leo. A. Rover, United States attorney for the District of Columbia, be, and he is hereby, directed to report to the Senate—

(1) Whether said motion for a rehearing in the Circuit Court of Appeals for the Third Circuit has been disposed of.

(2) If said motion for a rehearing has been disposed of and decided adversely to the contention of the United States, whether he, the said Leo A. Rover, has taken an appeal therefrom to the United States Supreme Court.

(3) If said motion for a rehearing has not been disposed of, why has the same been delayed?

(4) If said motion has been disposed of by the Circuit Court of Appeals for the Third Circuit, and the said Thomas W. Cunningham has been remanded to the United States marshal for the District of Columbia, why has the said Thomas W. Cunningham not been put upon trial upon the charges contained in said indictment?

In discussing the resolution Mr. Norris said:

I will say if there is any misstatement of fact in the whereases, I am unaware of it. The resolution is a little difficult to understand from a cursory reading of the whereases, but the Senate ought to realize the facts. Under the law, when a witness is subpoenaed before a committee of either branch of Congress and refuses to answer pertinent questions propounded to him, two things happen: First, he has committed a crime, a misdemeanor, by such refusal under section 102 of the Revised Statutes; and, second, he is in contempt of the Senate or the House, as the case may be. Then two courses can be pursued, or either one of them. In this instance both courses were pursued. When Mr. Cunningham refused to answer the questions of the then Senator Reed, of Missouri, the chairman of the committee, Senator Reed brought the matter before the Senate by proper resolution. The Senate referred the case to the United States district attorney for the District of Columbia for his attention, and also ordered the arrest of Mr. Cunningham. So there were two cases then pending against Cunningham arising out of the same state of facts.

It is a little difficult for a person who is not an attorney to realize that there are really two cases, that they axe exactly alike, that there is no difference in the facts, that they are exactly the same in each case. One was a prosecution for a violation of the statute, and one was action by the Senate to compel a witness who refused to answer proper questions.

351. The case of Thomas W. Cunningham, recusant witness, continued.

A further decision by the Supreme Court affirming the power of the Senate to compel testimony.

A recalcitrant witness having been committed for refusal to testify, the Supreme Court sustained the dismissal of a petition for a writ of habeas corpus.

The district judge ordered the commitment of the witness, who thereupon filed a petition for a writ of habeas corpus in the Federal district court. The court dismissed the petition; but on appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was reversed [1] on the ground that the questions propounded by the committee of the Senate to the witness were not pertinent to the inquiry.

The case again coming up to the Supreme Court for review on a writ of certiorari, Mr. Justice Sutherland delivered the opinion [2] of the court, reversing the judgment of the court of appeals and holding that the order of commitment was proper and should have been sustained.

352. The case of Bishop James Cannon, jr.

Witnesses having refused to answer questions not contemplated in the resolution authorizing the inquiry, the committee formally declined to insist.

A committee of investigation decided that the powers granted by the resolution authorizing its appointment did not extend to questions propounded in the course of the inquiry and laid the transcript of the record before the Senate.

On June 19, 1930,[3] in the Senate, Mr. T.H. Caraway, of Arkansas, from the subcommittee of the Committee on the Judiciary, authorized to make a special investigation of lobbying, submitted a report from that committee as follows:

Resolved, That it is the sense of the subcommittee of the Committee on the Judiciary investigating lobbying that it should not insist on answers to questions propounded to Bishop James Cannon, jr., and that the transcript of the whole record be laid before the Senate.

Senator Walsh assents to this order only because of the doubt raised as to the authority of the committee under the resolution pursuant to which it is acting.

Mr. Caraway in speaking to the report of the subcommittee quoted in full the resolution [4] empowering the subcommittee to subpoena witnesses and designating the subjects of inquiry as follows:

Whereas it is charged that the lobbyists, located in and around Washington, filch from the American public more money under a false claim that they can influence legislation than the legislative branch of this Government costs the taxpayer; and

Whereas the lobbyists seek by all means to capitalize for themselves every interest and every sentiment of the American public which can be made to yield an unclean dollar for their greedy pockets: Now, therefore, be it

Resolved, That the Committee on the Judiciary of the United States Senate, or a subcommittee thereof be appointed by the chairman of the committee, is empowered and instructed to inquire into the activities of these lobbying associations and lobbyists.

To ascertain of what their activities consist, how much and from what source they obtain their revenues.

How much of these moneys they expend and for what purpose and in what manner.

What effort they put forth to affect legislation.

Said committee shall have the power to subpoena witnesses, administer oaths, send for books and papers, to employ a stenographer, at a cost not exceeding 25 cents per 100 words, to report

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[1] *United States ex rel. Cunningham* v. *Mathues, United States Marshal*, 50 Federal (2d) 449.

[2] *Fetters, U.S. Marshal*, v. *United States ex rel. Cunningham*, 283 U.S. 638.

[3] Second session Seventy-first Congress, House Report No. 43, part 10.

[4] Senate Resolution No. 20.

such hearings as may be had on any subject before said committee or subcommittee thereof, and do those things necessary to make the investigation thorough.

All the expenses for said purposes shall be paid out of the contingent fund of the Senate. For the purposes of this investigation the expenditure of $10,000 is authorized, or such part thereof as may be necessary.

Mr. Caraway in support of the resolution reported by the subcommittee said:

No one would contend that the resolution empowered the Senate committee to go into purely political activities.

That view of the authority and scope of the committee, and the limitations upon it, was announced by the chairman of the committee whenever the question arose. It first rose when the chairman of the Republican National Committee was before the committee. At that time a question was asked by myself touching a transaction that I recognize was political, although at the time that suggestion had not occurred to me. The Senator from Indiana, Mr. Robinson, objected. I conceded that the Senator from Indiana was correct, and I withdrew the question.

The same question arose six times subsequent to that while the same witness was before the committee, and it was, decided the same way each time. So, as I have indicated, that rule was invoked seven times to protect the chairman of the Republican National Committee from answering any inquiry touching political activities, and the question was decided in the same way each time.

The rule was also invoked to protect Mr. Curran, in charge of the National Association Against the Prohibition Amendment, and the decision previously made was adhered to without objection. The same rule was invoked to protect Josephus Daniels when he was before the committee, by the Senator from Montana, Mr. Walsh, who contended that a question asked of Mr. Daniels was outside the power of the committee and concerned a matter which it was beyond the scope of the committee to make inquiry, and the objection was sustained.

Every time that question arose it was held and decided by the committee, without a division of sentiment, so far as I know, in the same way.

353. The case of Bishop James Cannon, jr., continued.

In 1931 a committee of the Senate investigated campaign contributions and expenditures with special reference to violations of the Federal corrupt practices act involving false statements of campaign expenditures and the fraudulent conversion of campaign funds to private uses.

An instance wherein the Clerk of the House, without an order from the House, produced before a Senate committee of investigation, after the expiration of the statutory period provided for their preservation, statements filed in his office in compliance with the provisions of the Federal corrupt practices act.

Instance wherein a witness, summoned in pursuance and by virtue of the authority conferred on a committee to elicit testimony, declined to testify.

On April 10, 1930 [1] (legislative day of April 8), the Senate agreed to the resolution (S. Res. 403) as follows:

Resolved, That a special committee consisting of five Senators, to be appointed by the Vice President, is hereby authorized and directed to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate in

[1] Second session Seventy-first Congress, Record, p. 6841.

enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

The investigation hereby provided for, in all the respects above enumerated, shall apply to candidates and contests before senatorial primaries, senatorial conventions, and the contests and campaign terminating in the general election in November, 1930.

No Senator shall be appointed upon said committee from a State in which a Senator is to be elected in the general election in 1930.

Said committee is hereby authorized to act upon its own initiative and upon such information as in its judgment may be reasonable or reliable. Upon complaint being made before said committee, under oath, by an person, persons, senatorial candidate, or political committee, setting forth allegations as to facts which, under this resolution it would be the duty of said committee to investigate, the said committee shall investigate such charges as fully as though it were acting upon its own motion, unless, after a hearing upon such complaint, the committee shall find that the allegations in said complaint are immaterial or untrue.

Said committee is hereby authorized, in the performance of its duties, to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper. It is specifically authorized to require the attendance of witnesses by subpoena or otherwise; require the production of books, papers, and documents; and to employ counsel, experts, clerical, and other assistants; and to employ stenographers at a cost not exceeding 25 cents per one hundred words.

Said committee is hereby specifically authorized to act through any subcommittee authorized to be appointed by said committee. The chairman of said committee or any member of any subcommittee may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation, shall be punished as prescribed by law.

The expenses of said investigation, not exceeding in the aggregate $100,000, shall be paid from the contingent fund of the Senate on vouchers signed by the chairman of the committee or the chairman of any subcommittee.

All hearings before said committee shall be public, and all orders or decisions of the committee shall be public.

The committee shall make a full report to the Senate on the first day of the next session of the Congress.

This resolution was supplemented on January 19, 1931[1] (legislative day of January 5), by the passage of the following:

Resolved, That the special committee of the Senate to investigate campaign expenditures, created under authority of S. Res. 215, adopted April 10, 1930, is hereby further authorized and directed to investigate any complaint made before such committee by any responsible person or persons, alleging (1) the violation, at any time within two years preceding the adoption of the aforesaid resolution, of any provision of the Federal corrupt practices act, 1925, involving a false statement of campaign expenditures, or (2) a fraudulent conversion to private uses, at any time within such period of two years, of any campaign funds contributed for use in any election as defined in the Federal corrupt practices act, 1925. The committee shall investigate fully the allegations in all such complaints, and shall, as soon as practicable, make a full report thereon to the Senate.

Under this authorization, the special committee thus constituted held hearings on February 11, 1931, which were attended by Bishop James Cannon, jr., and at which certain testimony adduced at former hearings before the subcommittee of the Committee on the Judiciary, in the form of memoranda relating to checks credited to the account of Bishop Cannon at various banks, were ordered incorporated in the record.

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[1] Third session Seventy-first Congress, Record, p. 2576.

In the course of the hearings William Tyler Page, clerk of the House of Representatives, appeared voluntarily before the committee and, being asked by the chairman to submit, from the files of the House, certain statements of campaign contributions and expenditures filed in the office of the Clerk of the House in the 1928 [1] campaign, without being sworn, testified as follows:

I am in a somewhat peculiar position with respect to these papers. For many years it has been the practice and policy of the House rather jealously to safeguard its archives, even from being produced upon a subpoena duces tecum before a court or even a committee of the Senate, without its consent. Having known of that practice for many years, and having observed it during my incumbency as Clerk of the House, I hesitated somewhat in coming here until I could rather clarify the situation, and make my coming voluntary altogether, and present to the committee certain statements which I think I am at liberty to present.

The Federal corrupt practices act in regard to statements filed under it in the office of the Clerk of the House says they "shall be preserved by the Clerk or Secretary for a period of two years from the date of filing, shall constitute a part of the public records of his office, and shall be open to public inspection."

Now this is what I find, that I have all of the statements filed in my office that pursuant to that law, by the so-called Anti-Smith Democrats in the campaign of 1928, were filed prior to the expiration of the 2-year period, or, in other words, they have been in my office now for more than two years, with one exception, and that is the statement dated February 15, 1929, filed by the treasurer of the so-called Anti-Smith Democrats with headquarters in Richmond, Va. The 2-year period with respect to that paper will have expired on next Sunday.

Now, in regard to these other papers, the time is past and, under the law, if I so choose I could utterly destroy them. That is not my policy, however. I keep these papers on file and have kept them since the campaign of 1920, for public inspection.

I only mention that to excuse myself from doing anything that might seem to be contrary to the policy of the House. Therefore I have brought these papers here, those antedating, or, rather, those that have been on file for two years or more, feeling at liberty so to do.

I find that in the testimony adduced before the lobby investigation, page 4857, and so forth, all of these statements filed by the treasurer of the Anti-Smith Democrats are set forth. I dare say somebody who had the right to do so, since these papers are open for public inspection, came in there and made copies of them.

Now, in regard to the statement of February 15, 1929, I have made a certificate as to its accuracy except in one respect. I found certain figures here that did not correspond with the original, and changed the statement accordingly, and embraced the change in my certificate, which I will give to the committee.

Now, let me say this, Mr. Chairman, if you please, that I feel at perfect liberty to make this certificate, because the making of a certificate is an exception to the general rule laid down some years ago in the House by the Judiciary Committee and by the House itself in regard to furnishing papers to court and committees under subpoena duces tecum, that where Congress has published a document, a certified copy thereof, if it be a House or Senate document, may be made, and this being a Senate document and the original paper being in my office and not in the Senate file, I feel at liberty to make this certificate.

Personally, I should have been glad to have appeared before this committee of the Senate, of course, and even under oath make any statement that might be desired, but I feel some hesitancy in going that far, but I did feel at liberty to come here and make the statement I have made.

On May 7, 1931,[2] in response to a subpoena, one Ada L. Burroughs appeared before the committee and, being questioned by the chairman and other members of

[1] Third session Seventy-first Congress, Hearings on S. Res. 215 and S. Res. 403, pp. 8, 9.

[2] Ibid, p. 68.

the committee, submitted a statement protesting the jurisdiction of the committee and declined to testify.

Bishop Cannon also submitted a statement and brief, questioning the jurisdiction of the committee and entering formal protest against the legality of Senate Resolution 403 and the investigation being conducted under its authorization.

In prosecution of this protest Bishop Cannon petitioned the Supreme Court of the District of Columbia for a writ of prohibition. The arguments by counsel being heard, the court, in an opinion delivered by Justice Joseph W. Cox, on August 13, 1931,[1] dismissed the petition. An appeal by the relator was dismissed in the Court of Appeals on November 2, 1931.[2]

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[1] Case No. 80100, Supreme Court of the District of Columbia.

[2] Bishop Cannon and Ada L. Burroughs were subsequently defendants in a case brought on indictment for violation of the corrupt practices act which was decided in their favor (65 Federal 2nd 796; 289 U.S. 159).

Chapter CLXXXVI.[1]

THE POWER OF INVESTIGATION.

354. Review of decisions of the Supreme Court relative to the scope and extent of congressional investigations.

Decisions of the Supreme Court relating to immunity of witnesses testifying in congressional investigations.

Decisions of the Supreme Court relating to the punishment of contumacious witnesses.

Form of resolution providing for a congressional investigation.

On May 16, 1911,[2] Mr. James R. Mann inserted in the Record, by unanimous consent, the following memorandum on the subject of congressional investigations:

In drafting a resolution or a law creating a committee or a commission and authorizing it to conduct an investigation for the purpose of securing information to be subsequently reported to Congress, certain principles, announced by the courts in cases involving the legality of governmental investigations, should be borne in mind. A review of the decisions of the Supreme Court in this class of cases discloses the fact that previous investigations which have failed met the disapproval of the courts because the acts of Congress authorizing them were insufficient, and not because of any lack of power in that body to make investigations. It is therefore of the utmost importance that mistakes and errors pointed out by the courts in the laws authorizing previous investigations be avoided. The leading cases announce the following principles:

SCOPE AND EXTENT OF CONGRESSIONAL INVESTIGATIONS.

Congress may authorize a committee or a commission to obtain information upon any subject which, in its judgment, it may be important to possess. (In re Pacific Ry. Com., 32 F. R., 241, 250; 1887.)

Interstate Commerce Commission *v.* Brimson (154 U. S., 447, 472; 1893) holds, in effect, that the Constitution having given to Congress full power in the matter of regulating commerce that body may investigate the whole subject and in that way obtain full and accurate information; that for the purpose of regulating commerce Congress may invest a commission with authority to require and compel the attendance and testimony of witnesses and the production of papers and documents relating to any matter legally committed to it for investigation.

This case holds also that the twelfth section of the interstate-commerce act is constitutional and valid so far as it authorizes and requires the circuit courts of the United States to use their process in aid of inquiries which it holds Congress may lawfully authorize the Interstate Commerce Commission to make. That part of the draft of the proposed resolution, herewith submitted, which authorizes the same aid, follows the language of that section.

[1] Supplementary to Chapter LIV.

[2] First session Sixty-second Congress, Record, p, 1231.

But the courts will not permit a governmental investigation to delve into the purely private affairs of the citizen unless it affirmatively appears that such investigation is material to matters over which Congress has jurisdiction and concerning which it may take some lawful action. I. C. C. *v.* Brimson, 154 U. S., 447, 481, et seq., 1894; Ertick *v.* Carrington, 19 Howell's State Trials, 1029; Kilbourne *v.* Thompson, 103 U. S., 168, 190–6, 1880; In re Chapman, 166 U. S., 661, 668–71, 1896.)

In Kilbourne *v.* Thompson (103 U. S., 168, 1880) a resolution, appointing a special committee and authorizing an investigation into the matter and history of the real-estate pool and the Jay Cooke & Co. settlement was held defective because it did not appear that the subject matter of the investigation was one concerning which Congress had jurisdiction or with reference to which it could take lawful action (p. 193).

The situation may be summarized thus: While Congress may authorize the collection, in the ordinary way, of information on any subject which it may deem of importance to possess, it may authorize the exercise of the extraordinary power of compelling the giving of testimony and the production of documents and papers only in cases where the information required is material to matters over which Congress has jurisdiction and concerning which it may take some lawful action. It is at this point that the power of the Government and the constitutional rights of the citizen meet, and it is here that governmental investigation reaches its limit.

In order, therefore, to lawfully entitle an investigating commission to forcibly compel the giving of testimony and the production of documents and papers, three things are essential.

First. The subject matter of the investigation must be one concerning which Congress has jurisdiction and with reference to which it may take lawful action.

Second. The resolution or statute creating the commission must describe in express terms the subject matter and should indicate clearly the object or purpose proposed to be accomplished by the investigation.

Third. The testimony, or the information contained in the papers and documents, which the commission forcibly seeks must be material and relevant to the subject matter which it is authorized to investigate.

If, therefore, a law authorizing an investigation contains these essential elements, the information pointed out may be secured notwithstanding it may be of a, private or personal nature, providing, of course, the law contains a clause granting to witnesses immunity from future prosecution with respect to information which might tend to criminate them.

In this connection it is to be observed that if the information sought is material to the subject matter which the commission is authorized to investigate it may not be withheld on the ground that it is also material to some other subject which it has no right to inquire into. Inquiries of a commission of this character are not narrowly constrained by technical rules as to the admissibility of proof. Its function is one of inquiry, and it should not be hampered by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof. (I. C. C. *v.* Baird, 194 U. S., 25, 44, 1904.)

PROVISIONS SUFFICIENT TO GRANT IMMUNITY TO WITNESSES.

Counselman *v.* Hitchcock (142 U. S., 547, 586, 1892) held that section 860, Revised Statutes, did not supply a complete protection against all the perils against which the fifth amendment to the Constitution was designed to guard, and was not a full substitute for that prohibition; that a statutory enactment to be valid must afford to a witness absolute immunity against future prosecution for the offense to which the question relates. While this case involved an investigation instituted by the Interstate Commerce Commission, section 12 of the interstate commerce act, as it then stood, does not appear to have been passed on. That section followed the language of section 860, Revised Statutes, above referred to, however, and when that provision was declared insufficient and ineffectual that part of section 12 of the interstate commerce act then in force was apparently abandoned. The act of February 11, 1893, was then passed to supply a provision which would be sufficient and effectual. It has so been held in Brown *v.* Walker (161 U. S., 591, 1895). The immunity provision of the draft of the proposed resolution herewith submitted follows the language of that act, which has been passed on and declared sufficient by the Supreme Court.

It is well to note, however, that the jurisdiction of an investigating commission is not extended because the resolution or act appointing it contains a provision granting to witnesses immunity from future prosecution. A statute granting immunity to witnesses does no more than deprive them of their right to refuse to answer questions or produce documents or papers which are material to the subject matter of a lawful investigation. It does not extend the jurisdiction of the commission; it only aids it in conducting investigations which it has a right to make.

PUNISHMENT OF CONTUMACIOUS WITNESSES.

As to the punishment of contumacious witnesses the case of Interstate Commerce Commission *v.* Brimson (154 U. S., 447, 485; 1893), holds that:

"Except in the particular instances enumerated in the Constitution and considered in Anderson *v.* Dunn (6 Wheat., 204) and in Kilbourn *v.* Thompson (103 U. S., 168, 190) of the exercise by either House of Congress of its right to punish disorderly behavior upon the part of its Members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine and imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See Whitcomb's case (120 Mass., 118) and authorities there cited."

In re Chapman (166 U. S., 661, 1897) holds that sections 102 and 104, Revised Statutes, for enforcing the attendance of witnesses, etc., are not open to the objection that they conflict with the Constitution; that Congress possesses constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legislative functions; while Congress can not divest itself, or either of its Houses, of the inherent power to punish for contempt, it may provide that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States.

In Interstate Commerce Commission *v.* Brimson (53 F. R. 476, 480; 1892), the court said:

"Undoubtedly Congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts," or subject witnesses "to penalties or forfeitures. A prosecution or an action for violation of such a statute would be clearly an original suit or controversy between parties within the meaning of the Constitution."

This part of the opinion of the lower court was expressly affirmed by the Supreme Court, notwithstanding the fact that in other particulars the decision was reversed. (I. C. C. *v.* Brimson, 154 U. S., 447, 469; 1894.)

That clause of the draft of the proposed resolution herewith submitted follows the language of the provision passed on in these cases, except that it omits the penalty of imprisonment which was stricken out by the Elkins law.

ALPHABETICAL LIST OF CASES CITED.

Anderson *v.* Dunn, 6 Wheat., 204 (1821); Counselman *v.* Hitchcock, 142 U. S., 547, 586 (1891); Ertick *v.* Carrington, 19 Howell's State Trials, 1029; 1. C. C. *v.* Baird, 194 U. S., 25 (1904); I. C. C. *v.* Brimson, 53 F. R., 476 (1892); 1. C. C. *v.* Brimson, 154 U. S., 447 (1893); In re Chapman, 166 U. S., 661 (1896); In re Pacific Ry Co., 32 F. R., 241 (1987); Kilbourn *v.* Thompson, 103 U. S., 168 (1880); Whitcomb's case, 120 Mass., 118.

TENTATIVE DRAFT OF PROPOSED RESOLUTION.

Whereas (here state the subject matter or thing to be investigated, the power under which Congress sets, and the purpose of the investigation).

Resolved, etc. (This clause should authorize the appointment of a committee; authorize and direct such committee to inquire into and investigate the subject described, and require it to report. Provisions with reference to compelling the giving of testimony and the production of documents, papers, etc., should be included, substantially as follows:

For the purposes of this investigation the committee shall have power to administer oaths and to require, by subpoena, the attendance and testimony of witnesses and the production of all book, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And, in case of disobedience to a subpoena, the committee may invoke the aid of any court in the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this action.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before said committee (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the committee, or in obedience to the subpoena of the committee, whether such subpoena be signed or issued by one or more of the members of such committee, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before such committee, or in obedience to its subpoena, or the subpoena of any member thereof: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the committee shall be guilty of an offense, and, upon conviction thereof by a court of competent jurisdiction, shall be punished by line not less than $100 nor more than $5,000.

365. Congress has power to obtain information to be used as an aid in formulating legislation, and may require witnesses to testify for that purpose.

Decision of Federal court confirming the right of duly constituted Congressional committees of investigation to inquire into matters pertaining to primary elections.

In an inquiry before a congressional committee, testimony relative to contributions made by one candidate to another candidate for nomination in the same primary was held to be within the scope of the committee's power of investigation.

Where a subcommittee has been authorized to pursue an investigation, hearings opened and conducted by one member are as legal and authoritative as if all members of the subcommittee were present.

For testifying falsely before a congressional committee of investigation a witness was certified to the district attorney and indicted by a Federal grand jury.

An instance wherein, under exceptional circumstances, a committee authorized to investigate matters pertaining to a campaign then in progress held hearings prior to the election.

On May 13, 1931, the Federal court for the Lincoln Division of the District of Nebraska handed down an opinion [1] in the case of The United States of America *v.* Victor Seymour.

The opinion cites the resolution [2] adopted by the Senate on April 8, 1930,[3] providing for the appointment of a committee of five to "investigate the campaign expenditures of the various candidates for the United States Senate."

Under authority conferred by this resolution the Vice President appointed a committee of five Senators, including Mr. Gerald P. Nye, of North Dakota, as chairman. The records of the committee relate that at a regular session attended by four members of the committee—

> A discussion of future procedure was had. The chairman was unanimously authorized to act as a subcommittee and to appoint subcommittees of one or more members to hold hearings as in his judgment was desirable.

Pursuant to this authorization, Mr. Nye held hearings at which it was alleged that one Victor Seymour, on July 2, 1930, testified falsely relative to his knowledge of the candidacy of a certain George W. Norris of Broken Bow, Nebr., in the primary election to nominate a candidate for United States Senator on the Republican ticket, in which primary Senator George W. Norris, of McCook, Nebr., was also a candidate.

The discrepancy in testimony being certified by the subcommittee to the district attorney, was presented to the United States grand jury, which returned an indictment charging perjury, and the case coming to trial, Judge Munger delivered the decision of the court.

The opinion confirms the constitutional grant of power authorizing the Senate committee to elicit testimony, in this language:

> In the arguments offered upon the demurrer it is conceded that the power of the committee of the Senate to make inquiry of the defendant depended upon some constitutional grant of power, express or implied, whereby the Senate committee was authorized to make the investigation which was outlined in the Senate resolution under which Senator Nye purported to act. This constitutional limitation of such an inquiry is well established.

The right of the Senate to investigate matters pertaining to primary elections with a view to acquiring data in contemplation of the formulation of legislation is sustained as follows:

> The inquiries made of the defendant in this case relate to his testimony concerning his knowledge and acts in connection with a campaign preceding a primary election in Nebraska, at which party candidates for United States Senator were to be selected. The seventeenth amendment to the United States Constitution provides for the election of such Senators by the people of each State, by voters having qualifications requisite for electors of the most numerous branch of the State legislature. * * *
>
> In support of the indictment the Government asserts that the inquiries propounded to, and the testimony given by, the defendant was material to the investigation authorized by the Senate resolution and was within the scope of the Senate's right of investigation, because it was in aid of legislation which the United States Senate could enact under section 4 of Article I of the United States Constitution, which reads as follows:

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[1] 50 U. S. 930.

[2] See see. 353, infra.

[3] Second session Seventy-first Congress, Record, p. 6841.

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

There can be no doubt of the power of Congress to obtain information as to legislation which it is authorized to enact and that it may require witnesses to testify for that purpose.

* * * The right of Congress to legislate with reference to primary elections similar to such primary elections as were permissible in Nebraska in 1930 has been the subject of decisions in adjudicated cases.

In this connection the court differentiates between the Newberry case [1] and the case at bar, and discusses at length various cases subscribing to this doctrine, in this wise:

In view of the decision in the Newberry case, the defendant in this case contends that Congress could enact no valid legislation as to which the testimony given by the defendant could be of any assistance. Section 4 of article I of the United States Constitution authorizes Congress to make or alter regulations as to the times and manner of holding elections for Senators and Representatives in Congress. The decision in the Newberry case dealt with a specific statute, which directly undertook the regulation of primary elections where United States Senators were nominated for election. The inquiry in this case has a much broader scope. The manner of holding elections for United States Senators and Representatives which has been in general use in recent years in the United States has been by the use of written or printed ballots, cast by qualified voters at a designated time and before qualified election officers. Since the adoption of the system known as the Australian ballot law, it has been provided by statutes that the only manner in which an election could be conducted in many of the States for the election of a Senator or Representative has been by the use of a printed official ballot, furnished to the voters by public officers, and that upon such ballots no names of nominees for Representative or Senator could be printed unless such nominee had been regularly chosen, as provided by other statutes, at a primary election preceding the general election. (See Corp. Jr. 140, 141.) It has further been a part of the manner of holding such general elections in many States that the names of those who have been otherwise regularly nominated for public office could not be printed upon the ballots to be used by the voters at a general election unless such nominees should first file a sworn statement of the amount of money which had been received and expended by such nominees in procuring their nominations. Other statutes require similar statements as to money contributed to or disbursed by any campaign committee or others acting on behalf of such nominee.

Congress at different times has exerted the power of controlling the manner of holding elections for members of Congress. In the case of *Ex parte Siebold*, the court was considering the provisions of sections 2011, 2012, 2016, 2017, 2021, 2022, 5515, and 5522 of the Revised Statutes of the United States providing for Federal supervisors of elections and the duties imposed upon them and upon officers of elections and forbidding interferences with such elections. Other acts of Congress have provided for the election of Representatives by districts, and that election should be by ballot or by voting machine.

In view of these decisions, it is not perceived why Congress may not enact valid legislation providing that the manner of elections for Senators and Representatives shall be by the use of a printed official ballot, that upon such ballot there shall be printed the names of those nominees only for such offices as shall have duly made and filed with some public officer a sworn statement of all contributions and expenditures which have been made by or for the benefit of such candidate, to his knowledge, in obtaining the nomination for such office, and the names of those contributing and of those to whom money was paid, also requiring, as a prerequisite to the printing of such nominee's name upon the ballot, that the officers of a campaign committee acting on behalf of such candidate should file a similar statement.

It would relate directly to the manner of holding the elections for Senators and Representatives. As an aid to the advisability and the scope of such legislation, the testimony of the defend-

[1] 256 U. S. 41.

ant in this case as to contributions alleged to have been made by W. M. Stebbins as an alleged candidate for nomination for United States Senator, and to alleged agents of George W. Norris of Broken Bow, Nebr., as an alleged candidate for nomination for United States Senator, was pertinent to the inquiry which was directed to be made by the resolution of the United States Senate. It would be difficult to say that such testimony was pertinent to no other possible legislation that Congress could enact, and it is not necessary to assert such a sweeping negative. In view of the conclusion reached it is not necessary to consider whether the inquiry directed by the resolution was authorized by clause I of section 5 of article 4 of the Constitution, as an investigation of the qualifications of candidates, one of whom might thereafter become a Member elect of the Senate.

The opinion in this case also decides inferentially questions pertaining to the number of members of a committee or subcommittee required to legally conduct hearings of this character. In the opening the hearings [1] at Broken Bow, Nebr., on July 19, 1930, Mr. Nye announced:

The question may now arise as to the authority for only one member of the committee conducting the hearing here today. That possibility was taken care of by a resolution of the committee itself, providing that a subcommittee of one could conduct hearings upon such occasions as it was found impossible for more than one to attend. So I will conduct this hearing to-day as a subcommittee of one of that Senate committee which is charged with the duties which have been outlined by me in the reading of this resolution.

Mr. Nye at this hearing [2] also called attention to the departure of his subcommittee in this inquiry from the custom of congressional committees of investigations in prosecuting such inquiries prior to election and during the progress of the campaign it was proposed to investigate. Mr. Nye said:

We are establishing here to-day something of a precedent for our committee. Until now it has not been our purpose, nor have we resorted to the holding of hearings in any State prior to the conduct or prior to the holding of the primary election. The committee did not make this a hard and fast rule, yet we had not anticipated what occasion might cause us to want to conduct hearings prior to the conduct of a primary; but in this specific case a new condition presented itself to the committee, a condition which found one candidate for the United States Senate filing for that office as a candidate and then absenting himself completely, so far as was known, from the State of Nebraska itself; and in the face of such allegations as were filed with the committee and conveyed to the committee through other means, the committee has deemed it highly advisable and quite the proper thing to conduct such a hearing as we are about to conduct here to-day.

356. Various instances of investigations by the House.

On March 29, 19 10,[3] the House authorized the investigation of changes reflecting on the integrity of Members of the House arising out of the interest of the Merchant Marine League in legislation relating to the American merchant marine.

357. On August 21, 1911,[4] the House on recommendation [5] of the Committee on Labor, authorized the appointment of a special committee to investigate systems of shop management, with special reference to their applicability to Government work.

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[1] Hearings on S. Res. 215, p. 2.

[2] Ibid.

[3] Second session Sixty-first Congress, Record, p. 3890.

[4] First session Sixty-second Congress, Record, p. 4364.

[5] House Report No. 52.

The report[1] of the committee, submitted on March 9, 1912, was referred to the House Calendar, and was not further acted upon.

358. On April 18, 1921,[2] the House agreed to a resolution creating and empowering a select committee to investigate the escape of Grover Cleveland Bergdoll, convicted by Army general court-martial as a draft deserter and sentenced to confinement in the United States disciplinary barracks.

The report of the select committee accompanied by minority views was submitted on August 18,[3] and was referred to the Committee of the Whole House.

359. On March 12, 1924,[4] the Senate agreed to a resolution authorizing the appointment of five Members, three of the majority and two of the minority party, to investigate the Bureau of Internal Revenue.

Thereupon the acting President of the Senate pro tempore appointed as members of this committee Messrs. James E. Watson, of Indiana; Richard P. Ernst, of Kentucky; James Couzens, of Michigan; Andrieus A. Jones of New Mexico; and William H. King, of Utah.

On May 6, 1924,[5] a resolution offered by Mr. Watson proposing to discharge the special committee from the further consideration of the subject under inquiry was indefinitely postponed.

Subsequently Mr. Watson resigned as chairman of the committee and Mr. Couzens was appointed to succeed him.

The committee held exhaustive hearings and submitted a report[6] in the first session of the Sixty-ninth Congress.

360. On March 24, 1924,[7] the House agreed to a resolution authorizing the appointment by the Speaker of a select committee of five Members to investigate the preparation, distribution, sale, payment, retirement, surrender, cancellation, and destruction of Government bonds and other securities. Pursuant to the resolution, the Speaker appointed Messrs. Louis T. McFadden, of Pennsylvania; James G. Strong, of Kansas; Edward J. King, of Illinois; Henry B. Steagall, of Alabama; and W. F. Stevenson, of South Carolina.

The committee was subsequently authorized to employ clerical assistance and to incur expenses not exceeding $10,000.

The report of the select committee was submitted March 2, 1925[8] accompanied by separate minority views signed by Mr. McFadden and Mr. Strong, respectively, and was referred to the House calendar.

361. On June 7, 1924,[9] the Senate, without debate or record vote, agreed to the following resolution:

Resolved, That a special committee of five Senators be elected forthwith to investigate and report to the Senate on December 5, 1924, the campaign expenditures made by or on behalf of,

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[1] Second session Sixty-second Congress, House Report No. 403.

[2] First session Sixty-seventh Congress, Journal, p. 103; Record, p. 412.

[3] House report No. 534.

[4] First session Sixty-eighth Congress, Record, p. 4023.

[5] Record, p. 7934.

[6] Senate Report No. 27.

[7] First session Sixty-eighth Congress, Journal, p. 363; Record, p. 4817.

[8] House Report. No. 1635.

[9] First session Sixty-eighth Congress, Record, p. 11139.

or in support of, or in opposition to, any and all candidates for President and Vice President and presidential electors; the names of the persons, firms, or corporations contributing to the said candidate or candidates or their party committee or committees, or any other agency, the amounts contributed, pledged, loaned, or otherwise made available for use, the method of expenditure of said sums, and all the facts in relation thereto, not only as to the subscriptions of money and the expenditures thereof but as to the use of any other means of influence, including the promise of patronage, and all other facts in relation thereto that would not only be of public interest but would aid the Congress in any necessary remedial legislation.

The said committee is hereby empowered to sit and act during the adjournment of Congress at such time and place as it may deem necessary; to require by subpoena, or otherwise, the attendance of witnesses, the production of books, papers, and documents; to employ stenographers at a cost of not exceeding 25 cents per hundred words. The chairman of the committee, or any member thereof, may administer oaths to witnesses. Subpoenas for witnesses shall be issued under the signature of the chairman or any member of the committee. Every person who, having been summoned as a witness by authority of said committee, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States.

The expenses thereof shall be paid from the contingent fund of the Senate on vouchers ordered by said committee, signed by the chairman thereof, and approved by the Committee to Audit and Control the Contingent Expenses of the Senate.

Immediately upon the passage of this resolution, on motion of Mr. Henry Cabot Lodge, of Massachusetts, Messrs. William E. Borah, of Idaho; Wesley L. Jones, of Washington; Henrik Shipstead, of Minnesota; T. H. Caraway, of Arkansas; and Thomas F. Bayard, of Delaware, were elected as members of the special committee of investigation.

Hearings were held by the committee, and on February 12, 1925 [1] (legislative day of February 3), Mr. Borah submitted the report of the committee, incorporating itemized records of contributions and expenditures of major political parties, and recommending the enactment of a corrupt practices act.

362. On February 10, 1925 [2] Mr. Homer P. Snyder, of New York, from the Committee on Indian Affairs, submitted the report from the Subcommittee of the Committee on Indian Affairs, appointed under authority of House Resolution 348 to inquire into and investigate the situation with reference to the administration of Indian Affairs in Oklahoma.

The subcommittee consisted of Messrs. Homer P. Snyder, of New York; Scott Leavitt, of Montana; George F. Brumm, of Pennsylvania; Sam B. Hill, of Washington; M. C. Garber, of Oklahoma; Carl Hayden, of Arizona; and W. W. Hastings, of Oklahoma. Under the authorizing resolution [3] expenses of the investigation were limited to $5,000.

The report consisted largely of findings of facts relating to the conduct of personal estates of four Indian wards of the Government, with recommendations relating to the administration of the affairs of the Five Civilized Tribes, and was accompanied by minority views signed by Mr. Hill and Mr. Hastings.

The report was referred to the House Calendar and was not acted upon by the House.

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[1] Senate Report No. 1100.

[2] Second session Sixty-eighth Congress, House Report No. 1527.

[3] Journal, 658.

363. On January 24, 1925,[1] the House agreed to a resolution authorizing an investigation by a select committee of five Members to be appointed by the Speaker, of the National Disabled Soldiers' League (Inc.), its methods of solicitation of funds, sources of revenue, character and pay of officials, distribution of funds for the benefit of the veterans of the World Wax, uses of the United States mails, implication of indorsement by the Commissioner of Internal Revenue, and all other matters pertaining to the organization and conduct of said league. The committee was authorized to send for persons and papers, administer oaths, take testimony, and, by later resolution, to incur expenses not to exceed $1,000.

The Speaker appointed as members of this committee Messrs. Hamilton Fish, of New York; William D. Boies, of Iowa; Richard S. Aldrich, of Rhode Island; Eugene Black, of Texas; William P. Connery, of Massachusetts.

On March 3[2] Mr. Fish, from the select committee, submitted a report which was referred to the Committee of the Whole House.

The report was received and ordered printed.

364. On May 19, 1926[3] (legislative day of May 17), in the Senate, Mr. James A. Reed, of Missouri, moved the following resolution:

Resolved, That a special committee of five, consisting of three members selected from the majority political party, of whom one shall be a progressive Republican, and of two members from the minority political party, shall be forthwith appointed by the President of the Senate; and said eommittee is hereby authorized and instructed immediately to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made, or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association to influence the nomination of any person as the candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a Member of the United States Senate at the general election to be held in November 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid, including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto.

Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary; to require, by subpena or otherwise, the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who having been summoned as a witness by authority of said committee willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States.

Said committee shall promptly report to the Senate the facts by it ascertained.

The resolution[4] was agreed to and a committee appointed consisting of Mr. Reed, chairman; Mr. Charles L. McNary, of Oregon; Mr. Guy D. Goff, of West

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[1] Second session Sixty-eighth Congress, Record, p. 2437.

[2] House Report No. 1638.

[3] First session Sixth-ninth Congress, Record, p. 9677.

[4] This resolution was supplemented by S. Res. 227, 258, and 324 of the Sixty-ninth Congress.

Virginia; Mr. William A. King, of Utah; and Mr. Robert M. La Follette, jr., of Wisconsin.

The committee was continued in the succeeding Congress [1] by the following resolution:

Resolved, That a resolution of the United States Senate, agreed to on May 19, 1926, numbered Senate Resolution 195, of the Sixty-ninth Congress, first session, creating a special committee to investigate expenditures in senatorial primary and general elections, and all subsequent resolutions dealing with the said special committee and agreed to by the United States Senate during the Sixty-ninth Congress (to wit, S. Res. 227, S. Res. 258, and S. Res. 324), have continued in full force and operation since the dates of their respective enactment by the Senate, and do now, as then, express the will of this body.

And that the said special committee appointed pursuant to said Senate Resolution 195 of the Sixty-ninth Congress, first session, shall continue to execute the directions of the said several resolutions relating to the said committee until the Senate accepts or rejects the final report of the said special committee or otherwise orders.

The committee held numerous us hearings and from time to time submitted reports,[2] including reports on the election of Frank L. Smith in the Illinois primary election, with special reference to contributions by Samuel Insull; the election of William S. Vare in Pennsylvania primaries and elections, with particular attention to contributions by Thomas W. Cunningham; the senatorial elections in Arizona; the primary election in Illinois, reporting the contumacy of Robert E. Crow, Daniel T. Schuyler, Samuel Insull, and Thomas W. Cunningham, and the election of a Senator from New Jersey. These investigations were made the basis of various further inquiries by the Senate and gave rise to a number of questions eventually carried to the Supreme Court for final adjudication.[3]

365. On April 29, 1922,[4] the Senate agreed to a resolution requesting the Secretary of the Interior to transmit to the Senate copies of oil leases within the naval reserve, with related papers, and authorizing the Committee on Public Lands and Surveys to investigate the entire subject with reference to the rights and equities of the Government and the preservation of natural resources.

The authorization was further supplemented on June 5,[5] by a resolution conferring on the committee power to require the attendance of witnesses and the production of books and papers, with provision for the payment of the expenses of the investigation from the contingent fund.

On January 9, 1928,[6] the Senate by further resolution authorized the Committee on Public Lands and Surveys to continue the investigation with specific directions to inquire into designated phases of the subject. This investigation eventually led to the indictment [7] of Harry F. Sinclair and Robert W. Stewart.

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[1] First session Seventieth Congress, Record, p. 488.

[2] Second session Sixty-ninth Congress, Senate Report No. 1197, parts 1 to 5; First session Seventieth Congress, Senate Report No. 603, parts 1 and 2; Second session Seventieth Congress, Senate Report No. 1861.

[3] See sec. 347 in this volume.

[4] Second session Sixty-seventh Congress, Record, p. 6096.

[5] Record, p. 8140.

[6] First session Seventieth Congress, Record, p. 1185.

[7] See sections 336 and 340 of this volume.

366. On October 1, 1929,[1] the Senate passed a resolution[2] empowering the Committee on the Judiciary to inquire into the activities of lobbyists and authorizing the expenditure of $10,000 in such investigations.

Under the authority thus granted, Mr. T. H. Caraway, of Arkansas, Chairman of the subcommittee, submitted from time to time various reports[3] including reports relating to Senator Hiram Bingham, of Connecticut; Frederick L. Koch, an employee of the Tariff Commission; Joseph R. Grundy, president of the Pennsylvania Manufacturers Association; J. A. Arnold, of the Southern Tariff Association; the Hawaiian Sugar Planters Association; the National Council of American Importers & Traders; the Tennessee River Improvement Association, with regard to its interest in legislation relating to Muscle Shoals; John J. Raskob, a director of the Association against the Prohibition Amendment; Dr. Eugene R. Pickrell, formerly chief chemist in the Customs Service, and representing the General Dye Stuffs Corporation, and others.

367. On February 10, 1930,[4] the House agreed to this resolution:

Resolved, That a subcommittee of the Committee on Appropriations, specially designated by the committee to conduct hearings and examine estimates of appropriations for the eradication, control, and prevention of the spread of the Mediterranean fruit fly, is authorized to visit the State of Florida and other adjacent territory to obtain information and data in connection with the purposes of such estimates. As a necessary incident to the examination of such estimates of appropriations, the subcommittee is authorized, to the extent it may deem advisable, to investigate expenditures heretofore made and currently being made from Federal funds on account of such fruit fly. For the purposes of this resolution, the subcommittee is authorized to sit and act at such times and places in the District of Columbia and elsewhere as it may determine, to hold hearings, to require the attendance of witnesses, to compel the production of books, papers, and documents, to take testimony, to employ personal services, to have printing and binding done, and to make such expenditures as it deems necessary.

The committee held hearings in the District of Columbia and in Florida but made no formal report.

368. On May 22, 1930,[5] the House authorized the investigation of Communist propaganda in the United States with particular reference to such activities in educational institutions. Subsequently, provision[6] was made for payment of the expenses of the investigation from the contingent fund in amount not to exceed $25,000.

369. In 1928,[7] and again in 1930,[8] the House provided by resolution for the appointment of a special committee to investigate campaign expenditures of the various candidates for the House in both parties.

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[1] First session Seventy-first Congress, Record, p. 4115.

[2] Senate Res. No. 20; see sec. 7603 of this volume.

[3] Senate Report No. 43, parts 1 to 10.

[4] Second session Seventy-first Congress, Record, p. 3375.

[5] Second session Seventy-first Congress, Record, p. 9759 temporary.

[6] Record, p. 11099.

[7] First session Seventieth Congress, Record, p. 10688; Second session Seventieth Congress, Record, p. 896.

[8] Second session Seventy-first Congress, Record, p. 11600.

Chapter CLXXXVII.[1]

THE CONDUCT OF INVESTIGATIONS.

370. Instance wherein the House, upon request of a committee of investigation, limited the scope of its inquiry.

At the suggestion of a committee charged with an investigation its authority to inspect private and secret archives was canceled.

The report of a committee authorized to report "during the present session" is privileged.

On January 9, 1909,[2] the House agreed to the following resolution:

Resolved, That the Speaker is authorized to appoint a select committee of five members, whose duty it shall be to inquire and report to the House at its present session, as follows:

First. What appropriations were made at the first session of the Sixtieth Congress for the fiscal year 1909 that could be used to prevent frauds in and depredations upon the several branches of the public service, including the protection of public lands and their products from fraudulent entry or appropriation, and to apprehend and punish persons charged with violations of the laws of the United States; also what increase, if any, was made in any of such appropriations over the amounts appropriated for 1908.

Second. What branches of the public service, paid for in whole or in part out of the United States Treasury, are authorized or are in existence and supported by appropriations made by Congress, whose principal duties are to detect and prevent frauds, or to apprehend and bring to trial and punishment persons charged with violating the laws of the United States; whether such branches of the public service or any persons employed therein have been or are engaged in any duty not contemplated by the law or the appropriation establishing or providing for such service; the names of the persons employed, for any period, in each branch of such service during the current and last fiscal year, the rates of compensation and allowance paid or being paid to each of them, by whom they were appointed and on whose recommendation, and a statement of the specific duty performed, or engaged upon by each of such employees, each day since the beginning of the fiscal year 1908.

[1] Supplementary to Chapter LV.

[2] Second session Sixtieth Congress, Record, p. 699; Journal, p. 137.

The committee, or any subcommittee thereof, is authorized to sit during the session of the House; to send for persons and papers, including private or secret archives; to administer oaths; and to employ such clerical, messenger, and stenographic assistance as they shall deem necessary; all expenses incurred hereunder shall be paid on the certificate of the chairman of the committee out of the contingent fund of the House.

Mr. Marlin E. Olmsted, of Pennsylvania, from the select committee so created, submitted on February 1,[1] a resolution enlarging the powers of the committee by authorizing an inquiry into what decrease as well as increase

If any was made in any of such appropriations over the amounts appropriated for nineteen hundred and eight.

authorized in the first paragraph of the original resolution, and eliminating the requirement that the committee ascertain and report on

the names of the persons employed, for any period, in each branch of such service during the current and last fiscal year; the rates of compensation and allowance paid or being paid to each of them, by whom they were appointed and on whose recommendation, and a statement of the specific duty performed or engaged upon by each of such employees each day since the beginning of the fiscal year nineteen hundred and eight.

The clause in the last paragraph:

Including private or secret archives.

was also eliminated.

The resolution was agreed to, and on March 3,[2] Mr. Olmsted submitted the final report of the committee with the request that it be printed in the Record without being read.

Mr. Edwin W. Higgins, of Connecticut, objected.

Mr. Olmsted submitted that under the authority of the resolution creating the committee it was authorized to report at any time and the report was privileged.

The Speaker[3] held that the report was privileged and as such could be read and would thereupon appear in the Record, but that unanimous consent was required for its insertion in the Record without reading.

371. By joint resolution a joint committee was created, empowered, and instructed to make an investigation.

The House by special order provided for election of House members of a joint select committee previously authorized by law.

The resignation of a member from a joint select committee created by law is made either to the House or to the committee and, while the House has no power either to accept or to refuse to accept such resignation, it may fill the vacancy so occasioned.

Instance wherein the House investigated delay in the reference and transmission of paper to a committee.

The report of a committee of investigation making no recommendations was laid on the table.

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[1] Record, p. 1685; Journal, p. 242.

[2] Record, p. 3795; Journal, p. 395.

[3] Joseph G. Cannon, of Illinois, Speaker.

Discussion of the procedure in the presentation and reference of reports from commissions created by law and from joint committees of the two Houses.

A statute provides for the printing and distribution of documents.

Discussion of the functions of the joint committee on printing.

A standing committee of the House, to which had been referred the report of a joint select committee of investigation, concluded it was not authorized to review the evidence or pass judgment on the findings so referred, and that the only duty which devolved upon it was to present to the House bills designed to carry into effect the recommendations of the committee of investigation.

On January 7, 1910,[1] the House transmitted to the Senate a joint resolution authorizing an investigation of the Interior Department and the Bureau of Forestry of the Department of Agriculture, which was later agreed to by the Senate and approved by the President January 19, 1920, in the following form:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a joint committee of both Houses of Congress is hereby created, to be composed of six Members of the Senate, to be appointed by the President thereof, and six Members of the House of Representatives, to be elected by that body. Any vacancy occurring on the committee shall be filled in the same manner as the original appointment. The said committee is hereby empowered and directed to make a thorough and complete investigation of the administration, action, and conduct of the Department of the Interior and its several bureaus, officers, and employees, and of the Bureau of Forestry, in the Department of Agriculture, and its officers and employees, touching, relating to, or bearing upon the reclamation, conservation, management, and disposal of the lands of the United States, or any lands held in trust by the United States for any purpose, including all the resources and appurtenances of such lands, and said committee is authorized and empowered to make any further investigation touching said Interior Department, its bureaus, officers, and employees, and of said Bureau of Forestry, its officers, and employees, as it may deem desirable. Said committee or any subcommittee thereof is hereby empowered to sit and act during the session or recess of Congress, or of either House thereof; to require, by subpoena or otherwise, the attendance of witnesses and the production of books, documents, and papers; to take the testimony of witnesses under oath; to obtain documents, papers, and other information from the several departments of the Government, or any bureau thereof; to employ stenographers to take and make a record of all evidence taken and received by the committee, and to keep a record of its proceedings; to have such evidence, record, and other matter required by the committee printed and suitably bound; and to employ such assistance as may be deemed necessary. The chairman of the committee, or any member thereof, may administer oaths to witnesses. Subpoenas for witnesses shall be issued under the signature of the chairman of the committee or the chairman of any subcommittee thereof. And in case of disobedience to a subpoena this committee may invoke the aid of any court of the United States or of any of the Territories thereof or of the District of Columbia or the district of Alaska, within the jurisdiction of which any inquiry may be carried on by said committee in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this resolution. And any such court within the jurisdiction of which the inquiry under this resolution is being carried on may, in case of contumacy or refusal to obey a subpoena issued to any person under authority of this resolution, issue an order requiring such person to appear before said committee and produce books and papers if so ordered and give evidence touching the matter in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend

[1] Second session Sixty-first Congress, Record, p. 383.

to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding except in prosecution for perjury committed in giving such testimony. In addition to being subject to punishment for contempt, as hereinbefore provided, every person who, having been summoned as a witness by authority of said committee, or any subcommittee thereof, Willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation herein authorized, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not more than one year nor less than one month.

Any official or ex-official of the Department of the Interior, or of the Bureau of Forestry, in the Department of Agriculture, whose official conduct is in question, may appear and be heard before the said joint committee or any subcommittee thereof, in person or by counsel.

All hearings by and before said joint committee or any subcommittee thereof shall be open to the public. The said joint committee shall conclude its investigation and report to this Congress all the evidence taken and received and their findings and conclusions thereon. The sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the necessary expenses of said joint committee, the said sum to be disbursed by the Secretary of the Senate upon vouchers to be approved by the chairman of the committee.

On January 20,[1] the House agreed to the following resolution reported by the Committee on Rules:

Resolved, That immediately on the adoption of this resolution the House shall proceed by resolution to elect its members of the joint committee provided for by the joint resolution "Authorizing the investigation of the Interior Department and the Bureau of Forestry of the Department of Agriculture."

Thereupon, Mr. Frank D. Currier, of New Hampshire, "by direction of the Republican Caucus," offered the following which was agreed to:

Resolved, That the following Members be elected the House members of the joint committee provided for by the joint resolution authorizing an investigation of the Interior Department and the Bureau of Forestry of the Department of Agriculture: Mr. Samuel W. McCall, of Massachusetts; Mr. Marlin E. Olmsted, of Pennsylvania; Mr. Edwin Denby, of Michigan; Mr. Edward H. Madison, of Kansas; Mr. James T. Lloyd, of Missouri; and Mr. Ollie M. James, of Kentucky.

On the following day Mr. Lloyd tendered in writing:

Hon. JOSEPH G. CANNON,
Speaker of the House of Representatives.

DEAR SIR: I hereby request to be excused from service on the joint committee to investigate the Interior Department and the Bureau of Forestry in the Department of Agriculture.

JAMES T. LLOYD.

A question arising as to whether the House was authorized to accept the resignation, the Speaker said:

As to the right of the gentleman from Missouri, Mr. Lloyd, to resign, this is the situation: The gentleman was appointed under the joint resolution, which is a law, which provided that the House should select six members and the Senate six members of the joint committee or commission of investigation, the Vice-President appointing the Senate members and the House electing the members on the part of the House. The commission exists under law. The House of Representatives, in the opinion of the Chair, has no power in this instance to make a removal or refuse a resignation. In many respects resignation from this joint committee is like unto the resigna-

[1] Record, p. 837; Journal, p. 195.

tion by a Member of Congress. Ordinarily the resignation by a Member of Congress is to the House. It may be to the governor of the State. The governor of the State in such case notifies the House, or the Member notifies the House that he has sent his resignation to the governor.

Now, the House, under the law, has the power which it has exercised in appointing the members of the commission in question. In the event of a vacancy among the House members upon the commission the House, as the law provides, has the power to fill that vacancy.

After citing various precedents:

That is sufficient to show what the practice has been; but if it were an open question, the House having the power under the law to appoint this commission, while it has no power to accept a resignation and no power to refuse to accept such a resignation, in the opinion of the Chair the resignation may be to the House, which has the power to select a successor, or it may be to the commission.

The report [1] of the joint committee was submitted to the House on December 7.

On January 26, 1911,[2] Mr. Gilbert M. Hitchcock, of Nebraska, rising to a question of the privilege of the House, offered the following:

Whereas on December 7 the House received from the joint committee appointed to investigate the Department of Interior and the Forestry Bureau three reports, made under House joint resolution 103; and

Whereas there was unexplained delay, doubt, and mystery, and confusion in referring said reports to the Committee on Agriculture, and the said reference was not made until December 19; and

Whereas the said committee did not receive said reports in accordance with said order of reference until January 25; and

Whereas said reports during that period were neither upon the Speaker's desk nor in the hands of the Committee on Agriculture, to which they were referred, nor of any other committee: Now, therefore,

Resolved, That these irregular proceedings and this misleading and improper treatment of these reports, rendering them for six weeks unavailable and inaccessible, constitute a violation of the proper procedure of the House, and the Committee on Rules be, and it is hereby, directed to investigate and report to the House within one week the reasons for the delay and irregular treatment of these reports.

After debate Mr. Hitchcock offered the following in lieu thereof, which was agreed to by the House:

Resolved, That the Committee on Rules be, and it is hereby, directed to investigate and report to the House within one week all facts connected with the reference of the so-called Ballinger reports and any delay regarding the transmission of said reports to the committee to which referred.

During the investigation by the Committee on Rules, Mr. Asher C. Hinds, clerk at the Speaker's table, testified:

The first question which came up about that report was in what way it should be made, and the view was taken that that committee was in reality a commission established by law, and was not a committee, parliamentarially, and that the proper way to make the report would be for the vice chairman, Mr. McCall, on behalf of the House, to write a letter of transmittal to the Speaker, and send the report that way. A report so sent to the House is treated as we treat executive communications, that is the communications from the heads of departments of the Government and other communications to the House that the Speaker lays before the House through the

[1] Senate Document No. 719.

[2] Third session Sixty-first Congress, p. 1491.

basket, and the usual way of treating it is for the endorsement to be made in behalf of the Speaker on the back of it, showing what it is and also showing the reference. That endorsement was made in this case, and the reference also on the back of the letter of transmittal, and the document was put into the basket on the Clerk's desk or handed to the journal clerk. Mr. McCall was anxious that the House should know that the report had been brought in, so he asked unanimous consent to have that letter of transmittal read to the House; and that letter of transmittal was read to the House, as a matter of information, by unanimous consent.

You will find that in the Congressional Record of December 7. That was merely an outside performance; it had nothing to do with the reference. It was a privilege accorded Mr. McCall by the House, but not one to which he had a right under the rules.

But nothing was said by the Speaker about a reference, because a document of that kind would not be referred in open House, but would be referred through the basket.

As to the printing and distribution of documents, he explained:

Where a document is referred, the minute it is referred the rules and the law take charge of it as to printing, and the law provides for the printing of 1,682 copies, and provides how they shall be distributed;

And the fact is that I had no right, so far as official authority goes, to send word to hold the report. When I have referred the document and handed it to the Journal clerk it has gone beyond my jurisdiction, or rather the Speaker's jurisdiction, but for convenience I sometimes use discretion to keep the business moving in proper channels.

For instance, the rule is that everything that is referred through that basket shall be printed. Sometimes some department of the Government will send up a wooden box of manuscript that would cost thousands of dollars to print. There is no way of bringing that to the attention of the House, so I simply leave off the direction to print. Strictly, under the rules, the printing is required as an incident of the reference, but by leaving off the direction to print time is given for the committee to whom a document is referred to examine as to the necessity for printing. Of course all that is beyond the proper authority of my office; but that little discretion does no harm and saves some useless printing. It was in line with this habit of exercising some discretion, and in order to facilitate the printing in the way desired by the joint committee, that I sent word to hold the report. Of course, really when it has passed from me to the Journal clerk the Speaker's connection with it was through.

As to the method of presenting reports from commissions:

Reports from commissions have very generally been handled as I tell you. It has varied, however. Sometimes they have arisen on the floor and asked unanimous consent to bring them in, and they were in those cases referred on the floor to committees by unanimous consent; but that takes time, so when Members have come to me in such cases I have always advised them to present the report by a letter of transmission; that saves delay and all bother.

If it had been a joint committee of the two Houses, created by the action of the two Houses entirely, the proper procedure would be for its report to go to the calendar directly.

In response to an inquiry as to the method of referring reports from the Joint Committee on Printing:

The Joint Committee on Printing, so far as its joint functions are concerned, has seemed not to be a legislating committee. The Joint Committee on Printing makes us no reports. It is a very anomalous committee. I do not remember when anything of a legislative nature has ever been reported from that committee, as a joint committee, to the House. The two parts of that committee act as standing committees of their respective Houses, and whenever you have a report on the calendar from the Committee on Printing it is not from the joint committee, but it is from the House section of it. The Joint Committee on Printing has practically no functions except executive functions.

But this joint committee was established by statute, and its method of compelling testimony was the statutory method and not the constitutional method under the prerogative of the House.

The report [1] of the Committee on Rules found:

On December 7, Senator Nelson, chairman of the Ballinger Commission, introduced into the Senate a concurrent resolution calling for the printing of 30,000 copies.

The only delay seems to have been caused by the slow progress through the Senate and the House of Senator Nelson's concurrent resolution. The committee are unable to find from the testimony submitted any delay as the result of design upon the part of anyone.

The Committee on Agriculture, to which the report of the joint committee of the Senate and House was referred, reported [2] on February 2, holding:

Your committee does not conceive it to be its duty or within its province to review this evidence as if it were a court of appeals and pass judgment upon the finding of the joint committee. Your committee does believe that through the reference to it of this report it might properly assume jurisdiction and present to the House for its consideration bills designed to carry into effect the legislative recommendations of the joint committee.

The records of the Congress disclosed the fact, however, that bills are now pending precisely in line with these recommendations. Inasmuch, therefore, as measures designed to carry into effect the recommendations of the report of the joint committee have been already introduced in the respective Houses and are under consideration by the committees to which they were properly referred, it would seem futile and unnecessary for this committee to enter upon the field.

For these reasons it is the judgment of your Committee on Agriculture that it has no function to perform in relation to this report, and it therefore respectfully returns the same to the House with the recommendation that it be discharged from the further consideration thereof.

372. The term of a resolution creating and empowering a committee of investigation have not always been strictly construed.

A committee of investigation expressed the opinion that the appearance as lobbyists of former Senators and former Members of the House should be discouraged.

On February 28, 1911,[3] the select committee appointed to investigate certain Indian contracts submitted their report.

The resolution under which the committee was appointed directed the committee to investigate—

all circumstances connected with certain contracts now said to exist by and between J. F. McMurray, an attorney, of McAlester, Oklahoma, or any other person or persons, and the Choctaw and Chickasaw Tribes of Indians of Oklahoma, or any member or members thereof, or any other of the Five Civilized Tribes, the Osage Indians, or any members thereof, this to include bribery, fraud, or any undue influence that may have been exerted on behalf of the approval or procuring of the said contracts, or any of them.

The report thus construes the resolution:

Strictly construed the text of the resolution would have limited the committee to the investigation of existing contracts. But when the resolution was being considered in the House it was evidently contemplated that the committee was not to be so limited in its inquiry, but might inquire into any contracts. See Congressional Record of June 25, 1910, wherein the following colloquy, which occurred on the floor of the House immediately prior to the adoption of the resolution, is reported:

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[1] House Report No. 2102.

[2] House Report No. 2044.

[3] Third session Sixty-first Congress, Record, p. 3711; House Report No. 2273.

"Mr. STEPHENS of Texas. I desire to ask the chairman of the committee whether or not this resolution is broad enough to include all contracts between this man McMurray and these nations of Indians?

"Mr. TAWNEY. And any other contracts?

"Mr. STEPHENS of Texas. Will it go back 10 years?

"Mr. MANN. It will go back as long as the committee wants it to go back."

It was deemed necessary, therefore, in order to make an exhaustive and intelligent inquiry relative to existing contracts with McMurray, to ascertain his contractual relations with any of the Five Civilized Tribes prior to entering into the pending or existing contracts.

In the course of its report the committee express the following opinion on the activities of former Members of the Senate and House in seeking to affect legislation:

Furthermore, the committee is of the opinion that the appearance of former Senators and former Members of the House of Representatives in respect to matters where legislation is desired to be procured through their activities, as well as in matters requiring executive or departmental approval, should be discouraged.

373. The House has sometimes provided for the election of a select committee.

The motion to amend is not entertained while the motion to refer is pending.

A resolution providing for the election of a select committee previously authorized is privileged as affecting the organization of the House.

A motion may be withdrawn in the House, although an amendment to it may have been offered and may be pending.

The motion to refer, the previous question not being ordered, has precedence of the motion to amend.

The ordering of the previous question on a pending proposition precludes the motion to amend.

The previous question may be moved on both the motion to refer and on the pending proposition.

The House has by resolution authorized a committee of investigation to sit wherever it might deem necessary.

On May 9, 1911,[1] the House agreed to the resolution (H. Res. 157) providing for the election of a select committee to investigate and ascertain whether the American Sugar Refining Co. had violated the antitrust act.

On a subsequent day[2] Mr. Robert L. Henry, of Texas, offered, as privileged, the following:

Resolved, That the following Members shall constitute the select committee provided for in House resolution 157: Thomas W. Hardwick (chairman), Finis J. Garrett, William Sulzer, H. M. Jacoway, John E. Raker, George R. Malby, Joseph W. Fordney, E. H. Madison, and Asher C. Hinds.

After debate, Mr. Thomas U. Sisson, of Mississippi, moved to refer the resolution to the Committee on Rules.

Mr. Victor Murdock, of Kansas, then proposed to offer an amendment striking out a name and substituting another.

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[1] First session Sixty-second Congress, Record, p. 1143.

[2] Record, p. 1254; Journal p. 205.

The Speaker [1] held:

If the motion to refer should be voted down, then any gentleman on the floor in the present situation has a right to offer to end this original resolution by striking out any name and substituting another, or by striking out all of the names and substituting others. That is true until some gentleman moves the previous question and the previous question is ordered. The gentleman from Louisiana is recognized.

In the course of debate Mr. S. A. Roddenbery, of Georgia, inquired if the resolution was privileged.

The Speaker replied that it was privileged because affecting the organization of the House.

After further debate, Mr. James R. Mann, of Illinois, offered as an amendment to Mr. Sisson's motion a proposition to refer the resolution to a select committee of 15 members instead of to the Committee on Rules.

Mr. Sisson then proposed to withdraw his motion to refer, when Mr. N. E. Kendall, of Iowa, raised the point of order that a motion could not be withdrawn after an amendment had been offered and was pending.

The Speaker ruled that the mover of the resolution could withdraw it, no amendment having been adopted or decision made thereon, and that Mr. Sisson's motion was withdrawn.

Whereupon, Mr. Mann moved to refer the resolution to a select committee of 15 members.

Mr. Oscar W. Underwood, of Alabama, having moved the previous question, on the motion of Mr. Mann, Mr. Murdock inquired if a motion to strike out and insert was in order.

The Speaker replied that the demand for the previous question, if ordered, would preclude amendment.

Thereupon Mr. Mann made the point of order that the previous question could not be moved on the original resolution while a motion to refer was pending.

The Speaker held that it was in order to move the previous question on both the resolution and the motion to refer and entertained the motion for the previous question which was ordered, yeas 139; nays 80. The resolution was then agreed to.

Subsequently [2] the House further—

Resolved, That the special committee created 'under the provisions of House resolution No. 157 be authorized to sit, as a whole or by subcommittee, at such places as it may deem necessary.

374. The House by resolution elected a committee of investigation.

A Member appointed on a committee of investigation was, at his request, excused by the House from service on the committee.

Discussion of practices of the committees in ordering printing of hearings.

The House has denied to subcommittees the right granted to the committee as a whole to sit at such places as it might deem necessary.

The Department of Justice having instituted proceedings involving an investigation of subjects previously entrusted to a committee of investiga-

[1] Champ Clark, of Missouri, Speaker.

[2] Record, p. 2944; Journal, p. 310.

tion appointed by the House, the committee of its own initiative abandoned that phase of the investigation and confined its attention to other subjects committed to it by the House.

Form of special order providing for consideration of report of a committee of investigation.

On May 16, 1911,[1] the House by resolution elected the committee previously authorized under the resolution providing for an investigation of alleged violations of the antitrust act by the United States Steel Corporation.

On the following day[2] the Speaker laid before the House:

WASHINGTON, D. C., *May 17, 1911.*

Hon. CHAMP CLARK,

Speaker of the House of Representatives.

MY DEAR MR. SPEAKER: Not anticipating that any business would be transacted by the House yesterday beyond the debate upon the resolution providing for the approval of the constitutions of New Mexico and Arizona, I withdrew from the Hall to attend to other matters. During my absence the House paid me the compliment of a unanimous election to membership on the select committee provided for by House resolution 148, for the investigation of the affairs of the United States Steel Corporation and other corporations. That election, coming without solicitation or suggestion from me, I very much appreciate, but I find that the resolution includes, by name, the Pennsylvania Steel Co. and calls for an inquiry whether it has any relations of affiliations in violation of law with the so-called Steel Corporation.

The Pennsylvania Steel Co. is located in my district. I have no financial interest in it of any kind and have never represented it professionally or in any other way. I have, however, a great interest in its welfare because so many of my constituents are dependent upon it for support and some of its officers are my warm personal friends. I do not believe that it has any relations or affiliations in violation of law with the United States Steel Corporation or anybody else, but it will avoid any appearance of partiality if the finding to that effect be made by others than myself. I therefore beg to be excused from service upon the committee.

Very respectfully,

M. E. OLMSTED.

There being no objection when the question was put by the Speaker the resignation was accepted, and on June 2,[3] the House—

Resolved, That Augustus P. Gardner be, and is hereby, elected a member of the select committee provided for in House resolution 148 in place of Marlin E. Olmsted, resigned.

On June 9, 1911,[4] Mr. Augustus O. Stanley, of Kentucky, chairman of the select committee, asked unanimous consent for the consideration of the following:

Resolved, That there shall be printed 10,000 extra copies of the testimony taken in each of the hearings before the special committee appointed under House resolution 148, to investigate violations of the antitrust act of 1890, and other acts.

Mr. James R. Mann, of Illinois, reserving the right to object, said:

It does not require action on the part of the House at all to accomplish this; that the matter has always been in the hands of the Committee on Printing; and that under the law the committee would have authority to order a thousand copies of hearings printed on its own order; and under the law, within the limit of $200 at each time the hearing is printed, which would cover

[1] First session Sixty-second Congress, Record, p. 1253.

[2] Record, p. 1296; Journal, p. 214.

[3] Journal, p. 245; Record, p. 1683.

[4] Journal, p. Record, p. 1341.

more than 10,000 copies, they can get that number printed by getting a certificate from the clerk of the Committee on Printing. That leaves it so that the gentleman can have such number printed as he desires. If he prints 5,000 copies to-day and run short of the number necessary to meet the demand, he can order more printed to-morrow by getting an order from the Committee on Printing.

The special committee on pulp and paper printed a good many thousand copies of different hearings. We would order at one time 2,500 copies, or 3,000 or 4,000 copies, and, as the demand came in later, we would get another order. Of course, we had to go to the Committee on Printing, but there never was any hesitation in granting the order, and we had some control over the matter.

One time I took possession of some rooms over in the House Office Building which had been occupied by a special committee known as the Lilly investigation committee. I found in that room stacked up a great mass—tons, I should say—of hearings that had been ordered printed on the assumption that they would be used, which were still there, printed at great expense, and I ordered them thrown away or sold as waste paper, there being no other disposition to be made of them.

Thereupon Mr. Stanley withdrew the resolution.

Subsequently,[1] Mr. Stanley asked for the consideration of the following resolution:

Be it resolved, etc., That the special committee created under the provisions of the House resolution No. 148 be authorized to sit (as a whole or by subcommittee) at such places as it may deem necessary.

Mr. Mann said:

It has been called to my attention that various investigating committees are appointing small subcommittees where there is no occasion for it, to carry on investigations that ought to be carried on by the full committees, where all the minority members may attend and have notice.

After debate the resolution was modified and agreed to in the following form:

Be it resolved, etc., That the special committee created under the provisions of House resolution 148 be authorized to sit at such places as it may deem necessary.

Under the original resolution creating and empowering the select committee to conduct the investigation, the committee was particularly charged with the duty of determining whether the organization and operation of the United States Steel Corporation was in violation of the Sherman antitrust law. During the progress of the investigation, however, the Department of Justice instituted a proceeding in the Federal court seeking the dissolution of the corporation.

Thereupon, the select committee determined as follows:

The committee has had under careful consideration the objections made by the United States Steel Corporation, through its counsel, to the further prosecution of this investigation. The resolution under which this committee is proceeding directs the committee—

First. To inquire into and report as to whether the United States Steel Corporation is in its organization or operations acting in violation of the antitrust law.

Second. To inquire into and report violations of the interstate-commerce acts and amendments thereto, and to the acts relating to national-banking associations.

Third. To inquire into the restriction or destruction of competition by reason of the relations of the United States Steel Corporation and its officers with other companies.

Fourth. The excessive capitalization and bonding of corporations.

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[1] Journal, p. 313; Record, p. 3076.

Fifth. Combinations created by holding companies, interlocking directorates, and other devices.

Sixth. Combinations to depress the value of stocks and bonds for the purpose of acquiring them.

Seventh. Panics in the bond and stock markets.

And the committee is also directed to recommend such further legislation by Congress as in its opinion is desirable.

The objection made by the counsel for the Steel Corporation to the further continuance of the investigation was based upon the ground that the Government had filed a bill in the courts of New Jersey against the United States Steel Corporation, seeking its dissolution under the antitrust law. As to this objection, it is our unanimous opinion that the committee should continue the investigation as if no proceeding on the part of the United States Government were now pending against said corporation, but not for the purpose of determining the questions involved in the action brought by the Government against the United States Steel Corporation, and any inquiry into the subjects embraced in that action should be made for the purpose of enabling the committee to recommend such further legislation as in its opinion is desirable. Touching all other matters the committee will proceed as heretofore.

The report of the special committee was submitted by Mr. Stanley on August 2, 1912,[1] and was later debated under the following order agreed to on August 6.[2]

Resolved, That there be evening sessions of the House of Representatives on Thursday August 8, 1912, and Friday, August 9, 1912, beginning at 8 o'clock p. m. and continuing until 11 o'clock p. m. on each day, during which time it shall only be in order to discuss the report of the special committee appointed under House resolution 148 to investigate violations of the antitrust act of 1890, one half of the time to be controlled by the gentleman from Kentucky [Mr. Stanley] and the other half by the gentleman from Massachusetts [Mr. Gardner]; that on said days it shall be in order, when the business of the House is disposed of, to move to take a recess until 8 o'clock.

375. Instance wherein a committee of the House to which was referred a resolution providing for the creation of a select committee to make an investigation, itself conducted the investigation and reported to the House.

On June 6, 1911,[3] Mr. Robert L. Henry, of Texas, from the Committee on Rules, to which had been referred a resolution providing for the creation of a select committee to investigate the arrest and extradition of John J. McNamara, submitted the following report:[4]

The Committee on Rules has had under consideration House concurrent resolution 6, providing for the appointment of a committee on investigation and, report: That they held hearings, at which the proponent and all others desiring to be heard appeared and gave testimony. In the opinion of your committee it covered all the material facts that could be elicited by a select committee, and further investigation would throw no additional light on the transaction, and it is therefore unnecessary. The testimony is herewith submitted for the information of the House, with a view of determining whether or not further legislation is necessary. It is recommended that House concurrent resolution 6 do lie upon the table.

After brief debate, on motion of Mr. Henry, by unanimous consent, the testimony and the report were referred to the committee on the Judiciary.

The resolution was then laid on the table without debate or division.

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[1] Second session Sixty-second Congress, Record, p. 10078; House Report No. 1127.

[2] Record, p. 10304; Journal, p. 928.

[3] First session Sixty-second Congress, Record, p. 1717; Journal, p. 250.

[4] House report No. 46.

376. The House sometimes confers upon subcommittees the power to send for persons and papers.

A general investigation having been conducted by subcommittees, the several reports were made to the committee and appended to its general report.

Minority views may accompany the report of a subcommittee made to the committee.

A committee, under authority expressly conferred by the House, apportioned work of investigation among subcommittees.

Pursuant to authorization to "meet at such places as said committee deems advisable," subcommittees of a select committee held hearings in various States of the Union and in Europe.

On June 4, 1919,[1] the House agreed to the following resolution providing for the appointment of a select committee on expenditures in the War Department to investigate all contracts and expenditures by the War Department or under its direction during the World War:

Resolved, That the Speaker of the House of Representatives be, and he is hereby, directed to appoint from the membership of this House a select committee of 15 members, for the Sixty-sixth Congress, and which said committee is hereby authorized to fully investigate all contracts and expenditures made by the War Department, or under its directions, during the present war; and, in addition to the powers herein conferred, shall have the same powers and authority as are now conferred by the rules of this House upon the standing Committee on Expenditures in the War Department; said committee is hereby authorized to send for persons and papers, to administer oaths and affirmations, to take testimony, to sit during the sessions of the House and during any recess which may occur during its sessions, and may meet at such places as said committee deems advisable. Said committee is also hereby authorized and empowered to appoint such subcommittees as it may deem advisable, and such subcommittees, when so appointed, are hereby authorized to send for persons and papers, to administer oaths and take testimony, and to meet at such times and places as said committee shall from time to time direct.

Resolved further, That said select committee shall report to the House, in one or more reports, as it may deem advisable, the result of its investigations, with such recommendations as it may care to make.

Resolved further, That the Speaker of the House is hereby authorized to issue subpoenas to witnesses, upon the request of said committee or any subcommittee thereof, during any recess of Congress during the sessions.

Resolved further, That the Sergeant at Arms of the House be directed to serve all subpoenas and other process put into his hands by said committee or any subcommittee thereof.

Pursuant to this resolution, the Speaker appointed Messrs. William J. Graham, of Illinois; Edwin S. Johnson, of South Dakota; Charles F. Reavis, of Nebraska; Walter W. Magee, of New York; Roscoe C. McCulloch, of Ohio; Oscar E. Bland, of Indiana; Albert W. Jefferis, of Nebraska; Clarence MacGregor, of New York; Henry D. Flood, of Virginia; Finis J. Garrett, of Tennessee; Frank E. Doremus, of Michigan; Jerome F. Donovan, of New York; and Clarence F. Lea, of California, as members of the select committee.

Subsequently the following resolution providing for payment of the expenses of the investigation was agreed to by the House:

[1] First session Sixty-sixth Congress, Record, p. 640, Journal, p. 133.

Resolved, That the Select Committee on Expenditures in the War Department, appointed under the resolution of the House of Representatives adopted June 4, 1919, be, and is hereby, authorized and empowered to employ such stenographic, clerical, and legal assistance and such accountants, and to have such printing and binding done, as it may deem necessary.

All expenses that may be incurred by said committee, including the expenses of said committee or any subcommittee thereof when sitting outside of the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers signed by the chairman of said select committee, or by the chairman of a subcommittee, where such expenses are incurred by such subcommittee.

Upon organization, the select committee apportioned the work of the investigation among five subcommittees: Subcommittee No. 1, on aviation; subcommittee No. 2, on camps; subcommittee No. 3, on foreign expenditures; subcommittee No. 4, on the Quartermaster's Department; and subcommittee No. 5, on ordnance, there being two majority Members and one minority Member on each subcommittee.

These subcommittees held hearings and made exhaustive investigations in various States and in Europe and from time to time submitted reports to the select committee, which were adopted as reports of the select committee and by it reported [1] to the House. Most of the reports were accompanied by minority views. Accompanying these reports were minority views signed by dissenting members of the subcommittees.

In addition to findings of fact, the committee reported legislative and administrative recommendations, including resolutions requesting the Secretary of War to place on sale surplus food products,[2] providing for sale and distribution of surplus motor vehicles,[3] requesting the Secretary of Wax to review settlement of certain claims arising out of war contracts,[4] and bills [5] prohibiting sale of Government property to certain persons, and directing transfer of certain claims to Court of claims.

377. A committee of investigation adopted rules for examination of witnesses and taking of testimony.

The House enlarged the powers of a select committee after it had been created.

On May 9, 1911,[6] the following resolution providing for an investigation of violations of the antitrust act of July 2, 1890, commonly known as the Sherman antitrust law, by a special committee to be elected by the House, was agreed to:

Resolved, That a committee of nine members, to be elected by the House, be, and is hereby, directed to make an investigation for the purpose of ascertaining whether or not there have been violations of the antitrust act of July 2, 1890, and the various acts supplementary thereto, by the American Sugar Refining Co., incorporated January 10, 1891, under the laws of the State of New Jersey, and the various corporations controlled thereby or holding stocks or bonds therein or whose stocks or bonds are held, in whole or in part, thereby, and all other persons or corporations engaged in manufacturing or refining sugar and their relations with each other, which said violations have not been prosecuted by the executive officers of the Government.

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[1] House reports Nos. 171, 463, 441, 616, 637, 816, 998, 1002, 1307, 1400, 1406, 1408, 1410.

[2] Record, p. 3356.

[3] Record, p. 8898.

[4] Record, p. 8362.

[5] Third session Sixty-sixth Congress, Record, p. 357.

[6] First session Sixty-second Congress, Journal, p. 198. Record, p. 1147.

Said committee is also directed to investigate the organization and operations of said American Sugar Refining Co., and its relations with other persons or corporations engaged in the business of manufacturing or refining sugar, and all other persons or corporations engaged in manufacturing or refining sugar and their relations with each other, and if in connection therewith violations of the aforesaid laws are disclosed, to report same to the House.

Said committee shall also inquire whether the organization and operations of the American Sugar Refining Co. and other persons or corporations having relations with it, and all other persons or corporations engaged in manufacturing or refining sugar and their relations with each other, have caused or had a tendency to cause any of the following results:

First. The restriction or destruction of competition among manufacturers or refiners of sugar.

Second. An increase in price of refined sugar to the consumer or decrease in the price of sugar cane or sugar beets to the producer thereof.

And said committee shall report to the House all the facts and circumstances disclosed by the investigation herein provided, with such recommendations as it may deem advisable.

And said committee as a whole, or any subcommittee thereof, is authorized to sit during sessions of the House and the recess of Congress, to employ clerical and other assistance, to compel the attendance of witnesses, to send for persons and papers, and to administer oaths to witnesses.

The Speaker shall have authority to sign, and the Clerk to attest, subpoenas during the recess of Congress.

Mr. Henry of Texas, from the Committee on Rules, submitted the following:

The Committee on Rules, to whom was referred House resolution 157, to investigate violations of the antitrust act of 1890 and other acts, have considered the same and beg leave to report with the recommendation that it do pass.

Later the House by separate resolutions, designated the committee so authorized;[1] provided for payment of expenses, not to exceed $25,000,[2] and empowered it to sit as a whole or as a subcommittee wherever deemed necessary.[3]

Upon organizing the committee announced the adoption of the following rules:[4]

RULE 1. That each witness appearing before the committee shall first be examined by the chairman, or by a member designated by him, without interruption until conclusion, and after the chairman or member has concluded, then any other member desiring shall be permitted to ask such questions as he may wish, and when he shall have concluded, then any other member, and so on, until the members of the committee have had opportunity for examination.

RULE 2. That if in the public proceedings of the committee any objection is made by any member of the committee, or by any witness or other person, with regard to the admissibility of testimony or any other matter or thing, it shall, in the first instance, be ruled upon by the chairman of the committee, and if any member of the committee desires to object to such ruling, then the question shall be submitted to the committee.

RULE 3. Counsel may attend witnesses summoned before this committee, but may not participate in the proceedings, either by way of examination or argument, except upon permission given by the committee, from time to time, as the occasion arises.

RULE 4. These rules shall apply to any subcommittee sitting for the purpose of taking testimony.

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[1] Record, p. 1296.

[2] Record, p. 1717.

[3] Record, p. 2945.

[4] Committee hearings, vol. 1, p. 3.

On February 17, 1912,[1] Mr. Thomas W. Hardwick, of Georgia, from the special committee presented the report of the committee which was ordered to be printed.

378. A committee having completed the investigation with which charged, suggested in its report thereupon the filing of a supplemental report showing the results of the investigation.

The House has by express authorization granted a select committee power to report at any time.

The resolution adopted by the House September 11, 1917,[2] authorizing the appointment of a committee to investigate the East St. Louis riots, provided that the committee so appointed should "have power to report at any time."

The report of the committee was presented on July 6, 1918,[3] and closed with the following statement:

> Your committee has not adjourned sine die for the reason that it is possible, at least, that a supplementary report may be made showing the beneficial results of the exposures brought about by the investigation and also by the vigorous prosecutions hereinbefore referred to.

No further report was submitted.

379. A committee of investigation expressed the opinion that an organization under investigation had violated the provisions of the corrupt practices act.

Upon the presentation of a privileged report embodying no recommendations, any Member offering a motion for its disposition is entitled to recognition for one hour's debate thereon.

A Member presenting a privileged report and Members submitting minority views are entitled to recognition to read in full the report or views respectively although no question may be pending.

The consideration of conference reports is in order at any time and may interrupt the presentation of a privileged report, but a privileged report so interrupted remains the unfinished business and is in order following the disposition of the conference report.

The report of a select committee of investigation was agreed to by the House, although it contained no resolution or recommendation.

On March 3, 1919,[4] Mr. Ben Johnson, of Kentucky, from the select committee appointed to investigate and report on the character, activities, and purposes of the National Security League, submitted a privileged report[5] which he read from the floor.

Among other conclusions the committee reported the National Security League had participated actively in political campaigns without complying with the provisions of the corrupt practices act requiring itemized statements of expenditures on the part of political committees.

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[1] House Report No. 331.

[2] First session Sixty-fifth Congress, Record, p. 6961; Journal, p. 352.

[3] Second session Sixty-fifth Congress, Record, p. 8826; House document No. 1231.

[4] Third session Sixty-fifth Congress, Record, p. 4921.

[5] House Report, No. 1173.

The report says:

Section 1 of the Federal act, generally known as the "corrupt practices act," approved June 25, 1910, is as follows:

"The term 'Political committee,' under the provisions of the act, shall include national committees of all political parties, the national congressional campaign committees of all political parties, and all committees, associations, or organizations which shall in two or more States influence the result, or attempt to influence the result of an election at which Representatives in Congress are to be elected."

Sections 5 and 6 of the act, as amended by an act approved August 19, 1911, require that such political committees as are defined in section 1 shall file with the Clerk of the House of Representatives, at Washington, D.C., certain itemized statements which shall be verified by oath.

In the judgment of your committee the National Security League has violated the provisions of that act, the penalty for which is a fine of not more than $1,000, or imprisonment not longer than one year, or both.

At the conclusion of the reading of the report Mr. Joseph Walsh, of Massachusetts, proposed to read the minority report, when Mr. J. Thomas Heflin, of Alabama, made the point of order that a Member submitting a minority report was not entitled to the floor.

The Speaker[1] held that a Member submitting minority views was entitled to the same privilege granted the chairman of the committee for the submission of the majority report, and recognized Mr. Walsh to read the minority views.

Mr. Edward E. Browne, of Wisconsin, rising to a parliamentary inquiry, asked how much time was permitted for discussion of the reports.

The Speaker replied that no recommendation was embodied in the report, and any member offering a motion for its disposition would be entitled to recognition for one hour in which to debate his motion.

Before the minority views could be presented, Mr. Henry D. Flood, of Virginia, called up the conference report on the diplomatic and consular bill.

Mr. James R. Mann, of Illinois, submitted as a parliamentary inquiry that while the presentation of a conference report was in order at any time and took precedence over the pending report of the select committee, the latter remained the unfinished business and was in order immediately following the disposition of the conference report.

The Speaker sustained Mr. Mann's contention, and after the disposition of the conference report again recognized Mr. Walsh, who read the minority views.[2]

Thereupon Mr. Browne moved the adoption of the majority report. The motion was agreed to without debate or division.

380. The two Houses, by concurrent resolution, constituted a joint select committee of investigation, with power to send for persons and papers and sit during the recess of Congress.

By concurrent resolution the two Houses fixed the time within which a committee of investigation should complete the investigation and file its report thereon.

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[1] Champ Clark, of Missouri, Speaker.

[2] Record, p. 5035; Journal, p. 289.

On May 31, 1921,[1] the Senate sent to the House the following resolution in which the House concurred without amendment:

Resolved by the Senate (*the House of Representatives concurring*), That a joint commission is hereby created, to be known as the joint commission of agricultural inquiry, which shall consist of five Senators, three of whom shall be members of the majority party and two of whom shall be members of the minority party, to be appointed by the President of the Senate; and five Representatives, three of whom shall be members of the majority party and two of whom shall be members of the minority party, to be appointed by the Speaker.

Said commission shall investigate and report to the Congress within 90 days after the passage of this resolution upon the following subjects:

1. The causes of the present condition of agriculture.
2. The cause of the difference between the prices of agricultural products paid to the producer and the ultimate cost to the consumer.
3. The comparative condition of industries other than agriculture.
4. The relation of prices of commodities other than agricultural products to such products.
5. The banking and financial resources and credits of the country, especially as affecting agricultural credits.
6. The marketing and transportation facilities of the country.

The commission shall include in its report recommendations for legislation which in its opinion will tend to remedy existing conditions and shall specifically report upon the limitations of the powers of Congress in enacting relief legislation.

The commission shall elect its chairman, and vacancies occurring in the membership of the commission shall be filled in the same manner as the original appointments.

The commission or any subcommittee of its members is authorized to sit during the session or recesses of Congress in the District of Columbia or elsewhere, to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses, and to employ such personal services and incur such expenses as may be necessary to carry out the purposes of this resolution; such expenditure shall be paid from the contingent funds of the Senate and House of Representatives in equal proportions, upon vouchers authorized by the committee and signed by the chairman thereof.

On August 4,[2] the Senate concurred in the following resolution transmitted by the House:

Resolved by the House of Representatives (*the Senate concurring*), That the time for the completion of the investigation by the Joint Commission of Agricultural Inquiry, created by Senate concurrent resolution No. 4, of the present session, and the filing of the report to Congress therein directed to be made, be, and the same is hereby, extended to a date not later than the first Monday in January, 1922.

Subsequently[3] the two Houses concurred in the following:

Resolved by the House of Representatives (*the Senate concurring*), That the time for the completion of the investigation by the Joint Commission of Agricultural Inquiry, created by a Senate concurrent resolution (S. Con. Res. 4) of the first session of the Sixty-seventh Congress, and the filing of the report to Congress therein directed to be made, be, and the same is hereby, extended to a date not later than the 15th of April, 1922.

381. A committee of investigation was granted leave to file report with the Clerk of the House after adjournment of the Congress in which it was appointed.

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[1] First session Sixty-seventh Congress, Record, p. 1899; House Report No. 408.

[2] Record, p. 4644.

[3] Second session Sixty-seventh Congress. pp 311, 344.

On March 24, 1924,[1] the House agreed to a resolution providing for an investigation of the United States Army Air Service, the Naval Bureau of Aeronautics, and the mail air service by a special committee of nine, to be appointed by the Speaker.

The committee, consisting of Messrs. Florian Lampert, of Wisconsin; Albert H. Vestal, of Indiana; Randolph Perkins, of New Jersey; Charles L. Faust, of Missouri; Frank R. Reid, of Illinois; Clarence F. Lea, of California; Anning S. Prall, of New York; Patrick B. O'Sullivan, of Connecticut; William N. Rogers, of New Hampshire, was appointed by the Speaker March 24, and was subsequently authorized by resolution to employ legal and clerical assistance and incur expenses not exceeding $25,000.

On March 3, 1925,[2] Mr. Perkins said:

Mr. Speaker, I ask unanimous consent that the select committee appointed by the Speaker under House resolution 192, Sixty-eighth Congress, first session, have the right to file its report with the Clerk on or before the second Monday in December, with the strict understanding that no further expense of any kind will be incurred by the committee.

There was no objection, and the committee prepared and filed its report[3] with the Clerk of the House after the adjournment of the Sixty-eighth Congress.

382. Instance wherein time for filing report of a select committee was extended beyond life of the Congress in which appointed.

Form of resolution authorizing an investigation by select committee of the House.

On March 4, 1924,[4] the House agreed to the following resolution:

Resolved, That the Speaker of the House of Representatives be, and he is hereby, directed to appoint from the membership of the House a select committee of seven Members, for the Sixty-eighth Congress, and which said committee is hereby authorized and directed to inquire into the operations, policies, and affairs of the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, or any agency, branch, or subsidiary of either; said inquiry shall include an investigation of contracts, leases, sales, settlements, accounts, expenditures, receipts, assets, liabilities, properties, and any and all transactions, affairs, policies, and plans of the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation and any other corporations, firms, individuals, or agencies in any way associated with or controlled or regulated by the said Shipping Board or Emergency Fleet Corporation from the date of the passage of the several acts creating the same, together with an inquiry into such other pertinent matters as may aid the committee in determining and recommending future policies with respect to the Shipping Board and Emergency Fleet Corporation and the properties and agencies under their control.

Resolved further, That said committee is also hereby authorized and empowered to appoint such subcommittees as it may deem advisable, and the said committee or any subcommittee thereof is hereby authorized to sit during the sessions of the House or during any recess of the House, and to hold its sessions in such places as the committee may determine; to require by subpoenas, or otherwise the attendance of witnesses, the production of books, papers, and documents, to administer oaths and affirmations, and to take testimony.

Resolved further, That the Speaker is hereby authorized to issue subpoenas to witnesses upon the request of the committee or any subcommittee thereof at any time, including any recess of

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[1] First session Sixty-eighth Congress, Record, p. 4817.

[2] Second session Sixty-eighth Congress, Journal, p. 389. Record, p. 5466.

[3] House Report No. 1653.

[4] First session Sixty-eighth Congress, Record, p. 3553.

Congress; and the Sergeant at Arms is hereby empowered and directed to serve all subpoenas and other processes put into his hands by said committee or any subcommittee thereof.

Resolved further, That said select committee shall have the right at any time to report to the House in one or more reports the results of its inquiries with such recommendations as it may deem advisable.

Pursuant to this resolution, the Speaker appointed as members of the select committee Messrs. Wallace H. White, jr., of Maine, Chairman; Henry Allen Cooper, of Wisconsin; Frederick R. Lehlbach, of New Jersey; Walter F. Lineberger, of California; Edwin L. Davis, of Tennessee; William B. Bankhead, of Alabama ; and Tom Connally, of Texas.

The powers of the committee were further supplemented in the House March 18: [1]

Resolved, That the select committee, appointed under the provisions of House Resolution 186, adopted March 4, 1924, to make inquiry into the affairs of the United States Shipping Board, The United States, Shipping Board Emergency Fleet Corporation, or any agency, branch, or subsidiary of either, is hereby authorized to employ such stenographic, legal, and clerical assistance, including accountants and statisticians, as it may deem necessary, and is further authorized to have such printing and binding done as it may require.

Resolved further, That all expenses incurred by aid committee under the provisions of House Resolution 186, including the expenses of such committee or any subcommittee thereof when sitting outside of the District of Columbia shall be paid out of the contingent fund of the House of Representatives on vouchers, ordered by said committee, signed by the chairman of said select committee, or by the chairman of a subcommittee where such expenses are incurred by such subcommittee, and approved by the Committee on Accounts, evidenced by the signature of the chairman thereof.

On January 28, 1925,[2] Mr. White made the following request:

Mr. Speaker, I ask unanimous consent that the select committee appointed by the Speaker of the House under authority of House Resolution 186, Sixty-eighth Congress, first session, shall have the right to file the report of its inquiries, with such recommendations as it may deem advisable, with the Clerk of the House on or before the Second Monday of December next, and that the same right shall be accorded to any member or members of said committee, it being expressly understood that this request and consent thereto shall not extend the power and authority of said committee or of any member thereof in any other respect beyond the adjournment of the present Congress. This request is made by the direction of the committee designated by the Speaker to inquire into the Shipping Board and Emergency Fleet Corporation and its activities. The committee has conducted most exhaustive inquiries, but it is very much delayed in the printing of the record. This request contemplates that this committee shall have absolutely no authority beyond the 4th of March other than to write and file the report.

There was no objection, and the report of the select committee was filed with the Clerk of the House during vacation following the adjournment of the Sixty-eighth Congress.

383. A committee requested and was granted time in which to file a report beyond that specified in the authorizing resolution.

On February 28, 1924,[3] the Senate agreed to a resolution authorizing an investigation by the Committee on the District of Columbia as to housing condi-

[1] Journal, p. 348.

[2] Second session Sixty-eighth Congress, Journal, p. 171; Record, p. 2605.

[3] First session Sixty-eighth Congress, Record. p. 3240.

tions and combinations controlling rents and prices in-the District of Columbia, in order to determine the advisability of extending the District of Columbia rent act approved October 2, 1919.

This resolution provided that final report should be made by the committee of its investigations, with recommendations, not later than March 31, 1924.

On March 31, 1924, Mr. Heisler L. Ball, of Delaware, said:

Mr. President, under the resolution (S. Res. 158) authorizing the Committee on the District of Columbia to make an investigation of rental conditions in Washington, the committee was to file report on the 31st day of March, which is to-day. I ask for an extension of one week in which to submit the report. The investigation itself is completed, but the report is not yet ready to be presented to the Senate.

There was no objection, and the report of the committee was submitted May 12.[1]

384. Instance wherein the Senate increased the limit of expenditure originally provided for a select committee.

A select committee reported a resolution authorizing continuance of its investigation which was not acted on by the Senate.

On March 2, 1923,[2] the Senate, by the following resolution, authorized an investigation of the Veterans' Bureau:

Whereas complaints are being made against alleged delay by the Veterans' Bureau in the adjustment of claims for relief of invalid and disabled veterans of the World War under the various acts of Congress; and

Whereas it is claimed that there has been great and needless delay in the construction of hospitals and in providing proper hospitalization for the relief of disabled veterans, as a result of which much unnecessary suffering exists; and

Whereas it is claimed that an unnecessarily large proportion of the appropriations made by Congress for the relief of the veterans is being improperly consumed in overhead expense, duplication of duties, excessive rent of properties and quarters, and in the employment of an unnecessarily large number of agents, doctors, inspectors, instructors, and other persons; and

Whereas it has been charged that certain sales of surplus property belonging to the Government and under the supervision of the United States Veterans' Bureau were made improperly: Therefore be it

Resolved, That a committee consisting of three Senators, Members of the Sixty-eighth Congress, to be appointed by the President of the Senate, is authorized and directed to investigate the leases and contracts executed by the United States Veterans' Bureau or the Treasury Department for vocational schools and hospitals and for the purchase, rental, and sales of real estate and supplies used or to be used directly or indirectly by the Veterans' Bureau for the benefit of the veterans of the World War and the matters and conditions in the premises set forth and to report their findings, together with recommendations for the improvement of such conditions, to the next regular session of Congress. Such committee is authorized to sit during any recess of Congress and send for persons and papers, to administer oaths to witnesses, and to incur necessary expenses for clerical and other services not exceeding $20,000, which shall be paid out of the contingent fund of the Senate.

The limitation on expenditures was subsequently[3] increased to $26,500

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[1] Senate Report No. 530.

[2] Fourth session Sixty-seventh Congress, Record, p. 5102.

[3] First session Sixty-eighth Congress, Record, p. 773.

The committee appointed under the resolution, consisting of Messrs. David A. Reed, David I. Walsh, and Tasker L. Oddie, submitted preliminary reports[1] No. 1, No. 2, and No. 3 on January 8, 1924, February 7, and June 6, respectively. A resolution to continue the committee until the conclusion of the Sixty-eighth Congress, placed on the calendar, January 31, 1925, was not acted upon by the Senate.

385. A witness having declined to answer a pertinent question before a committee charged with an investigation, the House directed the Speaker to certify that fact to the United States district attorney.

The House sometimes enlarges the powers of a committee of investigation.

The report of a committee of investigation, as such, is without privilege.

On April 25, 1912,[2] Mr. Robert L. Henry, of Texas, from the Committee on Rules, presented as privileged a resolution enlarging the powers of the Committee on Banking and Currency in its conduct of an investigation of banking and currency conditions of the United States, previously authorized[3] and including the following:

Fifth. Said committee as a whole or by subcommittee is authorized to sit during the sessions of the House and during the recess of Congress. Its hearings shall be open to the public. The committee as a whole or by subcommittee is authorized to hold its meetings both during the sessions of Congress and throughout the recesses and adjournment thereof and in such cities and places in the United States as it may from time to time designate; to employ counsel, experts, accountants, bookkeepers, clerical and other assistants; may summon and compel the attendance of witnesses; may send for persons and papers; and administer oaths to witnesses. The Comptroller of the Currency, the Secretary of the Treasury, and the Commissioner of the Bureau of Corporations, and their respective assistants and subordinates, are hereby respectively directed to comply with all directions of the committee for assistance in its labors, to place at the service of the committee all the data and records of their respective departments, to procure for the committee from time to time such information as is subject to their control or inspection, and to allow the use of their assistants for the making of such investigations with respect to corporations under their respective jurisdictions as the committee or any subcommittee may from time to time request.

Subsequently[4] Mr. Arsene P. Pujo, of Louisiana, being recognized by the Speaker to submit a privileged motion said:

Mr. Speaker, as chairman of the Committee on Banking and Currency and acting under its instructions by unanimous vote, I present as privileged the contumacy of Mr. George G. Henry, of New York, who declined as a witness to answer certain questions propounded by counsel for the committee pertinent to the inquiry being had under House resolutions 429 and 504. I submit the report[5] of the committee, with the record of the proceedings had and the questions declined to be answered as a part thereof. I now move pro forma, as the statute does not require the approval of the House, but preferring to have its action thereon, that the question of the contumacy of the witness, George G. Henry, be certified by the Speaker to the United States district attorney, under the seal of the House, so that the said officer shall bring the matter before the grand jury of the District of Columbia for such action as may be authorized by sections 101, 102, 103, and 104 of the Revised Statutes of the United States.

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[1] Senate Report No. 103.

[2] Second session Sixty-second Congress, Record, p. 5336; Journal, p. 604.

[3] Record p. 2418.

[4] Third session Sixty-second Congress, Record, p. 1296

[5] House Report No. 1285.

The motion was agreed to.

On February 28, 1913,[1] Mr. Pujo submitted the report of the committee as privileged, when Mr. James R. Mann, of Illinois, made the point of order that it was not privileged.

The Speaker[2] sustained the point of order and the report was delivered to the clerk.

386. A person summoned as a witness before a select committee of the Senate declined to testify on the ground that the authorization under which the examining committee purported to act had expired.

Form of resolution authorizing continuance of an investigation beyond the expiration of the Congress in which instituted.

The authority of its committee to pursue an investigation having been challenged, the Senate passed a further resolution confirming the authority previously sought to be conferred.

On April 29, 1922[3] (legislative day of April 20), the Senate agreed to the following resolution providing for an investigation by the Committee on Public Lands and Surveys of leases upon naval oil reserves:

Resolved, That the Secretary of the Interior is directed to send to the Senate:

(a) Copies of all oil leases made by the Department of the Interior within naval oil reserve numbered one, and, separately, naval oil reserve numbered two, both in the State of California, and naval oil reserve numbered three in the State of Wyoming, showing as to each the claim upon which the lease was based or issued; the name of the lessee; the date of the lease; the area of the leased property; the amount of the rent, royalty, bonus, and all other compensation paid and to be paid to the United States.

(b) All Executive orders and other papers in the files of the Department of the Interior and its bureaus, or copies thereof if the originals are not in the files, authorizing or regulating such leases, including correspondence or memoranda embodying or concerning all agreements, instructions, and requests by the President or the Navy Department as to the making of such leases and the terms thereof.

(c) All correspondence, papers, and files showing and concerning the applications for such leases and the action of the Department of the Interior and its bureaus thereon and upon all the several claims upon which such leases were based or issued, all in said naval reserves.

(d) And all contracts for drilling wells on naval oil reserves, date and terms of same, reasons therefor, and the number and date of the drilling of wells on private lands adjacent to oil reserves.

Resolved further, That the Committee on Public Lands and Surveys be authorized to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate.

Thereafter, on June 5[4] (legislative day of April 20), this resolution was supplemented by the following resolution authorizing activities of the committee essential to the investigation and providing for payment of expenses:

Resolved, That S. Res. 282 is hereby amended by adding, at the end of said resolution, the following:

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[1] Journal, p. 108; Record, p. 4355.

[2] Champ Clark, of Missouri, Speaker.

[3] Second session Sixty-seventh Congress, Record, p. 6097.

[4] Record, p. 8140.

"That the said committee is hereby authorized to sit and perform its duties at such times and places as it deems necessary or proper and to require the attendance of witnesses by subpoenas or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, and other assistants, and stenographers, at a cost not exceeding $1.25 per printed page. The chairman of the committee, or any member thereof, may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law. The expenses of said investigation shall be paid from the contingent fund of the Senate on vouchers of the committee or subcommittee, signed by the chairman and approved by the Committee to Audit and Control the Contingent Expenses of the Senate."

For the purpose of authorizing continuance of this investigation beyond the expiration of the Sixty-seventh Congress, the Senate, on February 5, 1923 [1] agreed to the following:

Resolved, That Senate Resolution 282, agreed to April 21, 1922, and Senate Resolution 292, agreed to May 15, 1922, authorizing and directing the Committee on Public Lands and Surveys to investigate the entire subject to leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate, and providing that the expenses of such investigation be paid from the contingent fund of the Senate, be, and the same are, continued in full force and effect until the end of the Sixty-eighth Congress.

The committee or any subcommittee thereof is authorized to sit during the sessions or the recesses of the Senate, and after the expiration of the present Congress until the assembling of the Sixty-eighth Congress, and until otherwise ordered by the Senate.

Subsequent to the adjournment of the Sixty-seventh Congress, a witness appearing before the committee, Albert B. Fall, declined to testify, giving as his reason for so refusing:

I decline to answer the question for the following reasons and on the following grounds:

The committee is conducting an investigation under Senate Resolution 282, agreed to April 21, 1922, in the Sixty-seventh Congress, and Senate Resolution 294, agreed to May 15, 1922, in the same Congress, and further by virtue of Senate Resolution 434, agreed to by the Senate on February 5, 1923, during the same Congress, and I do not consider that, acting under those resolutions, or under the last-named resolution, which authorizes the committee to sit after the expiration of the Sixty-seventh Congress "until the assembling of the Sixty-eighth Congress, and until otherwise ordered by the Senate," this committee has any authority to conduct the investigation now attempted to be conducted by the addressing of this question to me.

I decline to answer on the further ground that on January 7, 1924, Senator Caraway introduced in the Senate of the United States, in this Congress, Senate Joint Resolution 54, attempting to deal with the lease of the Mammouth Oil Co.; that that resolution was referred to this committee and in due course the Senate discharged this committee as of January 24, 1924, and the Senate thereafter, on January 31, 1924, agreed to that resolution and completed its consideration thereof, the resolution being so amended as to deal, in the Senate, in a plenary way, with the leases upon naval oil reserves which were before this committee under Senate Resolution 282 and Senate Resolution 294; and that this committee has not further authority to deal with Senate Joint Resolution 54, since it has been discharged by the Senate, and the Senate itself has finally acted upon the resolution.

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[1] Fourth session Sixty-seventh Congress, Record, p. 3048.

For the purpose of confirming the authority of the committee thus questioned, the Senate on February 7, 1924,[1] agreed to the following resolution:

Resolved, That the Secretary of the Interior is directed to send to the Senate:

(a) Copies of all oil leases made by the Department of the Interior within naval oil reserve numbered 1, and, separately, naval oil reserve numbered 2, both in the State of California, and naval oil reserve numbered 3, in the State of Wyoming, showing as to each the claim upon which the lease was based or issued; the name of the lessee; the date of the lease; the area of the leased property; the amount of the rent, royalty, bonus, and all other compensation paid and to be paid to the United States.

(b) All Executive orders and other papers in the files of the Department of the Interior and its bureaus, or copies thereof, if the originals are not in the files, authorizing or regulating such leases, including correspondence or memoranda embodying or concerning all agreements, instructions, and requests by the President or the Navy Department as to the making of such leases and the terms thereof.

(c) All correspondence, papers, and files showing and concerning the applications for such leases and the action of the Department of the Interior and its bureaus thereon and upon all the several claims upon which such leases were based or issued, all in said naval reserves.

(d) And all contracts for drilling wells on naval oil reserves, date and terms of same, reasons therefor, and the number and date of the drilling of wells on private lands adjacent to oil reserves.

Resolved further, That the Committee on Public Lands and Surveys be authorized to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to ascertain what, if any, other or additional legislation may be advisable, and to report its findings and recommendations to the Senate.

Resolved further, That the said committee is hereby authorized to sit and perform its duties at such times and places as it deems necessary or proper and to require the attendance of witnesses by subpoenas or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, and other assistants, and stenographers, at a cost not exceeding 25 cents per hundred words, to report such hearings. The chairman of the committee, or any member thereof, may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee or any subcommittee thereof, who refuses or fails to obey the process of said committee or appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law. The expenses of said investigation shall be paid from the contingent fund of the Senate on vouchers of the committee or subcommittee, signed by the chairman and approved by the Committee to Audit and Control the Contingent Expenses of the Senate.

The report of the majority of the committee signed by Messrs. Ladd, Norbeck, Jones, Adams, Kendrick, Dill, Walsh, and Pittman, was submitted on June 6, 1924,[2] by Mr. Walsh of Montana, accompanied by minority views signed by Messrs. Spencer, Smoot, Stanfield, Cameron, and Bursum.

On June 6, 1924, and again on June 7, in the Senate Mr. Walsh of Montana moved the adoption of the report but consideration of the motion was not reached.

Supplemental minority views were filed January 15, 1925, and debated in the Senate on March 17 and March 18.[3]

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[1] First session Sixty-eighth Congress, Record, p. 1972.

[2] Senate Report No. 794.

[3] Special session of the Senate, Sixty-ninth Congress, Record, p. 322.

387. Witnesses having declined to testify, hearings were discontinued.

On January 17, 1924,[1] the Senate agreed to the following resolution:

Resolved, That a special committee of five shall be forthwith appointed by the President pro tempore of the Senate, and said committee is hereby authorized and directed immediately to investigate and report to the Senate whether there is any organized effort being made to control public opinion and the action of Congress upon legislative matters through propaganda or by the use of money, by advertising, or by the control of publicity, and especially to inquire what, if any, such methods are being employed to control the action of Congress upon revenue measures, and whether or not the profiteers of the war are now contributing to defeat the soldiers' adjusted compensation bill by money or influence, and what, if any, such influences are being employed, either by American citizens or the representatives of foreign governments or foreign institutions, to control or affect the foreign or domestic policies of the United States.

Said committee is authorized to send for or subpoena persons, books, and papers, to administer oaths, and to employ a stenographer at a cost not exceeding 25 cents per 100 words to report such hearings, and that said committee shall report the evidence and its conclusion to the Senate as early as is reasonably possible.

The proposed investigation had particular reference to a competitive prize offered, final award of which was contingent upon acceptance by the Senate.

The special committee consisting of Messrs. George H. Moses, of New Hampshire; Henrik Shipstead, of Minnesota; Frank L. Green, of Vermont; James A. Reed, of Missouri; and T. H. Caraway, of Arkansas, subpoenaed as witnesses Edward Bok and Esther Lape. Both witnesses declining to answer questions propounded by members of the committee, the hearings were discontinued and no report was formulated.

388. Form of resolution providing for expenses of a select committee of investigation.

On May 4, 1911,[2] the House agreed to the following resolution authorizing the election of a special committee to investigate violations of the antitrust act of 1890:

Resolved, That a committee of nine Members, to be elected by the House, be, and is hereby directed to make an investigation for the purpose of ascertaining whether there have occurred violations by the United States Steel Corporation, or other corporations or persons as hereinafter set out, of the antitrust act of July second, eighteen hundred and ninety, and the acts supplementary thereto, the various interstate-commerce acts, and the acts relative to the national banking associations, which violations have not been prosecuted by the executive officers of the Government; and if any such violations are disclosed, said committee is directed to report the facts and circumstances to the House.

Said committee is also directed to investigate the United States Steel Corporation, its organization and operation, and if in connection therewith violations of law as aforesaid are disclosed, to report the same.

Said committee shall inquire whether said Steel Corporation has any relations or affiliations in violation of law with the Pennsylvania Steel Company, the Cambria Steel Company, the Lackawanna Steel Company, or any other iron or steel company.

Also whether said Steel Corporation, through the persons owning its stock, its officers or agents, has or has had relations with the Pennsylvania Railroad Company, or any other railroad company, or any coal companies, nationalbanking companies, trust companies, insurance companies, or other corporate organizations or companies, or with the stockholders, directors, or

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[1] First session Sixty-eighth Congress, Record, p. 1086.

[2] First session Sixty-second Congress Journal, p. 179. Record, p. 918.

other officers or agents of said companies, or with any person or persons, which have caused or have a tendency to cause any of the results following:

First. The restriction or destruction of competition in production, sale, or transportation.

Second. Excessive capitalization and bonding of corporations.

Third. Combinations created by ownership or control by one corporation, or the stockholders or bond holders thereof, of the stock or bonds of other corporations, or combinations between the officers or agents of one corporation and the officers or agents of other corporations by duplication of directors or other means and devices.

Fourth. Speculations in stocks and bonds by agreement among officers and agents of corporations to depress the value of the stocks and bonds of other corporations for the purpose of acquiring or controlling same.

Fifth. Profits through such speculation to officers or agents of such corporations to the detriment of the stockholders and the public.

Sixth. Panics in the bond, stock, and money markets.

Said committee shall in its report recommend such further legislation by Congress as in its opinion is desirable.

Said committee, as a whole or by subcommittee, is authorized to sit during sessions of the House and the recess of Congress, to employ clerical and other assistance, to compel the attendance of witnesses, to send for persons and papers, and to administer oaths to witnesses.

The Speaker shall have authority to sign and the Clerk to attest subpoenas during the recess of Congress.

Pursuant to this resolution the House on May 17, 1911, resolved, that the following Members shall constitute the committee provided for in House resolution 148: Augustus O. Stanley (chairman), Charles L. Bartlett, Jack Beall, Martin W. Littleton, Daniel J. McGillicuddy, Marlin E. Olmsted, H. Olin Young, J. A. Sterling, H. G. Danforth.

These resolutions were subsequently supplemented by the passage of the following:

Resolved, That all expenses that may be incurred by the committee appointed under the resolution of the House of Representatives adopted May 16, 1911, to make an investigation for the purpose of ascertaining whether there have occurred violations by the United States Steel Corporation or other corporations or persons of the antitrust act of July 2, 1890, and the acts supplementary thereto, the various interstate commerce acts and the acts relative to the national banking associations to an amount not exceeding $25,000, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman thereof, and approved by the Committee on Accounts, evidenced by the signature of the chairman thereof.

On August 2, 1912,[1] Mr. Augustus O. Stanley, of Kentucky, from the special committee, presented the report of the committee on its investigation of the United States Steel Corporation, with recommendations for remedial legislation.

389. The House in providing for the expenses of a committee of investigation has limited both the amount and purpose of its expenditures.

On June 12, 1911,[2] Mr. John C. Floyd, of Arkansas, from the Committee on Accounts, presented, as privileged, the following resolution:

Resolved, That all expenses that may be incurred by the committee appointed under the resolution of the House of Representatives adopted June 6, 1911, to make an investigation and an inquiry into the operations and methods of the departments of assessment and collection of taxes of the Dis-

[1] House Report No. 1127.

[2] First session Sixty-second Congress, Record, p. 1925; Journal, p. 265.

trict of Columbia and such other departments of the District of Columbia as may be determined by them, as well as the organization, capitalization, bonded and other indebtedness, management and conduct of any and all of the public-utility corporations doing business in the said District, to an amount not exceeding $5,000, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman thereof, and approved by the Committee on Accounts, evidenced by the signature of the chairman thereof: *Provided*, That no expenses incurred by members of the said committee appointed under the said resolution for the purpose herein mentioned, in going outside of the District of Columbia, or incurred outside the said District, shall be payable out of the fund designated herein.

A committee amendment striking out the proviso was disagreed to, yeas 43, nays 52.

The resolution was then agreed to.

390. Expenditures by various select and joint committees of investigation, as reported by the Clerk of the House.

On September 5, 1919,[1] the Clerk of the House submitted the following statement of expenses incurred by committees of investigation from 1909 to 1919:

Expenditures incurred by certain committees of investigation.

Investigations of the United States Steel Corporation	$4,643.91
Investigation of the American Sugar Refining Co	7,556.83
Investigations of alleged violations of the antitrust act and other acts	37,408.89
Investigation by the Committee on Banking and Currency of the so-called money trust	61,277.12
Investigation of the "Taylor system"	4,287.00
Investigation of the Manufacturers' Association	4,119.56
Investigation of the shipping industry	15,284.00
Investigation of the affairs of the District of Columbia	51,191.03
Investigation of the charges by F. T. Lawson ("Leak")	22,883.76
Investigation of the expenditures in the Interior Department	13,503.16
Investigation of the expenditures in the Post Office Department	10,639.96
Investigation of the expenditures in the Department of Commerce and Labor	6,175.34
Investigation of the expenditures in the Department of Agriculture	5,461.95
Investigation of the expenditures in the Treasury Department	3,682.78
Investigation of the expenditures in the Department of Justice	3,834.48
Investigation of the expenditures in the Department of War	3,665.13
Investigation of the expenditures in the Navy Department	3,074.60
Investigation of expenditures in the State Department	2,969.20
Investigation of expenditures on public buildings	2,135.90
Investigation of the Forestry Service (Ballinger-Pinchot)	25,000.00

391. Annual Reports[2] of the Clerk of the House report the following expenditures by committees of investigation from 1919 to 1925:

Expenditures of committees, regular and special, under authority of House resolutions during the Sixty-sixth and Sixty-seventh Congresses to January 12, 1922.

Committee on Expenditures in the War Department and five subcommittees, total expenditures, June 11, 1919, to July 1, 1921	$157,109.91
Committee to Investigate Shipping Board Operations, total expenditures from August 2, 1919, to July 1, 1921	43,969.04

[1] Hearings on first deficiency appropriation bill, 1920, p. 876.

[2] Annual Reports of the Clerk of the House of Representatives, 1919–1924.

Expenditures of committees, regular and special, under authority of House resolutions during the Sixty-sixth and Sixty-seventh Congresses to January 12, 1922.—Continued

Committee on Immigration and Naturalization, total expenditures from November 17, 1919, to July 1, 1921	$10,047.13
Committee on Ways and Means, total expenditures from June 2, 1919, to January 12, 1923	14,809.96
Committee on Military Affairs, investigation of camp sites, total expenditures from September 8, 1919, to July 1, 1921	2,500.00
Committee on Education, investigation of Federal Board for Vocational Education March 27, 1920, to July 1, 1921	1,143.94
Committee on Expenditures in the Treasury Department, total expenditures from August 1, 1919, to July 1, 1921	991.50
Committee on Expenditures in the Navy Department, total expenditures from August 1, 1919, to July 1, 1921	150.00
Joint Committee to Investigate Naval Bases on the Pacific Coast, total expenditures from June 4, 1920, to July 1, 1921 (one-half)	8,492.42
Committee to investigate the Escape of Grover Bergdoll, total expenditures from April 18, 1921, to January 12, 1922	6,441.85
Joint Committee of Agricultural Inquiry, total expenditures from June 7, 1921, to January 12, 1922 (one-half)	10,913.21
Joint Commission on Reorganization of the Executive Departments, total expenditures from July 1, 1921, to January 12, 1922 (one-half)	3,802.73
Joint Committee to investigate the efficiency of commissioned and enlisted forces of the Army and Navy, total expenditures, from November 1, 1921, to January 12, 1922 (one-half)	33.33

392. The following summary of expenses incurred by standing and select committees in carrying out investigations authorized by the House in the Sixty-sixth, Sixty-seventh, and Sixty-eighth Congresses is reported by the Clerk of the House: [1]

Expenditures of committees, regular and special, under authority of House resolutions during the Sixty-sixth, Sixty-seventh, and Sixty-eighth Congresses.

Committee on Expenditures in the War Department and five subcommittees, total expenditures, June 11, 1919, to July 1, 1921	$157,109.91
Committee to Investigate Shipping Board Operations, total expenditures from August 2, 1919, to July 1, 1921	43,969.04
Committee on Immigration and Naturalization, total expenditures from November 17, 1919, to July 1, 1921	10,047.13
Committee on Ways and Mean, total expenditures from June 2, 1919, to June 30, 1924	17,083.87
Committee on Military Affairs, investigation of camp sites, total expenditures from September 8, 1919, to July 1, 1921	2,500.00
Committee on Education, investigation of Federal Board for Vocational Education, March 27, 1920, to July 1, 1921	1,143.94
Committee on Expenditures in the Treasury Department, total expenditures from August 1, 1919, to July 1, 1921	991.50
Committee on Expenditures in the Navy Department, total expenditures from August 1, 1919, to July 1, 1921	150.00
Joint Committee to Investigate Naval Bases on the Pacific Coast, total expenditures from June 4, 1920, to July 1, 1921 (one-half)	8,492.42
Committee to Investigate the Escape of Grover Cleveland Bergdoll, total expenditures from April 18, 1921, to June 30, 1923	5,816.85

[1] Annual Report of the Clerk of the House of Representatives, 1925.

Expenditures of committees, regular and special, under authority of House resolutions during the Sixty-sixth, Sixty-seventh, and Sixty-eighth Congresses.—Continued

Joint Committee of Agricultural Inquiry, total expenditures from June 7, 1911, to June 30, 1924 (one-half)	$21,440.92
Joint Commission on Reorganization of the Executive Departments, total expenditures from July 1, 1921, to June 30, 1924 (one-half)	16,948.16
Joint Committee to Investigate the Efficiency of Commissioned and Enlisted Forces of the Army and Navy, total expenditures from November 1, 1921, to January 12, 1922 (one-half)	333.33
Joint Committee to Investigate Membership of State Banks and Trust Companies of the Agricultural Sections in the Federal Reserve System (five eighths)	5,650.17
Select Committee to Investigate the Air Service, Sixty-eighth Congress	24,995.63
Select Committee to Investigate the United States Shipping Board and Emergency Fleet Corporation, Sixty-eighth Congress, to July 1, 1925	24,102.71
Select Committee to Investigate Alleged Charges Against Two Members, Sixty-eighth Congress	3,089.93
Select Committee to Investigate Alleged Duplication of Bonds, Sixty-eighth Congress	9,627.03
Select Committee to Investigate the National Disabled Soldiers' League, Sixty-eighth Congress	999.30
Committee on World War Veterans Investigation of Hospitals, Sixty-eighth Congress	6,912.02
Committee on the Judiciary:.	
Charges against Judge English (Missouri)	3,193.37
Charges against Judge Baker (West Virginia)	2,043.06
Investigation of Federal prisons	68.90

393. The rules provide for the rate of compensation of witnesses summoned to appear before the House or its committees.

Rule XXXVI provides:

> The rule for paying witnesses subpoenaed to appear before the House or either of its committees shall be as follows: For each day a witness shall attend, the sum of six dollars; for each mile he shall travel in coming to or going from the place of examination, the sum of seven cents each way; but nothing shall be paid for traveling when the witness has been summoned at the place of trial.

This is the form adopted in 1930. It was taken from the old Rule 138, which was dated from May 31, 1872,[1] and is practically the same except that the rule of compensation was then $4. On February 27, 1880,[2] the daily compensation was changed from $4 to $2 to conform to the rate then paid witnesses in the United States courts,[3] and remained at the rate until increased, February 25, 1930,[4] to $6 with an increase in mileage from 5 cents each mile to 7 cents.

The compensation of a witness residing in the District of Columbia was before the adoption of this rule fixed by statute at a sum not exceeding $2 a day.[5]

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[1] Second session Forty-second Congress, Cong. Globe, p. 4090.

[2] Second session Forty-sixth Congress, Record, p. 1206.

[3] On February 2, 1804 (first session Eighth Congress, Journal, p. 564; Annals, p. 966), the House by resolution provided that witnesses summoned before any committee during that session should be paid out of the contingent fund at the rate of $2.50 a day and 12½ cents mileage; and for every messenger sent after witnesses, $3 for every 20 miles.

[4] Second session Seventy-first Congress, Record, p. 4406 tem.

[5] 19 Stat. L., p. 41.

Chapter CXCIII.[1]

NATURE OF IMPEACHMENT.

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

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

THE GENERAL NATURE OF IMPEACHMENTS.

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

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

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

* * * * * * *

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

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

"The delegation of important trusts affecting the higher interests of society is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice, the seductions of foreign states, or the baser appetite for illegitimate emoluments are sometimes productions of what are not unaptly termed political offenses' (Federalist, No. 65), which it would be difficult to take cognizance of in the ordinary course of judicial proceeding.

[1] Supplementary to Chapter LXIII.

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

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

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

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

455. Discussion as to what are impeachable offenses.

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

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

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

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

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

[1] Third session Sixty-second Congress, Record, p. 1200.

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

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

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

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

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

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

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

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

[1] Record, p. 1269.

Sirs, if that be so, I want to know what has become of the Constitution in this case? Of what use was it to write into the Constitution that a man shall be impeached only for "treason, bribery, or other high crimes and misdemeanors" if there is no law to govern you, and if you may, out of your own consciences, evolve the thought that you will dismiss this respondent from the public service simply because you wish to get rid of him? You need no proof of "treason, bribery, or other high crimes and misdemeanors" to discharge him if that is the position you are to take in this case, for those words, under such circumstances, are unnecessary and meaningless.

I submit that that is not and can not be the true legal position. It must be precisely the reverse of that. You must find somewhere, whether it is under the "good behavior" clause of the Constitution, or whether it is under the article relating to impeachments themselves, that upon which you can lay your finger and say that this respondent has violated that thing, or you must under your oaths of office say that he shall go free.

And that is the position which Mr. Manager Sterling, speaking for the managers, asks you to take here. He asks you not to look to the law of the land for that which shall govern the rights of the parties here; but he asks you, out of your own conscience, whether your conscience agrees with mine or his or anybody's, to evolve a law which shall apply to this case and which when this case is over shall cease ever thereafter to be the law. In this, as in everything else, the Constitution is only a frame of government. It remains for the Congress to verify many of its provisions. It remains for Congress to write on the statute books what shall constitute "high crimes and misdemeanors," and there are already in the Revised Statutes many provisions upon that point.

On January 9, 1913,[1] Mr. A. S. Worthington, of counsel on behalf of the respondent, also referred to the position taken by Mr. Sterling in this address and said:

It has been insisted here by the managers on the part of the House of Representatives that the question of Judge Archbald's guilt or innocence is to be determined by what you individually consider to be an offense which justifies his removal from office; not that he has been brought here charged with anything of that kind, but having brought him here charged with certain specific offenses for which he and his counsel have prepared themselves and have summoned their witnesses he is now to be disgraced and forever branded as a criminal because you may find that he is not fit to be a judge.

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

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

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

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

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[1] Record, page 1282.

The sixth amendment says:

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

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

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

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

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

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

I wish to quote authority in opposition to this position.

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

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

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

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

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

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[1] Record, p. 1215.

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

It was strongly intimated if not directly contended by several members of the committee that the Attorney General could not be impeached except for an indictable offense. I think this view is absolutely incorrect. Impeachment is an extraordinary remedy born in the parliamentary procedure of England, and the principles which govern it have long been enveloped in clouds of uncertainty. The practice of impeachment began in the reign of Edward the Third of England, and statutes for prosecutions for offenses of this character were first enacted in the reign of Henry the Fourth.

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

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

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

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

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

The impeachments that have failed of conviction are of little value as precedents because of their close intermixture of fact and law, which makes it practically impossible to determine whether the evidence was considered insufficient to support the allegation of the articles, or whether the acts alleged were adjudged insufficient in law to constitute impeachable offenses. The action of the House of Representatives in adopting articles of impeachment in these cases has little legal significance, and the deductions which have been drawn from them are too conjectural to carry much persuasive force. Neither of the successful impeachments prior to the case of Judge Archbald was defended, and they are not entitled to great weight as authorities. In the case of Judge Pickering, the first three articles charged violations of statutory law, although such violations were not indictable. Article four charged open and notorious drunkenness and public blasphemy, which would probably have been punishable as misdemeanors at common law. In the case of Judge Humphreys, articles three and four charged treason against the United States. The offense charged in articles one and two probably amounted to treason, inasmuch as the ordinance of secession of South Carolina had been passed prior to the alleged recessionary speeches of the re-

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

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

spondent, and the offenses charged in articles five to seven, inclusive, savored strongly of treason. But, it will be observed, none of the articles exhibited against Judge Archbald charged an indictable offense, or even a violation of positive law. Indeed, most of the specific acts proved in evidence were not intrinsically wrong, and would have been blameless if committed by a private citizen. The case rested on the alleged attempt of the respondent to commercialize his potentiality as a judge, but the facts would not have been sufficient to support a prosecution for bribery. Therefore, the judgment of the Senate in this case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application. The case is constructive, and it will go down in the annals of the Congress as a great landmark of the law.

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

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

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

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

"The purpose of impeachment is to remove an officer whose conduct is a menace to the public interest, and it would be strange indeed if he could escape punishment by being elevated to a higher official position. If such a defense could be sustained one could by resignation avoid an investigation into his conduct by a court of impeachment, and if he was of the same political faith as the head of the executive department and in sympathy with it, he could be transferred from one office to another and thus avoid impeachment altogether. The effect of such defense would be to practically destroy the power of impeachment, and at any rate it would be greatly impaired. We believe that the authorities are practically unanimous in sustaining our contention that the change of office does not affect the power of impeachment. He is now exercising the same powers that he exercised when he was an associate justice. He is performing the same duties; he is practically filling the same office."

Mr. Foster, on this subject, says:

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

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

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

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

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

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

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

This arrangement could be preserved in earlier times when population was sparse and business intercourse small and human affairs were not intricate; but as civilization became more complex, and the division of labor in administering judicial affairs became more urgent, the right to decide and pass upon various questions was allotted to different officers, and so to-day we have a judicial system in which all judicial power is lodged, but distributed to different courts, but in all this evolution and distribution of judicial power there is one great right which the people have always reserved unto themselves, and that is the right to supervise the conduct of public officials and, through their representatives, to remove such officials from office for misconduct or misbehavior, and so, Senators, you sit today, theoretically at least, as the court of 90,000,000 people who have commanded us through the popular branch of Congress to bring this respondent before you to inquire into his conduct, and ascertain if the condition on which he was appointed to the high office which he now holds has not been broken by him.

Quoting Foster again:

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

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

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

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

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

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

That argument necessarily concedes the points decided in the Blount case and considered and voted upon in the Belknap case, that he who is out of office can no longer be impeached. It necessarily also concedes that the constitutional provision has for its primary purpose the removal of the delinquent from the particular office in which he is said to have done a wrong. That is the necessary conclusion from the provision of Article I, section 3, of the Constitution, which provides what shall be the penalty in case of impeachment. It is considered also by Judge Story in his work on the Constitution, and if the argument which was presented by Judge Story is sound it must

[1] Record, p. 1278.

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

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

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

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

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

III.

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

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

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

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

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

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

[1] Record of trial, p. 1007.

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

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

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

"That this honorable court ought not to have or take further cognizance of the said articles of impeachment * * * because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him * * * he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States; but at the said times was, ever since hath been, and now is, a private citizen of the United States and of the State of Iowa. (3 Hinds' Precedents, 919.)"

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

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

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

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

Hence, in Belknap's case, as in Blount's case, it will be seen that the final vote does not indicate that any of the Senators who voted "guilty" did so on the ground that one who has been a civil officer remains liable to impeachment as long as he lives, for acts done during the time he held the office. The evidence in the case showed that Belknap was advised at 10 o'clock of the morning of the day that he resigned, that the Judiciary Committee of the House was about to report a resolution recommending his impeachment. He hurried to the President, tendered his resignation, and had it accepted, a few hours only before the Judiciary Committee did present to the House the resolution recommending his impeachment. There was much controversy in the discussion of the case before the Senate by the managers and counsel, respectively, as to whether Belknap was an officer when the resolution of impeachment was presented to the House, on the theory that the law takes no notice of fractions of a day. But, aside from this, it was strenuously contended by the managers that even if the general rule be that an officer ceases to be subject to impeachment when he leaves the office, there should be an exception to that rule when the officer resigns for the very purpose of escaping impeachment.

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

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

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

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

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

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

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

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

The authorities are practically unanimous that a public official can be impeached for official misconduct occurring while he held a prior office if the duties of that office and the one he holds at the time of the impeachment are practically the same, or are of the same nature. The Senate must bear in mind, as stated by all of the authorities, that the principal object of impeachment proceedings is to get rid of an unworthy public official. In the State of New York it was held in the Barnard case that the respondent could be impeached and removed from office during his second term for acts committed during his first term. And in the State of Wisconsin the court held the same way in the impeachment of Judge Hubbell. To the same effect was the decision in Nebraska upon the impeachment trial of Governor Butler. On this point the respondent relies upon the case of the State *v.* Hill (37 Nebr., p. 80).

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

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

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

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

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

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

The learned counsel for the respondent, by insisting that only indictable offenses are impeachable, would seem to be placing himself in the position of holding that the object of impeachment was punishment to the individual. This conception of the object of impeachment is entirely erroneous, and whatever injury may result to the individual is purely incidental and not one of the objects of impeachment in any sense. An impeachment proceeding is the exercise of a power which the people delegated to their representatives to protect them from injury at the hands of their own servants and to purify the public service. The sole object of impeachment is to relieve the people in the future, either from the improper discharge of official functions or from the discharge of official functions by an improper person. This view of impeachment is clearly demonstrated by the judgment which the Constitution authorizes in case of conviction and which shall extend no further than removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the Government of the United States, leaving the punishment of the individual for any crime he may have committed to the criminal court. (See Art. I, sec. 3, par. 7, Constitution of the United States.)

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

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

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

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

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

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

What is the legal status of the judicial tenure and what determines that status? There are some considerations on which to base the claim that the legal status of the judicial tenure should be determined by the same principles that are applicable to a contract of hiring. The parties to the contract are the people of the United States and the candidate for a Federal judgeship. When he has been nominated by the President and confirmed by the Senate the commission

tendered or delivered to him is an offer on the part of the people of the United States to the candidate whereby they agree to enter into a contract on certain terms and conditions with the candidate and offer to pay him a fixed sum of money for the performance of certain services for them in accordance with the terms of the offer. No obligation on the part of the Government has yet attached; the candidate need not accept the offer; he is not compelled to qualify; that is a voluntary act on his part. (See Marbury *v.* Madison, 1 Cranch, 137.)

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

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

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

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

If it should be objected that the legal status of the judicial tenure must be placed on a higher ground than an ordinary contract right by reason of the solemnities necessary to create the status and by reason of the important and sacred functions of government with which the judge is charged, we perhaps would be justified in saying that a fiduciary relation of the highest and most sacred character known to the law is created by the commission of appointment and the oath of acceptance of a Federal judge. Under this conception of the status of the judicial tenure the judge is acting as a trustee. The subject matter of the trust is the judicial power of the United States, and the beneficiaries of the trust are the people thereof. Given this status in a court of equity, the trustee, under well-known and well-recognized principles of equitable jurisprudence, can always be removed on application of the beneficiary and a showing that the trustee is not performing his duties as such trustee in such a manner as to satisfy the conscience of the chancellor that he is acting for the best interest of the beneficiary. Realizing, however, the manifest impropriety of leaving the question of forfeiting the judicial tenure to the judges, the framers of the Constitution wisely provided a different forum, viz, the Congress, to raise and try the question of the forfeiture. We have now seen that whether we apply principles of law or equity to the status created by the appointment of the Federal judge there would be a forum to adjudicate the rights of the parties, and reasoning by analogy we are driven to the conclusion that the framers of the Constitution were not unmindful of the importance of the subject with which they were dealing, and intended to and did provide a forum before which the people of the United States could bring their judges and on proper showing of misbehavior, which demonstrates the unfitness of the judge to continue in office, work a forfeiture of the judicial tenure.

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

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

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

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

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

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

In the removal section of the Constitution we find the words "high crimes and misdemeanors." These words are used in the same sense that had attached to them for centuries in the impeachment trials of England. They were used as part of the well-recognized terminology of the law of Parliament as distinguished from the common law. We must bear in mind that these terms are used in a section of the Constitution which is plainly intended to protect the State against its own servants.

The two enumerated offenses of treason and bribery are offenses peculiarly against the state as distinguished from offenses against the individual. In construing a clause of this character in the Constitution, where the whole object is to protect and preserve the Government, such a construction should be placed upon the language used as will best accomplish the results desired. To insist that the technical definition of the criminal law should be applied in construing the meaning of the term "high crimes and misdemeanors" is to insist on the narrowest possible construction, and loses sight of the object and purpose of this clause in the Constitution. To insist that it is impossible to impeach a judge unless he has committed some indictable offense is to say that the people of this country are powerless to remove a Federal judge so long as he is able to keep out of jail. While no criminal is fit to exercise the judicial function, it does not follow that all other persons are fit to be judges. Such a construction is absolutely repulsive to reason and ought not to be and is not a correct interpretation of the term "high crimes and misdemeanors."

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

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

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

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

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

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

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

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

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

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

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

But what are you going to do if the matter is to be considered solely under the language of the Constitution itself? The word "misdemeanors" in that clause must be taken either in the technical sense or in the proper sense. If that word is taken in the technical sense everybody knows that a misdemeanor taken technically is a crime pure and simple. If it is taken in the popular sense, then, notwithstanding what some text writers have said, I venture the assertion that if you go out into the cars or on the streets or in your homes and ask the people you meet what is meant by the words "treason, bribery, or other high crimes and misdemeanors," you will not find one in a thousand but will say that every one of those words imports a crime. If that is so, then necessarily, when you come to construe those words after this trial is over, you will necessarily have to reach the conclusion that these charges must be indictable or they can not be impeachable.

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

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

In the first place, when we read this clause of the Constitution, as we are required to do in the light of the context of the instrument, we are confronted at once by the clause fixing the tenure

[1] Record, p. 1270.

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

of judges of the Federal courts during good behavior; and if it be difficult, as counsel for respondent assert, to enlarge the phrase "high crimes and misdemeanors" so as to embrace acts not indictable as crimes, it is certainly far more difficult to restrict "good behavior" to the narrow limits fixed by the criminal law. To say that a judge need take as the guide of his conduct only the statutes and the common law with reference to crimes, and that so long as he remains within their narrow confines he is safe in his position, is to overlook the larger part of the duties of his office and of the restraints and obligations which it imposes upon him. We insist that the prohibitions contained in the criminal law by no means exhaust the judicial decalogue. Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing and notorious partiality and favoritism, indolence and neglect, all are violations of his official oath, yet none may be indictable. Personal vices, such as intemperance may incapacitate him without exposing him to criminal punishment. And it is easily possible to go further and imagine such indecencies in dress, in personal habits, in manner and bearing on the bench; such incivility, rudeness, and insolence toward counsel, litigants, or witnesses; such willingness to use his office to serve his personal ends as to be within reach of no branch of the criminal law, yet calculated with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice. Can it be possible that one who has so demonstrated his utter unfitness has not also furnished ample warrant for his impeachment and removal in the public interest?

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

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

it will read that—

"the judges both of the Supreme and inferior courts shall hold their offices so long as they are guilty of no indictable crime."

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

But counsel ask: What shall be done with that clause which provides that in case of impeachment—the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

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

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

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

Mr. Davis then cited numerous authorities and said:

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

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

After citing authorities, Mr. Davis continued:

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

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

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

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

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

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

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

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

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

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

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

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

The Constitution provides (Art. I, sec. 2) that the House of Representatives shall have the sole power of impeachment, and in section 3 of the same article it is provided that the Senate shall have the sole power to try all impeachments. It is undisputed, and, indeed, has never been questioned, that to remove a United States judge from office two things are essential: First, he must be impeached by the House of Representatives, and, second, he must be tried and convicted by the Senate upon the articles of impeachment presented by the House. There is no other way provided by the Constitution of the United States for the removal from office of a judge. In the consideration of this subject, I shall draw a distinction between a judge of the United States court and all other civil officers of the United States. I shall demonstrate from the Constitution itself that a judge of the United States court can properly be impeached, convicted, and removed from office for any act from treason down to conduct that tends to bring the judiciary into disgrace, disrespect, or disrepute. Section 4 of Article II of the Constitution reads as follows:

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

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

Most of the civil officers provided for by the Constitution have a definite fixed term, but the judges hold office during good behavior. Much of the contention arises over what is meant in section 4, Article II, by the word "misdemeanor." It is contended by the respondent that this word is intended only to apply to such offenses as are indictable and punishable under the criminal law, and that a judge can not be impeached and removed from office unless his offense, whatever it may be called, is at least of so high a degree as to make it criminal and indictable. This construction, if adhered to, absolutely nullifies that provision of section 1, Article III, above quoted which provides that judges shall hold their offices during good behavior. If judges can hold their offices only during good behavior, then it necessarily and logically follows that they can not

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

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

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

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

While I believe the construction placed on "misdemeanors" by the respondent is wrong, yet they have not made a defense to the various charges of misbehavior in office, even if we accept their construction of the law that misdemeanors in this section means only indictable offenses. If, for instance, the President was expressly excluded, from the officers named in this section, then I concede there would be no way under the Constitution for him to be impeached, tried, and removed from office, because there is no other provision of the Constitution that provides for any offense on the part of the President or limits his tenure of office, excepting the expiration of his regular term. But if judges were expressly eliminated from this section, and it read, "all civil officers of the United States except judges, etc.," it would not follow that they could not be impeached, convicted of misbehavior, and removed from office, because section 1, Article III, expressly provides that they shall only hold their offices during good behavior. In other words, our forefathers in framing the Constitution have wisely seen fit to provide for a requisite of holding office on the part of a judge that does not apply to other civil officers. The reason for this is apparent. The President, Vice President, and other civil officers, except judges, hold their positions for a definite, fixed term, and any misbehavior in office on the part of any of them can be rectified by the people or the appointing power when the term of office expires. But the judge has no such tenure of office. He is placed beyond the power of the people or the appointing power and is, therefore, subject only to removal for misbehavior. Since he can not be removed unless he be impeached by the House of Representatives, tried and convicted by the Senate, it must necessarily follow that misbehavior in office is an impeachable offense.

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

If I am not right in my construction of the Constitution, then the Congress and the country are absolutely helpless in any attempt to get relief from a judge who drags the judicial ermine down into disgrace, but is careful in doing so not to commit any criminal offense. If I am not right in my construction, then that provision of the Constitution which says that judges shall hold office during good behavior is absolutely nullified, and as far as the good behavior part of it is concerned it has no vitality, no life, no effect. The judge who secretly arranges with attorneys on one side of a case to make a private argument—who not only makes such arrangement, but who initiates it—is guilty of a misbehavior. Every lawyer knows this; every Senator will admit it. Are we helpless in the premises simply because such an act is not indictable under the law? The judge who is continually asking favors of litigants in his court, if he is careful, can not be convicted of any crime, but he is guilty of a misbehavior. No one will dispute it. He is perverting the ends of justice. He is bringing the judiciary into disgrace and into disrepute. Carried to its logical conclusion, such conduct would soon mean that our judicial system would fall. It could not survive. Are we helpless? Must we say that, although the Constitution says the judge shall only hold his office during good behavior, the House of Representatives and the Senate are unable to apply those provisions of the Constitution which provide for impeachment, trial, and removal? If our forefathers meant anything when they provided in the Constitution that the judges should hold their offices during good behavior, they certainly intended that when the judge misbehaved he should be removed from office. Such a construction of the Constitution will not violate any principle of law, but, on the other hand, it will give full effect to a constitutional provision that would otherwise be meaningless and a dead letter. Our forefathers wisely, I think, refrained in the Constitution from giving any definition to "crimes and misdemeanors," and likewise refrained from defining what would be an abuse or a violation of "good behavior." Misbehavior, the opposite of good behavior, and I think the proper appellation of any conduct that is not good behavior, implies innumerable offenses of greater or less magnitude.

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

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

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

If the Constitution, Article III, section 1, means anything, then we want to bring it before the Senate to-day and ask Senators to say what it does mean when it provides that judges of the Supreme Court and inferior courts shall hold their offices "during good behavior."

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

The provision in Article II of the Constitution, section 4, Mr. President, refers to impeachment of the President, Vice President, and other civil officers for treason, bribery, or other high crimes and misdemeanors; but later on in that same great instrument, after Article II had been adopted, the constitutional fathers say the judges of the United States shall hold their offices "during good behavior."

It has been pointed out by many constitutional writers, and you yourselves see, that the people have no way of getting rid of a judge who has violated this provision by misbehavior except it is done by this great body. What does "during good behavior" mean?

The Century Dictionary says:

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

Mr. Foster in his work on the Constitution (p. 586) makes this statement:

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

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

Says Elliott in his Debates on the Constitution:

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

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

But, mark you, the object then was to remove for bad behavior, but to give them a trial, as the Senate is doing in this particular case.

Judge Lawrence, in the Johnson impeachment case (p. 643), says:

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

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

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

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

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

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

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

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

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

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

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

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

Now, I want to know what good behavior means. This is the provision:

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

If you take that whole clause and consider it, either historically or grammatically, you will find that the words "good behavior" relate to good behavior in office. The compensation which is to be paid is for service in the office. The good behavior which is the tenure is to be good behavior in the office. But, say the managers, it is not good behavior in office which is the test at all, and you may impeach and remove a man even though he has behaved perfectly well in his office. Personally I agree with that; I am not challenging that position, but it answers their proposition now being considered that good behavior in office is the tenure by which the respondent holds, and for a breach of that he may be removed from office without considering the impeachment clause of the Constitution.

I do not think that the good-behavior clause has anything whatever to do with the impeachment. Everybody knows how the good-behavior clause came into being. In the ancient days the judges, like all other civil officers, held their positions at the pleasure of the King. Then the barons wrested from the King his power of dismissal and required that there should a good-behavior tenure rather than a tenure at the pleasure of the King, subject at that time only to the power of impeachment. And then, a little later—I think it was in 1701, after the Revolution—there was added the removal power; so that, upon address, judges might be removed the same as upon impeachment. without a trial Those are the circumstances under which the good-behavior tenure came into existence.

But what does "good behavior" mean if you are going to take that alone into consideration? A man ill behaves if he speaks unduly cross to his wife and children. May he be removed from office because of that? If he is the happy owner of an automobile he may violate the speed laws and be hailed before some magistrate and fined. Is he to be removed from office because of that? No one would answer "yes" to either of those questions, and hence you must get down to something definite, something upon which you can lay your finger and say, "There is the definite thing which this man should have known, and as he should have known it and has chosen to violate it he must pay the penalty of his violation." That definite thing can be ascertained only by reference to the clause which says that he may be impeached for "treason, bribery, or other high crimes and misdemeanors." In the ordinary sense of the term one can understand how a man can be of perfectly good behavior in everything else and still be guilty of treason, but does anybody doubt but that he could be removed from office if he was guilty of treason? In truth, you have to go back from the good-behavior clause to the impeachment clause to find out what are the causes for an impeachment. It is the impeachment clause which is the controlling clause and not the good behavior clause at all.

The argument that grows out of the claim that a, violation of the good-behavior clause is sufficient justification for an impeachment is as clearly reasoning in a circle as anybody can well imagine. Concede that good behavior is the tenure, still you can not remove a man from office,

[1] Record, p. 1270.

under the Constitution, unless he is guilty of "treason, bribery, or other high crimes and misdemeanors," and hence the determinative factor as to whether or not a judge was of good behavior is whether or not he was guilty of "treason, bribery, or other high crimes and misdemeanors."

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

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

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

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

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

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

IMPEACHMENT TRIALS IN THE UNITED STATES SENATE.

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

IMPEACHMENT OF WILLIAM BLOUNT.

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

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

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

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

IMPEACHMENT OF JOHN PICKERING.

John Pickering, judge of the United States District Court for the District of New Hampshire, was impeached in 1803, on the ground that he had disobeyed the law in the course of proceedings brought by the United States to condemn a ship with its cargo for a violation of the customs laws, in that the judge delivered the ship to the claimant after its attachment by the marshall without requiring a bond, in accordance with the requirements of law; that in such proceedings he had refused to hear the testimony offered in behalf of the United States; that he had refused to grant an appeal by the Government from his arbitrary decree to the circuit court; and that he had attempted to perform his official functions while in a state of intoxication. The respondent did not appear to answer the articles exhibited against him, but his son presented a petition, alleging the insanity of his father and praying an opportunity to adduce evidence in that behalf. Evidence was admitted and considered by the Senate in support of this petition. The facts alleged in the articles of impeachment were proved to the satisfaction of the Senate, and the respondent was convicted on each of the articles against him and removed from office.

IMPEACHMENT OF SAMUEL CHASE.

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

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

IMPEACHMENT OF JAMES H. PECK.

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

IMPEACHMENT OF WEST H. HUMPHREYS.

In 1862 West H. Humphreys, judge of the United States District Court for the District of Tennessee, was impeached for making a public speech declaring the right of secession and inciting revolt and rebellion against the Government of the United States; with the support and advocacy of the ordinance of secession; with aiding in the organization of an armed rebellion against the United States; with conspiring to oppose the authority of the Government of the United States by force; with refusing to hold his court or perform its functions; and with unlawfully acting as judge of the Confederate district court in causing arrests, imprisonments, and confiscations. The respondent made no appearance, and the trial proceeded in his absence. The respondent was convicted on all the charges, with the exception of the unlawful arrests and confiscations, and was removed and disqualified from holding office.

IMPEACHMENT OF ANDREW JOHNSON.

Andrew Johnson, President of the United States. was impeached in 1868 on 11 articles charging the attempted removal of E. M. Stanton, the Secretary of War, in violation of the so-called

tenure-of-office act; in attempting to induce a general of the Army to violate the provisions of an act of Congress; and of attempting to bring into contempt and reproach the Congress of the United States by intemperate and inflammatory speeches. The respondent was acquitted on each of the charges by a margin of one vote.

IMPEACHMENT OF WILLIAM W. BELKNAP.

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

IMPEACHMENT OF CHARLES SWAYNE.

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

A trial was had and the respondent was ultimately acquitted.

Chapter CXCIV.[1]

FUNCTION OF THE HOUSE IN IMPEACHMENT.

467. A summary of impeachment proceedings resulting in trial, with reference to methods of their institution, and the number and manner of appointment of managers on the part of the House.

An examination of the comparatively few impeachment cases which have resulted in trial shows a wide variance in the manner in which preliminary investigations in the House have originated and in the method of selecting managers on the part of the House to conduct impeachment in the Senate.

The case of Senator William Blount, of Tennessee,[2] the first in the history of the Congress to reach trial, had its inception in a confidential letter from the President to the House.

The eleven managers selected by the House were elected by ballot. All were, of course, members of the Federalist Party.

In this, and in the two cases following, procedure was through special committees, as the Judiciary Committee did not come into existence as a standing committee until 1813.

The case of Judge Pickering[3] originated in response to a special message from the President, to which were affixed certain ex parte affidavits.

The special committee to which the message was referred having reported in favor of impeachment, and the report being agreed to by the House, eleven managers were elected by ballot, all of whom were from those voting for impeachment, seven being members of the majority party of the House and one of the minority party. The party affiliations of the remaining three are not of record.

Action against Judge Chase[4] was begun as the result of a formal statement in the House by Mr. John Smilie, of Pennsylvania, who incorporated in his remarks a statement made by Mr. John Randolph, of Virginia, criticizing the official conduct of Judge Chase.

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[1] Supplementary to Chapter LXIV.
[2] Hinds' Precedents, sections 2294–2318.
[3] Hinds' Precedents, sections 2319–2341.
[4] Hinds' Precedents, sections 2342–2363.

Two members of the select committee chosen to inquire into the charges were chosen from those opposing the investigation, but all of the seven managers, elected by the House by ballot had voted both for the investigation and in favor of impeachment. Four of them were members of the majority party.

The case of Judge Peck [1] originated as the result of a memorial by an individual, which was referred to the Committee on the Judiciary and was by that committee reported to the House with a recommendation in favor of impeachment.

Five managers were selected by ballot, three of whom served on the Judiciary Committee, three belonging to the majority party of the House and two to the minority.

In the case of Judge Humphreys [2] the Committee on the Judiciary, as the result of an investigation authorized by resolution, reported recommending impeachment.

Five managers were appointed by the Speaker, three from the Judiciary Committee and four representing the majority party of the House.

The first attempt to impeach President Andrew Johnson [3] was initiated by Mr. James Ashley, of Ohio, who rose in the House and impeached the President, submitting specific charges, which were by resolution referred to the Committee on the Judiciary for investigation.

Congress having adjourned without action on the subject, a second proceeding looking to impeachment was begun in the succeeding Congress and referred to what was known as the Committee on Reconstruction, which recommended impeachment.

Under authority conferred by resolution, the Speaker appointed seven managers, two of whom were members of the Committee on the Judiciary and six of whom were members of the majority party of the House.

The impeachment of Secretary of War William W. Belknap [4] resulted from an investigation by a select committee appointed to look into the affairs of the Government in general. On report of this committee, the Committee on the Judiciary was instructed to draw up articles of impeachment.

Seven managers were appointed by the Speaker, three of whom were from the Committee on the Judiciary and five of whom belonged to the majority party in the House.

Mr. William Lamar, of Florida,[5] rising in his place, impeached Judge Swayne, making specific charges, which were referred to the Committee on the Judiciary. The Judiciary Committee reported in favor of impeachment and, by resolution, a select committee was appointed to draw up articles of impeachment. This was in keeping with the procedure in each previous impeachment case, with the exception of that of Secretary Belknap, where, as in the case of Judge Archbald, following, the investigating committee reported the articles of impeachment.

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[1] Hinds' Precedents, sections 2364–2384.

[2] Hinds' Precedents, sections 2385–2397.

[3] Hinds' Precedents, sections 2408–2443.

[4] Hinds' Precedents, sections 2444–2468.

[5] Hinds' Precedents, sections 2469–2485.

Seven managers to conduct the impeachment of Judge Swayne were appointed by the Speaker, five of whom were members of the Committee on the Judiciary and four of whom were from the majority party of the House.

The original charges against Judge Archbald [1] were filed by a commissioner of the Interstate Commerce Commission in a letter to the President. Later, in the House, Mr. George W. Norris, of Nebraska, introduced a resolution asking that the President transmit this letter to the House. The letter having been messaged to the House by the President, was referred to the Committee on the Judiciary, which, after investigation, recommended impeachment.

Seven Members were named by resolution to act as managers, all of them members of the Committee on the Judiciary, the only instance in the history of impeachment proceedings in which all managers were selected from one committee. Four of the managers belonged to the majority party of the House.

In most of the cases cited a select committee was appointed by the Speaker to take the case of impeachment to the bar of the Senate. The function of this committee was simply to report to the Senate the fact that an impeachment had been voted in the House and to report back to the House that they had so reported to the Senate.

In some cases the Speaker appointed a select committee to draw up the articles of impeachment, the work of the committee being completed when the articles so drawn had been adopted by the House.

It is to be noted that managers have been selected in three ways:

(*a*) By resolution authorizing the Speaker to appoint managers and naming the number thereof;

(*b*) By resolution naming both the number and the personnel of the committee;

(*c*) By election by ballot.

In case of election by ballot a majority vote has been necessary to the selection of each of the seven managers.

Where six received a majority vote and the seventh (although the next highest) failed to receive a majority vote another ballot on the seventh manager was taken.

468. A proposition to impeach a civil officer of the United States is presented as a question of constitutional privilege.

The inquiry into the conduct of H. Snowden Marshall, United States district attorney for the southern district of New York.

An instance in which a Member after submitting articles of impeachment which were referred to a committee of the House, later submitted amended articles of impeachment which were referred to the same committee.

The incorporation of unprivileged matter in a resolution proposing impeachment destroys its privilege.

A resolution directly proposing impeachment is privileged but the same is not true of one proposing investigation with a view to impeachment.

A Member submitting a privileged resolution proposing impeachment is entitled to recognition for one hour in which to debate it.

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[1] Sections 7727–7741 of this work.

A Member recognized to present a privileged resolution may not be taken from the floor by a motion to refer.

On December 14, 1915,[1] Mr. Frank Buchanan, of Illinois, submitted as a privileged subject the following:

Mr. Speaker, by virtue of the power conferred on me by the Constitution of the United States as a Member of this House, and to the end that justice may be restored in the administration of the office of United States district attorney for the southern district of New York, I impeach H. Snowden Marshall, United States district attorney for the southern district of New York, for the following specific offenses:

1. He has corruptly neglected and refused to prosecute gross and notorious violations of law by the most powerful and dangerous criminal trusts and monopolies in the United States within his said judicial district.

2. He has prostituted the great office intrusted to him by the people to the service of the great criminal trusts.

He has used the powers of his said office for the purpose of publicly defaming, slandering, and libeling the good name of peaceful and law-abiding citizens of the United States, to their great injury.

4. He has violated persistently the eight-hour laws of the United States and of the State of New York.

5. He has corruptly neglected and refused to prosecute men who have made the port of New York within his said district a naval base for foreign belligerent powers.

6. He has corruptly neglected and refused to prosecute violators of the Federal statutes prohibiting the loading and shipment of explosives on ships carrying passengers.

And for other high crimes and misdemeanors.

On motion of Mr. Buchanan, of Illinois, the charges were referred to the Committee on the Judiciary.

On January 11, 1916,[2] Mr. Buchanan again asked recognition for a question of privilege and said:

I rise to offer a resolution amending my impeachment charges against H. Snowden Marshal and I desire to send the following resolution to the Clerk's desk, to be read.

The Clerk read as follows:

Whereas on the 14th day of December, 1915, certain charges of impeachment were presented in this House by me against the United States district attorney for the southern district of New York, H. Snowden Marshall; and

Whereas said charges were not accompanied by a resolution empowering the Judiciary Committee sufficiently:

Therefore I present the following amended impeachment charges contained in the resolution which I am now offering:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the alleged official misconduct of H. Snowden Marshall, United States attorney for the southern district of New York.

The resolution here details at length specific items, and concludes:

And in making this investigation, the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and

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[1] First session Sixty-fourth Congress, Record, p. 240.

[2] Record, p. 913.

wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee, while so employed, shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign, and the Clerk to attest, subpoenas for any witness or witnesses.

The expense of such investigation shall be paid out of the contingent fund of the House.

Mr. James R. Mann, of Illinois, made the point of order that the resolution was not privileged, in that it included a provision for the payment of expenses from the contingent fund of the House, and said:

To begin with, it provides for the payment of the expenses out of the contingent fund of the House, and under the rules no resolution providing for that is privileged unless it is reported from the Committee on Accounts.

That is far enough; but my colleague from Illinois has impeached this official and the House had referred that matter to the Committee on the Judiciary. Now he presents a resolution, not of impeachment, but a resolution authorizing a committee to make an investigation, which of itself is not a privileged matter.

The privileged matter is the impeachment. That is not concerned in this case. The Speaker could very readily see that if to-day I can impeach a judge or other official of the United States and have it referred to the Committee on the Judiciary and immediately thereafter present a resolution providing for an investigation, and that is privileged, then I am entitled to have an hour in the House in the discussion of that, and if that be voted down I can present another resolution, if it be privileged, in a little different form, and take another hour in the House, and if that be laid upon the table or something else be done with it, then I present another resolution along the same lines, and so on ad infinitum.

Now, the privilege is the presenting of the impeachment. A Member on his responsibility in the House impeaches an official of the Federal Government. That is a matter of high privilege. But when the House has disposed of that it is not a privileged matter to present another resolution referring to an investigation of that subject.

The Speaker sustained the point of order, and Mr. Buchanan withdrew the resolution and immediately reoffered it with the provision for expenses omitted.

Mr. Mann made the point of order that the resolution proposed an investigation with view to impeachment rather than impeachment as such, and was therefore without privilege. The Speaker sustained the point of order, and Mr. Buchanan withdrew the resolution.

Finally, on January 12[1] Mr. Buchanan again presented a resolution similar in form to that last offered omitting the preamble, and moved its adoption.

Mr. John J. Fitzgerald, of New York, interrupting at the conclusion of the reading of the resolution, moved that it be referred to the Committee on the Judiciary. Mr. Buchanan made the point of order that he had not yielded the floor.

The Speaker held that Mr. Buchanan was entitled to the floor for one hour to debate the resolution, at the conclusion of which Mr. Fitzgerald might move to commit, and recognized Mr. Buchanan.

After debate, on motion of Mr. Fitzgerald, the resolution was referred to the Committee on the Judiciary, yeas 133, noes 71.[2]

469. A proposition to impeach civil officers of the United States presents a question of high constitutional privilege.

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[1] Record p. 962.

[2] For further proceedings in this case see sections 7747–7751, Chapter CXCIV in this volume.

The investigation of the Federal Reserve Board in 1917.

An arraignment of impeachment may interrupt the reading of the Journal or business proceeding under a unanimous consent agreement.

An instance in which a Member proposed impeachment individually and collectively against members of an official board.

Articles of impeachment were referred by the House to the Committee on the Judiciary.

In the absence of evidence to support charges the House declined to institute impeachment proceedings.

A member having submitted articles of impeachment, it was held that his privilege had expired.

On February 12, 1917,[1] Mr. Charles A. Lindbergh, of Minnesota, rising to a matter of privilege, said:

Mr. Speaker, I rise to a point of the highest privilege to prefer impeachment proceedings.

Mr. James R. Mann, of Illinois, inquired if pending business under a unanimous consent agreement could be interrupted by the proposed matter of privilege.

The Speaker[2] said:

The gentleman can interrupt the reading of the Journal with a question of that kind. A question of the highest privilege takes precedence over everything.

Subsequently[3] Mr. Lindbergh, as a privileged subject, submitted the following:

Mr. Speaker and the House of Representatives, I, Charles A. Lindbergh, the undersigned, upon my responsibility as a Member of the House of Representatives, do hereby impeach W. P. G. Harding, governor; Paul M. Warburg, vice governor; and Frederick A. Delano, Adolph C. Miller, and Charles S. Hamlin, members, each individually as a member of the Federal Reserve Board, and also all of them collectively as the five active working members of said board, of high crimes and misdemeanors.

I, upon my responsibility as a Member of the House of Representatives, do hereby impeach the said W. P. G. Harding, governor; Paul M. Warburg, vice governor; and Frederick A. Delano, Adolph C. Miller, and Charles S. Hamlin, members, and each of them as members of the Federal Reserve Board, and also impeach all of them collectively as the five active working members of the Federal Reserve Board, of high crimes and misdemeanors in aiding, abetting, and conspiring with certain persons and firms hereinafter named, and with other persons and firms, known and unknown, in a conspiracy to violate the Constitution and the laws of the United States and the just and equitable policies of the Government, which said conspiracy developed and grew out of and was consummated from the following facts and acts, to wit:

Mr. Lindbergh then presented in detail fourteen charges upon which the arraignment was based. At the conclusion of the arraignment Mr. Lindbergh inquired if his privilege ceased with the presentation of charges. The Speaker replied that it did. Thereupon, on motion of Mr. Claude Kitchin, of North Carolina, the articles of impeachment were referred to the Committee on the Judiciary.

On March 3,[4] Mr. Edwin Yates Webb, of North Carolina, from the committee, submitted a report recommending that no further proceedings be had in the matter. The report was adopted by the House without debate.

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[1] Second session Sixty-fourth Congress, Record, p. 3117.

[2] Champ Clark, of Missouri, Speaker.

[3] Record p. 3126.

[4] House Report No. 1628.

470. Questions relating to impeachment while of high privilege must be submitted in the form of a resolution to entitle the proponent to recognition for debate.—On January 18, 1933,[1] Mr. Louis T. McFadden, of Pennsylvania, announced that he rose to a question of constitutional privilege relating to impeachment proceedings, and asked recognition for one hour.

Mr. Robert Luce, of Massachusetts, made the point of order that recognition to raise a question of constitutional privilege could not be granted unless preceded by a resolution or motion in writing.

The Speaker[2] sustained the point of order and said:

The rules of the House provide that the gentleman must send a resolution to the Clerk's desk in raising a question of constitutional privilege.

In order for the gentleman to have the right to make such a statement to the House, he must send a resolution to the Clerk's desk and have it read, on which the House may then act. The gentleman would then have one hour in which to address the House, if he presented a question of constitutional privilege.

Mr. McFadden submitted that he was entitled under the rules governing the presentation of questions of privilege to make a statement of his proposition.

The Speaker dissented and said:

Not prior to the submission of a resolution. That is true of a question of personal privilege, but the gentleman rises to a question of constitutional privilege. This can only be done by the presentation of a resolution upon which the constitutional question is based. A mere statement by the gentleman does not comply with the rules of the House. If the gentleman has no resolution involving a constitutional question, the Chair thinks he is not entitled to recognition. The gentleman must present a resolution in the first instance on which to base his statement to the House, and then would be entitled to one hour.

Mr. McFadden called attention to occasions on which impeachment proceedings had been set in motion through memorials and other methods than those referred to by the Speaker:

The Speaker rejoined:

When such memorials and petitions are presented to the House, they are referred to the committee having jurisdiction of the particular subject. If a Member of the House bases his question of privilege on a memorial or petition, the memorial or petition must first be reported by the Clerk, and then the House may take such action as it sees fit. If the gentleman has a communication of that character, let him send it to the Clerk's desk and the Clerk will report it. Then the House can take such action as it deems proper. The gentleman can not get the floor under the proposition he has presented at the present time unless he sends up a resolution or motion.

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[1] Second session Seventy-second Congress, Record, p. 2042.

[2] John N. Garner, of Texas, Speaker.

Chapter CXCIX.[1]

RULES OF EVIDENCE IN AN IMPEACHMENT TRIAL.

1. Strict rules of the courts followed. Sections 403, 494.
2. As to opinions of witnesses. Section 495.
3. General decisions as to evidence. Sections 496, 497.

493. Under recognized rules of evidence, leading questions were ruled out in a trial of impeachment and witnesses were admonished to observe established procedure.

On December 4, 1912,[2] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, during the direct examination of a witness on behalf of the House of Representatives, Mr. Worthington, of counsel for the respondent, objected to a question propounded by Mr. Manager Edwin Yates Webb, of North Carolina, and said:

One moment, please. I submit, Mr. President, we had as well try this case with some appearance of conformity to the rules of a court. That was a leading question, which ought never to have been asked and should not be allowed to be answered.

The President pro tempore ruled:

Counsel, as far as possible, will avoid leading questions.

During the examination of the same witness by Mr. Manager Webb, Mr. Worthington objected to a question asked the witness by Mr. Manager Webb as a leading question. The witness, however, answered the question and Mr.Worthington said:

As the witness has already answered the question, for the present purposes it is futile to proceed. I think the witness should be cautioned, when objection is made, not to answer a question until the Presiding Officer or the Senate has ruled upon it.

The PRESIDENT PRO TEMPORE. That is a very proper suggestion. The witness will be governed by that. Hereafter when there is an objection to testimony the witness will not reply until after the matter has been pawed upon.

494. Evidence may be introduced by counsel to contradict testimony in chief given by their own witness only upon statement that such testimony is at variance with that expected and that relying on evidence previously given by the witness, they have been surprised and entrapped.

Instance wherein the President pro tempore ruled on the admission of evidence in the trial of an impeachment.

[1] Supplementary to Chapter LXIX.

[2] Third session Sixty-second Congress, Record, p. 98.

On December 6, 1912,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. John A. Sterling, of Illinois, of the managers on the part of the House of Representatives, offered testimony in the following words:

Mr. President, we offer Exhibit 7, the examination of Edward J. Williams at Scranton, Pa., March 16 and March 17 of this year, made by Mr. Wrisley Brown, representing the Department of Justice, who was sent there by the Attorney General to investigate this case.

Objection to admission of the deposition was made by Mr. A. S. Worthington, of counsel for the respondent.

After extended argument by managers and counsel, the President pro tempore ruled:

If the proposition be simply to disprove the statement of the witness as to the number of questions which had been asked by Mr. Boland, the Chair would undoubtedly rule that only the questions themselves could be put in evidence for the purpose of contradicting him to that extent. But the Chair thinks it is a well-recognized rule, which is found in every jurisdiction, that where a witness is put up by a party and where the party who offers him as a witness has had previous information from him as to what his testimony would be, and upon his examination he gives testimony contrary to that former testimony, the party offering that witness can prove the former statements of the witness if he will state in his place that he has been entrapped by him; that relying upon the evidence that he had given and that he would again testify as he had previously done, they have put him up and they have been entrapped and surprised by the fact that he then testified to matters in conflict to what he had previously testified.

The Chair thinks that is a well-recognized rule of law. It is not for the purpose of impeaching the witness, though it might be called one class of impeachment. It is for the purpose of negativing testimony which he had given and which the counsel otherwise would be bound by, they themselves having put him up.

The Chair will add, so far as the bulk of this testimony is concerned, unless it is in the main, generally as well as specifically upon the particular points in which the counsel have been entrapped, that only such parts of it as do relate to than contradiction in his testimony would be admissible, but on the statement of the counsel that they have been thus entrapped the Chair is of the opinion that to that extent it is admissible .

The President pro tempore further held:

Counsel for the respondent will, of course, have the right to recall the witness and require him to make such explanation of the apparent conflict as is proper and consistent with his information; he is not debarred from that privilege, but the purpose of that rule is not to impeach a witness and establish the fact that he is not to be believed on oath, because of that were the case a party could never put up an adverse witness. He is entitled to the testimony of this witness, and he is entitled to have the truth ascertained from the testimony of the witness and from his conflicting statements. The Chair thinks that is a correct rule of law, and that is the principle upon which it is based.

495. In the Archbald trial it was held that while witnesses might testify as to the general reputation of the respondent, and as to his reputation for judicial integrity in particular, it was not competent to introduce evidence as to his reputation for ability and industry; and in no event was the personal opinion of a witness on questions of character or reputation admissible.

On December 17, 1912,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, this question was asked by Mr. A. S. Worthington, of

[1] Third session Sixty-second Congress, Record, p. 222.

counsel for respondent, on the direct examination of Everett Warren, a witness subpoenaed on behalf of the respondent.

Now, Major Warren, I want to ask you to tell us from your long acquaintance with Judge Archbald and your observation of him as a judge what were his principal characteristics as a judge, as to integrity, ability, and industry.

Mr. Manager Norris objected, saying:

Mr. President, I object to the question as immaterial and irrelevant. The counsel has a right to ask the witness as to reputation, but I do not believe he can go beyond that.

Mr. Worthington argued:

I ask you to remember, Mr. President, that we are not trying this case before a jury. We are trying this case before a tribunal which is the judge of the law and the judge of the facts, and the tribunal which is to inflict the sentence as well.

The question which the Senate is to determine at the end of this case is not the mere question whether this or that thing is proved, but whether upon the whole, taking into consideration the character of the man, the good that he has done, the kind of judge that he is, what the people in and about Scranton think of him and know of him, he shall be deprived of office, and be held forever incapable of showing his head as a reputable man, because of the contention that has been made here that he is not fit to hold any office of any kind under the Government of the United States.

Now, one thing more, it seems to me, takes this entirely out of the considerations which are invoked in ordinary courts of justice when a similar question arises. When our forefathers framed this Constitution of ours, they put into it the provision that the trial of persons accused of crime shall take place in the districts where the crime was committed.

Now, Mr. President, in this case the trial has to be here in the Senate Chamber. This defendant can not have the benefit of being tried by his neighbors, the people who know him and know the witnesses against him.

We can not take the Senate to Scranton, but we do want to bring to this trial the atmosphere of Scranton so far as relates to Judge Archbald's reputation, and, as far as we can, give him the benefit of that which the meanest criminal throughout the Union has—to be tried in the place where the crime was committed and among people who know him and who know those who testify against him. We can not go there; where the witnesses generally know the man. We want Senators to know what the men who have spent their lives in and around Scranton practicing before Judge Archbald—his neighbors and friends—think of him and what his reputation is throughout the whole State of Pennsylvania.

Mr. Manager Clayton argued:

Mr. President, it is perhaps unnecessary for me to state the general rules governing the admission of character testimony, and perhaps it is also unnecessary for me to state the questions which have generally been propounded in such matters of inquiry and recognized as proper in places where character is put in issue.

I may say, Mr. President, in the beginning that we have not controverted the good character of Judge Archbald. Perhaps if we had controverted that a larger range would be permissible for the respondent in reply to that controversy raised by the managers. But the managers have not raised that question.

So, Mr. President, I take it that the rules of evidence are to be applied by the Senate in this case, first, for the purpose of doing justice both to the managers who represent the accusation, the House of Representatives, and of also doing justice to this respondent. Secondarily, and perhaps just as important, these rules are for the expeditious disposition of the cause. It is not to militate against the doing of justice in this case that we raise this question. We say that justice can be done within the rules which permit ordinary questions which are asked in ordinary cases about character, and the answers thereto. There is enough latitude in that to do justice

[1] Third session Sixty-second Congress, Record, p. 772.

to both sides in this controversy, especially to the respondent, where the managers have not assailed his character by introducing evidence for that specific purpose.

Mr. President, the next reason, to which I have adverted, is for the dispatch of his case. Any rule looking to the speedy termination of this case ought to be enforced unless its relaxation would favor the doing of more ample justice to all parties concerned. In this case I take it that the Senate will consider the respondent as having gotten all he is entitled to when he proves by those who know him the fact that they know him; the fact that they know his general reputation, and that his general reputation and his character, predicated upon that general reputation, is good. We have not controverted that, and therefore it does not seem to me that there is any necessity here for the enlargement of the rule.

The Presiding Officer said:

The Chair thinks there is, of course, basis for the contention that rules should be liberal in practice in certain circumstances. Nevertheless, generally, the rules of law must be applied. The Chair thinks that the rule, generally, as to proof of character is, first, that anyone who is accused of misconduct may put in issue his general character, irrespective of what the charge is, because general character always is involved in any question of violation of law or misbehavior. Further, he may put in evidence his character as to the particular quality or characteristic which will elucidate the particular charge. With that view, the Chair thinks it is perfectly competent for the counsel to prove the general reputation of the respondent, as to whether or not he bears a good character, in the broadest sense of that term, and also that he may prove his general reputation as to the particular matter involved in issue.

Now, as the Chair understands, the particular matter involved here is a question of judicial integrity. So the Chair would not, if the Senate approves the opinion of the Chair, limit the counsel to proof of reputation for general good character, but would recognize the right of the respondent also to prove his general reputation for judicial integrity. But the Chair knows of no rule of law which permits a witness to give his individual opinion of the character of an accused. If there is any such case, the Chair has failed absolutely to learn of it in such experience as he has been fortunate enough to have.

This particular question is as to the opinion of the witness himself. If the counsel would limit his question to the witness's knowledge of the general character of the respondent for judicial integrity, the Chair would think that was competent; but this question not only asks the individual opinion of the witness, leaving aside the question of general reputation, but it goes further and asks for the opinion of the witness, not only as to integrity, but as to ability and industry, none of which characteristics or features are involved, as the Chair understands, in any issue before the Senate at this time. The Chair is therefore obliged to sustain the objection to this particular question, but will recognize the right of the respondent to proceed along the lines indicated, with every disposition to be as liberal as the rule will possibly permit.

496. Decision by the President pro tempore in the impeachment trial of Judge Archbald, on the latitude of counsel in cross-examination of witness relative to testimony previously given by the witness before a committee of the House.

On December 6, 1912,[1] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, during the cross-examination of W. A. May, a witness on behalf of the managers, by Mr. A. S. Worthington, of counsel for the respondent, Mr. Manager George W. Norris, of Nebraska, objected, saying:

Mr. President, before the witness answers the question, I desire to object to this form of interrogation of the witness. As I understand, we would not be allowed to call his attention to the testimony unless we had first asked him about the same matter and he had testified differently. Counsel has been asking questions of this witness, reading evidence that was taken before the

[1] Third session, Sixty-second Congress, Record, p. 217.

Judiciary Committee, without any intimation that there is anything different in his testimony now. He reads a lot of testimony and asks the witness if that was true. It seems to me that that is not a proper examination of the witness.

The President pro tempore said:

The previous testimony of this witness can be read to him for two purposes. As the Chair recollects the rule, it can be read for the purpose of contradicting him or for the purpose of refreshing his memory. If counsel examine the witness as to a matter and his testimony is not clear on the subject, the Chair would hold that then, after having attempted to elicit testimony in the usual way without success, he could go further and call attention to the witness to what he had previously testified to by way of refreshing his memory. The Chair thinks that is the correct rule of law.

The Chair would suggest to counsel for the respondent that it is perfectly competent for him to put questions as to the particular matters that he desires to have testimony upon without reading from the questions and answers; but in either case the Chair would rule that counsel has the right to bring out the testimony if it is either for the purpose of calling attention to the fact that the witness had previously made conflicting statements, or for the purpose of refreshing his memory upon some things in regard to which he is not now clear.

497. A contract having been admitted as evidence in an impeachment trial, it was held competent to show the intention of the parties thereto.

Instance of a ruling by the President pro tempore on a question of evidence in an impeachment trial.

On December 6, 1912,[1] in the Senate, sitting in trial of the impeachment of Judge Robert W. Archbald, one of the managers called William L. Pryor, a witness to prove the charge that the respondent had been a silent party to a written contract previously admitted in evidence by vote of the Senate.

Mr. A. S. Worthington, counsel for the respondent, objected to questions propounded and submitted:

Mr. President, it was held by the Senate, by the vote on the first day of our taking testimony here, that this silent-party paper was admissible in evidence, or at least should be introduced here, although no evidence was offered tending to show Judge Archbald knew of it or authorized it. But I do not understand that that ruling went so far as to hold that the parties who may have made statements about Judge Archbald would be competent witnesses against him, or that any statement made against Judge Archbald by Pryor, or perhaps other persons who were in Boland's office, would be competent and proper evidence in this matter.

The President pro tempore ruled:

The paper has been admitted as a legitimate piece of evidence. The Chair is of the opinion that everything that is necessary for a proper explanation of the meaning of that paper is competent. What effect it would have upon the respondent is a question of law that would afterwards be determined. But as to the question of the admissibility of the evidence, the Chair is of opinion that whenever there is an ambiguity in an instrument which itself is admitted in evidence it is competent to show what those who made the paper intended. How far that would be binding upon the respondent is an altogether different question, and the Chair does not mean in the ruling to rule on that point. That would be a question for the Senate to determine when it comes to consider the weight of the evidence. As to whether or not a partnership has been proven and whether the respondent should be bound by statements made by one who is alleged to be his partner, is a question to be determined by the Senate sitting as a court.

Upon the naked question as to whether or not the paper which is proven to have been executed, and which the Senate has decided to be proper evidence, shall have any ambiguous term explained by showing what the parties to it said it meant, the Chair is not in any doubt whatever.

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[1] Third session Sixty-second Congress, Record, p. 226.

Chapter CXCV.[1]

FUNCTION OF THE SENATE IN IMPEACHMENT.

1. Does the Senate sit as a court? Section 471.

471. During the Archbald trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.

On January 9, 1913[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Alexander Simpson, of counsel for respondent, in final argument said:

The question is whether or not the duty which you have to perform is in point of fact a judicial duty. It must be conceded that it is not a legislative duty. That is perfectly clear. It is certainly equally clear that it is not an executive duty. I can not see what else remains unless it is a judicial duty.

But the Constitution in its various articles has made that exceedingly clear. In Article I, section 3, it says "the Senate shall have the sole power to try all impeachments." It says, "when the President of the United States is tried the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the Members present." It says, "judgment in cases of impeachment shall not extend further than to removal from office," and so on, "but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to the law." It says in Article II, section 2, "the President * * * shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment," and Article III, section 2, lastly says, "the trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the State where the said crime shall have been committed.

Now, I want to ask if it is possible to use words more clearly demonstrative that that which you as Senators are doing, you are doing in a judicial capacity? That is what I am claiming at this stage. It will reach up itself to its proper conclusion after a little while. The point is, you are in fact sitting as judges. I read, for it expresses briefly the thought, the language of Professor Dwight in 6 American Law Register (n. s.), 258–259:

"When a criminal act has been committed, it may evidently be regarded in three aspects: first, the injury to the individual or his family may be considered; second, the wrong to the executive officer charged with the administration of the laws may be looked at; and, third, the mind may dwell upon the general wrong done to the State, or 'the people,' as we say in modern times. This view was early taken in the common law; the injury to the individual was redressed by a proceeding called an appeal; the injury to the King by a process called an indictment; the wrong to the entire nation by a proceeding called an impeachment. In process of time the injury

[1] Supplementary to Chapter LXV.

[2] Third session Sixty-second Congress, Record, p. 1271.

to the individual came to be regarded as a private and not as a public wrong, so that in the progress of the law there remained two great criminal proceedings-indictment and impeachment."

If the position I have taken on this point be accurate, we ought to be able to take the next step, and a long one, in regard to this matter. If this is a court then it is perfectly evident that the rules which experience has demonstrated to be wise and applicable in trials in other courts ought to be applied here; and among those rules, which are down at the very foundation of Anglo-Saxon jurisprudence, are those which relate to the effect of character evidence, to the effect of the reasonable doubt doctrine, to the effect of the presumption of innocence, and to the effect to be given to admissions made during the trial.

Replying to this argument on the following day,[1] Mr. Manager Henry D. Clayton, of Alabama, said:

Mr. President, much has been attempted by counsel for the respondent in their effort to show that this is a court in the ordinary acceptance of that term. Whatever name you may call this body sitting here now, whatever functions they may discharge, it can not be said to be a court as that word is employed in the Constitution or understood by the ordinary man. It is more than a court. Under our Government it is clothed with the highest and most extraordinary powers of any body or any functionary or any agency of our Federal Government. Your powers here invoked are political in their nature. Mr. Bayard announced that doctrine in the first impeachment case, that of Blount. Every commentator, including Story and all the rest, has quoted it with approval, and should any man deny it he would at once confess himself ignorant of the history and the law of impeachments.

Mr. Manager Clayton quoted from Article III of the Constitution and continued:

So we form a correct conception of what this tribunal is, its purposes and its powers. Again, if it be necessary, let me ask from what power did this judge derive that trust which he has violated? Did he derive it from the judicial power? No. It was derived from the exercise of a political power. The President, exercising political power, nominated him for this office, and the Senate of the United States, with its power of disapproval, with its vitalizing power of confirmation, before he could become a public officer exercised not a legislative function, not a judicial function, but brought into operation a power which in its very nature and in any just conception you can take of it was a political power.

Now, Mr. President, I say this because I want to get away from the murky and unhealthful atmosphere of a police court, and I want to try on a higher plane this great cause, involving the rights—the civil rights—the power, and the majesty of the American people on the one side and on the other the puny privilege of an unfaithful judge, to desecrate his official position. It is political. Why? Because under representative institutions that is the only way under our Constitution that the political power exercised in the creation of a Federal judge can be performed. Under the State constitutions, or most of them, that political power is exercised by the people in their primary capacity when they select by ballot their judges to preside over them and administer public justice.

Mr. Manager Clayton then read citations from the following authorities: The Works of Charles Summer, Vol. XII, E. 415, 6th S., 93, p. 321; Samuel J. Tilden, Public Writings and Speeches, vol. 1, p. 474; Rawle, on the Constitution, p. 211.

[1] Record, p. 1345.

Chapter CXCVI.[1]

PROCEDURE OF THE SENATE IN IMPEACHMENT.

472. The hour of adjournment of the Senate, sitting for an impeachment trial, being fixed, a motion to adjourn at another time is not in order.

On December 5, 1912[2] the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, agreed to this order:

Ordered, That the daily sessions of the Senate, sitting in the trial of impeachment of Robert W. Archbald, shall, until otherwise ordered, commence at 1 o'clock and 30 minutes in the afternoon and continue until 6 o'clock in the afternoon of each day.

On the following day[3] Mr. Jacob H. Gallinger, of New Hampshire, moved that the Senate, sitting in the trial of articles of impeachment, adjourn at another hour than that previously ordered.

The President pro tempore held that the hour for ending the daily session, having been fixed by order of the Senate, could be altered only by unanimous consent or by order formally passed by a majority of the Senate, and the motion of the Senator from New Hampshire was not in order.

473. The Senate elected a presiding officer for the Archbald trial, who thereupon exercised the powers of the President of the Senate in signing orders, writs, etc.

On December 16[4] the term for which Mr. Augustus O. Bacon, of Georgia, was chosen President pro tempore of the Senate, having expired, Mr. Jacob H. Gallinger, of New Hampshire, was elected President pro tempore of the Senate, and thereupon requested that he be relieved from the duty of presiding over the Senate sitting as a court in the impeachment of Robert W. Archbald.

Whereupon Mr. Lodge submitted the following resolution, which was unanimously agreed to:

Resolved, That the Hon. Augustus O. Bacon, a Senator from the State of Georgia, be, and he is hereby, appointed to preside during the trial of the impeachment of Robert W. Archbald, circuit judge of the United States.

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[1] Supplementary to Chapter LXVI.

[2] Third session Sixty-second Congress, Record, p. 170.

[3] Record, p. 230.

[4] Third session Sixty-second Congress, Record, p. 696.

474. Argument on incidental questions arising during the trial of an impeachment is properly confined to an opening, a reply, and a conclusion.

On December 4, 1912,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, at the conclusion of a colloquy between managers and counsel for the respondent, the President pro tempore said:

The Chair desires, in the interest of expedition and orderly procedure, to suggest to both the managers on the part of the House and counsel for the respondent that hereafter when incidental questions are to be discussed they be confined to an opening and a reply and a conclusion. The Chair will not rule that arbitrarily or positively, but trusts that counsel will act upon its suggestion.

475. In impeachment trials all orders and decisions of the Senate, with specified exceptions, are by the yeas and nays, but the yeas and nays may be waived by unanimous consent.

On December 4, 1912,[1] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, the question of the admission of a certain exhibit offered by the managers being submitted to the Senate, Mr. Moses E. Clapp, of Minnesota, asked if the requirement under the rule for a yea-and-nay vote could be waived.

The President pro tempore replied:

If it is unanimous, the Chair is of the opinion that a yea-and-nay vote is not required, because it is the same as if every Senator voted.

Upon the suggestion of Mr. Clapp, the President pro tempore put the question:

Is there objection by any Senator to the admissibility of the paper in evidence?

Whereupon Mr. Clarence D. Clark, of Wyoming, objected, and the roll was called.

476. Managers on the part of the House having verbally notified the Senate of the impeachment of Judge Archbald, formal reading of articles of impeachment was delayed for proclamation by the Sergeant at Arms.

On July 13, 1912,[2] (legislative day of July 6), in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, after Mr. Manager Clayton had read the resolution adopted by the House, informing the Senate that the House had impeached Judge Archbald, he proposed to read the articles of impeachment, when Mr. Henry Cabot Lodge, of Massachusetts, interposed and said:

Mr. President, before the presentation by the managers on the part of the House of the articles of impeachment, section 2 of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials requires that the Sergeant at Arms shall make proclamation as therein prescribed.

Thereupon, by direction of the President pro tempore, the Sergeant at Arms made proclamation, at the conclusion of which Mr. Manager Clayton read the articles of impeachment drawn by the House.

477. After trial of impeachment had proceeded for several days, the formality of announcement by the Doorkeeper of appearance in the

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[1] Third session Sixty-second Congress, Record, p. 107.

[2] Second session, Sixty-second Congress, Senate Journal, p. 625; Record, p. 8989.

Chamber of the managers and the respondent was by consent dispensed with.

On July 29, 1912,[1] in the Senate, at the opening of the trial of the impeachment of Robert W. Archbald, the Doorkeeper of the Senate announced formally the appearance of the respondent and the managers on the part of the House of Representatives.

This ceremony continued to be observed each day until December 3, 1912[2] when Mr. Henry D. Clayton, of the managers on the part of the House of Representatives, suggested:

Mr. President, if it is agreeable to the Senate sitting as a Court of Impeachment, hereafter the managers on the part of the House of Representatives will appear without the formality of an announcement.

To which Mr. Worthington, of counsel, on behalf of the respondent, added:

I presume that might apply, Mr. President, to the counsel for the respondent and to the respondent himself.

The President pro tempore said:

The Chair will give proper direction in that regard.
Proper order will be given in the premises.

The appearance of the managers and the respondent was not thereafter announced.

478. The expenses of the Archbald trial were defrayed from the Treasury.

On July 16, 1912,[3] the Senate, in legislative session, agreed to the following resolution:

Resolved, etc., That there be appropriated from any money in the Treasury not otherwise appropriated the sum of $10,000, or so much thereof as may be necessary, to defray the expenses of the Senate in the impeachment trial of Robert W. Archbald.

This resolution was agreed to by the House on July 27, without amendment and was approved by the President on July 31.

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[1] Second session Sixty-second Congress, Record, p. 9795.

[2] Third session Sixty-second Congress, Record, p. 20.

[3] Second session Sixty-second Congress, Senate Journal, p. 460; Record, p. 9118.

Chapter CXCVII.[1]

CONDUCT OF IMPEACHMENT TRIALS.

479. The writ of summons issued for the appearance of Judge Archbald to answer articles of impeachment does not appear in the Journal.

Form of return appended to the writ of summons served by the Sergeant at Arms on the respondent.

On July 16, 1912,[2] the Senate, sitting for the trial of the impeachment of Robert W. Archbald, agreed to an order directing that a summons be issued as required by the rules of procedure and practice, returnable on Friday, the 19th.

The text of this writ does not appear either in the Record or in the Journal.

On July 19,[3] however, immediately after the approval of the Journal, the Secretary, by direction of the President pro tempore, read the return appended to the writ of summons as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons, addressed to Robert W. Archbald, and the foregoing precept, addressed to me, were duly served upon the said Robert W. Archbald, by delivery to and leaving with him true and attested copies of the same at 236 Monroe Avenue, Scranton, Pa., the residence of Robert W. Archbald, on Wednesday, the 17th day of July, 1912, at 11 o'clock and 30 minutes in the afternoon of that day.

DANIEL M. RANSDELL,
Sergeant at Arms United States Senate.

480. In the trial of the impeachment of Judge Robert W. Archbald the procedure of former trials of impeachment was observed, in that briefs were not submitted until after managers and counsel for respondent had made opening statements and introduced witnesses.

Form of order providing for filing and printing of briefs by managers and respondent in trial of impeachment.

On December 4, 1912,[4] in the Senate, sitting for the trial of Robert W. Archbald, Mr. William E. Borah, of Idaho, sent to the desk a question, in writing, addressed to the managers on the part of the House of Representatives.

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[1] Supplementary to Chapter LXVII.

[2] Second session Sixty-second Congress, Senate Journal, p. 629; Record, p. 9124.

[3] Record, p. 9275; Senate Journal, p. 629.

[4] Third session Sixty-second Congress, Record, p. 97.

The President pro tempore said:

The Senator from Idaho propounds, in writing, the following inquiry for the consideration of the managers, and the Secretary will read it.

The Secretary read as follows:

Are the managers prepared at this time to present their brief as to our power to impeach for offenses or acts which were not committed or done during the term of the office which the party charged now holds?

In reply to this inquiry Mr. Henry D. Clayton, of Alabama, for the managers, submitted:

Mr. President, on behalf of the managers, in reply to the suggestion, I beg to say that that question has been thoroughly considered by the managers, and they have no doubt that this judge can be impeached for a misbehavior of a grave character that he may have committed while he held the office of district judge, his tenure of the one having dovetailed into the tenure of the present office.

We have gathered as best we could the authorities to sustain that position. We have made a brief, and we are prepared to make the argument on that proposition.

But, Mr. President, the managers have not up to this time deemed it proper or, I might say, advisable to bring that question to the attention of the court, for the reason that we are pursuing in this case the practice which was pursued in other cases, notably the practice in the Swayne case. After the statement of facts in that case, as the present occupant of the chair knows, immediately the managers began the introduction of their witnesses, and neither the law nor the facts bearing upon any phase of the different controversies involved in that case were argued until the respondent had also made his opening statement and introduced his witnesses; and after all the witnesses had been examined, then the case was opened for discussion both upon the law and the facts.

So, Mr. President, the managers have followed what they deemed the practice to be in like cases.

On the following day,[1] on motion of Mr. John D. Works, of California, it was

Ordered, That such briefs and citations of authorities as have already been prepared by the managers on the part of the House and counsel for the respondent be filed with the Secretary and printed in the Record for the immediate use of Senators.

Mr. Worthington, of counsel for the respondent, then said:

I can say, Mr. President, we can certainly have that done this week.

481. Correction of errors in the report of the proceedings of the Senate, sitting in trial of impeachment as reported in the Record, is properly made after the reading and approval of the Journal.

On December 4, 1912,[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, after the reading and approval of the Journal, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, called attention to inaccuracies in the report of the proceedings of the previous day as printed in the Record, and said:

Mr. President, the managers desire to call the attention of the court to a verbal inaccuracy in the proceedings of yesterday. It, perhaps, is immaterial to the statement as made on yesterday, but for the sake of better English I desire to have a correction made in the Record.

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[1] Senate Journal, p. 318.

[2] Third session Sixty-second Congress, Record, p. 96.

Mr. Manager Clayton then referred to particular pages of the record and indicated a number of corrections desired.

The President pro tempore said:

The correction will be made as desired by the manager.

482. Instance in which on motion of counsel for respondent, and over protest of managers for the House, the Senate granted the respondent 10 days in which to answer articles of impeachment.

On July 19, 1912,[1] in the Senate, sitting for the impeachment trial of Robert W. Archbald, counsel for the respondent submitted the following motion:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

UNITED STATES *v.* ROBERT W. ARCHBALD.

The respondent, by his counsel, now comes and moves the court to grant him the period of—days in which to prepare and present his answer to the articles of impeachment presented against him herein.

R. W. ARCHBALD, JR.
A. S. WORTHINGTON.

JULY 19, 1912.

Thereupon Mr. Clark, of Wyoming, asked for the adoption of the following order:

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes postmeridian on the 24th day of July, 1912.

Whereupon Mr. Worthington, of counsel for the respondent, submitted:

Mr. President, I should like to state that that time seems very short to the counsel for the respondent, in view of the number of articles of impeachment which are here and the customs which have been followed heretofore in cases of this kind, and also because of certain circumstances which exist in this case, which I wish to bring to the attention of the court.

It was for that reason that in the motion which we made we left blank the number of days which we were to have, to be filled at the pleasure of the court.

I had hoped we might get 20 days for that purpose. As I calculate the time proposed to be given by the order which has just been presented by a member of the court, it would give us but 5 days, which, I think, would be entirely insufficient, in view of the fact that one of those days is dies non.

On behalf of the respondent and his counsel, I therefore respectfully ask that we be given at least 20 days for the purpose indicated.

To which Mr. Manager Clayton responded:

After a conference had this morning the managers reached the conclusion, that perhaps four or five days would be ample time to afford the accused the opportunity of fully answering all the articles of impeachment in this case.

The managers think there is nothing by way of surprise contained in the articles of impeachment. We believe Judge Archbald and his counsel are well informed as to every charge set forth in the articles of impeachment. We think five days—or four days, if one day be excluded on account of its being dies non juridicus—are quite sufficient for Judge Archbald to answer these articles of impeachment. Their nature is fully understood. The testimony which induced the House to adopt these articles is perfectly familiar to the counsel and perfectly familiar to the accused.

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[1] Second session Sixty-second Congress, Senate Journal, p. 630; Record, p. 9277.

Mr. Porter J. McCumber, of North Dakota, moved to amend the order to read:

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes postmeridian on the 31st day of July, 1912.

A suggestion by Mr. Henry Cabot Lodge, of Massachusetts, that the date proposed be amended to read "Monday, the 19th day of July," was accepted and the order with this amendment was agreed to.

483. In the Archbald trial new rules of procedure and practice of the Senate, when sitting in impeachment trials, were not adopted, the rules framed in former trials being considered as operative.

On July 15, 1912,[1] on motion of Mr. Clarence D. Clark, of Wyoming, extracts from the Journals of the Senate containing the record of former impeachment trials were ordered printed. No further preliminary action with reference to procedure in the pending trial of the impeachment of Judge Archbald appears, and the "Rules of procedure and practice of the Senate when sitting in impeachment trials" observed in former trials, and to all intents identical with those revised and adopted in 1868[2] for the Johnson trial, and followed in the Belknap and Swayne trials, were treated as existing rules.

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[1] Second session Sixty-second Congress, Senate Journal, p. 454.

[2] Second session Fortieth Congress, Senate Journal, pp. 794, 870, 878, 937; Senate Report No. 59.

Chapter CXCVIII.[1]

PRESENTATION OF TESTIMONY IN AN IMPEACHMENT TRIAL.

484. Lists of witnesses to be subpoenaed in a trial of impeachment are supplied by the managers and respondent respectively to the Sergeant at Arms of the Senate.

After the filing of lists of witnesses to be subpoenaed in a trial of impeachment, further witnesses may be subpoenaed on application of the managers or the respondent made to the Presiding Officer.

On August 6, 1912,[2] in the Senate, sitting for the impeachment trial of Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, chairman of the managers for the House of Representatives, said:

On behalf of the managers of the House, I desire to say that the managers will furnish—I presume that it ought to be furnished to the Secretary of the Senate—a list of the witnesses whom the managers desire to have subpoenaed on behalf of the prosecution, if I may so term the side which is occupied by the managers on the part of the House. Am I correct in the view that we shall furnish this list to the Secretary of the Senate?

The President pro tempore replied:

The Presiding Officer is not advised as to what are the precedents, but as the Sergeant at Arms is to execute the order, the Chair will suggest that the Sergeant at Arms is the proper person to whom the list should be supplied.

Mr. Manager Clayton inquired:

Then Mr. President, under the intimation of the Chair, the managers beg to say at this time that they will in due time furnish the Sergeant at Arms a list of the witnesses they desire subpoenaed, and they expect to be ready, by having the witnesses here and ready otherwise to proceed with the cause, if it meets the pleasure of the Senate, on the 3rd day of December next.

Mr. Manager Clayton further inquired:

Mr. President there is one other thing that the managers desire to know. There is no settled practice, it appears from my rather imperfect examination of the precedents in the case, but I have reached the conclusion from such examination as I have been able to make that after this list is furnished by the managers and the list furnished on behalf of the respondent by the

[1] Supplementary to Chapter LXVIII.

[2] Second session Sixty second Congress, Record, p, 10139.

respondent that then it is the practice or the usage of the Senate, under, I suppose, certain discretion vested in the Presiding Officer, to entertain and to direct the issuance of subpoenas for other witnesses whose names may not appear on the list which is furnished in the first instance; and believing that to be the practice and believing that the managers should have that right, I shall not insist upon the proposition which I offered in the beginning of the cause to-day; that is, to provide that these additional witnesses might be subpoenaed on application made by the managers or the respondent, as the case might be, but that the application should be made to the Presiding Officer, the Presiding Officer having the discretion and presumably the authority to grant a request for additional Witnesses.

Putting that interpretation upon the matter, Mr. President, we shall not ask any amendment of the order at this time, for it is presumed that this court, like any court that wants to do justice in the premises, would, notwithstanding any rule to the contrary, or because of the absence of any positive rule making provision for such an emergency, direct the subpoena of witnesses if, in the judgment of the court, it ought to be done to meet the manifest ends of justice.

The President pro tempore said:

The Chair will state that the manager has stated the practice as it is understood and contemplated by the Senate in that regard.

485. Under a rule of the Senate subpoenas or other writs are signed by the Presiding Officer, whether the Vice President or President pro tempore, during session of the Senate sitting in trial of impeachment or in vacation.

On August 3, 1912,[1] in the Senate, sitting for trial of the impeachment of Robert W. Archbald, Mr. William J. Stone, of Missouri, propounded the following inquiry:

Mr. President, I should like to propound an inquiry. The Presiding Officer, in other words, the Senator who shall preside, I presume is to attach his signature to the subpoenas for witnesses Is that correct?

On response, the President pro tempore directed the Secretary to read the following rule of the Senate:

V. The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

Mr. Stone then inquired:

Then under the rule the Vice President will be the Presiding Officer who would sign all writs.

Would the present occupant of the chair be clothed with that power during the vacation? Application for the issue of subpoenas for witnesses will be made during the vacation of the Senate, in all probability; probably in November. It puzzles me a little bit to know who would sign those writs.

The President pro tempore said:

The Chair does not think there is any trouble at all about it. Whoever is the presiding officer at the time the writ is required would, in the opinion of the present occupant of the chair, be clothed with that power. The Vice President, of course, will be during the vacation the presiding officer of the Senate, and if the Senate should indicate anyone else to be President pro tempore during that time, the power would be exercised in the first instance by the Vice President, or, if he should be under disability, by the President pro tempore, whoever he might be.

[1] Second session Sixty-sixth Congress, Record, p. 10140.

486. The Senate, sitting for the Archbald trial, ordered process to compel the attendance of a witness who had disregarded a subpoena duly served by the Sergeant at Arms.

Form of order for attachment of delinquent witness.

A dilatory witness who failed to appear until after attachment had been ordered was admonished by the President pro tempore.

On December 5, 1912,[1] in the Senate, sitting for trial of the impeachment of Judge Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, said:

Mr. President, at the session held by the managers this morning, it was called to our attention that a certain witness who has been subpoenaed announced that he did not intend to come here unless brought on process issued by the Senate. It appeared yesterday, Mr. President, from reading the returns of the Sergeant at Arms, that Mr. J. H. Rittenhouse, an important witness in this case, had been regularly subpoenaed to attend and was required to be here yesterday. He was not here yesterday. He is not here to-day. He is the witness, who we are informed, said he would not come unless brought here by process of the Senate.

Therefore, Mr. President, I ask to have called the officer who served the subpoena upon the witness and prove the service. Then I shall ask for an attachment to bring him here.

Mr. James K. Julian, being called and sworn, testified, that as an employee in the office of the Sergeant at Arms, he had served J. H. Rittenhouse personally with a subpoena. The Sergeant at Arms was then directed to call the said James H. Rittenhouse, and on his failure to respond, Mr. Manager Clayton moved for an attachment, which was unanimously ordered, as follows:

Ordered, That an attachment do issue in accordance with the rules of the Senate of the United States for one J. H. Rittenhouse, a witness heretofore duly subpoenaed in this proceeding on behalf of the managers of the House of Representatives.

Later on the same day Mr. Manager Clayton stated that the witness, James H. Rittenhouse, had appeared and was now in the corridor and asked that he be admonished to be present until discharged.

The PRESIDENT PRO TEMPORE. The witness will be brought into the presence of the Senate.

James H. Rittenhouse appeared in the Chamber.

The PRESIDENT PRO TEMPORE. Mr. Witness, you are brought before the Senate to be admonished that you must scrupulously obey the orders you have received in the summons to appear here and not to absent yourself without leave of the Senate. You may now retire.

Thereupon Mr. Rittenhouse retired from the Chamber.

The PRESIDENT PRO TEMPORE. Does the manager on the part of the House desire that the order for attachment be vacated?

Mr. Manager CLAYTON. I ask that that be the course pursued.

The order for the attachment was then vacated.

487. The posture and position of managers and counsel in trials of impeachment has been left to their own judgment and preference.

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[1] Third session Sixty-second Congress, Senate Journal, p. 318; Record, p. 152.

On December 4, 1912,[2] in the Senate, sitting for the trial of the impeachment of Robert W. Archbald, Mr. Worthington, of counsel for the respondent, inquired:

Mr. President, may I ask a question? The practice differs. In some courts it is required that counsel examining a witness shall stand; but it is not customary where I have been; and I presume it is a matter about which the examining counsel or manager may use his judgment.

The PRESIDENT PRO TEMPORE. Absolutely, on both sides. The managers and counsel may assume such posture as they prefer.

On the following day,[1] in concluding the examination of a witness, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, said:

It has been suggested that the few remaining questions which I am to ask this witness may be heard more distinctly by standing at this point in the Chamber.

Mr. Webb then concluded the examination standing in the central aisle.

488. Witnesses in an impeachment trial were required to stand when necessary in order to be better heard.

Witnesses whose testimony was audible when seated were permitted to testify from a seat at the Secretary's desk.

On December 4, 1912,[2] in the Senate during the examination of a witness, in the impeachment trial of Judge Robert W. Archbald, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, inquired:

Mr. President, is it desired that the witness shall sit or stand?

The President pro tempore said:

The present position of the witness is probably the one from which he can be best heard by the Senate.

Mr. Miles Poindexter, of Washington, also inquired:

Mr. President, is it required that the witness should remain standing while he is giving his testimony?

The President pro tempore said:

The Chair directed that he should, because he did not think that if the witness took his seat he could be heard on the other side of the Chamber.

It is for that purpose that it was directed that the witness should stand; otherwise, of course, he would be permitted to sit.

As the trial progressed, however, it appears that witnesses whose testimony was audible were provided with a seat at the desk of the Secretary.[3]

489. Discussion of the order in which witnesses should be sworn in trial of impeachment.

Procedure to be followed in the swearing of witnesses having been left to managers and counsel, witnesses were sworn as produced.

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[1] Record, p. 152.

[2] Third session Sixty-second Congress, Record, p. 98.

[3] Record, p. 152.

On December 4, 1912,[1] in the Senate, preliminary to the presentation of evidence in the impeachment trial of Judge Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, said:

We ask at this time that the Secretary read the whole list of witnesses on behalf of the managers on the part of the House of Representatives, and then after that list is read I will do as the Chair may suggest, either have all the witnesses sworn en bloc or have each one sworn separately as we produce him to testify. If the Chair would prefer that each witness be sworn separately as he is produced, that course will be followed.

The PRESIDENT PRO TEMPORE. The presumption is that the Senate will allow the managers to pursue their own course in that matter.

Mr. Manager CLAYTON. I would therefore ask that the witnesses be called, and all of them required to enter the Chamber who are present to-day and that the oath be administered to them.

The PRESIDENT PRO TEMPORE. The Secretary will call the names of those who are here.

The Secretary read the list of witnesses for the managers on whom service had been made.

Mr. Manager CLAYTON. I suppose, Mr. President, that it would be a difficult matter for the Secretary to call the names of witnesses.

The PRESIDENT PRO TEMPORE. Are the managers prepared to furnish the names of those whom they now wish to be sworn? If so, they will be called into the Chamber.

Mr. Manager CLAYTON. We will proceed to swear each witness as we produce him.

The PRESIDENT PRO TEMPORE. Very well; that course is preferred.

490. In the Archbald trial the Senate declined to admit and reserve decision on the admissibility of evidence to the admission of which an objection was pending.

Questions as to admissibility of evidence in impeachment trials are not debatable.

On December 4, 1912,[1] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, a question as to the admissibility of certain evidence having arisen, Mr. Miles Poindexter, of Washington, inquired:

Mr. President, I should like to inquire if it be within the rules of the Senate sitting as a court of impeachment to receive this evidence and to reserve a decision as to its admissibility? That practice is common in the courts. If we undertake to vote upon each objection to the testimony, or at least each important objection to the testimony of witnesses——

The President pro tempore answered:

The Senator has no right under the rule to discuss the question. The Senator has the right, if he so desires, to submit an order to the Senate, which would cover the point that he wishes to make.

Thereupon Mr. Poindexter submitted the following order:

Ordered, That the evidence be received and the decision as to its admissibility be reserved.

Mr. Poindexter proposed to debate the question, when the President pro tempore ruled:

The Senator has not the right to discuss it.

Mr. POINDEXTER. Have I no right to make an explanation?

The PRESIDENT PRO TEMPORE. No.

The question being submitted to the Senate, it was decided in the negative, yeas 3, nays 57, so the order was not adopted.

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[1] Third session Sixty-second Congress, Record, p. 97.

[2] Third session Sixty-second Congress, Record, p. 106.

491. Questions as to admissibility of evidence in a trial of impeachment are by long-established custom, submitted by the Presiding Officer to the Senate for decision.

On December 4, 1912,[1] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, offered in evidence a copy of an assignment of two options covering a culm bank, executed on September 5, 1911, to which Mr. A. S. Worthington, of counsel for the respondent, interposed an objection. After argument on the admissibility of the exhibit, the President pro tempore said:

Before taking action in regard to this question the Chair desires to make a statement to the Senate. Anticipating that questions of the admissibility of evidence would arise, the present occupant of the chair has examined former impeachment cases in order to ascertain what was the practice of Presiding Officers themselves in regard to deciding questions of this character or of submitting them to the Senate. Upon examination it is found in former impeachment cases that very liberally, to say the least, the Presiding Officer had availed himself of the privilege of submitting the matter to the Senate. In the Andrew Johnson impeachment case in particular, which was presided over by the highest judicial officer in the land, Chief Justice Chase, almost invariably every question as to the admissibility of evidence was submitted by him to the Senate for its determination. While the present occupant of the chair is not averse to taking responsibility in a matter that is alleged by the counsel to be peculiarly vital to the case, he feels that the matter should be submitted to the Senate. He is more inclined to that course by the fact that if one single Senator differed from the conclusion of the Chair he would have the right to have the vote taken by the Senate. Therefore, in this case the present occupant of the chair will submit to the Senate the question as to the admissibility of the evidence.

492. The President pro tempore ruled, in the Archbald trial, that counsel in examination might confine a witness within the limits of his interrogation, but witness should have opportunity either in direct examination or under cross-examination, to explain fully any answer made.

On December 6, 1912,[2] in the Senate sitting for trial of the Archbald impeachment, during the examination of a witness on behalf of the managers, Mr. Alexander Simpson, of counsel for the respondent, submitted an objection, saying:

I submit, Mr. President, when a witness is answering a question he has a right to complete his answer so as to make it clear to the Senate what his answer is, and the manager has no right to interrupt him in making a clear statement as to what his answer is. If the witness gets beyond that point, of course the manager has the right to interrupt him.

The President pro tempore ruled:

The Chair will rule that the manager has the right to conduct his examination in his own way and confine it within the limits of his questions, if he desires to do so, and that then the witness shall, before he leaves the stand, have full opportunity to explain any answer he has made. The manager in examining a witness has the right to confine him within the limits of the interrogation which he desires to submit, but the witness certainly must have the opportunity, either before the direct examination concludes or under cross-examination, to explain fully any answer which he may make.

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[1] Third session Sixty-second Congress, Record, p. 106.

[2] Third session Sixty-second Congress, Record, p. 224.

Chapter CC.

THE IMPEACHMENT AND TRIAL OF ROBERT W. ARCHBALD.

498. The impeachment and trial of Robert W. Archbald, United States circuit judge, designated as a member of the Commerce Court.

In response to a resolution of the House, the President transmitted to the Judiciary Committee of the House charges filed against Judge Archbald and all papers relating thereto with a message suggesting that they be not laid before the House until examined by the committee.

Form of resolution instructing the Judiciary Committee to examine the charges against Judge Archbald.

In investigating the conduct of Judge Archbald, the Judiciary Committee, by resolution, extended to the accused permission to be present with counsel and cross-examine witness.

On April 23, 1912,[1] Mr. George W. Norris, of Nebraska, introduced, by delivery to the Clerk, the following resolution:

"Resolved, That the President of the United States be, and he is hereby, requested, if not incompatible with the public interest, to transmit to the House of Representatives a copy of any charger, filed against Robert W. Archbald, associate judge of the United States Commerce Court, together with the report of any special attorney or agent appointed by the Department of Justice to investigate such charges, and a copy of any and all affidavits, photographs, and evidence filed in the Department of Justice in relation to said charges, together with a statement of the action of the Department of Justice, if any, taken upon said charges and report."

[1] Second session Sixty-second Congress, Record, p. 5242.

The resolution was referred, under the rule, to the Committee on the Judiciary. On April 25,[1] Mr. Henry D. Clayton, of Alabama, from that committee, submitted the report of the committee, with favorable recommendation, and the resolution was unanimously agreed to.

A message from the President in response to this request was laid before the House by the Speaker on May 4,[2] in part as follows:

In reply, I have to state that, in February last, certain charges of improper conduct by the Hon. Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now judge of the Commerce Court, were brought to my attention by Commissioner Meyer of the Interstate Commerce Commission. I transmitted these charges to the Attorney General, by letter dated February 13, instructing him to invesitgate the matter, confer fully with Commissioner Meyer, and have his agents make as full report upon the subject as might be necessary, and, should the charges be established sufficiently to justify proceeding on them, bring the matter before the Judiciary Committee of the House of Representatives.

The Attorney General has made a careful investigation of the charges, and as a result of that investigation has advised me that, in his opinion, the papers should be transmitted to the Committee on the Judiciary of the House to be used by them as a basis for an investigation into the facts involved in the charges. I have, therefore, directed him to transmit all of the papers to the Committee on the Judiciary; but in my opinion—and I think it will prove in the opinion of the committee—it is not compatible with the public interests to lay all these papers before the House of Representatives until the Committee on the Judiciary shall have sifted them out and determined the extent to which they deem it essential to the thoroughness of their investigation not to make the same public at the present time. But all of the papers are in the hands of the committee and, therefore, within the control of the House.

The message was read and, with the accompanying papers, was referred to the Committee on the Judiciary. On the same day Mr. Clayton, from that committee, reported the following resolution, which was agreed to by the House.

Resolved, That the Committee on the Judiciary be, and is hereby, authorized to inquire into and concerning the official conduct of Honorable Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now a judge of the Commerce Court, touching his conduct in regard to the matters and things mentioned in House Resolution numbered five hundred and eleven, and especially whether said judge has been guilty of an impeachable offense, and to report to the House the conclusions of the committee in respect thereto, with appropriate recommendation;

And resolved further, That the Committee on the Judiciary shall have power to send for persons and papers, and to subpoena witnesses and to administer oaths to such witnesses; and for the purpose of making this investigation said committee is authorized to sit during the sessions of this House; and the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

Preliminary to the investigation thus authorized the committee agreed upon the following program of procedure:[3]

That for the present the committee will hold public hearings, under the authority given by House resolution 524, for the purpose of examining the witnesses in regard to the matters and things mentioned in House resolution 511, which involve the conduct of Hon. Robert W. Archbald, and that in these public hearings where witnesses are examined Judge Archbald may be represented by counsel, if he desires, and that after the chairman of the committee shall have conducted the principal examination of witnesses and asked the members of the committee to ask such questions

[1] Record, p. 5346.

[2] Record, p. 5896.

[3] Record, p. 8907.

as their judgment may dictate to be proper, then, with the permission of the committee, counsel for Judge Archbald, if Judge Archbald is desirous to have counsel present, may ask such questions of the witnesses as the committee may deem proper to be asked of the witnesses in such investigation.

Pursuant to this determination, Judge Archbald attended and was represented by counsel, who cross-examined witnesses and submitted briefs, which were considered by the committee.

499. The Archbald impeachment continued.

The committee, empowered to investigate, reported simultaneously resolutions impeaching Judge Archbald and articles of impeachment.

On July 8, 1912, Mr. Clayton, from the Committee on the Judiciary, presented as privileged a unanimous report, which was referred to the House Calendar.[1]

The report, which incorporates findings of fact and conclusions reached by the committee as well as a discussion of the law, nature, and function of impeachment, with citations of authorities relating thereto, concludes:

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge Robert W. Archbald, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said Robert W. Archbald, United States circuit judge designated as a member of the Commerce Court:

"Resolved, That Robert W. Archbald, additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (U. S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court, be impeached for misbehavior and for high crimes and misdemeanors; and that the evidence heretofore taken by the Committee on the Judiciary under House resolution 524 sustains 13 articles of impeachment which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

(Then follow 13 articles of impeachment setting forth the charges in detail.)

500. The Archbald impeachment, continued.

Form of resolution designating managers on the part of the House to conduct the impeachment trial and instructing them to carry the impeachment to the Senate.

The managers elected to conduct the Archbald trial on behalf of the House of Representatives consisted of seven members of the Judiciary Committee and represented both the majority and minority parties in the House.

Form of resolution authorizing the managers to incur necessary expenses in the conduct of the Archbald case.

The report[2] was debated in the House on July 11.[3] At the conclusion of the reading of the report by the Clerk, Mr. James R. Mann, of Illinois, said:

Mr. Speaker, when the report was made by the gentleman from Alabama [Mr. Clayton it was stated by him, and properly so, that the resolution would be printed separately as any other resolution. The Clerk has read the resolution from the report. The resolution was not printed separately, through some misunderstanding, probably, on the part of the clerk in charge,

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[1] Record, p. 8705.

[2] Second session Sixty-second Congress, House Report No. 946.

[3] Record, p. 3004.

and I ask unanimous consent that the resolution may be numbered and printed and reported from the committee as of July 8, 1912, in the ordinary form. It seems to me that that is due to the proper procedure in the House.

There was no objection, and the resolution was ordered printed separately, as of July 8, and numbered H. Res. 622.

After extended debate, the resolution, with the accompanying articles of impeachment, was agreed to, yeas 223, nays 1.

Thereupon, it was:

Resolved, That Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court; that said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Robert W. Archbald of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Robert W. Archbald to answer said impeachment, and demand his impeachment, conviction, and removal from office.

It was also:

Resolved, That the managers on the part of the House in the matter of the impeachment of Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers, and the managers have power to send for persons and papers.

It was further:

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, and that the House adopted articles of impeachment against said Robert W. Archbald, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, have been appointed such managers.

The Members so elected were members of the Committee on the Judiciary and represented both the majority and minority parties in the House.

501. The Archbald impeachment, continued.

A message was sent to inform the Senate that the managers on the part of the House of Representatives would present the impeachment of Judge Archbald, and the Senate transmitted a message in reply informing the House that the Senate was ready to receive them.

Forms and ceremonies of presenting the Archbald impeachment at the bar of the Senate.

The articles of impeachment, signed by the Speaker and attested by the Clerk, after being read by the chairman of the managers, were handed to the Secretary of the Senate.

Having carried to the Senate the articles impeaching Judge Archbald, the managers returned and reported verbally in the House.

On July 13[1] (legislative day of July 6), in the Senate, a message was received from the House of Representatives, delivered by its Chief Clerk, announcing that the House had passed the following resolution:

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors, Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, and that the House adopted articles of impeachment against said Robert W. Archbald, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate; and that Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, have been appointed such managers.

On motion of Mr. Augustus O. Bacon, of Georgia, it was:

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, agreeably to the notice communicated to the Senate.

On July 15,[2] at 12 o'clock and 15 minutes p. m., the Assistant Doorkeeper of the Senate announced:

I have the honor to announce the managers on the part of the House of Representatives to conduct the proceedings in the impeachment of Robert W. Archbald, judge of the circuit court and designated a judge of the Commerce Court of the United States.

The President pro tempore said:

The managers on the part of the House will be received, and the Sergeant at Arms will assign them their seats.

The committee from the House of Representatives were escorted by the Sergeant at Arms to seats assigned them in the area in front of the Chair, and Mr. Manager Clayton, its chairman, said:

Mr. President, the managers on the part of the House of Representatives are here present and ready to present the articles of impeachment which have been preferred by the House of Representatives against Robert W. Archbald, a circuit judge of the United States and designated a judge of the Commerce Court of the United States. The House adopted the following resolution, which I will read to the Senate:

By direction of the President pro tempore, the Sergeant at Arms made proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Robert W. Archbald, circuit judge of the United States and designated a judge of the United States Commerce Court.

Mr. Manager Clayton then read the articles of impeachment, and continued:

And, Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Robert W. Archbald, a circuit judge of the United States and designated as a judge of the

[1] Second session Sixty-second Congress, Record, p. 8989.

[2] Record, p. 9051.

United States Commerce Court, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Robert W. Archbald may be put to answer the high crimes and misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives by the adoption of the resolutions and articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of said Robert W. Archbald to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

The articles of impeachment signed by the Speaker and attested by the Clerk, were handed to the Secretary of the Senate,[1] and the President pro tempore said:

Mr. Chairman and gentlemen of the committee of the House of Representatives, the Chair begs to assure you that the Senate will take order in the matter of the impeachment of Judge Archbald and communicate its action to the House of Representatives.

Mr. Manager Clayton replied:

Mr. President, in behalf of the House of Representatives the managers of the House beg to thank the Presiding Officer and the Senate for the courtesy extended to the managers upon the part of the House of Representatives.

The committee of the House of Representatives then retired from the Chamber.

The committee of the House of Representatives having returned to the Hall of the House, Mr. Clayton submitted as privileged:

Mr. Speaker, as one of the managers, and in behalf of all the managers on the part of the House of the impeachment proceedings, I beg to report to the House that the articles of impeachment prepared by the House of Representatives and preferred against Robert W. Archbald, a United States circuit judge and designated as a judge of the Commerce Court of the United States, have been exhibited and read to the Senate; that the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, and that due notice of the same would be given to the House of Representatives.

502. The Archbald impeachment continued.

The articles of impeachment in the Archbald trial were ordered printed by the Senate and referred to a special committee appointed by the President pro tempore.

In the organization of the Senate for the Archbald trial the oath was administered to the President pro tempore by a Senator designated by order of the Senate for that purpose.

The President pro tempore, after being sworn, administered the oath to the Senators sitting for the trial of Judge Archbald.

The Senate notified the House by message that it was organized for the trial of the Archbald impeachment.

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[1] These articles of impeachment appear in full in the Journals of both the House and Senate, in the House Journal on July 11, (p. 854), the day of their adoption, and in the Senate Journal on July 15, (p. 454), the day they were presented and read.

The hour prescribed by the rule having arrived, the President pro tempore declared legislative business suspended and the Senate in order to proceed for the impeachment trial.

Whereupon [1] Mr. George Sutherland, of Utah, offered the following order, which was agreed to:

Ordered, That the articles of impeachment presented against Robert W. Archbald be printed for use of the Senate.

The following resolution offered by Mr. Clarence D. Clark, of Wyoming, was also agreed to:

Resolved, That the message of the House of Representatives, relating to the impeachment of Robert W. Archbald be referred to a select committee to consist of five Senators to be appointed by the President pro tempore.

The President pro tempore appointed Messrs. Clarence D. Clark, of Wyoming; Knute Nelson, of Minnesota; William P. Dillingham, of Vermont; Augustus O. Bacon, of Georgia; and Charles A. Culbertson, of Texas, as members of this select committee.

On July 16 [2] at 1 o'clock p. m., the President pro tempore of the Senate announced:

The hour of 1 o'clock has arrived, and in accordance with the rule the legislative business will be suspended, and the Senate will proceed upon the impeachment of Robert W. Archbald.

On motion of Mr. Reed Smoot, of Utah, by unanimous consent, Mr. Shelby M. Cullom, of Illinois, was designated to administer the constitutional oath.

Mr. Cullom administered the oath to the President pro tempore:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Robert W. Archbald, additional circuit judge of the United States for the third judicial district, designated a judge of the Commerce Court, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The President pro tempore said:

Without objection, the Chair will suggest that the Secretary will call the roll, calling 10 Senators at a time, and that as their names are called the Senators advance to the desk to have the oath of office administered to them.

Accordingly the roll was called and those Senators present advanced to the desk in groups of 10 and the oath was administered by the President pro tempore to the several groups as called.

The oath having been administered to those present, the names of the absentees were again called, and Senators who had entered the Chamber since the first call advanced to the desk and were sworn.

The President pro tempore announced:

Senators, the Senate is now sitting for the trial of the impeachment of Robert W. Archbald additional circuit judge of the United States for the third judicial district, designated a judge of the United States Commerce Court.

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[1] Second session Sixty-second Congress, Senate Journal, p. 628.

[2] Record, p. 9117.

On motion of Mr. Clark, the following resolution was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Robert W. Archbald, United States circuit judge, and is ready to receive the managers on the part of the House at its bar.

A message announcing the passage of this order was delivered in the House by Mr. Crockett, one of the clerks of the Senate.

Mr. Lodge then submitted:

I am about to make a motion that the Senate, sitting as a court of impeachment, take a recess until 3 o'clock in order to give the managers on the part of the House time to assemble and appear here. Before making the motion, however, I call attention to the fact that the Senate, sitting as a court, when it takes a recess brings the Senate back into legislative session where it was. I now make the motion that the Senate, sitting as a court of impeachment, take a recess until 3 o'clock.

The motion was agreed to, and at 1 o'clock and 45 minutes, p. m., the Senate, sitting as a court of impeachment, took a recess until 3 o'clock p.m., and a message notifying the House of this recess was transmitted [1] to the House.

503. The Archbald impeachment, continued.

The ceremony of formal demand by the managers that process issue in the trial of the Archbald impeachment.

On demand of the managers, the Senate ordered summons to be issued for the appearance of Judge Archbald, fixing the day and hour of return.

The proceedings of the Senate, sitting in the impeachment trial of Judge Archbald, were recorded in a separate journal.

In the meanwhile [2] the resolution notifying the House that the Senate was now organized for the trial was delivered in the House, and, at 3 o'clock and 1 minute p.m., the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant at Arms.

The PRESIDENT PRO TEMPORE. The Sergeant at Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDENT PRO TEMPORE. Gentlemen managers, the Senate is now organized for the trial of the impeachment of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the Commerce Court.

Whereupon Mr. Manager Clayton, chairman of the managers on the part of the House, rose and said:

Mr. President, we, as managers on the part of the House of Representatives, are directed by the House of Representatives to appear at the bar of the Senate, which we now do, and demand that process be issued to Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the Commerce Court, and that he be required to answer at the bar of the Senate the said articles of impeachment.

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[1] Record, p. 9145.

[2] Second session Sixty-second Congress, Record, p. 9123.

Thereupon Mr. Clark offered the following, which was agreed to by the Senate:

Ordered, That a summons be issued, as required by the Rules of Procedure and Practice in the Senate when sitting for the trial of the impeachment of Robert W. Archbald, returnable on Friday, the 19th day of the present month, at 12.30 o'clock in the afternoon.

Mr. Manager Clayton said:

Mr. President, I beg to say on behalf of the managers on the part of the House of Representatives that they will await the further pleasure of the Senate.

And then, at 3 o'clock and 5 minutes p. m., the managers on the part of the House retired from the Chamber.

On motion of Mr. Clark, the Senate, sitting for the trial of the impeachment, adjourned until Friday, July 19, at 12.30 o'clock in the afternoon. A message advising the House of this action on the part of the Senate was transmitted to the House.

The proceedings of the court of impeachment do not appear in the daily Journal of the Senate but are recorded in a separate journal appended thereto and entitled "Proceedings of the Senate on the Trial of Robert W. Archbald, etc."

The daily Journal of the Senate merely records the announcement of the session of the Senate sitting on the trial, and in each instance concludes:

After proceedings had therein as stated in the record, the Senate resumed its legislative business.

504. The Archbald impeachment trial.

Form of oath of the Sergeant at Arms and form of proclamation opening sessions of the Senate sitting in the impeachment trial of Judge Archbald.

In response to the writ of summons, Judge Archbald appeared in person attended by counsel to answer the articles of impeachment.

In the Archbald trial the Senate adopted orders supplementing the rules of procedure and practice for the Senate when sitting in impeachment trials.

Order of the Senate prescribing method of submitting requests, applications, or objections, and regulating colloquys and questions.

In response to a motion by respondent's counsel that time be allowed to present the answer, the Senate granted 10 days.

On July 19,[1] in the Senate, the following appears:

The PRESIDENT PRO TEMPORE. The hour of 12.30 o'clock, to which the Senate sitting as a court in the impeachment of Judge Robert W. Archbald adjourned, has arrived. The Sergeant at Arms will make the opening proclamation.

The SERGEANT AT ARMS. Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the United States Commerce Court.

By direction of the President pro tempore, the names of those Senators who had not been sworn were called. There were no responses.

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[1] Second session Sixty-second Congress, Record, p. 9275; Senate Journal, p. 629.

Mr. Clark offered this resolution, which was agreed to:

Ordered, That the Secretary inform the House of Representatives that the Senate is sitting in its Chamber and ready to proceed with the trial of the impeachment of Robert W. Archbald.

On motion of Mr. Clark, it was:

Ordered, That the Presiding Officer on the trial of the impeachment of Robert W. Archbald, circuit judge of the United States, be, and is hereby, authorized to sign all orders, mandates, writs, and precepts authorized by the Rules of Procedure and Practice in the Senate when sitting on impeachment trials and by the Senate.

At 12 o'clock and 37 minutes p. m. the Assistant Doorkeeper announced the managers on the part of the House, who were conducted to the seats assigned to them in the area in front of the Secretary's desk, on the left of the Chair.

At 12 o'clock and 39 minutes p. m. the respondent, Robert W. Archbald, and his counsel, A. S. Worthington and Robert W. Archbald, jr., entered the Chamber and were conducted to seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

The PRESIDENT PRO TEMPORE. The Secretary will read the Journal of the proceedings of the last session of the Senate while sitting in the trial of the impeachment of Robert W. Archbald.

The Secretary read the Journal of proceedings of the Senate sitting for the trial of the impeachment of Tuesday, July 16, 1912.

By direction of the President pro tempore, the Secretary read the following return appended to the writ of summons and administered the following oath to the Sergeant at Arms:

"I, Daniel M. Ransdell, Sergeant at Arms of the Senate of the United States, do solemnly swear that the return made by me upon the process issued on the 16th day of July, 1912, by the Senate of the United States, against Robert W. Archbald, additonal circuit judge of the United States for the third judicial circuit and designated a judge in the Commerce Court, is truly made, and that I have performed such service therein described. So help me, God."

Whereupon the Sergeant at Arms made proclamation:

Robert W. Archbald! Robert W. Archbald! Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The President pro tempore announced:

Counsel for the respondent are informed that the Senate is now sitting for the trial of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge of the Commerce Court, upon articles of impeachment exhibited by the House of Representatives, and will hear his answer thereto.

Mr. Worthington, of counsel for the respondent, entered formal appearance, which was read by the Secretary and ordered placed on file.

Mr. Worthington then submitted a motion on behalf of the respondent praying that time be granted in which to prepare an answer to the articles of impeachment.

On motion of Mr. Clark, of Wyoming, amended by motion of Mr. Porter J. McCumber, of North Dakota, and further modified on suggestion of Mr. Henry Cabot Lodge, of Massachusetts, it was:

Ordered, That the respondent present the answer to the articles of impeachment at 12 o'clock and 30 minutes post meridian on Monday, the 29th day of July, 1912.

The following orders were then severally agreed to:

Ordered, That the managers on the part of the House be allowed until the 1st day of August, 1912, at 1 o'clock in the afternoon, to present a replication, or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent, respectively, so that all pleadings shall be closed on or before the 4th day of August, 1912.

Ordered, That in all matters relating to the procedure of the Senate, sitting in the trial of the impeachment of Robert W. Archbald, circuit judge of the United States, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request or objection, the same shall be addressed directly to the Presiding Officer, and not otherwise.

It shall not be in order for any Senator to engage in colloquy or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

Ordered, That the proceedings of the Senate sitting in the trial of impeachment of Robert W. Archbald be printed daily for the use of the Senate as a separate document.

And then, at 1 o'clock and 19 minutes p. m., the Senate, sitting for the trial of the impeachment, adjourned, and the managers on the part of the House and the respondent and his counsel withdrew from the Chamber.

505. The Archbald impeachment continued.

The answer of Judge Archbald to the articles of impeachment was signed by himself and his counsel.

The answer in the Archbald case was read by the Secretary of the Senate.

The answer of Judge Archbald demurred severally to all the articles of impeachment, alleging that no impeachable offense had been charged and then replying in detail to the charges set forth in each article.

The managers were not supplied with a copy of the answer of Judge Archbald at the time of filing.

On July 29 [1] the Senate, at the appointed hour, discontinued its legislative business, and the session for the impeachment proceedings was opened with the usual proclamation by the Sergeant at Arms.

The oath was administered to certain Senators not previously sworn.

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[1] Second session Sixty-second Congress, Senate Journal, p. 630; Record, p. 9795

The managers, and the respondent with his counsel, having attended, the President pro tempore directed the Journal of the last session's proceedings to be read. The Journal having been approved, Mr. Worthington presented the respondent's answer, consisting of a separate demurrer and answer to each of the 13 articles of impeachment, which was read by the Secretary.

This answer of respondent appears in full in the Journal.[1]

At the conclusion of the reading Mr. Manager Clayton inquired if the counsel could furnish the managers on the part of the House of Representatives with a copy of this answer by the respondent to the articles of impeachment.

Mr. Worthington, of counsel for the respondent, replied:

> Mr. President, I regret to say that we had obtained a copy for that purpose, but different newspapers and press associations exhausted the copies, even our own office copy. Otherwise we should be very happy to hand a copy to the managers.

And then, on motion of Mr. Lodge, at 2 o'clock and 5 minutes p.m., the Senate, sitting on the trial of impeachment, adjourned until Thursday, August 1, 1912, at 1 o'clock, p.m.

506. The Archbald impeachment continued.

An attested copy of Judge Archbald's answer, having been messaged to the House by the Senate, was referred to the managers.

The managers having prepared a replication to the answer of Judge Archbald, submitted it to the House for approval and adoption.

The House notified the Senate by message that it had adopted a replication in the Archbald trial and had authorized its managers to file with the Secretary of the Senate any further pleading deemed necessary.

On July 31,[2] in the House, the Speaker announced the reference to the managers on the part of the House of Representatives of an attested copy of the answer of Robert W. Archbald to the articles of impeachment messaged to the House from the Senate on the previous day.

Mr. Manager Clayton said:

> Mr. Speaker, I am directed by my associate managers on the part of the House to say that the managers were furnished on yesterday with a certified copy of the answer of Judge Archbald, additional circuit judge for the first judicial circuit, designated a judge in the Commerce Court.
>
> And I am further directed to say that the managers have considered the answer in the matter of the impeachment proceedings against Judge Archbald and have directed me to present to the House, and ask its adoption, the replication[3] to such answer, and I ask that the Clerk read the replication, which I send to the desk.

The Clerk read the replication. On motion of Mr. Manager Clayton, the replication was unanimously adopted.

Mr. Manager Clayton then offered the following resolution, which was agreed to:

> *Resolved,* That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Robert W.

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[1] Senate Journal, pp. 630–639.

[2] Second session Sixty-second Congress, House Journal, p. 910; Record, p. 9954.

[3] House Report No. 1119.

Archbald, additional circuit judge of the United States for the third judicial circuit, and designated a judge of the United States Commerce Court, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House; and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary.

507. The Archbald impeachment, continued.

The replication in the Archbald trial was presented by the managers and read by the Secretary of the Senate.

The replication of the House to the answer of Judge Archbald was submitted without signature.

The replication of the House consisted of a general denial of all allegations set forth in Judge Archbald's answer and an averment that the charges contained in the articles of impeachment set forth impeachable offenses.

On August 1[1] the Senate went into session for the trial in the usual form.

The President pro tempore laid before the Senate a message received from the House of Representatives, which was read by the Secretary, as follows:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge of the United States Commerce Court, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House; and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary.

Mr. Manager Clayton said:

Mr. President, on behalf of the House of Representatives and on behalf of the managers of the House of Representatives I now present the replication of the House of Representatives to the answers made by Robert W. Archbald, United States circuit judge for the third judicial circuit and designated a judge of the United States Commerce Court. The replication is to the answer of the respondent. I ask that it be read by the Secretary.

The replication was read by the Secretary and ordered to be printed.

Mr. Manager Clayton then submitted the following order for adoption by the Senate:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

Mr. Worthington, of counsel for the respondent, objected:

Mr. President, as far as I know, it is unprecedented to ask the court to fix a time for the trial of a case until it is at issue. By an order which has heretofore been made by the Senate it is provided that after this replication shall have been filed further pleadings on either side may be filed with the Secretary of the Senate, the pleadings to be closed by next Saturday. Having heard the replication read, I am quite clear that it will be necessary to file a further pleading on

[1] Second session Sixty-second Congress, Senate Journal, p. 638; Record, p. 9983.

behalf of the respondent in order to have this case in such shape that it can be legally determined. So far as we are concerned, I think that further pleading may in all probability be filed certainly by 12 o'clock to-morrow.

I would respectfully suggest that it is not in order to fix a time for the trial until what is to be tried is fixed by the pleadings in the case.

Upon further argument by Mr. Manager Clayton and Mr. Worthington—

The PRESIDENT PRO TEMPORE. The Chair will be glad to submit any motion which counsel for the respondent may make.

Mr. WORTHINGTON. The rule which you have adopted would permit counsel for the respondent or the managers to make orally any request for an order, but it must be reduced to writing if required.

I make orally the motion that the question of fixing a date for the trial be postponed until the court convenes on Saturday next.

After further discussion, Mr. Thomas S. Martin, of Virginia, suggested that the managers on the part of the House permit consideration of their motion to go over until Saturday, August 1.

The President pro tempore submitted:

Counsel on the part of the respondent asks that the consideration of the question as to when the trial shall be proceeded with be postponed for determination until Saturday. Is there objection? If not, by unanimous consent it is so ordered. Is there any other matter the managers on the part of the House desire to present?

Mr. Manager CLAYTON. There is nothing else, Mr. President, and having no other business before the Senate, we beg leave at this time to retire.

Thereupon the managers and respondent, with his counsel, withdrew and adjournment was taken until August 3, at 2 o'clock p.m.

508. The Archbald impeachment, continued.

Counsel for Judge Archbald having elected not to plead further notified the managers by letter of that decision.

In response to an objection by the managers to the designation "board of" managers, contained in a communication incorporated in the record of proceedings, the Secretary of the Senate was authorized to correct the designation.

In the Archbald trial the Senate provided that lists of witnesses to be subpoenaed should be furnished by managers or counsel to the Sergeant at Arms and that additional witnesses desired later should be subpoenaed on application to the Presiding Officer.

The Senate considered in secret session a motion by the managers fixing the date on which the Archbald trial should be opened.

The Senate declined to grant the motion of the managers, submitted August 3, that the trial of Judge Archbald begin August 7, and, on motion of a Senator, set the opening of the trial for December 3.

On August 3 [1] a letter addressed to Mr. Manager Clayton by Mr. Worthington, of counsel for the respondent, was, by request of Mr. Worthington, seconded by Mr., Manager Clayton, read and incorporated in the record as follows:

WASHINGTON, D. C., *August 2, 1912.*

Hon. HENRY D. CLAYTON,
Chairman Board of Managers in the matter of
the impeachment of Robert W. Archbald.

DEAR SIR: Inasmuch as counsel for Judge Archbald have decided not to file any further pleadings in his case, it is due to the board of managers that I should notify them of that fact and inform them why counsel have changed their minds on this subject since the argument in the Senate yesterday.

In the respondent's first answer to each of the articles of impeachment he avers in substance that the article does not set forth an impeachable offense. In the first paragraph of the replication filed on behalf of the House of Representatives issue was joined on these answers. But as to whole of the sixth article and as to part of the thirteenth article the respondent pleads in substance that even if the article sets forth an impeachable offense it sets it forth in such general and indefinite terms that the respondent should not be called upon to answer it. And as to the thirteenth article, the plea is made that it is bad because it undertakes to charge in one article two separate and distinct offenses.

We do not find in the replication any distinct reference to either of these two last-mentioned defenses, relating one to both the sixth and the thirteenth articles and the other to the thirteenth article alone. It was our impression yesterday that for this reason some further pleading would be necessary on our part as to these two matters. However, as you stated in the Senate yesterday that it is the understanding of the board of managers that their replication is a denial of all of our allegations as to the insufficiency of the articles of impeachment, whether on one ground or another, counsel for tale respondent have decided that they will accept this construction of the replication made by the board of managers. This being so, no further pleading seems to be necessary, and we will be ready, when the Senate meets to-morrow, to take up the question of the date of trial.

Yours, very truly,

A. S. WORTHINGTON
Of Counsel for Respondent.

Thereupon Mr. Manager Clayton said:

Mr. President, I do not desire to be hypercritical of the language employed by the counsel, but so far as my investigation goes, I am led to understand that the managers of the House have never before been spoken of as a board of managers. I therefore ask the counsel to strike from his letter the words "board of" wherever they occur. We are not a board of managers. We are managers on the part of the House of Representatives; and while not a purist, not a hairsplitting dealer in technicalities, I think it is proper that in papers of this character and of this solemnity the usual forms be followed.

The PRESIDENT PRO TEMPORE. The Secretary will make the correction.

On request of Mr. Manager Clayton, the order pending before the Senate at adjournment was reported. On motion of Mr. Manager Clayton, the order was amended to read as follows:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

And further ordered, That in case hereafter the managers or the respondent may desire the attendance of additional witnesses, in such case the managers or the respondent may have the

[1] Second session Sixty-second Congress, Senate Journal, p. 638; Record, p. 10132.

witness or witnesses desired subpoenaed, in accordance with the practice and usage of the Senate, upon application in such form as may be approved by the Presiding Officer.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

The PRESIDENT PRO TEMPORE. The Presiding Officer would inquire whether the counsel for the respondent desires to submit any order.

Mr. WORTHINGTON, No, Mr. President.

After argument by Mr. Manager Clayton and Mr. Worthington on the adoption of the order as amended, Mr. Clark, of Wyoming, submitted:

Mr. President, anticipating that the decision of this matter will lead to some debate, and as under the rules it must be considered behind closed doors, I move that the doors be closed for the purpose of deliberation.

The motion was agreed to, and the President pro tempore directed the Sergeant at Arms to clear the galleries and close the doors. The managers and the respondent, with his counsel, withdrew, and at 4 o'clock and 30 minutes p. m., the doors were closed until 5 o'clock and 32 minutes p. m., when the doors were reopened.

The managers on the part of the House and the respondent, accompanied by counsel, entered the Chamber and took the seats assigned them.

Mr. Jacob H. Gallinger, of New Hampshire, offered the following order:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 3d day of December, 1912.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 3d day of December, 1912.

Mr. Henry L. Meyers, of Montana, offered the following as a substitute for the order submitted by Mr. Gallinger:

Ordered, That the trial of the accused under these impeachment proceedings and charges be, and is hereby, set for the 15th day of August, 1912, at 12:30 p. m., and that orders for witnesses be filed on or before August 10, 1912, and thereafter as the Senate may order.

The order submitted by the managers on the part of the House of Representatives was also read. The pending question was then put by the President pro tempore, as follows:

The several orders are before the Senate for consideration. Under the view taken by the Presiding Officer, the question should first be put on the order fixing the most distant time. That is in accordance with parliamentary procedure and also in accordance with such procedure as might be considered proper in a court. The order proposed by the Senator from New Hampshire, Mr. Gallinger, is the one which fixes the longest period, and the vote will first be taken upon that. The rule [1] of the Senate requires that the vote shall be taken by yeas and nays. It is therefore not necessary that the yeas and nays should be ordered as in other instances. As Senators' names are called, those who favor the date fixed by the order proposed by the Senator from New Hampshire will vote "yea." Those who are opposed to that date and favor other dates will as their names are called, vote "nay." The Secretary will call the roll.

The roll being called, it was decided in the affirmative, yeas 44, nays 19, and the order submitted by Mr. Gallinger was agreed to.

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[1] Standing Rules of the Senate, Rule V, p. 174.

The managers on the part of the House thereupon retired from the Chamber.

The Senate sitting for the trial of the impeachment continued in session and considered briefly a matter of procedure [2] relating to the trial.

Following the disposition of the question of procedure, the respondent retired from the Chamber, and the Senate, sitting for the trial of the impeachment, adjourned until Tuesday, December 3, at 12:30 o'clock p. m.

509. The Archbald impeachment, continued.

The opening addresses in the Archbald trial were regulated by order of the Senate.

Managers and counsel made extended opening statements in the Archbald trial, the managers outlining charges which they proposed to establish and counsel for the respondent setting forth the contention that impeachment could be sustained only on conviction of offenses punishable in criminal court and controverting charges preferred in the articles of impeachment.

On December 3, 1912,[1] Mr. Worthington introduced Mr. Alexander Simpson, Jr., of the Philadelphia bar, as associate counsel for the respondent.

The following orders were severally agreed to:

Ordered, That the daily sessions of the Senate sitting in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall, unless otherwise ordered, commence at 2 o'clock in the afternoon.

Ordered, That the opening statement on behalf of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.

Upon suggestion of Mr. Manager Clayton and Mr. Worthington, respectively, it was agreed that the managers on the part of the House of Representatives and the respondent and his counsel should, during the remainder of the proceedings, appear without the formality of an announcement.

Mr. Manager Clayton opened the case for the House of Representatives as follows:

Mr. President, as I understand the action of the Senate, it contemplated that at this time the managers should proceed to make a statement embodying the facts upon which the articles of impeachment are predicated in this case.

Mr. Manager Clayton then proceeded with a statement of what the managers proposed to prove.

He was followed by Mr. Worthington, who said:

Mr. President and Senators, for the first time in an impeachment trial in this tribunal the opening statement for the respondent is to be made at the beginning of the case instead of at the close of the testimony on behalf of the managers. We have desired to do this and are doing it with the acquiescence of the honorable managers for two reasons. One is that the Members of the Senate may know when the introduction of testimony is going on what are the questions of fact in dispute. The other is that Senators may know from the beginning what we rely upon as the law of the case.

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[1] Third session Sixty-second Congress, Senate Journal, p. 317; Record, p. 21.

[2] See section 7714, Chapter CXCI in this volume.

Mr. Worthington then stated the contention of counsel on behalf of the respondent, that Judge Archbald could be properly convicted in impeachment proceedings only when convicted of an offense punishable in a criminal court, and controverted and discussed in detail allegations contained in the charges preferred in the articles of impeachment.

In reply to an allusion made by Mr. Worthington in discussing the theory that impeachment could be only for indictable offenses, Mr. Manager Clayton said by way of rebuttal:

Mr. President, in reply to the complaint which has been made by the honorable gentleman who represents the respondent that we did not go into the discussion of the law in the preliminary statement which the managers had the honor to submit this afternoon, I beg to say that we followed what we believed to be the practice in such cases. I have before me the record in the case of Judge Swayne. I observe that Judge Palmer, who was then the manager speaking for all the managers, after he concluded his statement of facts, winding up, with a condensed summary of all the statements which he had made at length, ended the preliminary statement of facts which is required according to the rules and practice of the Senate. He did not at that time present any brief or any argument or any views on the law of impeachment. The managers, Mr. President, have already prepared in a formal way a brief, and can present that brief, and in argument fully cover their views as to the law of impeachment; but we thought that this brief and what the managers said last summer, which is in the Record and to which I have referred, would amply apprise the honorable counsel for the respondent of the line of argument on the law in this case that the managers would pursue.

On December 5,[1] on motion of Mr. John D. Works, of California, it was—

Ordered, That such briefs and citations of authorities as have already been prepared by the managers on the part of the House and counsel for the respondent be filed with the Secretary and printed in the Record for the immediate use of Senators.

510. The Archbald impeachment, continued.

The presentation of evidence in the Archbald trial.

Instances wherein the Senate by order restricted the number of character witnesses which might be called to testify.

An instance in which the Senate by order disregarded an established rule of evidence.

On December 4,[2] following the reading and approval of the Journal, the names of witnesses on behalf of the managers were read to ascertain their presence, and the introduction of testimony on behalf of the managers began.

This presentation of testimony continued on December 5, 6, 7, 9, 10, 11, 12, and was concluded on December 14, when Mr. Manager Clayton announced that examination in chief had been concluded.

The introduction of testimony on behalf of the respondent was begun on December 16 and continued until December 19, when adjournment was taken until January 3, 1913.

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[1] Record, p. 151.

[2] Third session Sixty-second Congress, Record, p. 98.

On December 17,[3] following the introduction of a number of witnesses called by counsel on behalf of the respondent to testify as to respondent's character, Mr. Manager Clayton said:

Mr. President, the managers have offered no character witnesses anywhere in these proceedings; it is not their purpose to offer any character witnesses. Ten character witnesses have been examined. The rule adopted, or the practice I may say, to be more accurate, in all the courts of justice so far as I know is that the court has the discretionary power to limit the number of witnesses as to character. I take it that that power is an inseparable incident of the court to regulate its proceedings and for the purpose, among others, of bringing the trial to an end.

In so far as I know, all courts permit a reasonable number of witnesses to be examined on character; but where the testimony of the character of the party is not controverted, the court has always, after a reasonable number of witnesses have been examined, held that no more should be examined on that particular matter. Some of the courts of the Union hold that four character witnesses are sufficient where the testimony of those witnesses is not controverted.

So, Mr. President, I respectfully submit to you and to the Senate that after these gentlemen have examined 10 witnesses on character and when the testimony of those character witnesses is not disputed—is not controverted—and when the managers tell the Senate it will not be controverted, it seems to me that the further examination of character witnesses might well be dispensed with.

The Presiding Officer said:

The Chair recognizes, of course, that the practice is such as the manager has indicated, and the necessity of it is apparent. Otherwise the time of a court might be indefinitely taken up through the introduction of innumerable witnesses. At the same time the Chair recognized that in this case the character of the respondent is necessarily in issue, and on account of the gravity of the case and the peculiar position which the Presiding Officer holds, simply as the mouthpiece of the Senate, the Chair does not feel authorized to take the responsibility of shutting off the respondent in the proof which he seeks to make upon this line. The Senate has full control over the matter whenever it sees proper to exercise it.

Thereupon, on motion of Mr. James A. Reed, of Missouri, it was—

Ordered, That the number of character witnesses shall be limited to 15.

On December 18,[1] on cross-examination, Mr. Manager Webb proposed to interrogate Miss Mary F. Boland, a witness called in behalf of the respondent, about certain matters relative to a conversation which had not been referred to in the examination in chief. Objection by counsel for the respondent was sustained by the presiding officer.

The PRESIDING OFFICER. The rule is plain that the counsel can only cross-examine the witness about matters upon which the witness has been interrogated on direct examination.

Whereupon, on motion of Mr. James A. Reed, of Missouri, it was—

Ordered, That the witness now on the stand, Miss Mary F. Boland, be at this time interrogated by the managers relative to that part of the conversation sought to be elicited.

511. The Archbald impeachment, continued.

In the impeachment trial of Judge Archbald the respondent took the stand and testified in his own behalf.

No rebuttal evidence was offered by the managers in the Archbald trial.

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[1] Third session Sixty-second Congress, Senate Journal, p. 322; Record, p. 841.

[2] Record, p. 774.

The Senate limited the time of the final arguments in the impeachment trial of Judge Archbald.

The order in which closing arguments in the Archbald trial should be made was arranged by stipulation between managers and counsel.

The Senate permitted argument in manuscript to be filed with the reporter and included in the printed report of the proceeding.

Counsel having withheld remarks from the record in violation of the rule, the managers called attention to the infraction and asked that the rule be enforced.

The Senate fixed the time at which a final vote should be taken on the articles of impeachment presented against Judge Archbald and notified the House by message.

The voting on the articles in the Archbald impeachment was without debate but each Senator was permitted to file an opinion to be published in the printed proceedings.

The presentation of testimony on behalf of the respondent was resumed on January 3, 1913, and continued on January 4 and January 6, and concluded on January 7. On the last two days the respondent was called to the stand in person by counsel and testified in his own behalf,[1] being cross-examined by the managers and answering numerous questions propounded by Senators in writing. No rebuttal evidence was presented by the managers.

The taking of evidence having been concluded on both sides, on suggestion of the managers, all witnesses summoned on behalf of either side were finally discharged.

On motion of Mr. Reed Smoot, of Utah, it was:

Ordered, That hereafter the daily sessions of the Senate sitting in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall commence at 1 o'clock in the afternoon and shall continue until 6 o'clock p. m.; that the time for final argument of the case shall be limited to three days from and including January 8, 1913, and shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, the time thus assigned to each side to be divided as each side may for itself determine.

On January 8[2] agreement between managers and counsel for the respondent as to order in which argument should be made was indicated by Mr. Worthington, as follows:

Mr. President, I may say it is entirely agreeable to counsel for the respondent. We have had some conference with the managers about it, and we understand that all the managers who are to speak, except the one who is to make the closing argument, will speak before we begin.

The following orders were severally agreed to:

Ordered, That the time for final arguments in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall be limited to three days from and including January 8, 1913, and shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, the time thus assigned to each side to be divided as each side may for itself determine.

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[1] This is apparently the only instance in which a respondent in an impeachment case before the Senate has taken the stand in his own behalf.

[2] Third session Sixty-second Congress, Senate Journal, p. 325; Record, p. 1208.

Ordered, That any of the managers or counsel for the respondent having all or any portion of his argument in manuscript may deliver a copy of the same to the Reporter or any portion thereof, which for lack of time or to save the time of the Senate the managers or counsel shall omit to deliver or read, and the same shall be incorporated by the Reporter as a part of the argument delivered, and any manager or counsel who does not address the court may file and have printed as a part of the proceedings an argument before the close of the discussion.

Mr. Manager Sterling, on behalf of the managers, began the argument in support of the articles of impeachment, and was followed by Messrs. Manager Webb and Manager Floyd. Mr. Manager Howland also addressed the Senate and had not concluded at adjournment. On January 9[3] Mr. Manager Howland concluded his argument, and Messrs. Manager Norris and Manager Davis continued for the managers.

Mr. Simpson then opened the argument on behalf of the respondent, and was followed by Mr. Worthington, who concluded his argument on January 10.[4] Mr. Worthington was followed by Mr. Manager Clayton, who closed the argument on behalf of the managers.

At the conclusion of the argument, Mr. Reed, proposed to submit to the respondent for answer the following question which he sent to the desk in writing:

You have testified that you were in doubt with reference to the proper construction to be placed upon the testimony of Mr. Compton, and that thereupon you wrote a letter to Helm Bruce, the attorney, asking him for his construction of the evidence and you have further stated that you attached the reply written by Helm Bruce to the record. It appears in the original record that in the sentence which appears in typewriting, "We did apply it there," an alteration is made by pen and ink, a caret being inserted between the words "did" and "apply," and a line is drawn from the caret to the margin, and the word "not" written. Did you make this alteration?

On motion of Mr. Clark, of Wyoming, the doors were closed for deliberation. After one hour and four minutes the doors were reopened, and the President pro tempore announced that the Senate in private conference had determined that the question should not be asked. Mr. Reed withdrew the request.

On January 11,[5] upon the approval of the minutes, Mr. Clark, of Wyoming, moved that the doors be closed for deliberation on the part of the Senators, and the question was put, when Mr. Manager Clayton said:

Before the motion is announced as having been carried, I will state that I submitted a communication to the President of the Senate this morning directing attention to what I think is an infraction of the rules of the Senate on the part of Mr. Worthington, of counsel for the respondent, who has withheld his remarks from the Record.

Mr. President, everyone else printed his remarks when those remarks were completed without withholding them, and I know of no rule of any court which permits this to be done. Against that, Mr. President, I desire to say that I think it is improper. I have called the attention of the Presiding Officer to that fact, and I hope that the order made in this case will be observed.

Mr. Worthington said:

I have only to say, Mr. President, that after the late hour when we adjourned here last night, as soon as possible I got to work at the manuscript which had been forwarded to me and continued to work on it until midnight. I was then told that it was too late to get it in the Record of to-day.

I was not aware of any rule of the Senate which prevented this from being done, and I observed I think that the remarks of one of the managers, Mr. Manager Howland, had been withheld.

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[3] Record, p. 1258.

[4] Record, p. 1329.

[5] Record, p. 1385.

To which Mr. Manager Clayton rejoined:

Mr. President, may I not make, with the permission of the Senator, another suggestion? The manager who is now addressing you remained at his office last night until the hour of 12:30 in order to read the manuscript of the report of his remarks made here yesterday, made after the gentleman who has just addressed you made his. And it will be borne in mind that Mr. Worthington made part of his argument day before yesterday.

Mr. President, it seems to me that in all fairness and due observance of this rule his remarks should have been in the Record this morning. This manager, who labored under greater disadvantage than he did, has put his in the Record this morning.

Mr. Frank B. Brandegee, of Connecticut, having made the point of order that made the motion to close the doors is not debatable, the President pro tempore said:

The Chair withheld the announcement of the vote out of courtesy to the manager on the part of the House of Representatives, which the Chair supposed would meet with the acquiescence and approval of the Senate. Strictly, of course, the order to close the doors ought to have been made, but this was the only opportunity, and the manager on the part of the House of Representatives, in the opinion of the Chair, was entitled to that courtesy. The Chair will now, however, declare that the motion of the Senator from Wyoming is carried, and the Sergeant at Arms is directed to clear the galleries and close the doors.

The doors having been reopened, on motion of Mr. Clark of Wyoming, it was severally:

Ordered, That on Monday, January 13, 1913, at the hour of 1 o'clock p.m., a final vote be taken on the articles of impeachment presented by the House of Representatives against Robert W. Archbald, additional circuit judge of the United States.

Ordered, That the Secretary of the Senate do acquaint the House of Representatives that the Senate sitting as a High Court of Impeachment will on Monday, the 13th day of January instant, at the hour of 1 o'clock, p.m., proceed to pronounce judgment on the articles of impeachment exhibited by the House of Representatives against Robert W. Archbald.

Mr. Elihu Root of New York then submitted the following:

Ordered, That upon the final vote in the pending case each Senator may, in giving his vote, state his reasons therefor, occupying not more than one minute, which reason shall be entered in the Journal in connection with his vote; and each Senator may, within two days after the final vote, file his opinion, in writing, to be published in the printed proceedings in the case.

Mr. MCCUMBER. I move to amend the proposed order by striking out the first of it, relating to the one-minute explanation of a vote, so that the latter portion may still stand.

The amendment was agreed to, yeas 40, nays 31, and the order as amended was unanimously adopted.

512. The Archbald impeachment, continued.

Forms of voting on the articles and declaring the result in the Archbald impeachment.

The Presiding Officer announced the result of the vote on each article of the Archbald impeachment and the conviction or acquittal of respondent on each.

The respondent, who had attended throughout the Archbald trial, was represented by counsel, but was not present at the time of rendering judgment.

Having found Judge Archbald guilty, the Senate proceeded to pronounce judgment of removal and disqualification.

The Presiding Officer held that the question on removal and disqualification was divisible.

Form of judgment pronounced by the Presiding Officer in the Archbald case.

The Archbald trial being concluded, the Senate, on motion, adjourned without day.

No report, on the conclusion of the Archbald trial, was made to the House by the managers, but the Senate, by message, announced the judgment.

On January 13[1] the President pro tempore announced that the time had arrived for the consideration of the impeachment. Mr. Worthington, Mr. Robert W. Archbald, jr., and Mr. Martin, of counsel for the respondent, and the managers on the part of the House of Representatives appeared in the seats provided for them.

The Sergeant at Arms made the usual proclamation and the Journal was read and approved.

On motion of Mr. Root, it was:

Ordered, That upon the final vote in the pending impeachment the Secretary shall read the articles of impeachment successively, and when the reading of each article is concluded the Presiding Officer shall state the question thereon as follows:

"Senators, How say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article?"

Thereupon the roll of the Senate shall be called, and each Senator as his name is called shall arise in his place and answer "guilty" or "not guilty."

Several Senators were by unanimous consent excused from voting on plea of having been unavoidably detained from the Senate during a portion of the trial or having come into the Senate since the beginning of the trial. Other Senators were excused from voting on those articles specifying offenses occurring prior to appointment of the respondent as circuit judge, expressing themselves as entertaining doubts as to his impeachability for offenses committed in an office other than that he held at time of impeachment. Mr. Benjamin R. Tillman, of South Carolina, was excused from voting on all save the first count. The Speaker pro tempore, as presiding officer, was also excused from voting except in the case of an article where his vote would affect the result.

By direction of the President pro tempore, the first article of impeachment was read.

The PRESIDENT PRO TEMPORE.

The Chair now submits article 1 to the judgment of the Senate.

Senators, how say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article? The Secretary will call the roll of the Senate for the separate response of each Senator.

[1] Third session Sixty-second Congress, Senate Journal, p. 326; Record, p. 1438.

The roll was called and the President pro tempore announced:

It appears from the responses given by Senators that 68 Senators have voted guilty and 5 Senators have voted not guilty. More than two-thirds of the Senators having voted guilty, the Senate adjudges the respondent, Robert W. Archbald, guilty as charged in the first article of impeachment.

The Secretary proceeded to read the second article, when Mr. Hoke Smith, of Georgia, moved that the Senate close the doors and go into secret session.

Mr. CULBERSON. Mr. President, a point of order. The Senate has already decided to vote at this hour on the articles of impeachment.

The President pro tempore said:

That is true; and in the absence of any order to the contrary, that order would undoubtedly be carried out. It is, however, for the Senate to determine whether it will at any time suspend that order. It is not a matter of unanimous consent, but it is an order which can be changed or not changed, as the Senate may see proper to do.

Pending the vote, Mr. Worthington inquired:

Mr. President, before the question is put, I ask, if the motion be carried, whether it will result in excluding counsel for the respondent from the Senate Chamber?

The PRESIDENT PRO TEMPORE. Yes; it would, while the Senate was in secret deliberation, exclude everybody except Senators and those who are privileged under such circumstances.

Mr. WORTHINGTON. I trust that nothing will be done which will exclude counsel for the respondent while the vote is being taken.

The PRESIDENT PRO TEMPORE. There will be no vote taken in secret session; there can not be. The question is on the motion of the Senator from Georgia [Mr. Smith], to now close the doors.

Thereupon Mr. Smith withdrew his motion.

The remaining articles of impeachment were read by the Secretary, and at the conclusion of the reading of each article the roll was called. After each roll call the vote was recapitulated and the President pro tempore announced the result.

The results were as follows:

	Guilty.	Not guilty.
Article I	68	5
Article 2	46	25
Article 3	60	11
Article 4	52	20
Article 5	66	6
Article 6	24	45
Article 7	29	36
Article 8	22	42
Article 9	23	39
Article 10	1	65
Article 11	11	51
Article 12	19	46
Article 13	42	20

At the conclusion of the voting Mr. James A. O'Gorman, of New York, presented the following:

Ordered, That the respondent, Robert W. Archbald, circuit judge of the United States from the third judicial circuit and designated to serve in the Commerce Court, be removed from office and be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States.

A division being demanded, the first portion of the order was agreed to.

The question being taken on the second portion of the order, it was decided in the affirmative—yeas 39, nays 35. So the order was adopted.

The President pro tempore thereupon pronounced the judgment of the Senate as follows:

The Senate therefore do order and decree, and it is hereby adjudged, that the respondent Robert W. Archbald, circuit judge of the United States from the third judicial circuit, and designated to serve in the Commerce Court, be, and he is hereby, removed from office; and that he be and is hereby forever disqualified to hold and enjoy any office of honor, trust, or profit under the United States.

On motion of Mr. Gallinger, it was:

Resolved, That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate and transmit a certified copy of the same to each.

Whereupon, on motion of Mr. Gallinger, the Senate, sitting for the trial of the article of impeachment against Robert W. Archbald, adjourned without day.

On January 14, in the House, a message was received from the Senate, by one of its clerks, announcing that the Senate had passed the following order:

Ordered, That the respondent, Robert W. Archbald, circuit judge of the United States from the third judicial circuit, and designated to serve in the Commerce Court, be removed from office and be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States.

Resolved, That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate and transmit a certified copy of the same to each.

No report was made by the managers to the House.

Chapter CCI.

THE IMPEACHMENT AND TRIAL OF HAROLD LOUDERBACK.

513. The impeachment and trial of Harold Louderback, Judge of the Northern District of California.

Instance wherein the local bar association initiated proceedings by recommending impeachment.

The impeachment proceedings were set in motion through a resolution introduced by delivery to the Clerk and referred to the Committee on the Judiciary.

Form of resolution authorizing investigation with a view to impeachment.

On May 26, 1932,[1] Mr. Fiorello H. LaGuardia, of New York, introduced, by delivery at the Clerk's desk, the following resolution (H. Res. 329):

Resolved, That a special committee of five Members of the House of Representatives who are members of the Committee on the Judiciary of the House, the same to be designated by the chairman of said committee, be, and is hereby, authorized and directed to inquire into the official conduct of Harold Louderback, a district judge of the United States District Court for the Northern District of California, and to report to the Committee on the Judiciary of the House whether in their opinion the said Harold Louderback has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D. C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the session of the House and until adjournment of the first session of the Seventy-second Congress and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House; and be it further

[1] First session Seventy-second Congress, Record, p. 11358.

Resolved, That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary; and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however,* That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

The resolution was referred to the Committee on the Judiciary, which reported it back on May 31 [1] with the conclusion that—

the committee feels that under the circumstances the matter of Judge Louderback's conduct should be investigated.

On June 9,[2] on motion of Mr. Hatton W. Sumners, of Texas, from the Committee on the Judiciary, by unanimous consent, the House proceeded to the consideration of the resolution and after brief debate agreed to it without division.

Mr. Sumners included as a part of his remarks a letter from the Bar Association of San Francisco reciting certain occurrences leading up to the proposal of impeachment as follows:

SAN FRANCISCO, CALIF., *May 24,1932.*

JUDICIARY COMMITTEE,

House of Representatives, Washington, D. C.

SIRS: Under date of May 2, 1932, the Bar Association of San Francisco addressed a communication to His Excellency Herbert Hoover, President of the United States, with reference to certain matters published in the press of San Francisco concerning Hon. Harold C. Louderback, judge of the United States district court at San Francisco, Calif., accompanying said communication with clippings from San Francisco newspapers.

Under date of May 9, 1932, we received an acknowledgment of said communication from Mr. Lawrence Richey, Secretary to the President, stating that the matter "is being referred for consideration of the Attorney General," and thereafter we received a letter dated May 12, 1932, from Mr. Charles P. Sisson, Assistant Attorney General, stating in effect that our letter addressed to the President had been referred to the Department of Justice for consideration, and further stating "that the Department of Justice has no jurisdiction whatsoever over the United States judges. Criticisms of Federal judges are ordinarily addressed to the Judiciary Committee of the House of Representatives."

Pursuant to the suggestion contained in the letter from the Assistant Attorney General, we are hereby addressing your honorable committee and forwarding copies of the above-mentioned correspondence, together with duplicate press clippings, for such action as your committee may deem proper.

We feel certain that you will readily realize that the interest of the Bar Association of San Francisco in this matter is solely a public one and that it is concerned only in preserving the integrity of the bench, public confidence in, and respect for, the courts and the due administration of justice. We believe that no department of the Government should occupy a higher position in the public mind, or performs a more important function, than that of the courts, and that it is of the utmost importance they shall be maintained on a plane of the strictest honesty and efficiency and shall be above suspicion. Charges against a court or judge, especially when publicly made, require thorough investigation, not only in the interest of the public and respect for our judicial system but also in the interest of the incumbent.

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[1] House report No. 1461.

[2] Record, p. 12470.

If your committee should undertake an investigation of the matters in question, our association will cheerfully render such assistance as is within its power, in the hope that whatever the outcome may be the result will contribute to the maintenance of public confidence in our courts. Respectfully submitted.

BAR ASSOCIATION OF SAN FRANCISCO,
BY RANDOLPH V. WHITING, *President.*

514. The special committee authorized to conduct the investigation held hearings at which Judge Louderback appeared in person and by counsel.

A resolution proposing abatement of impeachment proceedings was held to be of high privilege.

The member reporting a bill from a committee is entitled to recognition when the bill is taken up for consideration in the House.

The House, disregarding the majority report of the committee, adopted the minority recommendation and passed articles of impeachment.

The House by resolution elected five managers, chosen from the Committee on the Judiciary and from both parties, to carry the impeachment of Judge Louderback to the Senate.

Pursuant to the terms of the resolution, a special committee was appointed by the Chairman of the Committee on the Judiciary, from the membership of the committee, consisting of Mr. Sumners, Mr. Tom D. McKeown, of Oklahoma, Mr. Gordon Browning, of Tennessee, Mr. Leonidas C. Dyer, of Missouri, and Mr. LaGuardia.

The special committee held hearings in San Francisco the week of September 6, 1932, at which Judge Louderback was represented by counsel, and in Washington, January 16 and 17, at which he appeared in person.

The special committee then submitted a divided report to the Committee on the Judiciary.

On February 17, 1933,[1] Mr. McKeown, by direction of the Committee on the Judiciary, presented a report to the effect that the special committee authorized to conduct the investigation had transmitted its conclusions to the Committee on the Judiciary, and that after consideration of the findings—

The committee censures the judge for conduct prejudicial to the dignity of the judiciary in appointing incompetent receivers, for the method of selecting receivers, for allowing fees that seem excessive, and for a high degree of indifference to the interest of litigants in receiverships.

The committee, however, did not consider the circumstances sufficiently flagrant to warrant impeachment and recommended the adoption of this resolution:

Resolved, That the evidence submitted on the charges against Honorable Harold Louderback, district judge for the northern district of California, does not warrant the interposition of the constitutional powers of impeachment of the House.

The minority dissented from the majority recommendation and, after summarizing the several charges of misconduct involved, proposed articles of impeachment.

On February 24, 1933,[2] Mr. Sumners, who had submitted minority views, rising in the House, asked whether he as Chairman of the Committee on the Judiciary or the Member reporting the resolution by direction of the committee, was entitled to recognition to debate it.

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[1] H. Rept. No. 2065.

[2] Second session Seventy-second Congress, Record, p. 4913.

The Speaker [1] replied:

The usual custom is that the Member who has been directed by the committee to report the bill and who reports the legislation coming before the House is the one the Chair recognizes.

Whereupon, the Speaker recognized Mr. McKeown, who called up the resolution reported by the committee.

Mr. Bertrand H. Snell, of New York, inquired whether a resolution of this character could be considered as privileged.

The Speaker replied that, inasmuch as it related to the abatement of impeachment proceedings, it was of the highest privilege.

In the course of the debate on the resolution, Mr. LaGuardia offered the following as a substitute:

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239 sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office as United States district judge for the northern district of California on April 17, 1928.

(The substitute then set forth the articles of impeachment proposed by the minority.)

After extended debate, the substitute was agreed to on a yea and nay vote, and on February 27,[2] on motion of Mr. Sumners, it was—further:

Resolved, That Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Harold Louderback, United States district judge for the northern district of California; and said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Harold Louderback of misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by the House; and that the said managers do demand the Senate take order for The appearance of said Harold Louderback to answer said impeachment, and demand his impeachment, conviction, and removal from office.

Of the five managers thus selected to conduct the impeachment proceedings on behalf of the House, three were of the majority party, two were of the minority, and all were members of the Committee on the Judiciary.

515. The ceremonies of presenting to the Senate the articles of impeachment.

The impeachment proceedings having been presented in the Senate during the closing days of the Seventy-second Congress, were made the special order for the first day of the first session of the succeeding Congress.

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[1] John N. Garner, of Texas, Speaker.

[2] Second session Seventy-second Congress, Record, p. 5177.

A decision holding that a motion relating to a question of the Senate sitting as a court of impeachment is not debatable.

The Senate having been informed, on February 28,[1] by message, of the action[2] of the House of Representatives, transmitted to the House on the same day[3] a message announcing its readiness to receive the managers appointed by the House for the purpose of exhibiting the articles of impeachment.

On March 3,[4] the managers on the part of the House appeared before the Senate and were received with the formalities customarily observed on such occasions.

Mr. Manager Sumners read the resolution[5] agreed to by the House appointing its managers, and yielded to Mr. Manager Browning, who read the articles of impeachment, as follows:

ARTICLES OF IMPEACHMENT AGAINST HAROLD LOUDERBACK

CONGRESS OF THE UNITED STATES OF AMERICA,
IN THE HOUSE OF REPRESENTATIVE,
February 24, 1933.

Resolution

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239, sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States district judge for the northern district of California, on April 17, 1928.

ARTICLE I

That the said Harold Louderback, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned and while acting as a district judge for the northern district of California did on divers and various occasions so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in said district in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior, falling under the constitutional provision as ground for impeachment and removal from office.

In that the said Harold Louderback on or about the 13th day of March, 1930, at his chambers and in his capacity as judge aforesaid, did willfully, tyrannically, and oppressively discharge one Addison G. Strong, whom he had on the 11th day of March, 1930, appointed as equity receiver in the matter of Olmsted against Russell-Colvin Co. after having attempted to force and coerce the said Strong to appoint one Douglas Short as attorney for the receiver in said case.

In that the said Harold Louderback improperly did attempt to cause the said Addison G. Strong to appoint the said Douglas Short as attorney for the receiver by promises of allowance of large fees and by threats of reduced fees did he refuse to appoint said Douglas Short.

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[1] H. Res. 403, Record, p. 5178.

[2] Record, p. 5193.

[3] Record, p. 5195.

[4] Record, p. 5473.

[5] H. Res. 402, Record, p. 5177.

In that the said Harold Louderback improperly did use his office and power of district judge in his own personal interest by causing the appointment of the said Douglas Short as attorney for the receiver, at the instance, suggestion, or demand of one Sam Leake, to whom the said Harold Louderback was under personal obligation, the said Sam Leake having entered into a certain arrangement and conspiracy with the said Harold Louderback to provide him, the said Harold Louderback, with a room at the Fairmont Hotel in the city of San Francisco, Calif., and made arrangements for registering said room in his, Sam Leake's name and paying all bills therefor in cash under an arrangement with the said Harold Louderback, to be reimbursed in full or in part in order that the said Harold Louderback might continue to actually reside in the city and county of San Francisco after having improperly and unlawfully established a fictitious residence in Contra Costa County for the sole purpose of improperly removing for trial to said Contra Costa, County a cause of action which the said Harold Louderback expected to be filed against him; and that the said Douglas Short did receive large and exorbitant fees for his services as attorney for the receiver in said action, and the said Sam Leake did receive certain fees, gratuities, and loans directly or indirectly from the said Douglas Short amounting approximately to $1,200.

In that the said Harold Louderback entered into a conspiracy with the said Sam Leake to violate the provisions of the California Political Code in establishing a residence in the county of Contra Costa when the said Harold Louderback in fact did not reside in said county and could not have established a residence without the concealment of his actual residence in the county of San Francisco, covered and concealed by means of the said conspiracy with the said Sam Leake, all in violation of the law of the State of California.

In that the said Harold Louderback, in order to give color to his fictitious residence in the county of Contra Costa, all for the purpose of preparing and falsely creating proof necessary to establish himself as a resident of Contra Costa County in anticipation of an action he expected to be brought against him, for the sole purpose of meeting the requirements of the Code of Civil Procedure of the State of California providing that all causes of action must be tried in the county in which the defendant resides at the commencement of the action, did in accordance with the conspiracy entered into with the said Sam Leake unlawfully register as a voter in said Contra Costa County, when in law and in fact he did not reside in said county and could not so register, and that the said acts of Harold Louderback constitute a felony defined by section 42 of the Penal Code of California.

Wherefore the said Harold Louderback was and is guilty of a course of conduct improper, oppressive, and unlawful and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE II

That Harold Louderback, judge as aforesaid, was guilty of a course of improper and unlawful conduct as a judge, filled with partiality and favoritism in improperly granting excessive, exorbitant, and unreasonable allowances as disbursements to one Marshall Woodward and to one Samuel Shortridge, jr., as receiver and attorney, respectively, in the matter of the Lumbermen's Reciprocal Association.

And in that the said Harold Louderback, judge as aforesaid, having improperly acquired jurisdiction of the case of the Lumbermen's Reciprocal Association contrary to the law of the United States and the rules of the court did, on or about the 29th day of July, 1930, appoint one Marshall Woodward and one Samuel Shortridge, jr., receiver and attorney, respectively, in said case, and after an appeal was taken from the order and other acts of the judge in said case to the United States Circuit Court of Appeals for the Ninth Circuit and the said order and acts of the said Harold Louderback having been reversed by said United States Circuit Court of Appeals and the mandate of said circuit court of appeals directed the court to cause the said receiver to turn over all of the assets of said association in his possession as receiver to the commissioner of insurance of the State of California, the said Harold Louderback unlawfully, improperly, and oppressively did sign and enter an order so directing the receiver to turn over said property to said State commissioner of insurance but improperly and unlawfully made such order conditional that the said State commissioner of insurance and any other party in interest would not take an

appeal from the allowance of fees and disbursements granted by the said Harold Louderback to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, thereby improperly using his said office as a district judge to favor and enrich his personal and political friends and associates to the detriment and loss of litigants in his, said judge's court, and forcing said State commissioner of insurance and parties in interest in said action unnecessary delay, labor, and expense in protecting the rights of all parties against such arbitrary, improper, and unlawful order of said judge; and that the said Harold Louderback did improperly and unlawfully seek to coerce said State commissioner of insurance and parties in interest in said action to accept and acquiesce in the excessive fees and the exorbitant and unreasonable disbursements granted by him to said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, and did improperly and unlawfully force and coerce the said parties to enter into a stipulation modifying said improper and unlawful order and did thereby make it necessary for the State commissioner of insurance to take another appeal from the said arbitrary, improper, and unlawful action of the said Harold Louderback.

In that the said Harold Louderback did not give his fair, impartial, and judicial consideration to the objections of the said State commissioner of insurance against the allowance of excessive fees and unreasonable disbursements to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, in the case of the Lumbermen's Reciprocal Association, in order to favor and enrich his friends at the expense of the litigants and parties in interest in said matter, and did thereby cause said State commissioner of insurance and the parties in interest additional delay, expense, and labor in taking an appeal to the United States Circuit Court of Appeals in order to protect their rights and property in the matter against the partial, oppressive, and unjudicial conduct of said Harold Louderback.

Wherefore, said Harold Louderback was and is guilty of a course of conduct oppressive and unjudicial and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE III

The said Harold Louderback, judge aforesaid, was guilty of misbehavior in office resulting in expense, disadvantage, annoyance, and hindrance to litigants in his court in the case of the Fageol Motor Co., for which he appointed one Guy H. Gilbert receiver, knowing that the said Gilbert was incompetent, unqualified, and inexperienced to act as such receiver in said case.

In that the said Harold Louderback, judge as aforesaid, oppressively and in disregard of the rights and interests of litigants in his court did appoint one Guy H. Gilbert as receiver for the Fageol Motor Co., knowing the said Guy H. Gilbert to be incompetent, unfit, and inexperienced for such duties, and did refuse to grant a hearing to the plaintiff, defendant, creditors, and parties in interest in the matter of the Fageol Motor Co. on the appointment of said receiver, and the said Harold Louderback did cause sad litigants and parties in interest in said matter to be misinformed of his action while said Guy H. Gilbert took steps necessary to qualify as receiver, thereby depriving said litigants and parties in interest of presenting the facts, circumstances, and conditions of the said equity receivership, the nature of the business and the type of person necessary to operate said business in order to protect creditors, litigants, and all parties in interest, and thereby depriving said parties in interest of the opportunity of protesting against the appointment of an incompetent receiver.

Wherefore the said Harold Louderback was and is guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was and is guilty of a misdemeanor in office.

ARTICLE IV

That the said Harold Louderback, judge aforesaid, was guilty of misbehavior in office, filled with partiality and favoritism, in improperly, willfully, and unlawfully granting on insufficient and improper papers an application for the appointment of a receiver in the Prudential Holding Co. case for the sole purpose of benefiting and enriching his personal friends and associates.

In that the said Harold Louderback did on or about the 15th day of August, 1931, on insufficient and improper application, appoint one Guy H. Gilbert receiver for the Prudential

Holding Co. case when as a matter of fact and law and under conditions then existing no receiver should have been appointed, but the said Harold Louderback did accept a petition verified on information and belief by an attorney in the case and without notice to the said Prudential Holding Co. did so appoint Guy H. Gilbert the receiver and the firm of Dinkelspiel and Dinkelspiel attorneys for the receiver; that the said Harold Louderback in an attempt to benefit and enrich the said Guy H. Gilbert and his attorneys, Dinkelspiel and Dinkelspiel, failed to give his fair, impartial, and judicial consideration to the application of the said Prudential Holding Co. for a dismissal of the petition and a discharge of the receiver, although the said Prudential Holding Co. was in law entitled to such dismissal of the petition and discharge of the receiver; that during the pendency of the application for the dismissal of the petition and for the discharge of the receiver a petition in bankruptcy was filed against the said Prudential Holding Co. based entirely and solely on an allegation that a receiver in equity had been appointed for the said Prudential Holding Co., and the said Harold Louderback then and there willfully, improperly, and unlawfully, sitting in a part of the court to which he had not been assigned at the time, took jurisdiction of the case in bankruptcy and though knowing the facts in the case and of the application then pending before him for the dismissal of the petition and the discharge of the equity receiver, granted the petition in bankruptcy and did on the 2d day of October, 1930, appoint the same Guy H. Gilbert receiver in bankruptcy and the said Dinkelspiel and Dinkelspiel attorneys for the receiver, knowing all of the time that the said Prudential Holding Co. was entitled as a matter of law to have the said petition in equity dismissed; in that through the oppressive, deliberate, and willful action of the said Harold Louderback acting in his capacity as a judge and misusing the powers of his judicial office for the sole purpose of benefiting and enriching said Guy H. Gilbert and Dinkelspiel and Dinkelspiel, did cause the said Prudential Holding Co. to be put to unnecessary delay, expense, and labor and did deprive them of a fair, impartial, and judicial consideration of their rights and the protection of their property, to which they were entitled.

Wherefore the said Harold Louderback was, and is, guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was, and is, guilty of a misdemeanor in office.

ARTICLE V

That Harold Louderback, on the 17th day of April, 1928, was duly appointed United States district judge for the northern district of California, and has held such office to the present day.

That the said Harold Louderback as judge aforesaid, during his said term of office, at divers times and places when acting as such judge, did so conduct himself in his said court and in his capacity as judge in making decisions and orders in actions pending in his said court and before him as said judge, and in the method of appointing receivers and attorneys for receivers, in appointing incompetent receivers, and in displaying a high degree of indifference to the litigants in equity receiverships, as to excite fear and distrust and to inspire a widespread belief in and beyond said northern district of California that causes were not decided in said court according to their merits, but were decided with partiality and with prejudice and favoritism to certain individuals, particularly to receivers and attorneys for receivers by him so appointed, all of which is prejudicial to the dignity of the judiciary.

All to the scandal and disrepute of said court and the administration of justice therein.

Wherefore the said Harold Louderback was, and is, guilty of misbehavior as such judge and of a misdemeanor in office.

[SEAL.]

JNO. N. GARNER,
Speaker of the House of Representatives.

Attest:

SOUTH TRIMBLE, *Clerk.*

Mr. Manager Sumners then entered a reservation of the right to exhibit at any time thereafter any further articles of accusation or impeachment, and made formal announcement that the managers on the part of the House of Representatives—

do now demand that the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

The Vice President responded:

The Chair will state to the managers on the part of the House that the Senate will take proper order on the subject of impeachment, of which due notice shall be given to the House of Representatives.

On motion of Mr. George W. Norris, of Nebraska, the articles of impeachment were ordered printed for the use of the Senate.

Mr. Norris further submitted:

Mr. President, under the Rules of the Senate governing impeachment trials, it would be the duty of the Senate tomorrow at 1 o'clock to organize itself into a court and take the necessary oath, and then proceed with the trial.

It is evident that we shall not be able to comply with the rules now, because this session of Congress will adjourn at 12 o'clock to-morrow, and therefore I ask unanimous consent that the further consideration of the impeachment charges presented by the managers on the part of the House of Representatives be deferred until 2 o'clock on the first day of the first session of the Seventy-third Congress.

The Vice President submitted the request to the Senate, when Mr. Huey P. Long, of Louisiana, objected.

Thereupon, Mr. Norris moved that the impeachment proceedings be made the special order for 2 o'clock on the first day of the first session of the Seventy-third Congress.

Mr. Henry F. Ashurst, of Arizona, addressed the Chair and asked for recognition to debate the motion.

The Vice President held that inasmuch as the motion related to a question of the Senate sitting as a Court of Impeachment, it was not debatable, and recognized all who addressed themselves to the question by unanimous consent only.

Discussion by consent having been concluded, the motion was agreed to; the managers on the part of the House withdrew; and the Senate proceeded to its legislative business.

516. The organization of the Senate for the impeachment trial of Judge Louderback.

A Senator was designated by resolution to administer the oath to the Presiding Officer, who in turn administered the oath simultaneously to all Senators standing in their places.

Certain Senators on their statements were excused from participation in the impeachment proceedings.

Various Senators were excused from voting on a part or all of the articles of impeachment.

On March 9, 1933,[1] the Senate, sitting as a Court of Impeachment, met at 2 o'clock p.m. under its previous order.

On motion of Mr. Norris, Mr. William F. Borah, of Idaho, was designated by the Senate to administer the oath to the presiding officer of the Court of Impeachment.

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[1] First session, Seventy-third Congress, Record, p. 47.

Mr. Borah administered the oath to the Vice President as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Harold Louderback, a district judge for the northern district of California, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Mr. Borah then announced:

Mr. President, I want to make a personal statement before the oath is taken. I feel that I ought not to sit in this matter by reason of some things which transpired at the time of the appointment of Judge Louderback. The question which I wish to submit now is, Should I make that excuse definite at this time or will it be proper after the oath is taken?

Mr. Ashurst suggested:

In my judgment, such statement should be made after Senators shall have taken the oath as members of the court; only the court should excuse Senators from duties to be performed in the court. Care should be taken as to establishing precedents. In strict practice, under the English procedure and under the American procedure, there is no such thing as an impeachment juror or Senator escaping from his responsibility to compose the court. Indeed, in the Andrew Johnson impeachment case, Senator Ben. F. Wade, then the President pro tempore, who would have become President had the impeachment succeeded, was asked to stand aside, but it was determined that there was no way by which he, Senator Wade, could be disqualified and thus made to stand aside. But I am sure, if a Senator should declare that he is disqualified, he could not and should not be required to hear evidence or to render a verdict.

Mr. Hiram W. Johnson, of California, dissented and said:

Mr. President, in order that the matter may be brought to a head, I ask unanimous consent of those who sit here as a court of impeachment or are about to take the oath as jurors or Senators in the court of impeachment, that I be permitted to stand aside in this trial. There are certain incidents which have occurred which, in my opinion, render it improper that I should sit as a judge in this case. I do not wish to detail them, of course, because I feel that in the detailing of them I might do or say something which ought not to be done or said. But while certain of myself, Mr. President, perhaps feeling that I might lean backward one way or the other in a case of this sort, I do not think that I ought to sit in the case, and I ask unanimous consent of the Senate that I may stand aside in the trial of Harold Louderback about to begin.

The question being put, there was no objection and the Vice President announced that the Senator from California was excused.

A similar request by Mr. Borah was agreed to.

Subsequently,[1] Mr. John H. Overton, of Louisiana, requested:

Mr. President, I wish to make a statement. I was a Member of the House of Representatives at the time the articles of impeachment were preferred against Judge Louderback. I voted against the impeachment. I thought that matter should be tendered to the Chair and Members of the Senate before the court convened; but other Senators occupy the same position that I occupy and I wished to consult with them before making the statement. After consulting with them and consulting with some senior Senators who are experienced in such matters, I have come to the conclusion that under all the circumstances it would be proper that I ask to be excused from sitting as a member of the court which I accordingly do.

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[1] First session, Seventy-third Congress, Record, p. 49.

The request was granted.

Requests by Mr. Augustine Lonergan,[1] of Connecticut, and Mr. William H. Dieterich,[2] of Illinois, to be excused for the same reason were likewise agreed to.

Thereupon the Vice President said:

Will members of the court permit the Chair to make a statement? The Chair presided in the House at the time impeachment proceedings were considered by that body. The Chair did not have occasion to vote or in any way express himself concerning the merits of the case. The Chair thought that members of the court ought to know the situation so that if they have any doubt as to the qualifications of the Chair to act as the presiding officer of the court, they may act accordingly.

There was no response.

On May 23,[3] at the conclusion of the testimony in the trial, Mr. Royal S. Copeland, of New York, submitted:

Mr. President, on account of illness, I have been away from the Chamber for a number of days. I have heard none of the testimony, and feel myself incompetent either to vote or to continue as a member of the court. Therefore I ask unanimous consent that I may be excused from further attendance and from voting in the Impeachment Court.

The request being submitted to the Senate by the Presiding Officer, there was no objection, and Mr. Copeland was excused.

On the succeeding day[4] and following the deliberative session of the Senate immediately preceding the vote on the articles of impeachment, Mr. Carter Glass, of Virginia, requested:

Mr. President, on the advice of the distinguished chairman of the Judiciary Committee, the Senator from Arizona, Mr. Ashurst, I am taking the first and last opportunity to say that I shall ask the Senate to excuse me from voting on these various articles of impeachment, for the reason that other public duties have made it impossible for me to be present and hear more than fragments of the testimony adduced in this proceeding and none, of the arguments presented. Therefore I feel that under my oath I am not so advised as to be able to render a verdict as a juror, and I shall ask the Senate to excuse me from voting.

There being no objection, the Senator was excused from voting on the impeachment.

At this stage of the proceedings, by unanimous consent, Mr. Thomas P. Gore, of Oklahoma, was also excused from voting, on account of unavoidable absence, and Mr. Henrik Shipstead, of Minnesota, and Mr. Edward P. Costigan, of Colorado, were excused from voting on the first four articles.

On motion of Mr. Joseph T. Robinson, of Arkansas, by unanimous consent, the oath was administered simultaneously to all the Senators present as follows:

You do each solemnly swear that in all things appertaining to the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

On motion of Mr. Norris it was—

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Harold Louderback, United States

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[1] Record, p. 49.

[2] Record, p. 1469.

[3] Record, p. 3994.

[4] Record, p. 4082.

district judge for the northern district of California, and is ready to receive the managers on the part of the House at its bar.

On March 13, 1933,[1] at the hour previously designated for the court to assemble, the Senate sitting as a Court of Impeachment convened; by unanimous consent, the journal of the court was considered as read and approved; the managers of the impeachment on the part of the House of Representatives appeared, were announced, and conducted to the seats assigned them; and proclamation of the sitting of the court was made by the Sergeant at Arms.

Mr. Ashurst announced that if it met with the approval of the managers on the part of the House he proposed to submit the following:

Ordered, That a summons be issued as required by the rules of procedure and practice in the Senate, when sitting for the trial of the impeachment against Harold Louderback, United States district judge for the northern district of California, returnable on Tuesday, the 11th day of April, 1933, at 12.30 o'clock in the afternoon.

Mr. Manager Sumners, speaking for the managers, approved the form of the order and it was agreed to.

517. Managers of an impeachment being no longer Members of the House by reason of the expiration of their terms, successors were elected.

Discussion of the power of the House to appoint managers to continue in office in that capacity after the expiration of the term for which they were elected to the House.

A resolution providing for the selection of managers of an impeachment was admitted as a matter of privilege.

Instance wherein the number of managers of an impeachment was increased after the institution of proceedings in the Senate.

On March 22,[2] Mr. Manager Sumners rising in the House, offered this resolution:

Whereas in the Seventy-second Congress, on the 27th day of February, 1933, Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles 1. Sparks, Members of the House of Representatives, were appointed managers on the part of the House of Representatives to conduct the impeachment against Harold Louderback, a United States district judge for the northern district of California; and

Whereas the said LaGuardia and Sparks are no longer Members of the House of Representatives:

Resolved, That Randolph Perkins and U. S. Guyer, Members of the House of Representatives, be, and they are hereby, appointed to serve with the said Hatton W. Sumners,- Gordon Browning, and Malcolm C. Tarver as the managers on the part of the House of Representatives to conduct the impeachment pending in the United States Senate against Harold Louderback, a United States district judge for the northern district of California.

Mr. Edward W. Goss, of Connecticut, submitted a parliamentary inquiry as to the privilege of the resolution.

The Speaker held it to be privileged.

Mr. Robert Luce, of Massachusetts, raised a question as to the power of the House to appoint managers beyond the term of their office as Representatives.

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[1] Record, p. 260.

[2] Record, p. 768.

In reply, Mr. Sumners said:

My judgment, after careful examination, is that the House of Representatives may appoint managers who can continue after the expiration of the term for which that House has been elected.

I want to be very candid with the House. I am anxious to go as far as we may safely go toward establishing a precedent in that direction. We find upon examination of the Constitution that there lie between the provisions of the Constitution spaces that have to be filled in either by judicial construction or by precedent. Only precedent can occupy the space, for instance, which lies between the provision granting to the House—not as a part of the Congress, however—the power to originate and prosecute impeachments and that great constitutional guaranty of a speedy trial. Judicial construction may not enter there. We barely escaped a very difficult situation in this case. As the Members of the House here present who were Members of the preceding House will remember, this impeachment was sent to the Senate near the expiration of the Seventy-second Congress. If the Congress had not been called into extraordinary session, in the absence of any recognized right on the part of a House to empower managers to proceed after the expiration of that House, this judge would have rested under impeachment for a year, without possibility of trial, notwithstanding the general principles which run through our whole system of giving the right of speedy trial. Not only is the duty to make effective to the individual a great constitutional right but there is involved a great public interest. Precedents are not unakin to legislative enactments. When established they come to have the force of law. It is as much a duty to set helpful and proper precedents as it is to make wise and helpful laws. I am anxious to go as far in this instance as we may safely go in establishing a proper and helpful precedent.

Mr. Bertrand H. Snell, of New York, questioned the right of the House to extend the powers or privileges of such managers, or other appointees, beyond the life of the House itself, and after debate, Mr. Sumners withdrew the resolution and reintroduced it in this form:

Whereas in the Seventy-second Congress on the 27th day of February, 1933, Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of the House of Representatives, were appointed managers on the part of the House of Representatives to conduct the impeachment against Harold Louderback, a United States district judge for the northern district of California; and

Whereas the said LaGuardia and Sparks are no longer Members of the House of Representatives:

Resolved, That Randolph Perkins and U. S. Guyer, Members of the House of Representatives, be, and they are hereby, appointed in lieu of the said LaGuardia and Sparks to serve with the said Hatton W. Sumners, Gordon Browning, and Malcolm C. Tarver as the managers on the part of the House of Representatives to conduct the impeachment pending in the United States Senate against Harold Louderback, a United States district judge for the northern district of California.

The resolution as revised was agreed to; the Clerk was directed to notify the Senate; and on the motion of Mr. Sumners, it was further—

Resolved, That the managers on the part of the House in the matter of the impeachment of Harold Louderback, United States district judge for the northern district of California, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers; and the managers have power to send for persons and papers, and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary: *Provided,* That the total expenditures authorized by this resolution shall not exceed $3,230.25, being the amount of the unexpended balance of $5,000 authorized to be expended by the special committee designated under authority of House Resolution 239, Seventy-second Congress, first session, approved June 9, 1932, to inquire into the official conduct of said Harold Louderback.

On March 27,[1] the Chair laid before the House the following communication:

HOUSE OF REPRESENTATIVES,
Washington, D. C., March 27, 1933.

Hon. HENRY T. RAINEY,
Speaker of the House of Representatives, Washington, D.C.

DEAR MR. RAINEY: I hereby submit my resignation as one of the managers on the part of the House in the pending impeachment proceedings against Harold Louderback, a United States judge for the northern district of California.

Yours truly,

M. C. TARVER.

The resignation was accepted, and on April 3,[2] a resolution offered by Mr. Sumners, as privileged, was agreed to and messaged to the Senate as follows:

Whereas Malcolm C. Tarver, on the 27th day of March, 1933, submitted to the House of Representatives his resignation as a manager on the part of the House in the pending impeachment against Harold Louderback, a district judge of the United States for the northern district of California, which resignation on said date was accepted by the House of Representatives,

Resolved, That J. Earl Major and Lawrence Lewis, Members of the House of Representatives, be, and they are hereby, appointed managers on the part of the House of Representatives, with the managers on the part of the House heretofore appointed and acting, to conduct the impeachment pending in the United States Senate against Harold Louderback, a district judge of the United States for the northern district of California.

518. The respondent having waived personal service, the oath was not administered to the Sergeant at Arms on the return of the writ.

Form of proclamation by the Sergeant at Arms calling. Judge Louderback to appear and answer the articles of impeachment.

Judge Louderback appeared in person, attended by counsel, to answer the articles.

The answer of Judge Louderback to the articles of impeachment.

A motion entered by respondent to make more definite and certain an article of the articles of impeachment was agreed to by the managers on the part of the House without action by the Senate.

Allowance of time in which to file pleadings.

On April 11,[3] the managers on the part of the House were received in the Senate with the usual formalities and the respondent, Harold Louderback, and his counsel, James M. Hanley, Esq., and Walter H. Linforth, Esq., appeared and were conducted to the seats assigned to them in the space in front of the Secretary's desk on the right of the Chair.

Mr. Ashurst offered the following resolution:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

Whereas on March 13, 1933, John N. Garner, Vice President and President of the Senate, acting under authority of the Senate, sitting as a Court of Impeachment, and in accordance with the Rules for Impeachment Trials, issued a writ of summons to Harold Louderback, United States district judge for the northern district of California, commanding him to appear before the Senate of the United States of America at their Chamber in the city of Washington on the 11th

[1] Record, p. 876.
[2] Record, p. 1155.
[3] Record, p. 1462.

day of April, 1933, at 12:30 o'clock afternoon, to answer to articles of impeachment exhibited against him by the House of Representatives of the United States of America, and addressed to Chesley W. Jurney, Sergeant at Arms of the Senate, a precept commanding him to serve true and attested copies of said writ of summons and precept upon the said Harold Louderback personally or by leaving same at his usual place of abode or at his usual place of business; and

Whereas since the recess of the Senate, sitting as a Court of Impeachment, the said Chesley W. Jurney, as Sergeant at Arms, acting upon a suggestion of the Committee on the Judiciary of the Senate, with a view to securing a waiver of personal service of said writ of summons as required by the precept, communicated by telegraph with the said Harold Louderback, who consented to such waiver, and who subsequently forwarded to said Chesley W. Jurney, as Sergeant at Arms, a waiver, in writing, of personal service of said writ of summons, signed by him and witnessed on the 28th day of March, 1933, agreeing voluntarily to appear in person before the Senate of the United States at the time and place specified in said writ of summons and acknowledging receipt of true and attested copies of said writ of summons and precept, transmitted to him by the said Chesley W. Jurney, Sergeant at Arms: Now, therefore, be it

Resolved, That the action of the said Chesley W. Jurney, Sergeant at Arms of the Senate, in securing waiver of personal service of said writ of summons upon the said Harold Louderback be, and the same is hereby, ratified and approved; that the delivery, by registered mail, of true and attested copies of the said writ of summons and precept to the said Harold Louderback, and his acceptance thereof, be deemed and taken to have been a satisfactory and sufficient compliance by the said Chesley W. Jurney, Sergeant at Arms, with the said precept, and that the said Chesley W. Jurney, as Sergeant at Arms, be, and he is hereby, authorized to make return of said writ of summons and precept accordingly.

The resolution having been agreed to, the Secretary, by direction of the Vice President, read the return of the Sergeant at Arms to the summons as follows:

SENATE OF THE UNITED STATES.
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons, addressed to Harold Louderback, and the foregoing precept, addressed to me, were duly served upon the said Harold Louderback by the transmittal, by registered mail, to the said Harold Louderback of true and attested copies of the same, and by his receipt thereof, as shown in the attached waiver by the said Harold Louderback of personal service of summons, said waiver being made a part of this return.

CHESLEY W. JURNEY,
Sergeant at Arms, United States Senate.

IN THE SENATE OF THE UNITED STATES, SITTING AS A COURT OF IMPEACHMENT IN THE CASE OF HAROLD LOUDERBACK, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA

Waiver of personal service of Harold Louderback, United States district judge for the northern district of California.

I, Harold Louderback, United States district judge for the northern district of California, do hereby waive personal service of summons issued on the 13th day of March, 1933, by Hon. John N. Garner, Vice President and President of the Senate, which commands me to appear before the Senate of the United States on April 11, 1933, at 12.30 p. m., to answer specific articles of impeachment exhibited to the Senate by the House of Representatives, and agree to voluntarily appear in person before the Senate of the United States at the aforesaid time.

I acknowledge receipt of a true and attested copy of the writ of summons issued in this case, together with a like copy of the precept.

Witness my signature this 28th day of March, 1933, at the city of San Francisco, State of California.

HAROLD LOUDERBACK,
Respondent.

Signature of witness:
JAMES M. HANLEY.

The Vice President announced that in view of the waiver of summons by the respondent, the administration of the oath to the Sergeant at Arms would be dispensed with, and directed the Sergeant at Arms to make proclamation.

The Sergeant at Arms made proclamation:

Harold Louderback! Harold Louderback! Harold Louderback, United States district judge for the northern district of California: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The Vice President resumed:

The Chair advises the counsel for the respondent that the Senate is now sitting for the trial of Harold Louderback, United States district judge for the northern district of California, upon the articles of impeachment exhibited by the House of Representatives, and will hear his answer thereto.

Mr. Linforth, of counsel for the respondent, announced that the respondent appeared in person and by counsel, and submitted a written appearance which he asked to have filed and which was read by the Secretary as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* HAROLD LOUDERBACK, APPEARANCE OF RESPONDENT.

The respondent, Harold Louderback, having been served with a summons requiring him to appear before the Senate of the United States of America at their Chamber in the city of Washington, on the 11th day of April, 1933, at 12.30 o'clock afternoon, to answer certain articles of impeachment presented against him by the House of Representatives of the United States, now appears in his proper person and also by his counsel, who are instructed by this respondent to inform the Senate that respondent is ready to file his answer to said articles of impeachment at this time.

Dated this 11th day of April, 1933.

HAROLD LOUDERBACK.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Respondent.

The Vice President directed that the appearance be placed on file, and said:

Counsel for the respondent may make a statement, or the respondent in person may do so.

Mr. Linforth then presented the answer of the respondent to the articles of impeachment which, by direction of the Vice President, was read by the Secretary as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* Harold Louderback, Upon Articles of Impeachment Presented by The House of Representatives of The United States of America.

Answer of respondent Harold Louderback to the articles of impeachment exhibited against him by the House of Representatives of the United States

ANSWER TO ARTICLE I

For answer to the first article the respondent says that this honorable court ought not to have or take further cognizance of the first of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said first article do not if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United

States, and that therefore the Senate, sitting as a Court of Impeachment, should not further entertain the charge contained in said first article.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a Court of Impeachment, as to said first article, said respondent saving to himself all advantages of exception to said first article, for answer thereto saith:

I

Admits that he is now and was at all times mentioned in said article a duly appointed, qualified, and acting judge of the United States District Court for the Northern District of California.

II

Further answering said article, the respondent admits, denies, and alleges as follows:

Admits that on the 11th day of March, 1930, by an order duly made and entered in that certain action then pending in the United States District Court for the Northern District of California, in which Gardner M. Olmstead was plaintiff and Russell Colvin Co. was defendant, he appointed one Addison G. Strong as equity receiver.

Admits that on the 13th day of March, 1930, by an order duly made and entered in said action he revoked and set aside the order appointing said Addison G. Strong as receiver in said action.

Alleges that the facts and circumstances surrounding and leading up to the making of the said order on the 13th day of March, 1930, setting aside the appointment of the said Addison G. Strong were as follows, and not otherwise:

(The remainder of Article II and Articles III, IV, and V set forth in detail the respondent's answer to the specific charges in the articles of impeachment.)

Article V of the answer includes the following:

I

That said Article V is so uncertain and indefinite as to time, place, and proceedings that respondent can not ascertain therefrom with reasonable, or any, certainty, in what proceeding or proceedings, or at what time or times, or at what place or places, his conduct was, as set forth in said Article V, and respondent can not safely proceed to trial as to said fifth article before this honorable Senate, sitting as a Court of Impeachment, at a distance of more than 3,000 miles from where respondent has presided as such judge, as aforesaid, without being apprised in advance in the particulars aforesaid, in order to procure the attendance of such witnesses as may be necessary to meet such charge or charges.

Wherefore respondent, upon the reading and filing of this answer will move the honorable Senate of the United States, sitting as a Court of Impeachment, to require the honorable House of Representatives of the United States, within a reasonable time, to be by it specified, to make said fifth article more definite and certain in the particulars aforesaid, and failing so to do, this honorable body dismiss said Article V.

And without waiving but expressly reserving his right to make said motion and to have the same passed upon by the honorable Senate of the United States, sitting as a Court of Impeachment, respondent, answering said Article V, admits and denies as follows, to wit:

The answer concluded:

V

Respondent further denies that he ever was or now is guilty of misbehavior as such judge and/or of a misdemeanor in office.

Except as hereinbefore specifically admitted, respondent denies each and every allegation in said Article V contained.

And this respondent in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully insists that he is not guilty of any of the charges contained in any of the said 5 articles of impeachment, and respectfully reserves leave to amend and add to this his said answer from time to time as may become necessary or proper and when said necessity and propriety shall appear.

Dated April 11, 1933.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Of Counsel for Respondent.

Mr. Linforth then submitted written notice of a motion to make the fifth article in the articles of impeachment more definite and certain. The notice was read by the Secretary, as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT,

THE UNITED STATES OF AMERICA V. HAROLD LOUDERBACK—MOTION TO MAKE ARTICLE V OF THE ARTICLES OF IMPEACHMENT MORE DEFINITE AND CERTAIN

The respondent, Harold Louderback, moves the honorable Senate sitting as a Court of Impeachment, for an order requiring the honorable House of Representatives of the United States, within a reasonable specified time, to make more definite and certain the charges contained in Article V of the articles of impeachment herein in the following particular or particulars, that is to say:

To specify the time and times, and the place or places, and the name or title of the proceeding or proceedings, and the circumstance or circumstances wherein in said fifth article it is claimed the said respondent was guilty of the conduct referred to and set forth therein.

Said motion is made for the reason and on the ground that it is impossible for respondent to be prepared to meet said charges and to summon witnesses in regard thereto without first being advised of the time and times, and the place and places, and the name or title of the proceeding or proceedings, and the circumstance or circumstances wherein in said fifth article it is claimed the said respondent was guilty of the conduct referred to and set forth therein.

And, in the event of the failure of said House of Representatives within the time so fixed to amend said fifth article in the particulars aforesaid, that this honorable body dismiss the charges contained in said fifth article.

Dated April 11, 1933.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Said Respondent.

In conformity with the notice, Mr. Linforth, on behalf of the respondent, moved to require the House to specify, in the particulars set forth, the fifth count of the articles of impeachment, and failing to do so within a reasonable time, that the article be dismissed.

Mr. Manager Sumners responded:

Mr. President, the managers on the part of the House, in order to comply with the suggestion of counsel for the respondent and to save the necessity of considering the motion, consent to attempt to make article 5 more specific and to procure the endorsement of the House of Representatives. It is understood that we can not of ourselves do these things. They have to be done through the House, but we will undertake to do the best we can.

Accordingly, on motion of Mr. Ashurst, it was—

Ordered. That the managers on the part of the House be allowed until the 15th day of May, 1933, at 1 o'clock in the afternoon, to present a replication or other pleading, of the House of

Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the Managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent, respectively, so that all pleadings shall be closed on or before the 15th day of May, 1933, and that the trial shall proceed on the said 15th day of May, 1933, at 1 o'clock p. m.

During the discussion occasioned by the proposed order, Mr. Long dissented and was proceeding in debate, when Mr. Sam G. Bratton, of New Mexico, made the point of order that under the rules governing impeachment trials Senators were not permitted to engage in colloquies.

The Vice President said:

The point of order is sustained.

An order having been made for printing the answer of the respondent for the use of the Senate, it was further:

Ordered, That lists of witnesses be furnished to the Sergeant at Arms by the managers and by the respondent, and said witnesses shall be subpoenaed to appear on Monday, the 15th day of May, 1933, at 1 o'clock p. m.

519. Certain rules adopted by the Senate for the trial of Judge Louderback.

Managers and counsel for respondent might submit applications orally to the Presiding Officer but if requested by any Senator should reduce them to writing.

Managers and counsel for respondent were required to address motions or objections directly to the Presiding Officer and not otherwise.

Senators might not engage in colloquies or address directly the managers, the counsel, or each other.

Stipulations in writing by parties were received by the Senate as though the facts therein agreed upon had been established by evidence.

Decisions of the Presiding Officer on questions raised by parties in the course of the trial stood as the judgment of the Senate unless a Senator made formal request for a vote thereon.

Mr. Bratton, from the Senate Committee on the Judiciary, offered the following:

Ordered, That in addition to the rules of procedure and practice in the Senate when sitting on impeachment trials, heretofore adopted, and supplementary to such rules, the following rules shall be applicable in the trial of the impeachment of Harold Louderback, United States judge for the northern district of California:

1. In all matters relating to the procedure of the Senate, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

2. In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers on the part of the House or counsel representing the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.

3. It shall not be in order for any Senator, except as provided in the rules of procedure and practice in the Senate when sitting on impeachment trials, to engage in colloquy or to address questions either to the managers on the part of the House or to counsel for the respondent, nor

shall it be in order for Senators to address each other; but they shall address their remarks directly to the Presiding Officer and not otherwise.

4. The parties may, by stipulation in writing filed with the Secretary of the Senate and by him laid before the Senate or presented at the trial, agree upon any facts involved in the trial; and such stipulation shall be received by the Senate for all intents and purposes as though the facts therein agreed upon had been established by legal evidence adduced at the trial.

5. The parties or their counsel may interpose objection to witnesses answering questions propounded at the request of any Senator, and the merits of any such objection may be argued by the parties or their counsel; and the Presiding Officer may rule on any such objection, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without debate and without a division, unless the ayes and nays be demanded by one fifth of the Members present, when the same shall be taken.

The order was agreed to, and the Senate sitting as a court of impeachment stood in recess.

520. In response to respondent's motion to make more certain, the House revised an article of the articles of impeachment and transmitted it to the Senate as amended.—On April 17 [1] the Speaker laid before the House the following communication from the Senate:

I, Edwin A. Halsey, Secretary of the Senate of the United States of America, certify that the Senate, sitting for the trial of Harold Louderback, United States district judge for the northern district of California, upon articles of impeachment exhibited against him by the House of Representatives of the United States of America, did on April 11, 1933, adopt an order, of which the following is a full, true, correct, and compared copy:

"Ordered, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Harold Louderback, judge of the United States district court in and for the northern district of California, to the articles of impeachment, and also a copy of the foregoing order."

I do hereby further certify that the document hereto attached, consisting of 38 sheets, is a photostatic copy of the answer of said Harold Louderback to the articles of impeachment exhibited against him by the House of Representatives, presented by said Harold Louderback to the Senate, sitting as Court of Impeachment, on April 11, 1933.

In testimony whereof I hereunto subscribe my name and affix the seal of the Senate of the United States of America this 12th day of April, A. D. 1933.

[SEAL.]

EDWIN A. HALSEY,
Secretary of the Senate of the United States.

Mr. Sumners called up as privileged a proposed amendment to article 5 of the articles of impeachment as follows:

AMENDMENT TO ARTICLE 5 OF THE ARTICLES OF IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES EXHIBITED AGAINST HAROLD LOUDERBACK, JUDGE OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Article 5 is amended to read as follows:

"Article 5.

"It is intended by article 5 to charge, and it is charged, that the reasonable and probable result of Harold Louderback's action in his capacity as judge in making decisions and orders in

[1] Record, p. 1846.

actions pending in his court and before him as said judge and by the method of appointing receivers and attorneys for receivers, by appointing incompetent receivers and attorneys, by his relationship and transactions with one Sam Leake, and by the relationship and transactions of the said Sam Leake with such appointees of the said respondent made possible and probable by the action and attitude of the said Harold Louderback, and by displaying a high degree of indifference to the interest of estates and parties in interest in receiverships before him and his court, and by displaying a high degree of interest in making it possible for certain individuals and firms to derive large fees from the funds of such estates, has been to create a general condition of wide-spread fear and distrust and disbelief in the fairness and disinterestedness of the official actions of the said Harold Louderback, and to create by his said acts, deeds, and relationships, contrary to his individual and official duty, a favorable condition and a cause for the development naturally and inevitably of rumors and suspicions destructive of public confidence in and respect for the said Harold Louderback as an individual and a judge to the scandal and disrepute of his said court and the administration of justice therein and prejudicial generally to the public respect for and public confidence in the Federal judiciary. Wherefore the said Harold Louderback was and is guilty of misbehavior as such judge and of misdemeanors in office.

"It is hereby alleged and charged that the conduct of said Harold Louderback, as alleged in articles 1, 2, 3, and 4, and as hereinafter alleged, in its general and aggregate result has been such as reasonably and probably calculated to destroy public confidence in so far as he and his court are concerned in that degree of disinterestedness and fidelity to judicial duty and responsibility which the public interest requires shall be held by the people in the Federal courts and in those who administer them, and which for a Federal judge to hurt or destroy is a crime and misdemeanor of the highest order;

"First, specifying as indicative of and disclosing the character and judicial attitude of said Harold Louderback revealed by his acts and official conduct to the people among whom he has jurisdiction, and the cause for the loss of public confidence of the bar and people of the northern district of California and particularly of the city of San Francisco, where the principal business of such court is transacted, on or about December 19, 1929, the said Harold Louderback appointed one Guy H. Gilbert receiver of the Sonora Phonograph Co., a going concern extensively engaged in the business of receiving and distributing radios and phonographs, the said Guy H. Gilbert being a personal and political friend of the said Harold Louderback, and an intimate friend and financial contributor to one Sam Leake, hereinafter referred to, the said Harold Louderback knowing at the time of such appointment that the whole training and experience of the said Guy H. Gilbert had been as operator and employee of a telegraph company, and the said Harold Louderback at the time of such appointment knowing with certainty that the said Guy H. Gilbert was without qualification to discharge the duties of such receivership, that the said Guy H. Gilbert was appointed such receiver by the said Harold Louderback without regard to the interest of such estate in receivership and in disregard thereof and of the interest of creditors and parties in interest and in violation of the official duty of the said Harold Louderback. That the said Gilbert after said appointment continued in his regular and usual duties and employment as employee of said telegraph company, drawing his accustomed salary during his employment of approximately 6 months as such receiver and received for such services from the funds of the estate of said Sonora Phonograph Co. the sum of $6,800, all of which facts became the subject of newspaper comments and matters of common knowledge throughout and beyond the northern judicial district of California, to the hurt of public confidence in the said Harold Louderback, judge of said court, and to the hurt and standing of the Federal judiciary.

The proposed amendment then recounted the appointment of Guy H. Gilbert as receiver in various other cases and charged that he was incompetent and had not in fact discharged the duties of receiver but had merely signed the papers in such

cases and accepted sums which were a small part of the compensation allowed by the respondent in his capacity as judge. The amendment concluded:

All of which facts and circumstances became published and known in said northern district of California. By such acts the said Harold Louderback exhibited himself to the public as being willing to obstruct the officials of the State of California in their effort to conserve for citizens of California the assets of said insurance company which they had impounded, willing to assert a jurisdiction which he did not possess, willing to defy a mandate of the circuit court of appeals and attach an illegal and unconscionable condition to said mandate in order to penalize and discourage the exercise of a constitutional right of appeal for the definite and obvious purpose of making sure, so far as possible by such illegal action and coercion, that the said Shortridge and his attorney would be paid from the assets of said insurance company so impounded the fees which he, the said Harold Louderback, had allowed, all to the scandal and discredit of the said Harold Louderback and his court and prejudicial to the dignity of the judiciary.

"Wherefore the said Harold Louderback has been and is guilty of high crimes and misdemeanors in office and has not conducted himself with good behavior."

After brief debate, the amendment was agreed to and on motion of Mr. Sumners it was—

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted an amendment to article 5 of the articles of impeachment heretofore exhibited against Harold Louderback, United States district judge for the northern district of California, and that the same will be presented to the Senate by the managers on the part of the House.

And also that the managers have authority to file with the Secretary of the Senate, on the part of the House, any subsequent pleadings they shall deem necessary.

521. The amended article of impeachment when received in the Senate was filed without being read, it having previously appeared in full in the Record.

The answer of the respondent to the amended article of impeachment.

The managers were excused from attendance on the sessions of the House during the course of the trial in the Senate.

On April 18,[1] in the Senate sitting as a Court of Impeachment, on motion of Mr. Ashurst, by unanimous consent, the reading of the amendment adopted by the House to Article 5 of the articles of impeachment was dispensed with, it having appeared in full in the Record of the previous day.

The respondent, by counsel, tendered his answer to Article 5 as amended by the House and proposed to enter a motion to strike out certain portions of the amended article and asked to be heard on the motion.

The answer was received and filed without reading as follows:

ANSWER TO ARTICLE 5, AS AMENDED

For answer to Article 5, as amended, the respondent says that this honorable court ought not to have or take further cognizance of said fifth article of impeachment so exhibited and presented against him, because, he says, the facts set forth in said fifth article, as amended, do not, if true, constitute an impeachable high crime and misdemeanor as defined by the Constitution of the United States, and that therefore the Senate, sitting as a Court of Impeachment, should not further entertain the charge contained in said fifth article as so amended.

[1] Record, p. 1877.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a Court of Impeachment, as to said fifth article, as amended, said respondent saving to himself all advantages of exception to said fifth article, as amended, for answer thereto saith:

Further answering said Article 5 as so amended, the respondent admits, denies, and alleges as follows:

Then follow specific admissions, denials, and allegations.
The answer concluded:

And, except as hereinbefore specifically admitted herein, respondent denies each and every allegation contained in said article 5, as so amended, relating or referring to the said *Golden State Asparagus Co. case,* so called.

Wherefore respondent having fully answered said article 5, as amended, declares that he is not guilty of any of the charges therein contained and denies that he has been or that he is guilty of high crimes and misdemeanors in office, or has been guilty of any high crime or any misdemeanor in office, and likewise denies that he has not conducted himself with good behavior.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,

APRIL 18, 1933.

Attorneys for Respondent.

The following motion was filed on behalf of the respondent:

MOTION TO STRIKE OUT OR MAKE MORE CERTAIN PORTIONS OF ARTICLE 5, AS AMENDED

The respondent, Harold Louderback, moves the Honorable Senate, sitting as a Court of Impeachment, for an order as follows:

1. Striking from article 5, as amended, the first paragraph thereof, constituting the entire first page; and

2. Striking therefrom the following part and portion thereof contained on pages 3 and 4 and reading as follows:

"It also became a matter of newspaper comment in connection with that receivership matter and others that theretofore, about 1925 or 1926, the said Gilbert had been appointed by the said Harold Louderback when the said Harold Louderback was a judge of the Superior Court of California, an appraiser of certain real estate, the said Harold Louderback well knowing at the time of such appointments that the said Gilbert was without any qualification to appraise the value of such real estate, and in truth the said Gilbert never saw said real estate, and that the said Gilbert did not undertake to assist in the appraisal of said real estate, only signing the report which was presented to him, for which services he was snowed the sum of $500."

The first part of said motion is based upon the ground and for the reason that it is impossible for respondent to be prepared to meet the said charge therein contained or to summons witnesses in respect thereto without being advised, first, the nature of the act or acts there attempted to be complained of; second, the time or times of said act or acts were committed by respondent; third, in what action or actions, proceeding or proceedings, such alleged acts occurred; fourth, the nature of the relationship and transactions of said Leake there attempted to be referred to and, fifth, with what appointee or appointees of respondent said "relationship and transactions" with the said Leake occurred.

And the second part of said motion is based upon the grounds that the alleged offense there referred to was not committed in the office now occupied by respondent and that this honorable Senate, sitting as a Court of Impeachment, has not jurisdiction to inquire into the transaction attempted to be complained of in said article 5, as amended, in that the act there attempted to be complained of is not and can not be the subject of this article of impeachment, and is not

and can not be a high crime or misdemeanor as defined by the Constitution of the United. States, but if true is an act committed by respondent while an officer of a State and not a Federal court.

And, in the event of the denial of said motion, or either part thereof, then and in such event, respondents moves this honorable Senate, sitting as a Court of Impeachment, to require the House of Representative of the United States within a time so to be fixed, to further amend said article 5 in the particulars and each thereof specified herein as the reason and grounds for the making of said motion to strike therefrom the portions of said article 5, as amended, above specified.

Dated: April 18, 1933.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Said Respondent.

Mr. Hanley, of counsel for the respondent, being recognized, said that an agreement had been reached with the managers on the part of the House under which the reference in paragraph 1 of the amended article 5 should refer only to matters set out in articles 1, 2, 3, and 4 and the rest of the amended article 5, and that no testimony relating to other matters would be offered.

Mr. Hanley cited a reference in paragraph 1 of the articles of impeachment referring to the conduct of the respondent while he was serving as a State judge and submitted that the conduct of the respondent as State judge was not within the jurisdiction of the Senate.

Mr. Manager Sumners, in reply, corroborated the statement of respondent's counsel with reference to the terms of the agreement between counsel for respondent and the managers on the part of the House; disclaimed any intention on the part. of the managers to impeach the respondent on the strength of his conduct as a member of the State judiciary; and justified the inclusion of the matter referred to as admissible under "at least two well-recognized rules" governing the admissibility of evidence.

In the House on May 9,[1] on motion of Mr. Sumners, by unanimous consent, the managers on the part of the House in the impeachment proceedings before the Senate were excused from attendance upon the sessions of the House until the conclusion of the trial.

522. The replication of the House to the answer of the respondent in the Louderback trial.

On motion of the managers, a clerk and additional counsel were authorized to sit with them in the conduct of the trial.

The managers announced that they had omitted the presentation of certain formal evidence, customary to impeachment proceedings, as relating to facts too obvious to require proof.

The Senate, by resolution, limited the opening statements to one person, on each side.

The Vice President was authorized to name a Senator to preside in the absence of the President pro tempore.

Questions of order raised in the course of an impeachment trial are decided without debate.

A question put by a Senator to a witness in an impeachment trial is reduced to writing and put by the Presiding Officer.

[1] Record, p. 3084.

On May 15,[1] in the Senate, sitting for the trial, Mr. Manager Sumners submitted the replication of the House of Representatives to the answer of the respondent as follows:

REPLICATION OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA TO THE ANSWER OF HAROLD LOUDERBACK, DISTRICT JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, TO THE ARTICLES OF IMPEACHMENT, AS AMENDED, EXHIBITED AGAINST HIM BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA

The House of Representatives of the United States of America, having considered the several answers of Harold Louderback, district judge of the United States for the northern district of California, to the several articles of impeachment, as amended, against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantages of exception to the insufficiency, irrelevancy, and impertinency of his answer to each and all of the several articles of impeachment, as amended, so exhibited against the said Harold Louderback, judge as aforesaid, do say:

(1) That the said articles, as amended, do severally set forth impeachable offenses, misbehaviors, and misdemeanors as defined in the Constitution of the United States, and that the same are proper to be answered unto by the Said Harold Louderback, judge as aforesaid, and sufficient to be entertained and adjudicated by the Senate sitting as a Court of Impeachment.

(2) That the said House of Representatives of the United States of America do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, misbehaviors, or misdemeanors charged against the said Harold Louderback in said articles of impeachment, as amended, or either of them, and for replication to said answers do say that Harold Louderback, district judge of the United States for the northern district of California, is guilty of the impeachable offenses, misbehaviors, and misdemeanors charged in said articles, as amended, and that the House of Representatives are ready to prove the same.

HATTON W. SUMNERS,
On Behalf of the Managers.

In response to the motion of the respondent that certain allegations in article 5 of the articles of impeachment be made, more certain, Mr. Sumners presented the following:

MAKING MORE SPECIFIC AN ALLEGATION CONTAINED IN ARTICLE 5, ARTICLES OF IMPEACHMENT, AS AMENDED

Whereas on April 17, 1933, the managers on the part of the House of Representatives, in the impeachment against Harold Louderback, filed an amendment to article 5 of the Articles of Impeachment, which contains the following language:

"It also became a matter of newspaper comment in connection with that receivership matter and others that theretofore, about 1925 or 1926, the said Gilbert had been appointed by the said Harold ouderback when the said Harold Louderback was a judge of the Superior Court of California, an appraiser of certain real estate, the said Harold Louderback well knowing at the time of such appointment that the said Gilbert was without any qualification to appraise the value of such real estate, and in truth the said Gilbert never saw said real estate, and that the said Gilbert did not undertake to assist in the appraisal of said real estate, only signing the report which was presented to him, for which services he was allowed the sum of $500."

And whereas said language and allegation was objected to by counsel for Harold Louderback by a motion to strike out said language on the ground that the said Harold Louderback was not advised of "the time or times (of) said acts were commited by respondent," or "in what action or actions, proceeding or proceedings such alleged acts occurred; "whereupon the managers agreed with counsel for the said Harold Louderback that they would endeavor to give to said counsel more exact information with regard to said transaction, and filing to do so by the 5th of May the said allegations would be withdrawn and no evidence offered in their support, counsel

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Record, p. 3394.

for the said Harold Louderback agreeing that they would exert themselves to try to ascertain the facts with regard to the transaction referred to and advise the managers.

Since such agreement and understanding, the managers have ascertained more definite information with reference to this transaction, and now allege the facts to be that on or about April 5, 1927, in the matter of the estate of Howard Brickell, No. 46618, pending in probate that said Harold Louderback appointed the said Guy H. Gilbert an appraiser of property of said estate and also appointed with him as appraiser of said property Sam Leake, referred to in said article 5 of the Articles of Impeachment as amended; that on or about December 21, 1927, the said Harold Louderback made an order awarding to the said Guy H. Gilbert and to the said Sam Leake the sum of $500 each for their services; which information has been furnished to the said counsel for Harold Louderback.

HATTON W. SUMNERS, *Chairman,*
On Behalf of the Managers.

Mr. William H. King, of Utah, offered a resolution which was agreed to as follows:

Ordered, That the opening statement on behalf of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.

The managers on the part of the House requested the privilege of having with them in the trial the clerk of the House Committee on the Judiciary to assist them in handling the documents in the case; and that Mr. Bianchi, a member of the bar of San Francisco, also be permitted to sit with them.

Mr. Hanley inquired whether Mr. Bianchi was to be called as a witness, and Mr. Manager Sumners, in reply, proposed to discuss the question, when Mr. Bratton raised the question of order that under the rules of the Senate the point should be decided by the Chair without comment or debate from the floor.

The Vice President sustained the point of order.

The Vice President, having entertained the request of the managers that the clerk of the House Judiciary Committee and Mr. Bianchi be permitted to sit with them, preferred to submit it to the Senate; and the question being put, it was decided in the affirmative, and the permission was granted, as requested.

By direction of the Vice President, on request of counsel for the respondent, the Secretary of the Senate read the answer of the respondent to article 5 as last amended, as follows:

Answer of respondent to Article V as last amended.

Respondent admits that on or about the 5th day of April, 1927, while acting as judge of the Superior Court of the State of California in and for the city and county of San Francisco, in the matter of the estate of Howard Brickell, deceased, he made an order appointing Guy H. Gilbert, W. S. Leake, and R. F. Mogan appraisers; that in said matter Crocker First Federal Trust Co., of San Francisco, was special administrator of said estate; that in the first and final account of said trust company was included the sum of $500 each paid to said Gilbert and said Leake as appraisers' fees therein; that upon the hearing of the settlement of said account, an officer of said trust company testified that said account was in all respects true and correct; that the inventory on file in said estate showed its appraised value to be $1,020,804.38; that thereupon respondent, as judge of said superior court, made an order settling and allowing said account. Other than as hereinabove specifically set forth, respondent denies that he made any order awarding said Gilbert and said Leake, or either of them, $500 for their said services as such appraiser.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Attorneys for Respondent.

In his opening statement, Mr. Manager Sumners informed the Court that he would deviate from the practice usually observed in such proceedings and would not introduce the commission of the respondent or make specific reference to the preliminary action on the part of the House of Representatives, taking it for granted that the respondent was known to be a Federal judge for the northern district of California, and that it was understood that the ordinary routine has been followed in the House leading up to the proceedings in the court of impeachment.

In the course of the opening statement in behalf of the respondent, Mr. Ashurst addressed the Chair and asked recognition to offer a resolution.

The Vice President inquired:

Will counsel suspend for that purpose?

The counsel for the respondent having answered in the affirmative, the resolution was offered by Mr. Ashurst and agreed to as follows:

Ordered, That during the trial of the impeachment of Harold Louderback, United States district judge for the Northern District of California, the Vice President, in the absence of the President pro tempore, shall have the right to name in open Senate, sitting for said trial, a Senator to perform the duties of the Chair.

The President pro tempore shall likewise have the right to name in open Senate, sitting for said trial, or, if absent, in writing, a Senator to perform the duties of the Chair; but such substitution in the case of either the Vice President or the President pro tempore shall not extend beyond an adjournment or recess, except by unanimous consent.

Under the provisions of the resolution, the Vice President called Mr. Bratton to the Chair, and the counsel for the respondent resumed his statement.

During the further course of the statement Mr. Long addressed the Chair and desired to submit a question to be answered by the counsel for the respondent.

Mr. Ashurst interposed the point of order that all questions propounded by Senators should be in writing.

The Presiding Officer sustained the point of order.

523. Witnesses in an impeachment trial were required to give their testimony standing, but this requirement was held not to apply to counsel.

In the Louderback impeachment trial witnesses were sworn as called and not en banc.

In the Louderback impeachment the Senate ordered process to compel the attendance of a witness who declined to appear in response to subpoena.

Evidence relating to events occurring prior to Sudge Louderback's appointment to the Federal bench were admitted to establish matters pertinent to the impeachment proceedings.

Exhibits relating to the case at bar but also embodying extraneous and irrelevant material were admitted in full over the objection that only the pertinent matters should be read into the record.

The issuance of process for the attachment of a witness was held not to bar the admission of depositions by such witness pending his arrival.

The opening statements having been concluded, on the proposal of Mr. Ashurst it was—

Ordered, That the witnesses shall stand while giving their testimony.

In response to an inquiry by Mr. Manager Sumners, as to whether counsel should also stand while examining the witness, the Presiding Officer [1] held—

It is the judgment of the present occupant of the chair that counsel may sit or stand, according to their convenience.

Mr. Manager Sumners further inquired if each witness should be sworn as examined or if all witnesses should be called and sworn at once.

The Presiding Officer said:

The Chair thinks that the business of the court would be expedited by swearing each witness as he enters the Chamber. The oath can be administered quickly.

The introduction of testimony on behalf of the managers then began and continued through May 15,16,17, and 18. On May 18 [2] Mr. Manager Sumners announced that the managers had no further evidence to offer at that time, and the introduction of testimony on behalf of the respondent began and continued until May 23, when both parties rested.

On May 16 [3] the Vice President laid before the Senate the return of the Sergeant at Arms which was printed and noted in the Journal as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, DC., May 15, 1933.

Hon. JOHN N. GARNER,
Vice President and President of the Senate,
Washington, D. C.

MY DEAR MR. VICE PRESIDENT: There are attached hereto a list of witnesses for the Government submitted to me by the managers on the part of the House of Representatives, and a list of witnesses for the respondent submitted to me by his counsel, all of said witnesses to be subpaned for the trial of Harold Louderback, United States district judge for the northern district of California.

There are also attached hereto original subpoenas personally served by me on the witnesses desired by both parties, said subpoenas being duly served and return made according to law.

Respectfully,

CHESLEY W. JURNEY,
Sergeant at Arms.

(Then followed the list of witnesses for the Government and the list of witnesses for the respondent.)

On motion of Mr. Ashurst it was—

Ordered, That the daily sessions of the Senate sitting for the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, shall, unless otherwise ordered, commence at 10 o'clock in the forenoon.

Mr. Hanley, of counsel for the respondent, moved that commission issue for taking the deposition of one W. S. Leake in San Francisco, and in support of his motion read this telegram:

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[1] Sam G. Bratton, of New Mexico, Presiding Officer.

[2] Record, p. 36,33.

[3] Record, p. 3444.

HON. JOHN N. GARNER,
Vice President of United States and President of Senate,
Washington, D. C.:

Mr. Leake, under subpoena Louderback trial, quite weak physically, due age and cerebral arteriosclerosis. Been his family doctor many years. Travel to Washington impractical, but if imperative should be accompanied by a nurse. Please instruct.

RUSSEL C. RYAN, M. D.,
Fairmont Hotel.

Mr. Manager Perkins resisted the motion and submitted the following excerpt from stipulations, previously entered into by counsel for the respondent and the managers on the part of the House, relative to certain testimony elicited before the special committee of the House of Representatives in San Francisco, in September, 1932.

It is further stipulated that the testimony of W. S. Leake and Miriam McKenzie, hotel maid, taken at the hearing above referred to, may be read upon said trial by either party hereto with the same force and effect as if said witness were present and testified in person. This stipulation, however, in so far as the said W. S. Leake is concerned is without waiver by either party hereto to insist upon the attendance of said Leake before the court above referred to, and shall become operative only in the event of the nonappearance of the said Leake at Washington before the said Court of Impeachment.

Dated May 3, 1933.

GORDON BROWNING,
RANDOLPH PERKINS,
For the House Managers.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Attorneys for Respondent.

The question being submitted to the court by the Vice President it was ordered, on motion of Mr. Bratton, that the Vice President be authorized to arrange for the attendance of the witness, to be accompanied by a nurse if that was deemed necessary.

Subsequently,[1] Mr. Manager Browning proposed to offer the testimony referred to in the stipulation before the arrival of the witness.

Mr. Hanley, of counsel for the respondent, objected on the ground that the witness would shortly arrive for examination in person.

The Vice President ruled:

The Chair overrules the objection. It seems to the Chair that reading the testimony, in view of the fact that Mr. Leake may be present in the Chamber, will not injure the cause of the respondent in any way.

In the course of the proceedings Mr. Manager Perkins proposed to offer in evidence certified copies of orders made by Judge Louderback appointing W. S. Leake and G. H. Gilbert appraisers in cases which had come before him in 1927 while on the State bench and prior to his appointment and confirmation by the Senate as a Federal judge.

Counsel for the respondent objected to the admission of the evidence on the ground that it related to matters occurring prior to the respondent's appointment as

[1] Record, p. 3503.

Federal judge and which for that reason were without the jurisdiction of the Court of Impeachment.

Mr. Manager Perkins rejoined that the orders were offered for the purpose of showing the long and intimate relation existing between Judge Louderback and W. S. Leake and G. H. Gilbert with whose appointment by respondent the case in trial was largely concerned.

The Presiding Officer [1] ruled:

The present occupant of the chair is very clear that it is admissible for whatever it may be worth for the purpose stated by the manager on the part of the House.

The orders being produced, respondent's counsel objected to their being admitted in full and contended that the announced purpose for which they were offered was fully served by the reading into the Record of the material parts germane to the case and that to admit them in full would admit many irrelevant matters not pertinent to the issues of the case at bar.

The Presiding Officer submitted the question of admissibility to the Court and in stating the question said:

The managers on the part of the House offered these papers for the record. Objection was made, and, after argument, the Chair held that these records were pertinent for one purpose, namely, to show the connection between the persons named in the papers and the respondent. The Inn sought to have the counsel on both sides agree that the material parts should be read into the record; but that was not satisfactory to the managers on the part of the House, who insisted that the whole records should be admitted. Counsel for the respondent objects to that because there are many things in the records themselves that are not in any sense material; and the question is whether or not the papers offered for the record shall be admitted.

The question having been taken, the Presiding Officer announced:

On this vote the yeas are 67 and the nays are 4, so the papers are admitted.

The Vice President laid before the Senate the following communication:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D. C., May 17, 1933.

Hon. JOHN N. GARNER,
Vice President and President of the Senate, Washington, D. C.

MY DEAR MR. VICE PRESIDENT: I was commanded to serve and return a subpoena issued in the impeachment trial of Harold Louderback on one W. S. Leake, of San Francisco, Calif. Said subpoena was personally served by me on the said W. S. Leake on May 2,1933, at San Francisco, and a return was duly made by me.

W. S. Leake was commanded to appear and testify on the 15th day of May, 1933, at 1 p. m., at the Senate Chamber in the city of Washington, and he has not appeared and refuses to appear and testify for the reason as stated by him to me personally on this day, that he is physically unable to do so.

This information is given to you so that the Senate of the United States may be officially informed in the matter.

Respectfully,

CHESLEY W. JURNEY,
Sergeant at Arm.

[1] Daniel O. Hastings, of Delaware, Presiding Officer.

Thereupon, a resolution presented by Mr. Ashurst was agreed to, as follows:

Whereas the Senate of the United States pursuant to House Resolution 403, Seventy-second Congress, second session, and orders of the Senate of the United States adopted in relation thereto, has authorized that witnesses be summoned as required by the rules of procedure and practice of the Senate; and

Whereas it appears from the letter of Chesley W. Jurney, Sergeant at Arms of the United States Senate, to Hon. John N. Garner, Vice President and President of the Senate, dated May 15, 1933, that one W. S. Leake, of San Francisco, Calif., was duly served with a subpoena on May 2, 1933, to appear on Monday, May 15, 1933, at 1 p. m., before the Senate of the United States at Washington, D.C., and then and there to testify his knowledge in the cause which is before the Senate in which the House of Representatives have impeached Harold Louderback, district judge of the United States for the Northern District of California; and

Whereas it appears from a letter of Chesley W. Jurney, Sergeant at Arms of the United States Senate to Hon. John N. Garner, Vice President and President of the Senate, dated May 16, 1933, that said W. S. Leake has not appeared in response to said subpoena, duly issued and served, and the said W. S. Leake has failed, in disobedience of such subpoena, so to appear and answer; and

Whereas the appearance and testimony of said W. S. Leake is material and necessary in order that the Senate of the United States may properly execute the functions imposed upon it by the Constitution of the United States, and other action as the Senate may deem necessary and proper: Therefore be it

Ordered, That the Vice President and President of the Senate issue his warrant commanding the Sergeant at Arms or his deputy, to take into custody the body of the Said W. S. Leake, where-ever found, to bring the Said W. S. Leake before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry; and to keep the said W. S. Leake to await the further order of the Senate.

On May 22,[1] the Vice President laid before the Senate a further communication as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D. C., May 20, 1933.

Hon. JOHN N. GARNER,
Vice President and President of Senate, Washington, D.C.

MY DEAR MR. VICE PRESIDENT: In pursuance of the order of the Senate dated May 17, 1933, commanding me to forthwith arrest and take into custody and bring to the bar of the Senate W. S. Leake, of San Francisco, Calif., I did, acting through my deputy, W. A. Rorer, on May 17, 1933, arrest and take Mr. Leake into custody.

The said W. S. Leake is now in my custody, and I await the further order of the Senate.

The original warrant issued in the case is attached hereto.

Respectfully yours,

CHESLEY W. JURNEY,
Sergeant at Arms.

Whereupon counsel for respondent called the witness W. S. Leake who appeared and testified.

524. The respondent in impeachment proceedings attended throughout the trial and was present when the articles were voted on and judgment rendered.

In the Louderback impeachment trial the respondent appeared and testified at length in his own behalf.

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[1] Record, p. 3844.

After testimony had been closed and the opening argument concluded in the Louderback trial, further questions were propounded in writing and were answered by the respondent.

The Senate limited the time but did not restrict the number participating in the final arguments in the Louderback impeachment.

The counsel for the respondent having touched on extraneous matters in his final argument in the Louderback trial, was admonished by the presiding officer to confine himself to the record.

In the Louderback trial the Senate deliberated behind closed doors before voting on the articles of impeachment.

Form of question prescribed for ascertaining the judgment of the court in the Louderback trial.

It was announced that pairs would not be arranged or recognized in the final vote on the articles of impeachment in the Louderback trial.

Senators were permitted to excuse themselves from voting on articles of impeachment as they were reached without having given notice of such intention prior to the vote on Article 1.

Two-thirds not having voted guilty on any article, the presiding officer declared Judge Louderback acquitted.

On May 23,[1] the respondent, Harold Louderback, was called and testified in his own behalf on direct examination by his counsel and on cross-examination by the managers. At the conclusion of his testimony, Mr. Linforth announced that the respondent rested. After brief testimony in rebuttal introduced by the managers, Mr. Manager Sumners on conference with Mr. Linforth, informed the court that all testimony had been concluded.

Whereupon, on motion of Mr. Ashurst, an order was entered finally excusing all witnesses from further attendance, and it was further—

Ordered, That the time for final argument of the case of Harold Louderback shall be limited to 4 hours, which said time shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, and the time thus assigned to each side shall be divided as each side for itself may determine.

On May 24,[2] Mr. Manager Browning opened the argument on behalf of the House of Representatives. At the conclusion of his remarks, Mr. Tom Connally, of Texas, addressed the Chair and asked, as a parliamentary inquiry, if it would be in order to propound further questions in writing to the respondent.

The Vice President replied:

The Chair does not think so. The case has been closed, as the Chair understands it, unless the Senate orders otherwise. If there is no objection on the part of the respondent, the Chair will admit the question.

There was no objection and Mr. Connally submitted certain questions in writing which were answered by the respondent.

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[1] Record, p. 3971.

[2] Record, p. 4064.

Mr. Linforth then argued in behalf of the respondent. In the course of Mr. Linforth's argument, Mr. Manager Sumners interposed and said:

Mr. President, I do not desire to interrupt counsel, but I give notice that if this is going to be the line of argument we shall endeavor to some degree to avail ourselves of it. We say that counsel is testifying at this time. I do not desire to object. I merely desire to serve notice now that we are going to avail ourselves of that line of argument.

The Presiding Officer admonished:

Counsel will confine themselves to the record.

Mr. Manager Sumners concluded the argument on behalf of the managers.

Thereupon, a motion presented by Mr. Ashurst that the doors of the Senate be closed for deliberation was agreed to; the managers on the part of the House and the respondent with his counsel withdrew from the Chamber; the galleries were cleared; and at 3 o'clock and 5 minutes p.m. the Senate proceeded to deliberate with closed doors.

At 4 o'clock and 45 minutes p. m. the doors were reopened, and the managers on the part of the House and respondent with his counsel appeared in the seats provided for them.

Mr. Joseph T. Robinson, of Arkansas, announced:

I have been requested to state that on these votes pairs will not be arranged or recognized.

The following order submitted by Mr. Ashurst was agreed to:

Ordered, That upon the final vote in the pending impeachment of Harold Louderback, the Secretary shall read the articles of impeachment separately and successively, and when the reading of each article shall have been concluded the Presiding Officer shall state the question thereon as follows:

"Senators, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article?"

Thereupon the roll of the Senate shall be called, and each Senator, as his name is called, unless excused, shall arise in his place and answer "Guilty" or "Not guilty."

In response to a parliamentary inquiry from Mr. Alben W. Barkley, of Kentucky, as to whether a Senator could be excused from voting on any article as it was reached in its order or whether notice should be given in advance of the reading of the first article, the Vice President held:

The Chair is of opinion that a Senator can ask to be excused from voting on any article at any time.

On motion of Mr. Ashurst, it was further—

Ordered, That upon the final vote in the pending impeachment of Harold Louderback, each Senator may, within 2 days after the final vote, file his opinion in writing to be published in the printed proceedings in the case.

The Vice President directed the Secretary to read the first article of the articles of impeachment, and following the reading, put the question:

Senators, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article? The secretary will proceed to call the roll, and as the name of each Senator is called, he will rise in his place and deliver his vote.

The roll having been called, the Vice President announced:

On the first article of impeachment 34 Senators have voted "guilty" and 42 Senators have voted "not guilty." Less than two-thirds having voted in favor of his guilt, the Senate adjudges that the respondent, Harold Louderback, is not guilty as charged in the article. The clerk will read the next article.

In like manner the vote was taken and announced on each of the remaining articles, with the following results:

	Guilty.	Not guilty
Article I	34	42
Article II	23	47
Article III	11	63
Article IV	30	47
Article V (as amended)	45	34

The Vice President summarized:

That completes the articles of impeachment, and, with the permission of the Senate sitting as a court, the Chair will enter in the record the following judgment, which the clerk will read.

The legislative clerk read:

JUDGMENT.

The Senate having tried Harold Louderback, judge of the District Court of the United States for the Northern District of California, upon five several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore

Ordered and adjudged, That the said Harold Louderback be, and he is, acquitted of all the charges in said articles made and set forth.

And then,

On motion of Mr. Ashurst, at 6 o'clock and 5 minutes p.m. the Senate sitting as a court of impeachment in the case of Harold Louderback adjourned sine die.

Chapter CCII.[1]

IMPEACHMENT PROCEEDINGS NOT RESULTING IN TRIAL.

525. The inquiry into the conduct of Lebbeus R. Wilfley, Judge of United States Court for China.

A Member having risen in his place and impeached Judge Wilfley and offered a resolution providing for an investigation, the House referred the matter to the Judiciary Committee.

In the investigation into the conduct of Judge Wilfley, he appeared before the committee and testified under oath.

The report of a subcommittee was disregarded and was not included as a part of the report of the committee to the House.

The committee, after conducting an investigation, acted adversely on a proposition to impeach Judge Wilfley and the House declined to take further action.

A Member being criticized by the President for instituting impeachment proceedings, rose to a question of personal privilege.

[1] Supplementary to Chapter LXXIX.

On February 20, 1908,[1] Mr. George E. Waldo, of New York, presented as a privileged matter the following:

I desire to impeach Lebbeus R. Wilfley, of the United States court of China, of mal and corrupt conduct in office, and of high crimes and misdemeanors, and I present the following articles of impeachment and ask that they may be read at the Clerk's desk.

The Clerk read the articles of impeachment, which detailed at length the charges upon which the proposed impeachment was based.

Mr. Waldo then submitted a resolution authorizing and directing the Committee on the Judiciary to investigate the charges, and, after debate, made the following motion, which was agreed to:

I move that this resolution and the articles be referred to the Committee on the Judiciary, to report back by resolution within ten days what, if any, proceedings should be taken.

The motion was agreed to.

The investigation was delegated to a subcommittee of the Committee on the Judiciary, which reported to the committee in part as follows:

It is obviously true that an aggregation of entirely legal acts may develop into a system of tyranny and oppression; and that an inequitable exercise of judicial discretion may convert the machinery of justice into an engine of despotic and autocratic power. This may be accomplished without the taint of individual corruption and with a laudable purpose of purifying a community and of inaugurating civic reform.

Terror to evil doers if purchased at the price of judicial fairness and overstrained legal authority is achieved at too great an expense, for it defeats its own high aim and warps the very fabric of the law itself.

Such sets of legal oppression and of abuse of judicial discretion lie at the base of these charges. They are made before the House of Representatives in the form prescribed by law and custom, and are presented as a question of high privilege upon the solemn responsibility of a Member of the House. Charges so presented against this court have a peculiar and dangerous significance. In this case they are dismissed as falling short of impeachable offenses, by what we believe to be sound principles of legal construction, and Judge Wilfley is therefore denied any opportunity of defense. He can file no answer, make no denial, nor explain to the House the legality or necessity for his action.

These charges therefore stand uncontroverted, and if Judge Wilfley's judicial acts in the future are marked by the rigorous and inflexible harshness imputed to him they will hang as a portentous cloud over this new court, impairing his usefulness, impeding the administration of justice, and challenging the integrity of American institutions.

During the investigation Judge Wilfley appeared before the committee and testified under oath.

On May 8, 1908,[2] Mr. Reuben O. Moon, of Pennsylvania, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, to whom was referred the articles of impeachment of Lebbeus R. Wilfley, judge of the United States court for China, in compliance with the action of the House, begs leave to report that, after investigation, it is the opinion of the committee that no proceedings should be taken on the said resolutions.

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[1] First session, Sixtieth Congress, Journal, p. 497; Record, 2262.

[2] House Report 1626.

The report was referred, under the rule, to the Committee of the Whole House.

On March 3, 1909,[1] Mr. Waldo rose to a question of personal privilege and said:

Mr. Speaker, on February 20, 1908, at the request of Hon. Lorrin Andrews, late attorney general of Hawaii, and who represented the American lawyers and other American citizens, residents of Shanghai, China, I presented to the House articles of impeachment against Lebbeus R. Wilfley, judge of the United States court for China.

These articles charged judicial outrages and gross abuse of power which, in my judgment, showed Judge Wilfley to be utterly unfit to hold judicial office.

The President, without any investigation of the facts, except to hear Judge Wilfley and his friends, sent to the subcommittee of the Judiciary Committee, which was then investigating the facts, a copy of a letter from himself to Secretary Root, in which the President used this language:

"I have received and read your report of February 29 upon the charges submitted by Lorrin Andrews, under date of November 19, 1907, against Judge Wilfley; it appearing from your report that Congressman Waldo stands sponsor for the charges."

And concluded letter as follows:

"It is not too much to say that this assault on Judge Wilfley in the interest of the vicious and criminal classes is a public scandal."

This was evidently an intentional reflection upon the uprightness of my motives and conduct and an invasion of my privileges as a Member of this House.

Mr. Sereno E. Payne, of New York, made the point of order that the gentleman was not stating a question of personal privilege.

The Speaker[2] sustained the point of order, and Mr. Waldo continued his remarks by unanimous consent.

526. The inquiry into the conduct of Judge Cornelius H. Hanford, United States circuit judge for the western district of Washington, in 1912.

A Member on his authority as a Member of the House impeached Judge Hanford and offered a resolution providing for investigation of charges.

Pending motion to refer a resolution providing for an investigation looking to impeachment the resolution is not open to amendment.

The House referred the charges made against Judge Hanford to the Judiciary Committee for investigation.

During the investigation of Judge Hanford with a view to impeachment, he was represented by counsel who cross-examined witnesses and produced evidence in his behalf.

Judge Hanford having resigned his office, the House discontinued its investigation into his conduct.

The report of the subcommittee, while recommending the discontinuance of impeachment proceedings against Judge Hanford, declared him to be disqualified for his position and recommended acceptance of his resignation.

On June 7, 1912,[3] Mr. Victor L. Berger, of Wisconsin, presented, as a matter of privilege, the following:

Mr. Speaker, I rise to a question of the highest privilege and also of the greatest importance. By virtue of my office as a Member of the House of Representatives, I impeach Cornelius H.

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[1] Second session Sixtieth Congress, Record, p. 3813.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Second session Sixty-second Congress, Journal, p. 772; Record, p. 7799.

Hanford, judge of the western district of the State of Washington, of high crimes and misdemeanors.

I charge him with having annulled, on May 13, 1912, in violation of the Constitution and on a frivolous charge, the naturalization papers of Leonard Oleson.

I charge him with having been guilty of a long series of unlawful and corrupt decisions.

I charge him with having issued in the collusive suit of Augustus Peabody *v.* The Seattle, Renton & Southern Railway, in August, 1911, an injunction in the interests of the company and against the interests of the citizens of Seattle, flagrantly in violation of justice and law.

I charge him with being an habitual drunkard.

I charge him with being morally and temperamentally unfit to hold a judicial position.

Mr. Berger then submitted the following resolution and moved that it be referred to the Committee on the Judiciary:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the official misconduct of Cornelius H. Hanford; whether he has been in a drunken condition while presiding in court; whether he has been guilty of corrupt conduct in office; whether his administration has resulted in injury and wrong to litigants of his court and to others affected by his decisions; and whether he has been guilty of any misbehavior for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said committee.

That the subcommittee shall have the same powers in respect to obtaining testimony as are herein given to the said Committee on the Judiciary.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

Mr. Samuel W. McCall, of Massachusetts, proposed to amend the resolution by inserting the word "alleged" before the word "misconduct."

A point of order by Mr. James R. Mann, of Illinois, that in view of the motion to refer the resolution it was not open to amendment, was sustained.

Thereupon Mr. Berger asked unanimous consent to amend the resolution as proposed by Mr. McCall. There was no objection and the resolution was so modified. The motion to refer the amendment to the Committee on the Judiciary was then agreed to.

On June 13 [1] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, presented as privileged the report of that committee, with the recommendation that the resolution be amended to read as follows:

That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Cornelius H. Hanford, United States judge for the western district of the State of Washington, and say whether said judge has been in a drunken condition while presiding in court; whether said judge has been guilty of corrupt conduct in office; whether the administration of said judge has resulted in injury and wrong to litigants in his court and others affected by his decisions; and whether said judge has been guilty of any misbehavior for which he should be impeached.

And in reference to this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, if necessary, and to appoint and send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. The said subcommittee while so employed shall

[1] House Report No. 880.

have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee and the process and orders of said subcommittee, and shall attend the sitting of the same as ordered and as directed thereby, and that the expense of such investigation shall be paid out of the contingent fund of the House.

The report was adopted and the resolution as amended was agreed to.

On August 6[1] Mr. Clayton, from the Committee on the Judiciary, submitted the unanimous report of the committee, incorporating the report of an investigation made by a subcommittee pursuant to the following resolution passed by the committee:

Resolved, That James M. Graham, Walter I. McCoy, and Edwin W. Higgins, members of this committee, be appointed the subcommittee by virtue of the authority given under House Resolution No. 576, passed by the House of Representatives on June 13, 1912, authorizing an inquiry into the alleged misconduct of Cornelius H. Hanford, United States judge for the western district of the State of Washington, and that the said subcommittee shall have all the powers authorized by said resolution hereinbefore named.

This report relates:

In pursuance of said resolution, the subcommittee left Washington on June 21, 1912, and reached Seattle the evening of June 25. Wednesday, June 26, was spent in making the necessary preliminary arrangements for proceeding with the hearings, and on Thursday, the 27th, the taking of testimony was begun in a court room of the Federal Building in Seattle, and was concluded on Monday, July 22, 1912. The subcommittee sat every day between those days except Sundays and the Fourth of July, making in all 21 days of actual work, including several evening sessions. Two hundred and three witnesses were examined and 3,291 typewritten pages of testimony were taken.

Immediately upon the arrival of the subcommittee in Seattle, the following Communication was addressed to Judge Hanford by Mr. Graham, chairman of the subcommittee.

SEATTLE, WASH., *June 26, 1912.*

DEAR SIR: The subcommittee on the Committee of the Judiciary of the House of Representatives, Washington, D.C., will convene to-morrow June 27, in the court room, Federal Building, in Seattle, for the purpose of taking testimony under House Resolution 576, a copy of which is attached hereto. You can, of course, be present at the session of the subcommittee, in person and by counsel, if you so desire.

JAMES M. GRAHAM, *Chairman.*

Hon. C. H. HANFORD.

The report says:

The subcommittee further reports that Judge Hanford was represented during the hearings by able and learned counsel, namely, Mr. E. C. Hughes, Mr. Harold Preston, and Mr. C. W. Dorr, and that they were given wide latitude in the examination of all the witnesses and in the production of evidence on behalf of Judge Hanford, so that the record contains such evidence in defense as counsel desired to offer, as well as the incriminating evidence.

The report continues:

The subcommittee had almost, but not quite, completed the taking of testimony when, at the morning session on Monday, July 22, counsel representing Judge Hanford asked for a conference with the members of the subcommittee, and the request was granted. They then

[1] House Report No. 1152.

informed the subcommittee that Judge Hanford had concluded to send his resignation to the President.

The subcommittee thereupon decided:

That there was no good reason why the resignation of the judge should not be accepted. And it appears to the committee that the further prosecution of the impeachment proceedings is inadvisable. Among the reasons for this conclusion may be stated in substance the reasons assigned by the subcommittee:

(1) The chief good which successful impeachment proceedings could effect would be the removal of Judge Hanford from the bench. That good his resignation accomplished.

(2) The record of the evidence shows that he is 64 years old his next birthday, and hence not entitled to retire on pay. Therefore, his resignation brings him no emolument or reward and involves no expenditure of public money.

(3) The committee do not think it necessary or advisable to pursue the impeachment further merely for the purpose of making him ineligible to hold office in the future, as his age and the circumstances disclosed by the testimony render such a contingency highly improbable.

(4) Bringing the witnesses from Seattle and vicinity to Washington, a distance of over 3,000 miles, to prosecute an impeachment proceeding before the Senate would involve an expenditure approximating $70,000. This expenditure of public money could not be justified in this case where the judge is now out of office and doubtless will never again be appointed to office.

The subcommittee further concluded:

On the whole record it clearly appears that Judge Hanford's usefulness as a Federal judge is over; that his personal and judicial conduct disqualify him for that position and that this committee recommend that his resignation be accepted.

The committee therefore recommended the following resolution:

Resolved, That the Committee on the Judiciary be discharged from further consideration of and action under House Resolution 576.

Resolved further, That the testimony taken by the subcommittee of the Committee on the Judiciary under the authority conferred by House Resolution 576 be printed as a part of this report and transmitted by the Clerk of the House of Representatives to the Attorney General for his consideration and with the recommendation that the Department of Justice take cognizance thereof, and take whatever action may be deemed advisable in case said testimony discloses or tends to disclose any infractions of the laws of the United States.

On the same day, after brief debate, Mr. Clayton moved to amend the resolution by inserting after the word "printed" the words "as a part of this report." The amendment was agreed to and the resolution as amended was adopted without division.

527. The investigation into the conduct of Judge Emory Speer.

A resolution proposing investigation with a view to impeachment was referred, under the rule, to the appropriate committee.

A resolution proposing investigation with a view to impeachment was considered by unanimous consent.

A subcommittee, with power to send for persons and papers, was sent to Georgia to investigate the conduct of Judge Speer.

During the investigation of Judge Speer, looking to impeachment, he attended each session, accompanied by counsel, and cross-examined witnesses.

The most liberal latitude was allowed in the examination of witnesses before the committee which investigated Judge Speer.

While declining to recommend acquittal, and declaring Judge Speer's acts merited condemnation, the Judiciary Committee reported satisfactory evidence was not obtainable and recommended that no further proceedings be had in the matter.

On August 26, 1913,[1] Mr. Henry D. Clayton, of Alabama, asked unanimous consent for the consideration of the following resolution:

Whereas on the 16th day of August, 1913, the Attorney General of the United States transmitted to the Committee on the Judiciary of the House of Representatives a report of a special examiner duly designated by the Attorney General to investigate various charges of alleged misconduct of Emory Speer, a United States district judge for the southern district of Georgia, which charges had been brought to the attention of the Department of Justice; and

Whereas the charges embodied in said report are accompanied by exhibits and affidavits and are of such grave nature as to warrant further investigation: Therefore be it

Resolved, That the Committee on the Judiciary be, and it is hereby authorized to inquire into and concerning the official conduct of Emory Speer, United States district judge for the southern district of Georgia, touching his conduct in regard to the matters and things set forth in said report; and further to inquire whether said judge has been guilty of any misbehavior for which he should be impeached and report to the House of Representatives the conclusions of the committee in respect thereto, with appropriate recommendations; and said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer if necessary, and to appoint and send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee; the said subcommittee, while so employed, shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee and the process and orders of said subcommittee and shall attend the sittings of the same as ordered and as directed thereby, and that the expense of such investigation shall be paid out of the contingent fund of the House; that said Committee on the Judiciary, or subcommittee thereof, shall have power to sit during the sessions of this House or in vacation.

Mr. James R. Miron, of Illinois, objected and, under the rule, the resolution was referred to the Committee on Rules.

On the following day Mr. Clayton again submitted a unanimous-consent request for consideration of the resolution. There was no objection, and after debate the resolution was agreed to, with the following amendment:

Amend, page 2, by inserting after the word "House," in line 19 and before the semicolon, the following: "On vouchers ordered by the Committee on the Judiciary, signed by the chairman thereof and approved by the Committee on Accounts and evidenced by the signature of the chairman thereof."

On October 2, 1914[2] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, submitted the report of the majority of that committee on the investigation authorized by the resolution.

The committee incorporate as a part of their report the report of the majority of a subcommittee which conducted the investigation, signed by Mr. Webb and Mr. Louis Fitzhenry, of Illinois. The history of the investigation is thus detailed in the majority report:

Your special subcommittee made a trip to the southern district of Georgia, leaving Washington on the evening of Saturday, January 17, and arriving at Macon, the seat of the court,

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[1] First session Sixty-third Congress, Journal, p. 254; Record p. 3777.

[2] House Report No. 1176.

on the evening of the following day. Monday morning, January 19, at 10 o'clock, the subcommittee opened its public hearings in the United States court room in the Federal Building at Macon, and examined witnesses who were caused to appear for the purpose of giving testimony. These hearings were held continuously throughout the week, ending Saturday, January 24. The committee then went to Savannah, Ga., in said district, and examined witnesses during the entire of the following week, concluding its hearings there on Saturday, January 31.

All of the hearings were public. Judge Speer attended each session of the committee and was accompanied by counsel, who were permitted to cross-examine the several witnesses.

A digest of the testimony of the witnesses examined is appended, and the committee thus summarize the evidence:

The conclusion of the subcommittee, deduced from the evidence taken and from the construction of the precedents of impeachment trials, is that at the present time satisfactory evidence sufficient to support a conviction upon a trial by the Senate is not obtainable.

The report continues:

A phase of the record is that it details a large number of official acts on the part of Judge Speer which are in themselves legal, yet, when taken together, develop into a system tending to approach a condition of tyranny and oppression. There has been an inequitable exercise of judicial discretion, many instances of which have been frequently criticized where the cases in which they were committed have been reviewed by the courts of appeal, while in others litigants were unable, financially, to prosecute appeals. That the power of the court has been exercised in a despotic and autocratic manner by the judge can not be questioned.

As to examination of witnesses and admission of evidence, the committee say:

In the conduct of the hearings the committee was extremely liberal and did not confine the witnesses to the giving of technically legal evidence. Some evidence of a hearsay nature was received. The committee felt justified in such a course in the light of the fact that it came to the attention of the committee that many witnesses were apprehensive of the consequences of giving evidence against Judge Speer in the event of his acquittal.

The committee also say:

The record shows instances where the judge, sitting in the trial of criminal cases, apparently forced pleas of guilty from defendants or convictions and there is strong evidence tending to show that in one case, at least, he forced innocent parties to enter such pleas through a fear of the consequences in the event of an unfavorable verdict at the hands of a jury presided over by the judge in the manner peculiar to himself.

The committee, however, decide:

The subcommittee regrets its inability to either recommend a complete acquittal of Judge Speer of all culpability so far as these charges are concerned, on the one hand, or an impeachment on the other. And yet it is persuaded that the competent legal evidence at hand is not sufficient to procure a conviction at the hands of the Senate. But it does feel that the record presents a series of legal oppressions and shows an abuse of judicial discretion which, though falling short of impeachable offenses, demand condemnation and criticism.

If Judge Speer's judicial acts in the future are marked by the rigorous and inflexible harshness shown by this record, these charges hang as a portentous cloud over his court, "impairing his usefulness, impeding the administration of justice, and endangering the integrity of American institutions."

The committee therefore recommend the adoption of the following resolution:

Resolved, That no further proceedings be had with reference to H. Res. 234.

Mr. Andrew J. Volstead, of Minnesota, a member of the subcommittee, in an accompanying minority report concurs in recommending the adoption of the resolution reported by the majority, but takes sharp issue with other conclusions set out in the majority report. After discussing in detail each charge considered in the majority report and warmly controverting conclusions reached by the majority, the minority views say:

While I concur in the recommendations made in the majority report, that no further proceedings be had upon the charges against Judge Speer, I desire to express in as emphatic language as possible my protest against the methods that have been pursued; but I desire to have it distinctly understood that I do not criticize the motives of my associates; for them I have the highest personal regards. In this investigation no effort was made to protect the judge against mere slander and abuse that could serve no other purpose than to disgrace and humiliate him. Every enemy that 29 years on the bench had produced was invited and eagerly encouraged to detail his grievance and to supplement that with all sorts of innuendoes, insinuations, and insulting opinions, utterly illegal as evidence and incompetent for any proper purpose. To add to this, the methods pursued in framing the majority report are equally reprehensible. It is apparent throughout that nothing has been considered pertinent that did not support some charge against the judge. As matters of explanation or denial do not meet this requirement, they are quite generally omitted, not only from the findings, but also from the summary of the evidence. Still this is not all. Although the majority report announces that there is not sufficient evidence to support any of the charges, that announcement is in the nature of a "Scotch verdict," or worse, because it is accompanied in almost every instance with an insinuation that the judge may be guilty, notwithstanding such finding. If anything could be more unfair or unjust, it is difficult to imagaine what it could be.

The minority views conclude:

It is not necessary to say anything in commendation of Judge Speer. The last line in the majority report, recommending no further action upon the charges, is, despite all criticism to the contrary, a complete vindication. It would not have been written if the evidence had pointed to anything worthy of real criticism. In conclusion let me add, the day win come when Judge Speer will be remembered with pride by the people of Georgia, not only for his ability and integrity, but especially for what Mr. Wimberly called his many beautiful acts of mercy to the oppressed.

On October 21, 1914, the House agreed to the majority report without debate or division.

528. The investigation into the conduct of Daniel Thew Wright, associate justice of the Supreme Court of the District of Columbia.

A Member, rising in his place, impeached judge Wright on his responsibility as a Member of the House.

A committee charged with an investigation looking to impeachment delegated the inquiry to a subcommittee.

During the investigation of Judge Wright with a view to impeachment he was permitted to appear before the committee with counsel.

Judge Wright having resigned his office before final report by the committee charged with the investigation, the House agreed to the recommendation of the committee and that it be discharged.

On March 20, 1914,[1] Mr. Frank Park, of Georgia, rose in his place and proposed as a matter of privilege the impeachment of Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbia. In the absence of a quorum, the House adjourned.

[1] Second session Sixty-third Congress, Record, p. 5204.

On the following day, immediately after the reading of the Journal, Mr. Park again rose and presented, as privileged, the following:

Mr. Speaker, at the adjournment hour on yesterday I brought to the attention of the House certain charges which I was about to deliver to the House.

Mr. Speaker, I rise to a question of the highest privilege and of the greatest importance. By virtue of my office as a Member of the House of Representatives I impeach Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbis of high crimes and misdemeanors.

I charge him with having accepted favors from practitioners at the bar of his court and of having permitted counsel for a street railway company to indorse his notes while said counsel was retained by said street railway company in business and causes before his court.

I charge him with performing the service of a lawyer and accepting a fee during his tenure or judicial office, in violation of the statute of the United States.

I charge him with collecting and wrongfully appropriating other people's money.

I charge him with purposely changing the record to prevent reversal of causes wherein be presided.

I charge him with bearing deadly weapons in violation of law.

I charge him with judicial misconduct in the trial of a writ of habeas corpus to an extent which provoked a reviewing court of the District of Columbia to justly characterize the trial as a "travesty of justice."

I charge him with arbitrarily revoking, without legal right, the order of a judge of concurrent jurisdiction, appointing three receivers, so as to favor his friend by appointing him sole receiver.

I charge him with being guilty of various other acts of personal and judicial misconduct for which he should be impeached.

I charge him with being morally and temperamentally unfit to hold judicial office.

Mr. Park continued:

Mr. Speaker, in accordance with former proceedings before the House in like cases, I submit the following resolution which I send to the Clerk's desk.

The resolution was as follows:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Daniel Thew Wright; whether he has accepted favors from lawyers appearing before him; whether he has permitted counsel for a street railway company to indorse his notes while said counsel was retained in business and causes before his court; whether he has performed the services of lawyer and accepted a fee during his tenure of judicial office, in violation of the statutes of the United States; whether he has collected and wrongfully appropriated other people's money; whether he has purposely changed the record in order to prevent reversal of causes wherein he presided; whether he has borne deadly weapons in violation of law; whether he is guilty of judicial misconduct in the trial of a writ of habeas corpus to an extent which provoked a reviewing court of the District of Columbia to justly characterize the trial as a "travesty of justice"; whether he has arbitrarily revoked, without legal right, an order of a judge of concurrent jurisdiction, appointing three receivers, so as to favor his friend by appointing him sole receiver; whether he is morally and temperamentally unfit to hold judicial office; and whether he has been guilty of various other acts of personal and judicial misconduct for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary. to take testimony for the use of said subcommittee,

That the subcommittee shall have the same power in respect to obtaining testimony as is herein given to the said Committee on the Judiciary; and the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

On motion of Mr. Park, the resolution was referred to the Committee on the Judiciary without debate.

On April 10 [1] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, submitted, as privileged, the following:

The Committee on the Judiciary, having had under consideration House resolution No. 446 report the same back with the recommendation that it be amended to read as follows, and as so amended that it be adopted:

"Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbia; whether he has corruptly accepted favors from lawyers appearing before him; whether he has corruptly permitted counsel for a street railway company to indorse his notes while said counsel was retained in business and causes before his court; whether he has performed the services of a lawyer and accepted a fee during his tenure of judicial office, in violation of the statute of the United States; whether he has collected and wrongfully appropriated other people's money; whether he has purposely and corruptly changed the record in order to prevent reversal of causes wherein he presided; whether he has borne deadly weapons in violation of law; whether he has arbitrarily revoked, without legal right, an order of a judge of concurrent jurisdiction appointing three receivers, so as to favor his friend by appointing him sole receiver; and whether said judge has been guilty of any misbehavior for which he should be impeached.

"And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

"The expense of such investigation shall be paid out of the contingent fund of the House."

In response to an inquiry as to wherein the resolution proposed by the committee differed from the original resolution, Mr. Clayton said:

It does not differ in any material respect, but it puts it in better form.

On October 14 [2] Mr. Jack Beall, of Texas, from the Committee on the Judiciary, submitted, through the Clerk of the House, the final report of that committee.

The committee reported the delegation of the inquiry to a subcommittee, the report of which is appended to and made a part of the report of the committee.

The subcommittee report says:

On May 1, 1914, the subcommittee began the examination of witnesses and held sessions on 43 days, including three night sessions, as well as numerous conferences with Mr. Justice Wright and his counsel, the taking of testimony being concluded on August 26, 1914. Such of the testimony and exhibits pertinent to the charges affecting Associate Justice Wright's official conduct

[1] House Report No. 514.

[2] House Report No. 1101.

that your subcommittee deemed necessary to print have been printed and a copy thereof is submitted herewith. Associate Justice Wright was duly notified and was present at each session of the subcommittee in person and was represented by counsel, Mr. J. J. Darlington, who was given opportunity to cross-examine the witnesses. Several witnesses were called on behalf of Mr. Justice Wright and examined by his counsel.

The committee report adds:

On October 6, 1914, Mr. Justice Wright tendered his resignation to the President, which was duly accepted October 7, 1914, to become effective November 15, 1914, and that because Judge Wright is not eligible under the law to retire with pay this resignation, when it becomes effective, will entirely separate him from the public service. Because of this fact the committee is of the opinion that further proceedings under House resolution 446 are unnecessary.

The committee therefore recommend the adoption of the following resolution:

Resolved, That the Committee on the Judiciary be discharged from further consideration of and action under House resolution 446.

The report of the committee was, under the rules, referred to the Committee of the Whole House on the state of the Union. On March 3 [1] Mr. Beall moved the adoption of the report. The motion was agreed to without debate or division.

529. The investigation into the conduct of Alston G. Dayton, United States district judge for the northern district of West Virginia in 1915.

A Member having presented charges against Judge Dayton, the House ordered an investigation.

In the investigation of Judge Dayton the respondent appeared before the subcommittee charged with the investigation and made an extended statement concerning the matters involved.

The Judiciary Committee authorized to make an investigation committed the matter to a subcommittee, the report of which was made a part of the committee report to the House.

A subcommittee visited West Virginia and took testimony in the case of Judge Dayton.

While the subcommittee, in its report, criticized Judge Dayton, it concluded there was little possibility of maintaining impeachment proceedings.

Minority views, although agreeing with the majority, report in the findings of fact, held that the evidence warranted further proceedings toward impeachment.

The committee and the House acted adversely on the proposition to impeach Judge Dayton.

On May 11, 1914,[2] Mr. M. M. Neeley, of West Virginia, submitted a resolution directing the Committee on the Judiciary to make an investigation of the official conduct of Alston G. Dayton, United States district judge for the northern district of West Virginia. Under the rule, the resolution was referred to the Committee on Rules.

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[1] Third session Sixty-third Congress, Journal, p. 301; Record, p. 5485.

[2] Second session Sixty-third Congress, Record, p. 8417.

On June 12 [1] Mr. Neeley rose in his place and presented as a privileged matter, the following:

Mr. Speaker, I rise to a question of the highest privilege. By virtue of my office as a Member of the House of Representatives, I impeach Alston G. Dayton, Judge of the District Court of the United States for the Northern District of West Virginia, of high crimes and misdemeanors.

At the conclusion of his arraignment, which consisted of 26 separate charges, Mr. Neeley offered the following:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Alston G. Dayton; whether he has unlawfully conspired with certain corporations and individuals to bring about the removal from office of the late John J. Jackson, judge of the District Court of the United States for the Northern District of West Virginia; whether he has shown marked favoritism to certain corporations having extensive litigation in his court; whether he has had summoned on juries in his court persons connected with certain corporations to which he has shown marked favoritism during his term of office; whether he has assisted his son, Arthur Dayton, in the preparation of the defense and trial of numerous cases against certain corporations for which the said Arthur Dayton is attorney, which cases were tried before him, the said Alston G. Dayton, and whether he has unlawfully used his high office and influence in behalf of said corporations; whether he has abused his power and influence as judge to further the interests of his son, Arthur Dayton; whether he has used the funds of the United States for an improper purpose; whether he has violated the acts of Congress regulating the selection of jurors; whether he has actively engaged in politics and used his high office as judge to further the political ambitions and aspirations of his friends; whether he has lent his services as judge to the coal operators of West Virginia by improperly issuing injunctions; whether he has shown hatred and bitterness toward miners on trial in his court; whether he has used his office as judge to discourage and prevent said miners from exercising their lawful right to organize and peacefully assemble under the laws of the United States and the State of West Virginia; whether he has wrongfully expressed his own opinions in charging grand juries in his court; whether he has conspired with certain corporations and individuals in the formation of a carbon trust in violation of law; whether he has unlawfully had an order entered staying a proceeding the object of which was the condemnation of a lot in Philippi, W. Va., for a site for a Federal building; whether he has publicly denounced the President of the United States from the bench and before a jury; whether he has unlawfully used the funds of the United States Government for his own private use; whether he has wrongfully collected from the Government funds as expenses not due or allowed to him under the statute; whether he has wrongfully kept open the books of his court at Philippi, W. Va.; whether he has, in open court and before a jury, accused witnesses of swearing falsely in cases then on trial before him; whether he has directed the marshal of his district to refuse to pay the fees of witnesses whom he had accused of testifying falsely; whether he has refused to enforce certain laws of the United States; whether he has openly denounced and criticised the United States Supreme Court; whether he has discharged jurors for rendering verdicts not agreeable to him; whether he has openly stated that he would not permit the United Mine Workers of America to exist within the jurisdiction of his court; whether he has refused to permit certain defendants in a case in his court to have an interpreter; whether he has stated in open court that the United Mine Workers of America are criminal conspirators; whether he is so prejudiced as to unfit him temperamentally to hold a judicial office; and whether he has been guilty of various other acts of personal and judicial misconduct for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said subcommittee.

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[1] Journal, p. 645; Record, p. 10327.

That the subcommittee shall have the same power in respect to obtaining testimony as is herein given to the said Committee on the Judiciary; that the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

Mr. Neeley moved that the resolution be referred to the Committee on the Judiciary without debate, and on that motion demanded the previous question.

The motion was agreed to without division.

On February 9, 1915,[1] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, reported the resolution back, with the recommendation that it be amended to read as follows:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misbehavior of Alston G. Dayton, United States district judge for the northern district of West Virginia; whether he, the said Alston G. Dayton, has unlawfully conspired with certain corporations and individuals to bring about the removal from office of the late John J. Jackson, judge of the District Court of the United States for the Northern District of West Virginia; whether he has shown marked favoritism to certain corporations having extensive litigation in his court; whether he has summoned on juries in his court persons connected with certain corporations to which he has shown marked favoritism during his term of office; whether he has abused his power and influence as judge to further the interests of his son, Arthur Dayton; whether he has violated the acts of Congress regulating the selection of jurors; whether he has lent his services as judge to the coal operators of West Virginia by improperly issuing injunctions; whether he has shown hatred and bitterness toward miners on trial in his court; whether he has used his office as judge to discourage and prevent said miners from exercising their lawful right to organize and peaceably assemble under the laws of the United States and the State of West Virginia; whether he has conspired with certain corporations and individuals in the formation of a carbon trust, in violation of law; whether he has openly stated that he would not permit the United Mine Workers of America to exist within the jurisdiction of his court; whether he has stated in open court that the United Mine Workers of America are criminal conspirators; and whether he has been guilty of any misbehavior for which he should be impeached.

And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer if necessary, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee, and shall attend the sittings of the same as ordered and directed thereby.

The Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

The expense of such investigation shall be paid out of the contingent fund of the House on vouchers approved by the chairman of the Judiciary Committee and approved by the Committee on Accounts and evidenced by the signature of the chairman thereof.

The amendment recommended by the committee was agreed to, and the resolution as amended was unanimously adopted.

On March 3,[2] Mr. Warren Gard, of Ohio, from the Committee on the Judiciary, submitted a report incorporating the report of a majority of the subcommittee to

[1] House Report No. 1381.

[2] House Report No. 1490.

which the investigation had been committed, accompanied by minority views signed by Mr. Daniel J. McGillicuddy, of Maine, a member of the subcommittee.

The report of the majority of the subcommittee is prefaced as follows:

The subcommittee appointed by the Committee on the Judiciary to make investigation of the charges contained in the foregoing resolution heard the testimony of numerous witnesses in Parkersburg and Wheeling, W. Va., and in Washington, D.C., on February 12, 13, 15, 16, 17, 22, 23, 24, and 26, at all of which hearings, except that of February 26 last, the Hon. A. G. Dayton, respondent, was present in person and attended by legal counsel; and on February 26 the hearing was had with the consent and approval of said Hon. A. G. Dayton, who was represented at that hearing by legal counsel.

The Hon. A. G. Dayton appeared before the subcommittee and made fun and extended statement of and concerning the matters involved in said investigation.

The witnesses and respondent were each and all sworn, their evidence taken by shorthand reporters, the evidence reduced to writing and is on the file with this committee.

The report then takes up the items of impeachment in their order and summarizes the evidence adduced on each charge.

The conclusion reached by the majority, after hearing the testimony, is that:

This evidence shows many matters of individual bad taste on the part of Judge Dayton, some not of that high standard of judicial ethics which should crown the Federal judiciary, but a careful consideration of all the evidence and attendant circumstances convinces us that there is little possibility of maintaining to a conclusion of guilt the charges made, and impels us therefore to recommend that there be no further proceedings herein.

Mr. McGillicuddy filed the following minority views:

I concur with my colleagues in the above findings of fact, but I do not concur in the recommendation that no further proceedings be had, as it is my opinion that the evidence taken by the subcommittee and findings of fact above made warrant further proceedings looking toward impeachment.

The committee recommend:

The Committee on the Judiciary considered the report of add subcommittee and the evidence thereon and came to the conclusion that no further proceedings should be had with reference to said resolution, and the Committee on the Judiciary beg to report the same to the House and recommend that no further proceedings be had with reference to said resolution.

The report was agreed to without debate or division.

530. The investigation into the conduct of H. Snowden Marshall,[1] United States district attorney for the southern district of New York.

The House declined to order an investigation of District Attorney Marshall on evidence presented by a Member and referred the subject to a committee.

Form of resolution providing for an investigation by the Judiciary Committee and authorizing a subcommittee to exercise powers delegated to the committee.

On January 12, 1916,[2] Mr. Frank Buchanan, of Illinois, presented, as a privileged matter, a resolution detailing at length numerous charges alleging official misconduct on the part of H. Snowden Marshall, United States district attorney for the southern

[1] For preliminary proceedings in this case see section 468 of this volume.

[2] First session Sixty-fourth Congress, Journal, p. 204; Record, p. 963.

district of New York, and directing the Committee on the Judiciary, to conduct an investigation of the charges and report their conclusions to the House.

After debate, on motion of Mr. John J. Fitzgerald, of New York, this resolution was referred to the Committee on the Judiciary.

On January 27[1] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, offered, as privileged, the following resolution:

Resolved, That the Committee on the Judiciary in continuing their consideration of House Resolution 90 be authorized and empowered to send for persons and papers, to subpoena witnesses, to administer oaths to such witnesses, and take their testimony.

The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

The Speaker of the House of Representatives shall have authority to sign, and the Clerk thereof to attest, subpoenas for witnesses, and the Sergeant at Arms or a deputy shall serve them.

Mr. Finis J. Garrett, of Tennessee, raised a question as to the privilege of the resolution, when, on motion of Mr. Webb, the resolution was considered by unanimous consent.

Mr. Webb said:

Mr. Speaker, the Committee on the Judiciary has had under consideration House Resolution No. 90, which was referred to that committee some 10 days ago. The committee has not come to any conclusion yet on the resolution, but feels that it should ask the House for the authority to subpoena some witnesses before it that might throw some light upon the charges made. The resolution was unanimously adopted by the Committee on the Judiciary to-day, and I trust that it may pass and that the committee may secure the authority, which it will immediately exercise.

The resolution was agreed to.

531. The case of H. Snowden Marshall, continued.

A witness having refused to testify before a subcommittee was arrested and detained in custody.

The action of a subcommittee in arresting a recalcitrant witness having been criticized in a letter addressed to the chairman, the committee reported the proceedings to the House, with recommendations for an investigation.

Instance in which the House authorized an investigation of purported violations of its privileges and its power to punish for contempt.

On April 5, 1916,[2] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, as a question of privilege, reported:

While considering House Resolution 90 and House Resolution 110, on the 31st day of January, 1916, the Committee on the Judiciary authorized the chairman to appoint a subcommittee of three to execute the purposes of House Resolution 110 to act for and on behalf of the full committee

[1] Record, p. 1658.

[2] First Sixty-fourth Congress, House Report No. 494.

wherever it may be deemed advisable to take testimony for said committee, and on February 1, 1916, the chairman appointed Messrs. Charles C. Carlin, Warren Gard, and John M. Nelson as members of such subcommittee.

Thereafter the said subcommittee organized and heard the testimony of certain witnesses in the Judiciary Committee rooms in the city of Washington. The subcommittee determined, for its further information and in carrying out the duties assigned it under the resolution of the House of Representatives, that it should hear the testimony of certain other witnesses in the city of New York, and on the 28th day of February, 1916, the said subcommittee, under subpoenas duly signed by the Speaker of the House of Representatives and attested by the Clerk thereof, caused certain witnesses to be brought before it, in the Federal post-office building in the city of New York, and continued the examination of witnesses upon said charges up to and including the 4th day of March, 1916.

On the 3d day of March, 1916, there appeared in a New York newspaper an article containing among other things, the following language:

"It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans."

On the 3d of March, 1916, the subcommittee called before it one, Leonard R. Holme, who testified to the subcommittee that he wrote the article containing the foregoing language, but when asked whether or not he conferred with anybody in the district attorney's office before the article was written replied that he declined to give the source of his information. The chairman of the subcommittee then propounded this question to the witness, "Did you confer with Mr. Marshall before you wrote this article?" To which the witness replied, "I respectfully decline to answer the question, Sir." The chairman of the subcommittee then propounded the following question to him, "Did you confer with anybody in Mr. Marshall's office?" To which the witness replied, "I respectfully decline to answer that question, sir."

Whereupon, the Sergeant at Arms was directed by the chairman of the subcommittee to take charge of the witness and keep him in custody until the further order of the committee.

The report appends an excerpt from the transcript of the testimony by Witness Holme before the subcommittee and continues:

On Saturday, the 4th day of March, 1916, the said H. Snowden Marshall, as district attorney for the southern district of New York, caused to be transmitted to C. C. Carlin, chairman of said subcommittee, then in the performance of its duties, as required by the House of Representatives, the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

Sir: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever—did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based on the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand-jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand-jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand-jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney

Hon. C. C. Carlin,
Chairman Subcommittee of the Judiciary Committee
of the House of Representatives, 323 Federal Building, New York, N. Y.

The report continues:

At the same time or before this letter was sent to the subcommittee, it was given to the newspapers and published by them.

On the 9th day of March 1916, the subcommittee aforesaid, through its chairman, Hon. C. C. Carlin, submitted to the Committee on the Judiciary the foregoing letter of H. Snowden Marshall.

On or about the 11th day of March, 1916, the following letter was received by the chairman of the Judiciary Committee and immediately laid before the full committee:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 10, 1916.

DEAR SIR: Referring to my letter of March 4, addressed to the chairman of the subcommittee which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed my statements as directed toward your honorable committee as a whole. I beg to advise you that the criticism in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation.

If you and the other members of your committee, for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

Respectfully,

H. SNOWDEN MARSHALL.

Hon. EDWIN Y. WEBB,
Chairman of the Judiciary Committee,
House of Representatives, Washington, D.C.

The report of the committee concludes:

The Judiciary Committee has carefully considered said letters in the light of congressional and judicial precedents as touching the prerogatives of the House of Representatives and its Members, and the committee has come to the determination that said letters, their publication and attendant circumstances, are of such nature, that they should be called to the attention of the House. For obvious reasons the committee deems it advisable to take this step rather than to report directly upon the facts and the law in the case. I am, therefore, directed by the committee to report the whole matter to the House of Representatives, with the recommendation that a select committee of five be appointed by the Speaker to report upon the facts in this case; the violations, if any, of the privileges of the House or the Committee on the Judiciary or the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, to the end that the privileges of the House shall be maintained and the rights of the Members protected in the performance of their official duties.

The House agreed to the following resolution:

Resolved, That a select committee of five members be appointed forthwith by the Speaker to consider the report, in the nature of a statement, from the Judiciary Committee with reference to certain conduct of H. Snowden Marshall, and to report to the House of Representatives the facts in the case; the violations, if any, of the privileges of the House of Representatives or of the Committee on the Judiciary, or of the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, in case they find a contempt has been committed, to the end that the privileges of the House shall be maintained and the rights of Members protected in the performance of their official duties.

The select committee shall have the power to send for persons and papers and shall submit its report to the House not later than April fourteenth, nineteen hundred and sixteen.

The Speaker appointed as members of this committee Messrs. John A. Moon, of Tennessee; John N. Garner, of Texas; Charles R. Crisp, of Georgia; John A. Sterling, of Illinois; and Irvine L. Lenroot, of Wisconsin.

532. The case of H. Snowden Marshall, continued.

By direction of the House, the Speaker issued and the Sergeant at Arms served a warrant for the arrest of a person charged with contempt of the House.

A person arrested by order of the House secured a writ of habeas corpus and was released on his own recognizance.

Discussion of the delegation of power to subcommittees.

On April 14, 1916,[1] Mr. Moon, from the select committee, presented the report of that committee, accompanied by a transcript of testimony.

The report quotes the following letter addressed to H. Snowden Marshall by direction of the committee:

APRIL 7, 1916.

Hon. H. SNOWDEN MARSHALL,

United States District Attorney for the
Southern District of New York, New York City.

DEAR SIR: Inclosed is House Resolution 193 and Report No. 494, which explain themselves. The select committee appointed by the Speaker of the House of Representatives are now engaged in the investigation of the matters referred to herein. We will be glad to have you appear before us, if you so desire, at the rooms of the Committee on the Post Office and Post Roads of the House of Representatives, in the Capitol Building, Washington, D.C., on Monday, April 10, 1916, at 10 o'clock a. m., and make such statement as you may desire before the committee touching this matter. As the time of the committee is limited in which to report, you will oblige us by advising by wire whether you desire to be present or not. This communication is made to you by order of the select committee.

Very truly yours,

JOHN A. MOON,
Chairman Select Committee.

In response to this letter, Judge Marshall appeared before the committee, and the report incorporates the following findings reached by the committee after hearing his testimony:

We conclude and find that the letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the Judiciary Committee of the House of Representatives, on March 4, 1916, is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity.

We find that Mr. Marshall's testimony is an aggravation of his contempt.

In discussing the delegation of power to subcommittees, the report says:

No legislative body consisting of a large number of members can move from one place to another to take testimony in cases where its power and authority or dignity is called into question. Its power in this respect must, therefore, necessarily be delegated to one of its committees or a subcommittee by a proper resolution, as was done in this case. This delegation of power

[1] First session Sixty-fourth Congress, H. Rept. 544.

to a subcommittee is lawful, and carries with it all of the authority belonging to the House in the execution of the immediate purpose for which the committee was called into existence.

Any conduct that would be a violation of the privileges of the House if directed against the House in the first place, would be a contempt against the House and a breach of its privileges when directed against one of its committees or subcommittees appointed by authority of the House to do a specific thing and acting within its delegated power and in the scope of its authority. Any other view would leave the House powerless to protect its honor and dignity and its constitutional rights. It would set at defiance the sovereignty of the people represented by the House. That the House as a representative body has the inherent power to protect itself from defamation and all slanderous and lawless conduct that would bring it into reproach and popular contempt, whether uttered or committed in the presence of the House or elsewhere, has not been disputed since the case of Anderson *v.* Dunn. Offensive, abusive, and defamatory language against a committee of the House acting within its authority is offensive, abusive, and defamatory against the House, and is just as dangerous to the integrity of that body as if had been committed in its presence.

As to the power of the House to punish for contempt, the committee decides:

We find, therefore, that the House has full power to punish for contempt committed in its presence, or not within its presence, by publication of matter that is defamatory against it or its committee lawfully constituted and acting within its authority. We find as stated that the privileges of the House in this case were breached by H. Snowden Marshall by the letter which he wrote to the subcommittee. This letter as a whole is insulting, defamatory, and a clear expression of contempt. The purpose for which it was written and printed was to defame—to bring into ridicule and contempt—the subcommittee of the Judiciary Committee having under investigation the impeachment charges against H. Snowden Marshall. It was as much a violation of the privileges of the House to have directed a scurrilous and offensive letter of this character against one of its committees, as if it had been addressed directly to the House.

It is proper for us to say that Mr. Marshall was given every opportunity to retract or apologize or in some way modify his statements contained in the letter. Parts of the letter containing the most defamatory matter were read to him, and he was asked if he meant to still say that that was true. He reaffirmed and reasserted the same, only with the statement that it was intended to criticize the procedure of the subcommittee and was not intended as a contempt of the House. It is clear that if the House could tolerate such a construction of this letter and could tolerate such vile and defamatory language against one of its committees, it would be powerless to conduct impeachment trials or perform any other duty without living under the disgrace of the contempt that would necessarily come to a body so unmindful of its duties to the people as to permit such insult and injury.

The committee therefore recommend:

As to the method of procedure that should be followed in the House in trial of the said H. Snowden Marshall for the contempt which the committee finds that he has committed, we recommend the passage of the following resolution:

Resolved, That the Speaker do issue his warrant, directed to the Sergeant at Arms, commanding him to take in custody, wherever to be found, the body of H. Snowden Marshall, of the State of New York, and to proceed forthwith to bring the said H. Snowden Marshall to the bar of the House of Representatives, to answer the charge that he, on March 4, 1916, in the city of New York, did violate the privileges of the House of Representatives of the United States by writing and causing to be published the following letter. (The letter is here quoted in full.)

Resolved, That the said H. Snowden Marshall, in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that the said H. Snowden Marshall be furnished with a copy of this resolution, and a copy of the report of the select committee of the House of Representatives, appointed to investigate the charges made against him in the House of Representatives.

Resolved, That when H. Snowden Marshall shall be brought to the bar of the House, to answer the charge of having violated the privileges of the House of Representatives, as afore set out, the Speaker shall then cause to be read to said H. Snowden Marshall the findings of fact and findings of law by the special committee of the House, charged with the duty of investigating whether or not the said H. Snowden Marshall had violated the privileges of the House of Representatives, or was in contempt of same; the Speaker shall then inquire of said H. Snowden Marshall if he desires to be heard, and to have counsel on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said H. Snowden Marshall desires to avail himself of either of these privileges, the same shall be granted him. If not, the House shall thereupon proceed to take order in the matter.

This report was considered in the House on June 20. In the course of the debate, Mr. Andrew J. Montague, of Virginia, said:

Mr. Speaker, I beg to submit to this House, without fear of successful contradiction, that neither this House nor the Senate has ever heretofore undertaken to exercise jurisdiction in contempt proceedings of a case of the character we are now considering. No slander or libel of this body has ever heretofore been treated as contempt by this body. This statement can not be controverted. Therefore we are driven to the unfortunate predicament of making a new law to fit a new case. The report attempts to declare that to be contempt which has never heretofore been adjudged to be contempt by either House of Congress. In other words, Mr. Speaker, we now seek to declare that unlawful which when heretofore done was lawful.

After extended debate, the resolutions recommended by the committee were agreed to—yeas 209, nays 85.

On June 22 the Speaker announced:

The Chair directs the reporter to record the fact to go in the Record that the Speaker signs this warrant for H. Snowden Marshall in the presence of the House.

The Chair does not think it necessary, but some gentlemen did.

On June 26 [1] the Sergeant at Arms addressed a letter to the Speaker advising him that in compliance with this warrant he had arrested Judge Snowden, who had thereupon secured a writ of habeas corpus and had been released on his own recognizance. On the same day the House agreed to the following:

Resolved, That the Sergeant at Arms of the House is hereby authorized to employ legal counsel in the matter of the proceedings against H. Snowden Marshall, United States district attorney for the southern district of New York, for contempt, the expenses to be paid out of the contingent fund of the House.

The hearing in the habeas corpus proceedings was held in the United States District Court for the Southern District of New York, which dismissed the writ of habeas corpus, remanded Judge Marshall to the custody of the Sergeant at Arms and directed that he be brought before the House.[2] The relator thereupon appealed the case to the Supreme Court.

533. The case of H. Snowden Marshall, continued.

A committee, after investigation of impeachment charges referred to it by the House, recommended that no further action be taken thereon.

On August 4, 1916,[3] Mr. Webb, from the Committee on the Judiciary, submitted the report of the committee on the resolution, proposing impeachment of H. Snowden

[1] Record, p. 10372.

[2] First session Sixty-fourth Congress, Record, p. 11691.

[3] House Report No. 1077.

Marshall, recommending that no further proceedings be had in the matter. The report was referred to the House Calendar and was not considered by the House.

534. The case of H. Snowden Marshall, continued.

Decision by the Supreme Court on the power of the House to punish for contempt.

The House is without constitutional jurisdiction to punish summarily for contempt in certain cases.

The power to punish contempt vested in the House of Commons is not conferred by the Constitution upon Congress.

While power to punish contempt is not expressly granted to Congress by the Constitution, it has the implied power to preserve itself and to deal by way of contempt with direct obstruction to its legislative duties.

The implied power to punish for contempt is limited to imprisonment and such imprisonment may not extend beyond the session of the body in which the contempt occurred.

In cases of contempt which it is not authorized to redress, the remedy of the House is resort to judicial proceedings under the criminal law.

On April 23, 1917,[1] the Supreme Court of the United States handed down a unanimous decision in the case of H. Snowden Marshall, appellant, *v.* Robert B. Gordon, Sergeant at Arms of the House of Representatives of the United States.[2]

As to the authority of the House of Commons to punish for contempt the decision says:

> Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly—that is, without the intervention of courts—and that such power included a variety of acts and many forms of punishment including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one, and continued to operate after the division of Parliament into two houses either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized as to make it too certain for anything but statement.

The opinion then differentiates between the power vested in the House of Commons and that conferred by the Constitution on the House of Representatives:

> No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own Members. Article 1, section 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes, then, to this: Was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the

[1] First session Sixty-fifth Congress, Record, p. 1706.

[2] U. S. 243, p. 521.

commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed.

The court holds, however, that, while not expressly granted, implied powers are conferred as follows:

As we have already said, the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself; that is, to deal by way of contempt with direct obstructions to its legislative duties.

As to the nature of these implied powers:

What does this implied power embrace, is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of two limitations; that is, that the power, even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases but the congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated.

The court then cites instances of the exercise of the power by Congress and characterizes them as dealing—

with either physical obstruction of the legislative body in the discharge of its duties or physical assault upon its Members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of Members from attending so that their duties might be performed, or, finally, with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.

In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten-that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are incidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance wherein the exertion of the power to compel testimony restraint

was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say that where a particular act because of interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence—that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

As to the application of these implied powers to the case at bar, the court holds:

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt; that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed. That they were not, would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted and the action of the House of Representatives based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legislative duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The opinion thus sums up the relation between the legislative and judicial departments of the Government:

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated

by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in State constitutions even before the adoption of the Constitution of the United States by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

As to the privilege of the House in impeachment proceedings, the decision says:

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary we think it is wholly without merit, as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides, it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted.

In conclusion the court recapitulates:

We repeat, out of abundance of precautions, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of habeas corpus and its action must be, and it is, therefore, reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.

535. The investigation of the conduct of Judge Kenesaw Mountain Landis.

A Member, rising in his place, impeached Judge Landis on his responsibility as a Member of the House.

As the Congress was nearing its close, the majority of the Judiciary Committee recommended that the further prosecution of the investigation be left to the succeeding Congress.

Conflicting views of the majority and minority of the Judiciary Committee, in 1921, as to offenses justifying impeachment.

On February 14, 1921,[1] Mr. Benjamin F. Welty, of Ohio, claiming the floor for a question of privilege, said:

I impeach said Kenesaw M. Landis for high crimes and misdemeanors and charge said Kenesaw M. Landis as follows:

[1] Third session Sixty-sixth Congress, Record, p. 3142.

First. For neglecting his official duties for another gainful occupation not connected therewith,

Second. For using his office as district judge of the United States to settle disputes which might come into his court as provided by the laws of the United States.

Third. For lobbying before the legislatures of the several States of the Union to procure the passage of State laws to prevent gambling in baseball, instead of discharging his duties as district judge of the United States.

Fourth. For accepting the position as chief arbiter of disputes in baseball associations at a salary of $42,500 per annum, while attempting to discharge the duties as a district judge of the United States which tends to nullify the effect of the judgment of the Supreme Court of the District of Columbia and the baseball gambling indictments pending in the criminal courts of Cook County, Ill.

Fifth. For injuring the national sport of baseball by permitting the use of his office as district judge of the United States because the impression will prevail that gambling and other illegal acts in baseball will not be punished in the open forum as in other cases.

Mr. Speaker, I move that this charge be referred to the Committee on the Judiciary without debate for investigation and report, and on that I move the previous question.

The House, without division, agreed to the motion.

On March 2,[1] Mr. Leonidas C. Dyer, of Missouri, from the Committee on the Judiciary, reported that the committee had considered the impeachment charges against Judge Landis—

which involve the legal and moral character of his alleged act in accepting employment while a district judge of the United States from certain baseball associations within the United States, to act as an arbitrator in disputes which may hereafter arise between them, at a compensation of $42,500 per annum, and that said committee find that said act of accepting the employment aforesaid, if proved, is, in their opinion, at least inconsistent with the full and adequate performance of the duty of the said the Hon. Kenesaw Mountain Landis, as a United States district judge, and that said act would constitute a serious impropriety on the part of said judge.

That said charges were filed too late in the present session of the Congress to admit of the full and complete investigation which their serious nature requires, and for that reason your committee recommend that the question of the further prosecution of said charges by full and adequate investigation be left to the Sixty-seventh Congress.

The minority views, submitted by Mr. Andrew J. Volstead, of Minnesota, fail to agree with the conclusions reached by the majority and take this position:

No violation of any law has been called to the attention of the committee, nor is it claimed that the judge is guilty of any act that would establish moral turpitude. One or both of those grounds would have to be established before impeachment proceedings could be maintained.

The investigation has gone far enough to disclose the actual facts and there is no reason for the recommendation that a further investigation be had in the next Congress. To postpone action is not only unjust to the judge, but equally unjust to the public. If the judge is guilty, this committee should say so; if he is not, he is entitled to have the public know that fact. Postponement tends only to discredit him in the eyes of the public and to weaken him in the administration of justice.

The Congress was nearing its close and consideration of the report was not reached by the House.

No action by Sixty-seventh Congress appears.

536. The investigation of charges against Attorney General Harry M. Daugherty

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[1] House Report No. 407: Record. p. 4359.

Instance wherein a Member rising to a question of privilege, impeached the Attorney General on his responsibility as a Member of the House.

A Member proposing impeachment is required to present definite charges before proceeding in debate.

Charges of impeachment may not be denied presentation because of generality in statement.

A committee was authorized to send for persons and papers and to administer oaths in an investigation delegated to it by the House.

On September 11, 1922,[1] Mr. Oscar E. Keller, of Minnesota, rising to a question of privilege, said:

Mr. Speaker, I impeach Harry M. Daugherty, Attorney General of the United States, for high crime and misdemeanors in office.

Mr. Keller proceeded in debate, when the Speaker interposed:

The Chair will say to the gentleman that he ought first to prefer his charges. When the gentleman rises to a question of this high privilege he ought to present definite charges at the outset.

Thereupon Mr. Keller submitted:

First. Harry M. Daugherty, Attorney General of the United States, has used his high office to violate the Constitution of the United States in the following particulars:

(1) By abridging freedom of speech.

(2) By abridging the freedom of the press.

(3) By abridging the right of people peaceably to assemble.

Second. Unmindful of the duties of his office and his oath to defend the Constitution of the United States, and unmindful of his obligations to discharge those duties faithfully and impartially, the said Harry M. Daugherty has, in his capacity of Attorney General of the United States, conducted himself in a manner arbitrary, oppressive, unjust, and illegal.

Third. He has, without warrant, threatened with punishment citizens of the United States who have opposed his attempts to override the Constitution and the laws of this Nation.

Fourth. He has used the funds of his office illegally and without warrant in the prosecution of individuals and organizations for certain lawful acts which, under the law, he was specifically forbidden to prosecute.

Fifth. He has failed to prosecute individuals and organizations violating the law after those violations have become public scandal.

Mr. Thomas L. Blanton, of Texas, made the point of order that the charges recited were too general in character to constitute an impeachment of a public official.

The Speaker overruled the point of order, and Mr. Kelier offered the following resolution:

Whereas impeachment of Harry M. Daugherty, Attorney General of the United States, has been made on the floor of the House by the Representative from the fourth district of Minnesota: Be it

Resolved, That the Committee on the Judiciary be, and they hereby are, authorized and directed to inquire into the official conduct of Harry M. Daugherty, Attorney General of the United States, and to report to the House whether, in their opinion, the said Harry M. Daugherty has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of this House; and that the

[1] Second session Sixty-seventh Congress, Record p. 12346.

said committee have power to send for persons and papers and to administer the customary oaths to witnesses.

On motion of Mr. Frank W. Mondell, of Wyoming, the resolution was referred to the Committee on the Judiciary.

On December 4[1] the House, by resolution, authorized the committee in the consideration of the resolution, to send for persons and papers, administer oaths to witnesses, and sit during sessions of the House.

537. The investigation of charges against Attorney General Harry M. Daugherty, continued.

Instance wherein a Member declined to obey a summons to appear and testify before a committee of the House.

A committee having summoned a Member to testify as to statements made by him in debate, he protested that it was an invasion of his constitutional privilege.

Form of subpoena served on a Member of the House.

A committee asserted the power of the House to arrest and imprison recalcitrant Members in order to compel obedience to its summons.

An official against whom charges of impeachment were pending asked leave and was allowed to file an answer.

In compliance with a request from the committee that he furnish it with a statement of the facts relied on by him as constituting the offenses charged, Mr. Keller filed a statement specifying some 60 different charges. Thereupon Attorney General Daugherty asked leave and was allowed to file an answer.

While these pleadings were under consideration by the Committee on the Judiciary Mr. Keller appeared before the committee and read a prepared statement criticizing the methods of the committee in conducting the inquiry and announcing:

> I reiterate now that I am in possession of evidence ample to prove Harry M. Daugherty guilty of all of the high crimes and misdemeanors with which I have charged him. I am ready and anxious to present this evidence in a proper way before an unbiased committee, but I emphatically refuse to permit it to be used as whitewashing material.
>
> I now repeat my demand that my resolution, House Resolution 425, be reported to the House of Representatives with the recommendation that it pass, and that I be permitted to present my evidence before an unbiased committee in the proper way. With these whitewashing proceedings I shall have nothing further to do.

He then withdrew and declined to further participate in the proceedings.

By direction of the committee the following subpoena was issued and was served upon Mr. Keller by the Sergeant at Arms of the House December 14:

> BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA.
>
> To the SERGEANT AT ARMS or his special messenger:
>
> You are hereby commanded to summon Hon. Oscar E. Keller to be and appear before the Judiciary Committee of the House of Representatives of the United States, of which the Hon. Andrew J. Volstead is chairman, in their chamber in the city of Washington on December 15, 1922,

[1] Fourth session Sixty-seventh Congress, Record, p. 18.

at the hour of 10:30 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States at the city of Washington, this 14th day of December, 1922.

[SEAL.]

F. H. GILLETT, *Speaker*.

Attest:

WM. TYLER PAGE, *Clerk*.

Mr. Keller refused to heed the summon and by his attorney, who appeared before the committee for him, submitted that as a Representative in Congress he was not legally bound to obey the subpoena.

On January 25, 1923,[1] Mr. Andrew J. Volstead, of Minnesota, from the Committee on the Judiciary, submitted a report reciting:

That the said Oscar E. Keller was duly summoned as a witness by authority of the House of Representatives to give testimony before this committee touching matters of inquiry committed to that committee, and that he willfully made default in that in disobedience to said subpoena and without valid cause or excuse, but in contempt of the authority of the House of Representatives, he willfully failed and refused to appear as such witness and willfully failed and refused to testify in obedience to said subpoena. Your committee is of the opinion that Mr. Keller was legally required to obey said subpoena and that the excuse he submitted through his said attorney is without any merit; that the House of Representatives possesses the power to cause him to be arrested and confined in prison until he shall consent to testify, such confinement not to extend beyond the term of this Congress, and power to otherwise deal with him so as to compel obedience to the summons.

Subsequent illness of Mr. Keller rendered inadvisable further action on the part of the committee or the House.

538. The investigation of the charges against Attorney General Harry M. Daugherty, continued.

A motion to lay on the table a resolution providing for final disposition of impeachment proceedings does not, if agreed to, carry such proceedings to the table with the resolution.

Minority views submitted by Mr. R. Y. Thomas, jr., of Kentucky, takes the position that House Resolution 425 merely authorized an investigation of the charges and not a trial of the Attorney General, and conclude with the recommendation:

I therefore recommend, in view of what I consider the farcical investigation of this case, that a special committee be appointed by the Speaker of the House with instructions to make a full and fair investigation of all the charges against the Attorney General.

On January 25, 1923,[2] Mr. Volstead called up the majority report and offered the following resolution:

That whereas the Committee on the Judiciary has made an examination touching the charges sought to be investigated under House resolution 425 to ascertain if there is any probable ground to believe that any of the charges are true; and on consideration of the charges and the evidence obtained it does not appear that there is any ground to believe that Harry M. Daugherty, Attorney General of the United States, has been guilty of any high crime or misdemeanor requiring the interposition of the impeachment powers of the House:

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[1] Fourth session Sixty-seventh Congress, House Report No. 1371.

[2] Fourth session Sixty-seventh Congress, Journal, p. 148; Record, p. 2410.

Resolved, That the Committee on the Judiciary be discharged from further consideration of the charges and proposed impeachment of Harry M. Daugherty, Attorney General, and that House Resolution 425 be laid upon the table.

After extended debate, Mr. Finis J. Garrett, of Tennessee, moved to lay the resolution on the table.

In response to a parliamentary inquiry as to whether an affirmative vote on the motion would carry the entire impeachment proceedings to the table, the Speaker held:

This is a resolution laying the whole subject on the table. A motion to lay that on the table, if it carried, would be equivalent to rejecting it. A motion to lay the impeachment proceedings on the table would still leave the impeachment matter pending.

On the question of agreeing to the motion to lay the resolution on the table there were 88 yeas and 204 nays, and the motion was rejected.

A division of the question on the pending resolution and preamble having been demanded, the resolution was agreed to without division, and the preamble by a vote of yeas 206, nays 78.

539. Instance wherein the Senate transmitted to the House testimony adduced before one of its committees for consideration by the House with a view to impeachment.

An official against whom charges were pending having resigned his office, the House committee to which they had been referred made no report.

On March 25, 1924,[1] the Senate passed and messaged to the House the following resolution:

Whereas one Clarence C. Chase is and, for more than a year last past, has been a civil officer of the United States, to wit, the collector of customs at the port of El Paso, Tex.; and

Whereas in the prosecution of an inquiry by the Committee on Public Lands and Surveys of the Senate under Senate Resolution 147, it became necessary to inquire into the source from which one A. B. Fall, late Secretary of the Interior, secured large sums of money at or about the time or shortly after he entered upon negotiations resulting in the execution of leases or contracts relating to the naval oil reserves; and

Whereas it appears from the testimony taken and proceedings had before the said committee that the said Clarence C. Chase entered into a conspiracy with the said A. B. Fall to mislead and deceive the said committee concerning the source of such moneys, and that pursuant to such conspiracy the said Clarence C. Chase, on or about the 29th of November, 1923, endeavored to induce one Price McKinney to represent to and testify before the said committee that he had loaned to the said Fall at or about the time hereinbefore mentioned the sum of $100,000; and

Whereas the said Clarence C. Chase well knew that the said Price McKinney had made no such loan to the said Fall; and

Whereas the said Clarence C. Chase being, on the 24th day of March, 1924, called before the said committee and interrogated concerning the matters herein referred to by the said committee, declined and refused to answer any questions in relation to the same upon the ground that his answers might tend to incriminate him: Now, therefore, be it

Resolved, That a copy of the testimony adduced and the proceedings had before the said Committee on Public Lands and Surveys under Senate Resolution 147 be, with a copy of this resolution, transmitted to the House of Representatives for such proceeding against the said Clarence C. Chase as may be appropriate.

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[1] First session Sixty-eighth Congress, Record, p. 4915.

On the following day[1] the resignation of Clarence C. Chase was announced in the Senate.

In the House the resolution was referred from the Speaker's table to the Committee on the Judiciary, which made no report thereon.

540. Proposed inquiry into the eligibility of Andrew W. Mellon to serve as Secretary of the Treasury, in 1932.

Secretary Mellon having been nominated and confirmed as ambassador to a foreign country and having resigned as Secretary of the Treasury, the House declined to authorize an investigation.

On January 6, 1932,[2] Mr. Wright Patman, of Texas, rising in his place in the House, charged that Andrew William Mellon, of Pennsylvania, was serving as Secretary of the Treasury of the United States in contravention of statutes[3] prohibiting certain officials from owning certain classes of property and engaging in certain business enterprises, and offered a privileged resolution providing for an investigation.

On February 13,[4] Mr. Hatton W. Sumners, of Texas, from the Committee on the Judiciary to which the resolution had been referred, presented a report[5] recommending the adoption of the following:

Whereas Hon. Wright Patman, Member of the House of Representatives, filed certain impeachment charges against Hon. Andrew W. Mellon, Secretary of the Treasury, which were referred to this committee; and

Whereas pending the investigation of said charges by said committee, and before said investigation had been completed, the said Hon. Andrew W. Mellon was nominated by the President of the United States for the post of ambassador to the Court of St. James and the said nomination was duly confirmed by the United States Senate pursuant to law, and the said Andrew W. Mellon has resigned the position of Secretary of the Treasury: Be it

Resolved by this committee, That the further consideration of the said charges made against the said Andrew W. Mellon, as Secretary of the Treasury, be, and the same are hereby discontinued.

The resolution submitted by the committee was agreed to without debate or division.

541. A proposal to investigate the official conduct of the President of the United States with a view to impeachment was laid on the table.

The question of consideration may not be demanded on a resolution of impeachment until the reading of the resolution has been concluded.

Recognition to propound a parliamentary inquiry is within the discretion of the Chair and may interrupt proceedings of high privilege.

The laying on the table of a resolution of impeachment does not preclude the offering of a similar resolution if not in identical language.

Motions for the disposition of a resolution of impeachment are not in order until it has been read in full.

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[1] Record p. 5009.

[2] First session, Seventy-second Congress, Record, p. 1400.

[3] U. S. Code, title 5, sec. 243; title 14, sections 1, 51, 66; title 19, sections 3, 382, etc.

[4] Record, p. 3850.

[5] House Report No. 444.

A resolution of impeachment may be expunged from the record by unanimous consent only.

On December 13, 1932,[1] Mr. Louis T. McFadden, of Pennsylvania, rising to a question of constitutional privilege in the House, proposed to impeach the President of the United States for "high crimes and misdemeanors" in that he had "unlawfully attempted to usurp legislative powers" and otherwise in domestic and foreign relations "violated the Constitution and laws of the United States." The charges were of a general nature and prefaced a resolution authorizing the Committee on the Judiciary to conduct an investigation with a view to impeachment.

In the course of the reading of the resolution by the Clerk, Mr. William H. Stafford, of Wisconsin, interrupted and proposed to submit a parliamentary inquiry, when Mr. Thomas L. Blanton, of Texas, presented the point of order that a proceeding of this character could not be interrupted by a parliamentary inquiry.

The Speaker[2] overruled the point of order and said:

> That is in the discretion of the Chair. The Chair will recognize the gentleman from Wisconsin to make a parliamentary inquiry.

Mr. Stafford inquired if it would be in order to raise the question of consideration. The Speaker, Mr. John N. Gamer, replied that the question of consideration could not be raised until the reading of the resolution had been completed.

The reading of the resolution having been concluded, Mr. Edward W. Pou, of North Carolina, moved that the resolution be laid on the table.

On a yea and nay vote, ordered on the demand of Mr. Leonidas C. Dyer, of Missouri, the yeas were 361, the nays, were 8, and the resolution was laid on the table.

On January 17, 1933,[3] Mr. McFadden again rose to a question of privilege and submitted a similar but not identical, resolution embodying similar charges and carrying a similar proposal for an investigation by the Committee of the Judiciary, and asked recognition to debate it. The Speaker said:

> The gentleman is entitled to an hour, but first the Clerk must report the resolution of impeachment.

During the reading of the resolution by the Clerk, Mr. Robert Luce, of Massachusetts, interrupted and submitted a parliamentary inquiry asking if it were in order to bring up at this time a proposition of similar import to one previously laid on the table.

The Speaker said:

> The Chair, of course, has not heard the resolution read. Probably if it was identical with the resolution submitted some time ago and laid on the table there would be some question whether or not a second impeachment could be had. But the President can be impeached, or any person provided for by the Constitution, a second time, and the Chair thinks the better policy would be to have the resolution read and determine whether or not it is the same.

Mr. Fred A. Britten, of Illinois, inquired if it would be in order at this time to offer a motion for disposition of the resolution.

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[1] Second session, Seventy-second Congress, Record, p. 399.

[2] John N. Garner, of Texas, Speaker.

[3] Second session seventy-second Congress, Record, p. 1954.

The Speaker replied:

No. The Chair would not recognize any Member to make a motion until the resolution is read.

Mr. Britten further inquired if a motion to expunge the resolution would be entertained.

The Speaker responded:

It may only be done by unanimous consent.

The Clerk having concluded the reading of the resolution, Mr. Henry T. Rainey,[1] of Illinois, offered a motion to lay the resolution on the table.

Mr. McFadden submitted that he was entitled to recognition for one hour.

The Speaker differentiated:

The gentleman from Illinois moves to lay the resolution of impeachment on the table.

May the Chair be permitted to make a statement with reference to the rules applying to that motion. The parliamentarian has examined the precedents with reference to the motion. Speaker Clark and Speaker Gillette, under identical conditions, held that a motion to lay on the table deprived a Member of the floor, although the general rules granted him one hour in which to discuss the resolution of impeachment or privileges of the House. Therefore the motion is in order.

The question being put, and the yeas and nays being ordered, it was decided in the affirmative, yeas, 344, nays, 11, and the resolution was laid on the table.

542. The inquiry into the conduct of Harry B. Anderson, United States judge for the western district of Tennessee, in 1931.

The inquiry into the conduct of Judge Anderson was initiated by a resolution supplemented by a report from the Department of Justice.

While the House decided against impeachment, it expressed disapproval of practices disclosed by the investigation.

On March 24, 1930,[2] Mr. Fiorello LaGuardia, of New York, introduced a resolution authorizing a special committee of five members of the Committee on the Judiciary to inquire into the official conduct of Harry B. Anderson, United States judge for the western district of Tennessee.

The resolution was referred to the Committee on the Judiciary and reported to the House by direction of that committee through Mr. Andrew J. Hickey, of Indiana, on June 13.[3]

After brief debate, the resolution was agreed to with an amendment providing for the designation of the members of the special committee by the chairman of the Committee on the Judiciary.

In the course of his remarks, Mr. Hickey, in response to an inquiry from Mr. William H. Stafford, of Wisconsin, explained that the preliminary inquiry had been delegated by the committee to a subcommittee which in addition to its own research had the advantage of a report by the Department of Justice which had made an

[1] Mr. McFadden and the President were members of the same party; Mr. Pou and Mr. Rainey were members of the opposing party.

[2] Second session Seventy-first Congress, Record, p. 6051.

[3] Record, p. 10649.

extensive investigation of the handling of bankruptcy proceedings in Judge Anderson's court.

Pursuant to the resolution, Mr. Hickey, Mr. LaGuardia, Mr. Charles I. Sparks, of Kansas, Mr. Hatton W. Sumners, of Texas, and Mr. Gordon Browning, of Tennessee, were appointed to the special committee which after investigation recommended to the committee that no further action be taken.

On February 18, 1931,[1] Mr. George S. Graham of Pennsylvania, presented the report of the Committee on the Judiciary, embodying the recommendation of the subcommittee.

The report recited that while there were no grounds for invoking the high power of impeachment, the investigation disclosed—

certain matters which the committee does not desire to be regarded as in any way approving or sanctioning. The practice existing in the western district of Tennessee, both under Judge Anderson and his predecessors, of appointing referees to the place and position of receivers in bankruptcy matters is one which the committee thinks ought to be discontinued and desires to express its disapproval of the practice. The atmosphere and surroundings in the Tully case while free from evidence of wrong on the part of the judge, lead the committee to say that in their opinion when private matters or family matters come in touch with the court a judge should exercise more than ordinary care to avoid the appearance of improperly using the process of the court in any way that might be misunderstood, for in such matters the conduct of a judge must always be above suspicion.

The report then recommended the adoption of the following resolution which was agreed to by the House without debate:

Resolved, That the evidence submitted on the charges against Hon. Harry B. Anderson, district judge for the western district of Tennessee, does not warrant the interposition of the constitutional powers of impeachment of the House.

543. The investigation into the conduct of William E. Baker, United States district judge for the northern district of West Virginia.

A memorial addressed to the Speaker and setting forth charges against a civil officer was referred to the Committee on the Judiciary, which recommended an investigation.

The House referred the case of Judge Baker to the Committee on the Judiciary instead of to a select committee for investigation.

On May 22, 1934,[3] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary, reported the following resolution, which was agreed to:

Whereas certain charges[4] against William E. Baker, United States district judge for the Northern District of West Virginia, have been transmitted by the Speaker of the House of Representatives to the Judiciary Committee: Be it

Resolved, That the Committee on the Judiciary be, and they hereby are, authorized and directed to inquire into the official conduct of William E. Baker, United States district judge for the Northern District of West Virginia, and to report to the House whenther in their opinion the

[1] Third session Seventy-first Congress, Record, p. 5312.

[2] Record, p. 5009.

[3] First session Sixty-eighth Congress, Record, p. 9240.

[4] The memorial submitting the charges appears in full at p. 4875 of the Record.

said William E. Baker has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring interposition of the constitutional powers of this House; and that the said committee have power to send for persons and papers, to administer the customary oaths to witnesses, and to sit during the sessions of the House until adjournment and thereafter until said inquiry is completed and report to the next session of the House.

The committee thus constituted was by later resolution authorized to employ clerical assistance and to incur expenses not to exceed $2,500.

On February 10, 1925,[1] Mr. Leonidas C. Dyer, of Missouri, from the Committee on the Judiciary, submitted the report of the committee on the case.

The committee found:

That in their opinion the said William E. Baker has not been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of this House, and recommends that articles of impeachment be not directed by the House against the said William E. Baker.

The report was referred to the Committee of the Whole House.

544. The inquiry into the conduct of Judge George W. English, United States judge for the eastern judicial district of Illinois.

A resolution proposing investigation with a view to impeachment was introduced by delivery to the Clerk and was referred to the Committee on Rules, on request of which committee it was referred to the Committee on the Judiciary.

A joint resolution created a select committee (in effect a commission), composed of Members of the House, and authorized it to report to the succeeding Congress.

A select committee visited various States and took testimony.

January 13, 1925,[2] Mr. Harry B. Hawes, of Missouri, introduced, by delivery to the Clerk, a resolution for an investigation of the official conduct of George W. English, district judge for the eastern district of Illinois, which, under the rule, was referred to the Committee on Rules. On February 3.[3] Mr. Bertrand H. Snell, from the Committee on Rules, by direction of that committee, asked unanimous consent that the resolution be referred to the Committee on the Judiciary, to which communications relating to the charges have been previously referred. The request was agreed to, and subsequently [4] Mr. George S. Graham, of Pennsylvania, introduced a joint resolution which was reported from the Committee on the Judiciary and agreed to February 12,[5] as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That William D. Boies, Charles A. Christopherson, Ira G. Hersey, Earl C. Michener, Hatton W. Sumners, John N. Tillman, and Royal H. Weller, being a subcommittee of the Committee on the Judiciary of the House of Representatives, be, and they hereby are, authorized and directed to inquire into the official conduct of George W. English, United States district judge for the eastern district of Illinois, and so report to the House whether in their opinion the said

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[1] House Report No. 1443.

[2] Second session Sixty-eighth Congress, Record, p. 1790.

[3] Record, p. 2940.

[4] Second session Sixty-eighth Congress, Record, p. 3472.[5] Journal, p. 237.

George W. English has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, District of Columbia, and elsewhere and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal, and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House and until adjournment sine die of the Sixty-eighth Congress, and thereafter until said inquiry is completed, and report to the Sixty-ninth Congress.

SEC. 2. That said special committee be, and the same is hereby, authorized to employ such stenographic and clerical assistance as they may deem necessary, and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside of the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

The joint resolution was passed by the Senate and approved by the President. Under the authorization thus conferred, the committee held hearings in Illinois, Missouri, and the District of Columbia following the adjournment of the Sixty-eighth Congress and submitted a report to the Sixty-ninth Congress.[1]

545. Impeachable offenses are not confined to acts interdicted by the constitution or the Federal Statutes but include also acts not commonly defined as criminal or subject to indictment.

Impeachment may be based on offenses of a political character, on gross betrayal of public interests, inexcusable neglect of duty, tyrannical abuse of power, and offenses of conduct tending to bring the office into disrepute.

No judge is subject to impeachment on the complaint that he has rendered an erroneous decision.

A committee finding that a judge had failed to live up to the standards of the judiciary in matters of personal integrity and in the discharge of the duties of his office, recommended articles of impeachment.

It is in order to demand a division of the question on agreeing to a resolution of impeachment and a separate vote may be had on each article.

On March 25, 1926,[2] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary submitted the report of the committee reviewing the several charges in detail.

In determining whether the nature of the offenses charged warranted indictment, the committee decide:

Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also, for abuses or, betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or,

[1] First session Sixty-ninth Congress, House Report No. 145.

[2] First session Sixty-ninth Congress, House Report No. 653.

as one writer puts it, for a "breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute, or for an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law."

The committee hold, however, that:

No judge may be impeached for a wrong decision.

In support of the contention that the personal conduct of an official may be made the basis of impeachment the report says:

A Federal judge is entitled to hold office under the Constitution during good behavior, and this provision should be considered along with article 4, section 2, providing that all civil officers of the United States shall be removed from office upon impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Good behavior is the essential condition on which the tenure to judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office.

A civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and he would continue to do this until his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution. When the Constitution says a judge shall hold office during good behavior it means that he shall not hold it when his behavior ceases to be good behavior.

The report therefore concludes:

The Federal judiciary has been marked by the services of men of high character and integrity, men of independence and incorruptibility, men who have not used their office for the promotion of their private interests or those of their friends. No one reading the record in this case can conclude that this man has lived up to the standards of our judiciary, nor is he the personification of integrity, high honor, and uprightness, as the evidence presents the picture of the manner in which he discharged the high duties and exercised the powers of his great office.

The committee accordingly submit five articles of impeachment with the recommendation that they be adopted by the House and presented to the Senate with a demand for conviction and removal from office.

Minority views [1] are filed taking issue with facts determined and conclusions reached in the several specific charges discussed in the majority report, but indicating no disagreement with the views of the majority as to the law governing impeachment proceedings as set forth in the report.

The report was debated in the House on March 30, 31, and April 1, when the resolution reported by the committee was agreed to—yeas, 306; nays, 62.

The House then adopted a resolution [2] submitted by Mr. Graham naming Messrs. Earl C. Michener, Ira G. Hersey, W. D. Boies, C. Ellis Moore, George R. Stobbs, Hatton W. Sumners, and Andrew J. Montague, majority and minority members of the Committee on the Judiciary, as managers to conduct the impeachment, and instructing them to appear at the bar of the Senate and demand conviction.

[1] Record, p. 6363.

[2] Record, p. 6736

On reception of the report in the House on March 25, Mr. Charles R. Crisp, of Georgia, rising to a parliamentary inquiry, asked if it would be in order to demand a separate vote on each of the five articles of impeachment.

The Speaker replied in the affirmative, and when the vote was taken on April 1,[1] recognized Mr. William B. Bowling, of Alabama, to demand a separate vote on the first article of the impeachment, and said:

In response to the query of the gentleman may the Chair state that in view of the fact he is about to recognize the gentleman from Alabama to demand a separate vote on article of impeachment No. 1, the Chair will now put the question on agreeing to the resolution with all the articles except article 1.

In the opinion of the Chair the proper procedure under the circumstances, a separate vote having been demanded on only one article, would be that the vote should be first taken on the resolution and all other articles.

546. The managers on the part of the House having formally presented articles of impeachment, the Senate organized for the trial.

A Senator excused himself from participation in impeachment proceedings on the ground of close personal relations with one of the managers for the House, but on suggestion took the oath as a member of the court of impeachment.

A committee of the Senate after investigation expressed the opinion that during a trial of impeachment the House could, with the consent of the Senate, adjourn and the Senate proceed with the trial.

By common consent it was agreed that a judge under trial before the Senate continued undisturbed in the exercise of the judicial duties of his office.

On April 6,[2] the House by resolution notified the Senate of the appointment of managers and a message was communicated from the Senate in response informing the House that the Senate was ready to receive them.

Accordingly, on April 22,[3] at 2 o'clock p. m., the managers of the impeachment on the part of the House appeared before the bar of the Senate and were announced by the doorkeeper. The Vice President received them and they were seated by the Sergeant at Arms.

By direction of the Vice President the Sergeant at Arms made proclamation:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Hon. George W. English, judge of the United States Court for the Eastern District of Illinois.

Thereupon Mr. Manager Michener read the resolution appointing the managers on the part of the House and presented the articles of impeachment with the demand of the House for impeachment, conviction, and removal from office.

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[1] Record, p. 6735.

[2] Record, p. 6963.

[3] Record, p. 7962.

On motion of Mr. Albert B. Cummins, of Iowa, the Senate agreed to an order fixing Friday, April 23, as the date on which the Senate would organize for the trial, and the managers on the part of the House retired from the Chamber.

Mr. Coleman L. Blease, of South Carolina, thereupon excused himself from participation in the trial on account of his former business relations with Mr. Manager Dominick.

When, however, on the day of trial, Mr. Blease's name was called for him to be sworn and he failed to appear to take the oath, Mr. John S. Williams, of Mississippi, submitted:

Mr. President, I noticed that, when the name of the Senator from South Carolina was called, he shook his head to indicate that he would not take the oath. On yesterday the Senator from South Carolina asked to be excused from participating in the trial of Judge English and gave as his reason for so doing the relationship which exists between himself and one of the board of managers of the House, Representative Dominick. We all sympathize with the views expressed by the Senator from South Carolina; but in the composition of the Senate as a court to try Judge English on the indictment which has been returned here by the House of Representatives, I think no one may be excused from taking the oath.

What shall happen to the Senator from South Carolina when it become necessary to vote is an entirely different matter, but the rule specifically provides that all the Members of the Senate who are present shall present themselves and take the oath, and that absent Senators shall take the oath as they appear in the Senate. I therefore think it not competent for us to excuse the Senator from South Carolina from taking the oath as a member of the court. I hope the question will not be raised and that we shall avoid any technicality which might be urged at any time. I ask the Senator from South Carolina to take the oath.

Thereupon Mr. Blease, when his name was called the second time, came forward and took the oath.

The designated day[1] having arrived, the senior Senator from Iowa, Mr. Cummins, by request administered the oath as the Presiding Officer of the court to the Vice President, who in turn swore in the Senators in groups of 10.

Mr. James A. Reed, of Missouri, having raised a question as to the administration of the oath of absent Senators, the Vice President said:

Under the precedents of the Senate each Senator who has not been sworn will be called to the desk when he enters the Chamber and the oath will be administered to him.

The Senate then agreed to an order submitted by Mr. Cummins notifying the House of Representatives that the Senate was ready for the trial of the articles of impeachment.

Pending the appearance of the House managers, Mr. Claude A. Swanson, of Virginia, inquired of Mr. Cummins, the Chairman of the Judiciary Committee, if conclusion has been reached as to whether the trial required that both Houses of Congress remain in session during the trial or whether the House of Representatives with consent of the Senate could adjourn sine die while the latter remained in session for the trial of the case of whether both Houses might adjourn and the Senate convene in extra session for the trial.

Mr. Cummin said:

Certain members of the Judiciary Committee, of which I happen to be chairman, have made rather an exhaustive study of that subject. I think it is the opinion of all the members of the

[1] Record, p. 8026.

Judiciary Committee who have examined the matter that the House can adjourn sine die, with the consent, of course, of the Senate, and that the impeachment proceedings can go forward without the presence of the House of Representatives; although I say, very frankly, that the only precedent with regard to that question was decided the other way. That precedent was in the impeachment of Secretary Belknap. It was then ruled by the Senate that the House of Representatives must be present during the impeachment trial. A very close vote. I think the vote was 19 to 17, but there were not more than 2 votes either way.

In the Belknap case the question arose whether it was necessary for the House to be in session during the trial of the impeachment, and it was ruled in that case that the House must remain in in session. I think everybody recognizes that there were very peculiar circumstances surrounding the trial of the impeachment of Secretary Belknap. There were political considerations, which I have no doubt had great weight in the determination of the matter. It was alleged that certain of the Senators did not want to try the Belknap case until after November elections. That did not appear, of course, in the ruling; but, at any rate, that was one of the material things that developed in that case. There was a controversy in respect to the time at which the case should be tried. Some wanted to put it over until after the elections and some wanted to try it before the elections. There are, I think, 12 precedents in the various States with constitutions substantially like our own.

There are half a dozen or more precedents in the States in which it has been uniformly held that the Senate could go forward in the trial of an impeachment case without the presence of the House.

Without any order on the part of the Senate, I appointed a committee—a subcommittee it may be called—of the Judiciary Committee to study and consider that subject.

And the majority of the committee, so far as I know, without any dissent, although they were not all present when the final conclusion was reached, held that it was not necessary for the House to be present or in session during the trial of the impeachment.

Mr. Joseph E. Ransdell, of Louisiana, further inquired if there was any question as to the right of a judge on trial to continue in the exercise of the judicial duties of his office.

Mr. Cummins replied:

None whatever. He will continue to discharge his duties as judge until after the trial of the impeachment.

The managers on the part of the House having appeared, an order was made that a summons be issued for George W. English returnable on May 3, and the Senate sitting for the trial of the impeachment adjourned until that date.

547. The answer of the respondent was printed and time allowed for replication of managers, with order that further pleadings be filed with the Secretary with due notice to the other party prior to a designated date.

The resignation of the respondent in no way affects the right of the court of impeachment to continue the trial and hear and determine all charges.

The respondent having retired from office, the managers, while maintaining their right to prosecute the charges to a final verdict, recommended that impeachment proceedings be discontinued.

On May 3,[1] the Senate convened as a court of impeachment and the respondent appeared and was seated with counsel in the area in front of the Secretary's desk. The return of the Sergeant at Arms was read and sworn to and the respondent presented his answer which was read by the Secretary. The answer was ordered

[1] Record, p. 8578.

printed and the managers on the part of the House were by order of the Senate given until May 5 in which to present a replication, with direction that further pleadings be filed with the Secretary of the Senate with notice to the other party and that all pleadings be closed not later than May 10. The Senate sitting as a court of impeachment then adjourned until May 5.

In the House on May 4,[1] Mr. Earl C. Michener, of Michigan, presented for the managers on the part of the House, their replication which was approved by the House and by resolution ordered to be messaged to the Senate.

On the following day[2] the Vice President laid before the court of impeachment the message received from the House transmitting the replication which was read by the Secretary and was ordered to be printed. The court of impeachment adopted the usual order relating to the procedure of the Senate sitting as a court of impeachment, and a further order setting the trial for November 10, 1926.

On November 10,[3] the court of impeachment having convened and the managers on the part of the House and counsel for the respondent having been received, Mr. Manager Michener announced:

Mr. President, I am directed by the managers on the part of the House of Representatives to advise the Senate, sitting as a court of impeachment, that in consideration of the resignation of George W. English, district judge of the United States for the eastern district of Illinois, and its acceptance by the President of the United States, certified copies of which I hereby submit, the managers on the part of the House have determined to recommend the dismissal of the pending impeachment proceedings. The managers desire to report their action to the House, and to this end they respectfully request the Senate, sitting as a court of impeachment, to adjourn to such time as may be necessary to permit the House to take appropriate action upon their report.

The resignation and its acceptance are as follows:

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF ILLINOIS,
CHAMBERS OF JUDGE GEORGE W. ENGLISH, EAST ST. LOUIS,
East St. Louis, Ill, November 4, 1926.

To His Excellency the PRESIDENT OF THE UNITED STATES:

I hereby tender my resignation as judge of the District Court of the United States for the Eastern District of Illinois, to take effect at once.

In tendering this resignation I think it is due you and the public that I state my reasons for this action.

While I am conscious of the fact that I have discharged my duties as district judge to the best of my ability, and while I am satisfied that I have the confidence of the law-abiding people of the district, yet I have come to the conclusion on account of the impeachment proceedings instituted against me, regardless of the final result thereof, that my usefulness as a judge has been seriously impaired.

I therefore feel that it is my patriotic duty to resign and let someone who is in no wise hampered be appointed to discharge the duties of the office.

Your obedient servant,

GEORGE W. ENGLISH.
THE WHITE HOUSE,
Washington, November 4, 1926.

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[1] Record, p. 8686.

[2] Record, p. 8725.

[3] First session Sixty-ninth Congress, Record, p. 3

Hon. GEORGE W. ENGLISH,
United States District Court, But St. Louis, Ill.

SIR: Your resignation as judge of the District Court of the United States for the Eastern District of Illinois dated November 4, 1926, has been received and is hereby accepted to take effect at once.

Very truly yours,

CALVIN COOLIDGE

On motion of Mr. Charles Curtis, of Kansas, it was:

Ordered, That the Sergeant at Arms be directed to notify all witnesses heretofore subpoenaed that they will not be required to appear at the bar of the Senate until so notified by him.

It was further ordered:

That in view of the statement just made by the chairman of the managers on the part of the House of Representatives, the Senate, sitting for the trial of the impeachment of Judge George W. English, adjourn until Monday, the 13th day of December, 1926, at 1'clock p.m.

The managers on the part of the House and counsel for the respondent then retired from the Chamber.

In the House on December 11,[1] Mr. Michener, by direction of the managers on the part of the House, submitted their unanimous report, reciting the resignation of George W. English, and holding:

The managers are of the opinion that the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine said impeachment charges.

The managers, however, recommended:

Inasmuch, however, as the respondent, George W. English, is no longer a civil officer of the United States, having ceased to be a judge of the District Court of the United States for the Eastern District of Illinois, the managers on the part of the House of Representatives respectfully recommend that the impeachment proceedings pending in the Senate against said George W. English be discontinued.

Mr. Michener, then moved the following resolution:

Resolved, That the managers on the part of the House of Representatives in the impeachment proceedings now pending in the Senate against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be instructed to appear before the Senate, sitting as a court of impeachment in said cause, and advise the Senate that in consideration of the fact that said George W. English is no longer a civil officer of the United States, having ceased to be a district judge of the United States for the eastern district of Illinois, the House of Representatives does not desire further to urge the articles of impeachment heretofore filed in the Senate against said George W. English.

After debate, the yeas and nays being demanded and ordered, the resolution was agreed to, yeas 290, nays 23.

The resolution of the House was messaged to the Senate and was considered by the Senate sitting as a court of impeachment on December 13,[2] when after debate the following order was agreed to, yeas 70, nays 9.

Ordered, That the impeachment proceedings against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be and the same are, duly dismissed.

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[1] Record, p. 297.

[2] Record, p. 344.

The Secretary having been directed to communicate the order to the House of Representatives, the Senate sitting as a court of impeachment adjourned sine die.

548. The investigation into the conduct of Frederick A. Fenning, a commissioner of the District of Columbia, in 1926.

A Member by virtue of his office submitted articles of impeachment and offered a resolution referring them to a committee of the House.

A committee of the House by majority report held a commissioner of the District of Columbia not to be a civil officer subject to impeachment under the Constitution.

A committee having reported that evidence adduced, while not supporting impeachment, disclosed grave irregularities, the respondent resigned.

On April 19, 1926,[1] Mr. Thomas L. Blanton, of Texas, claiming the floor for a question of privilege, announced that by virtue of his office as a Member of the House he impeached Frederick A. Fenning, Commissioner of the District of Columbia, of high crimes and misdemeanors, and submitted written charges. At the conclusion of the reading of the charges, Mr. Blanton proposed the following resolution which was referred to the Committee on the Judiciary.

Resolved, That the Committee on the Judiciary be, and it is hereby, directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Frederick A. Fenning, a commissioner of the District of Columbia, and said Committee on the Judiciary is in all things hereby fully authorized and empowered to investigate all acts of misconduct and report to the House whether in their opinion the said Frederick A. Fenning has been guilty of any acts which in the contemplation of the Constitution, the statute laws, and the precedents of Congress are high crimes and misdemeanors requiring the interposition of the constitutional powers of this House, and for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk, and to appoint and send a subcommittee whenever and wherever necessary to take necessary testimony for the use of said committee or subcommittee, which shall have the same power in respect to obtaining testimony as exercised and is hereby given to said Committee on the Judiciary.

That the expenses incurred by this investigation shall be paid out of the contingent fund of the House upon the vouchers of the chairman of said committee, approved by the Clerk of this House.

Mr. George S. Graham, of Pennsylvania, from that committee reported the resolution back to the House on May 4[2] with amendments as to phraseology and on May 6,[3] it was agreed to as amended.

The report[4] of the committee, presented on July 2, considers first the power and right of the House to impeach and thus analyzes the requisites essential to impeachment:

Two things are necessary before the House will authorize impeachment: First, there must be an officer who, by reason of holding such office, is impeachable under the Constitution and laws of the United States, and, second, the establishment by creditable evidence of such misconduct on the part of such officer, defined as "treason, bribery, or other high crimes and misdemeanors" as will

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[1] First session Sixty-ninth Congress, Record, p. 7753.

[2] Record, p. 8718.

[3] Record, p. 8828.

[4] House Report No. 1590.

bring the office into disrepute, and which will require his removal, to maintain its purity and the respect of the people for the office.

The question as to whether a Commissioner of the District of Columbia is a Federal officer and subject to the interposition of the Constitutional powers of the House in this respect, is answered in the negative as follows:

The first question that confronts us is, Is a Commissioner of the District of Columbia, appointed by the President and confirmed by the Senate, a civil officer of the United States, subject to the foregoing provision of the Federal Constitution? In order to arrive at a correct solution of this question it is necessary to review the sets of Congress relating to the District of Columbia.

The area within the District of Columbia was ceded by Maryland to, and accepted by, the Government in accordance with clause 17 of Article I of the Constitution, which granted to Congress exclusive legislative jurisdiction over such District. This in effect makes Congress the legislative body for the District with the same power as legislative bodies of the various States, and it has full authority in legislative matters pertaining to the District, subject to the prohibitions contained in the Constitution.

That act of July 16, 1790, provided for the establishment of a seat of government in the District of Columbia. On February 21, 1871, Congress created of the District a municipal corporation by the name of "the District of Columbia," with power to sue, be sued, contract, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution, the laws of the United States, and the provisions of this act.

Subsequently, on June 11, 1878, the organic act of the District of Columbia was enacted by Congress, which provides that the District of Columbia shall remain and continue a municipal corporation as provided in section 2 of the Revised Statutes relating to said District, and that the commissioners provided for should be deemed and taken as officers of such corporation.

This seems to be as clear as language can express it that thereafter the District of Columbia should enjoy a municipal corporate status and that its officer should be deemed and taken as officers of such corporation. The fact that Congress retains legislative authority and that the method of appointing Federal officers was followed in the appointment of the commissioners is not material and certainly not controlling, for the selection of the commissioners could have been delegated to the President alone or to the people of the District. Had it been the intent of Congress that the commissioners should enjoy the status of Federal officials then no expression thereon was necessary, but the fact that Congress in specific words gave them the status of municipal officers indicates clearly that Congress was making and did make a distinction as to the official status of these officers while, at the same time, retaining the Federal method of appointment.

This was a very reasonable provision for, while these officials are appointed by the President and confirmed by the Senate, they are not paid in the same manner as Federal officers. They are paid out of the District funds, to which, it is true, the Government contributes a certain sum, but they are not paid out of the Federal Treasury as are officials of the Federal Government.

For the reasons stated, it is our conclusion that Frederick A. Fennin is an officer of a municipal corporation, to wit, the District of Columbia, and as such is not a civil officer of the United States and as such is not subject to impeachment.

The report then discusses seriatim. the charges filed, and finds in each case insufficient evidence to support the allegation.

In concluding, however, the committee find that the evidence adduced in the course of the hearings discloses practices "illegal and contrary to law," neglect of duty, and conditions "which can not be too severely criticized and condemned" and recommend an investigation by a "proper committee of Congress."

Seven minority views filed by nine members of the committee disagree with the findings of the majority as to proof of various charges but with the exception of two

concur in the opinion that a Commissioner of the District of Columbia is not a Civil officer subject to impeachment within the meaning of the Constitution.

Congress adjourned on July 3,[1] and in the interim Frederick A. Fenning tendered his resignation as Commissioner of the District of Columbia.

549. The inquiry into the conduct of Judge Frank Cooper, in l927.

In instituting impeachment proceedings it is necessary first to present the charges on which the proposal is based.

Articles of impeachment having been presented, debate is in order only on debatable motions related thereto.

A motion to refer impeachment charges was entertained as a matter of constitutional privilege.

The proponent of a proposition to refer impeachment charges to a committee is entitled to one hour in debate exclusive of the time required for the reading of the charges.

The motion to refer is debatable in narrow limits only and does not admit discussion of the merits of the proposition sought to be referred.

Propositions relating to impeachment are privileged and a resolution authorizing the taking of testimony and defrayment of expenses of investigations in connection with impeachment proceedings was entertained as privileged.

On January 28, 1927,[2] Mr. Fiorello H. LaGuardia, of New York, rising to a question of high privilege, proposed to impeach Judge Frank Cooper, United States district judge for the Northern District of New York. After he had proceeded for some time in debate, Mr. Thomas L. Blanton, of Texas, made the point of order that he was not entitled to the floor, not having presented formal articles of impeachment.

The Speaker[3] sustained the point of order and said:

> The Chair thinks the gentleman from New York should make his charges. The Chair understood he was simply leading up to the charges. But if a point of order is made, the gentleman is bound to state his charges.

Mr. LaGuardia presented formal charges in writing and was again proceeding in debate when Mr. Leonidas C. Dyer, of Missouri, raised the further point of order that impeachment charges were not debatable except in connection with some admissible and debatable motion relating thereto.

The Speaker said:

> The Chair would think that the proper procedure would be to introduce the motion or resolution and then it would be proper.

Mr. LaGuardia moved to refer the charges to the Committee on the Judiciary and was again proceeding in debate when Mr. Louis C. Cramton, of Michigan, interposed the point of order that having secured the floor on a motion to refer, it was not in order to discuss the merits of the propositions sought to be referred.

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[1] Second session Sixty-ninth Congress, Record, p. 3723.

[2] Second session Sixty-ninth Congress, Record, p. 2487.

[3] Nicholas Longworth, of Ohio, Speaker.

The Speaker sustained the point of order and said:

The Chair thinks that under the motion to refer the gentleman from New York would be limited to a discussion of the reasons why these charges should or should not be referred to the Committee on the Judiciary.

The precedent to which the Chair will call attention is this:

"The simple motion to refer is debatable within narrow limits, but the merits of the proposition which it is proposed to refer may not be brought into the debate."

Under that the Chair would think the gentleman from New York would be confined to a discussion of the reasons why the resolution should be referred to the Committee on the Judiciary.

The gentleman from New York ought not to argue the merits of the case to the House. That is what will be argued before the Committee on the Judiciary, but the gentleman may argue to the House the merits of his motion, to wit, whether this matter should or should not be referred to the Committee on the Judiciary.

After further debate, Mr. Cramton submitted a parliamentary inquiry as to whether the time consumed in reading the charges should be taken from the hour allotted to the proponent of the motion to refer the charges.

The Speaker held:

No; the Chair would think not. The Chair would think that on his motion to refer, the gentleman is entitled to one hour.

The time taken to read the charges was simply time taken to inform the House of the matter before it, such as time taken by the clerk to read a bill. Now, the gentleman from New York makes a motion to refer, and under the rules of the House a motion to refer is debatable for one hour.

The gentleman did not present his case by way of argument. The gentleman read a series of charges, obtaining the floor as a matter of privilege. The reading of those charges was simply to give the House information—not argument, but information. The Chair held, in ruling on the point of order raised by the gentleman from Texas, that the gentleman from New York must read his charges before making any argument. Having now read his charges, the gentleman from New York moves to refer the charges to the Committee on the Judiciary, and under the rules of the House the gentleman is entitled to one hour.

The Chair overrules the point of order.

Subsequently, Mr. Cramton rose to the point of order that the debate was not being confined to the motion to refer.

The Speaker ruled:

The point of order has been made. The Chair thinks the gentleman from New York is going over the line of the argument and into the merits of the question instead of the merits of the motion to refer. The Chair in cases like this is always inclined to be in favor of a reasonable debate, but the Chair thinks that the line of argument which is being made now by the gentleman from New York goes more to the merits of the case than to the merits of the motion. The gentleman will proceed in order.

Debate having been concluded, the motion was agreed to and the charges were referred to the Committee on the Judiciary.

On February 11,[1] Mr. George S. Graham, of Pennsylvania, from that committee submitted the following resolution:

Resolved, That the Committee on the Judiciary, and any subcommittee that it may create or appoint, is hereby authorized and empowered to act by itself or its subcommittee to hold meetings and to issue subpoenas for persons and papers, to administer the customary oaths to witnesses, and

[1] Record, p. 3525.

to sit during the sessions of the House until the inquiry into the charges against Hon. Frank Cooper, United States district judge for the northern district of New York is completed, and to report to this House.

That said committee be, and the same is hereby, authorized to appoint such clerical assistance as they may deem necessary, and all expenses incurred by said committee or subcommittee shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee and signed by the chairman of said committee.

In response to a parliamentary inquiry from Mr. Blanton, as to the privilege of the resolution, the Speaker said:

It is privileged because it relates to impeachment proceedings.

Mr. Graham submitted the report of the committee on March 3,[1] as follows:

The committee has examined into the charges against Hon. Frank Cooper, United States district judge for the northern district of New York, made on the floor of the House and referred to it by the House on the 28th day of January, 1927 (Cong. Rec. pp. 2497–2493), and has heard all witnesses tendered by accuser and accused and reports to the House the oral and documentary evidence submitted, and while certain activities of the Hon. Frank Cooper with relation to the manner of procuring evidence in cases which would come before him for trial are not to be considered as approved by this report, it has reached the conclusion and finds that the evidence does not call for the interposition of the constitutional powers of the House with regard to impeachment. The committee, therefore, recommends the adoption of the following resolution:

"Resolved, That the evidence submitted to the Committee on the Judiciary in regard to the conduct of Hon. Frank Cooper, United States district judge for the northern district of New York, does not call for the interposition of the constitutional powers of the House with regard to impeachment."

The report was agreed to by the House without division.

550. The inquiry into the conduct of Francis A. Winslow, judge of the southern district of New York, in 1929.

Discussion of methods of authorizing an investigation with a view to impeachment.

Instance wherein a special committee was created for the purpose of instituting an inquiry and drafting articles of impeachment if found to be warranted by the circumstances.

Instance wherein a special committee of investigation was authorized to sit after adjournment of the current Congress and report to the succeeding Congress.

A special committee having been created to investigate charges, a member supplemented the proceedings by rising to a question of privilege in the House and proposing impeachment.

A judge whose conduct was under investigation having resigned, no further action was taken by the committee charged with the investigation.

A judge against whom impeachment proceedings were instituted refrained from the exercise of judicial functions from the date of the fling of the charges.

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[1] Record, p. 5619.

On February 12, 1929,[1] during consideration of the legislative appropriation bill in the Committee of the Whole House on the state of the Union, Mr. Fiorello H. LaGuardia, of New York, having been yielded time for debate said:

Mr. Chairman and members of the committee, at times it becomes necessary for a Member of the House to invoke the machinery provided in the rules of the House to ascertain whether or not a judge of the Federal court has been guilty of crimes and misdemeanors to warrant his impeachment. We have a situation in the southern district of New York so bad that it has shocked both the bench and the bar; so bad that it is reflecting on the integrity of that court; and unless we have an investigation either to ascertain the truth of these charges or otherwise, the people of that district will lose confidence in that court.

With the permission of the House I will read the resolution which I am now introducing:

Mr. LaGuardia then read from a written memorandum of specific charges and an appended resolution authorizing an investigation.

The resolution with the accompanying charges was later delivered to the Clerk and was referred by the Speaker to the Committee on the Judiciary.

On February 18, Mr. George S. Graham of Pennsylvania, submitted a report from the Committee on the Judiciary recommending the passage of the following joint resolution:

Whereas certain statements against Francis A. Winslow, United States district judge for the southern district of New York, have been transmitted by the Speaker of the House of Representatives to the Judiciary Committee: Therefore be it

Resolved, That Leonidas C. Dyer, Charles A. Christopherson, Andrew J. Hickey, George R. Stobbs, Hatton W. Sumners, Andrew J. Montague, and Fred H. Dominick, being a subcommittee of the Committee on the Judiciary of the House of Representatives, be, and they are hereby, authorized and directed to inquire into the official conduct of Francis A. Winslow, United States district judge for the southern district of New York, and to report to the House whether in their opinion the said Francis A. Winslow has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D. C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House until adjournment sine die of the Seventieth Congress and thereafter until aid inquiry is completed, and report to the Seventy-first Congress.

SEC. 2. That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary, and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however,* That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

Mr. Bertrand H. Snell, of New York, questioned the method of procedure on the grounds that under the rules a proposition for the creation of a special committee of investigation would come regularly within the jurisdiction of the Committee on Rules, and suggested that if impeachment was contemplated the matter should follow precedent and go direct to the Committee on the Judiciary.

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[1] Second session Seventieth Congress, Record, p. 3334.

Mr. Graham replied:

Mr. Speaker, this will not set up a special investigating committee. This resolution is exactly the same as was passed by this House under exactly similar circumstances in the English case. On the strength of that resolution the committee in the English case charged with the duty of investigating was able to subpoena witnesses and proceed in a regular and orderly way to ascertain whether or not the charges that had been made on the floor of the House were well founded. In the English case exactly the same procedure was followed. The-House referred the resolutions to the Committee on the Judiciary.

They made a preliminary examination, which was a preliminary step in the procedure. That committee heard any witnesses that were willing to appear before the committee. They had no power to compel anyone to appear before the committee. We have not the right, unless the House gives it to us, to subpoena witnesses and call on them to testify under oath. That authority being given, and the committee, recognizing that it was proceeding under the Congress and that the Congress would die on the 4th of March succeeding, took charge and this investigation was started but, of course, would die with the Congress. A resolution exactly the same as this was adopted by the House for two purposes, first, to give the committee power to make an investigation, and, second, to give the committee all the necessary machinery and prolong its life beyond the period of its extinction through the adjournment of the Congress.

Now, then, in addition to that the committee was instructed to report back to the House. That meant through the regular channel , which would be by the subcommittee of the Committee on the Judiciary reporting to that body, and it to the House. This subcommittee was not a special investigating committee.

Now, I want to say on the general principle that if this were the rule of the House then these resolutions ought not to have been referred to us. They ought to have been referred in the first instance to the Committee on Rules. I want to say to my friends of the House and everybody that such a procedure as this will be marked with regret by those who assent to it making it the practice of the House. Whenever a man on the floor of the House presents such statements as cloud the reputation and standing of a judge of the district court of the United States he puts against that man what is equivalent to impeachment. I care not by what name you call it, impeachment or charges, it is an impeachment of the integrity and mars the usefulness of the judge himself. The matter ought to be proceeded with. It will be a sad day when these matters have first to go to the Committee on Rules where it would be said by the public it was only a subterfuge to delay a procedure which was started by charges made on the floor of the House.

After further debate Mr. Graham offered the following amendment:

To sit during the sessions of the House until adjournment sine die of the Seventieth Congress, and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House of the Seventy-first Congress.

The amendment was agreed to and the joint resolution as amended was adopted by the House, and on February 23,[1] was agreed to by the Senate.

On March 2, Mr. LaGuardia, rising to a question of high privilege in the House, formally proposed the impeachment of Francis A. Winslow and submitted 12 specific charges accompanied by a resolution as follows:

Resolved, That Francis A. Winslow, United States district judge for the southern district of New York be impeached of high crimes and misdemeanors in office as hereinbelow in part specifically set forth.

The Speaker referred the resolution to the Committee on the Judiciary.

The subcommittee created by the joint resolution designated April 1 for the opening of the inquiry and notified Judge Winslow who on that day tendered his resignation to the President and issued the following statement by counsel:

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[1] Record, p. 4123.

Judge Winslow has felt, from the time the charges were made against him, that his usefulness as a member of the judiciary was thereby impaired, and he has since refrained from appearing as a judge. The same belief is still uppermost in his mind. In the interval, the charges directed against him in Congress have been made the subject of inquiry by the grand jury in New York.

Also, since the presentment of the grand jury was made, proceedings have been instituted and concluded against certain of those whose names have been associated with his in the complaints. These several proceedings having ended, Judge Winslow finds that he now has to consider the future of his relations to the bench in the light of his own sense of duty. He can not but realize, notwithstanding the failure to impugn his personal integrity, that the prestige of the court would be impaired should he return to it, and this he could not for himself endure, nor could he allow it to continue as an embarrassment to the other judges.

The resignation was accepted by the President on the day on which received and the committee discontinued the investigation.

Notwithstanding the resignation, Mr. LaGuardia again preferred the charges by resolution on the convening of the Seventy-first Congress.[1] The resolution was referred to the Committee on the Judiciary which made no report thereon.

551. The inquiry into the conduct of Harry B. Anderson, judge of the western district of Tennessee, in 1930.

Charges having been preferred by a Member of the House, the committee to which the matter was referred reported a resolution providing for the creation of a special committee of investigation.

On March 12, 1930,[2] Mr. Fiorello H. LaGuardia, of New York, filed charges against Harry B. Anderson, judge of the western district of Tennessee with a view to the institution of proceedings for impeachment.

The charges and the accompanying resolution were referred by the Speaker to the Committee on the Judiciary which, on June 13,[3] reported to the House the following resolution which was agreed to:

Resolved, That a special committee of five Members of the House of Representatives who are members of the Committee on the Judiciary of the House, be, and is hereby authorized and directed to inquire into the official conduct of Harry B. Anderson, United States district judge for the western district of Tennessee, and to report to the Committee on the Judiciary of the House whether in their opinion the said Harry B. Anderson has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D.C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House and until adjournment of the second session of the Seventy-first Congress and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House; and be it further

Resolved, That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary; and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however,* That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

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[1] First session Seventy-first Congress, Record, p. 33.

[2] Second session Seventy-first Congress, Record p. 5105.

[3] Record, p. 11097 tem.

552. The inquiry into the conduct of Grover M. Moscowitz, judge for the eastern district of New York, in 1930.

An instance wherein impeachment proceedings were set in motion by memorials filed with the Speaker and by him transmitted to a committee of the House.

A committee of the House having conducted a preliminary inquiry, a special subcommittee was by joint resolution created to further investigate the case with a view to impeachment.

A vacancy on a special committee created by joint resolution was filled by a further joint resolution.

The committee while criticizing the official conduct of a judge failed to find facts sufficient to warrant impeachment.

On February 27, 1929,[1] the Committee on the Judiciary, in response to certain memorials filed with the Speaker and by him referred to the committee, reported a joint resolution creating a special subcommittee of the Committee on the Judiciary to inquire into the official conduct of Grover M. Moscowitz, judge for the eastern district of New York, with authority to sit after adjournment of the Seventieth Congress and report to the Seventy-first Congress.

The resolution was agreed to by the Senate on March 1,[2] and was thereafter supplemented by a further joint resolution[3] filling a vacancy on the subcommittee.

The report[4] of the Committee on the Judiciary submitted by Mr. George S. Graham, of Pennsylvania, for the committee, on April 8,[5] thus explains the inception of the proceedings:

> This investigation had its origin in a letter addressed to the Speaker of the House of Representatives by Representative Andrew L. Somers, of the sixth New York district, transmitting to the Speaker a statement made by Sidney Levine and Joseph Levine, also some correspondence submitted by J. C. Rochester Co. (Inc.), charging misconduct on the part of Judge Grover M. Moscowitz.
>
> The Speaker of the House referred the matter to the Committee on the Judiciary, and owing to the fact that the Seventieth Congress was about to expire, House Joint Resolution 431 was presented by the chairman of the Committee on the Judiciary for the purpose of giving vitality to a subcommittee that might make an investigation during the recess and report to the Judiciary Committee in the next Congress.

The Committee finds grounds for severe criticism and the report recites:

> After seeing the witnesses, hearing them testify, and with due regard to the argument of counsel and all of the evidence in the case, individual members of this committee do not approve each and every act of Judge Moscowitz concerning which evidence was introduced. For example, the committee can not and does not indorse a business arrangement of Judge Moscowitz with his former partner which continued after Judge Moscowitz became a district judge, especially when he was appointing members of the legal firm to which this former partner belonged to various receiverships in his court. While this committee finds nothing corrupt in these transactions, yet

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[1] Second session Seventieth Congress, Record, p. 4610.

[2] Record, p. 4939.

[3] Record, p. 5015, 5068.

[4] House Report No. 1106.

[5] Record, P. 6992.

this procedure throws the court open to criticism and misunderstanding by the uninformed, as has happened in this case; and, therefore, this committee can not and does not indorse this practice.

The Committee, however, conclude:

Nevertheless, after a careful consideration of all the evidence in the case, and giving full consideration to the problems and persons with which the court had to deal, this committee is unanimous in its opinion that sufficient facts have not been presented or adduced to warrant the interposition of the constitutional powers of impeachment by the House.

The House accordingly approved the report and—

Resolved, That the House of Representatives hereby adopts the report of the Committee on the Judiciary relative to the charges filed against Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York; and further

Resolved, That no further action be taken by the House with reference to the charges heretofore filed with the committee against Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York.

CHAPTER 14

Impeachment Powers

Commentary and editing by Peter D. Robinson. J.D.

INDEX TO PRECEDENTS

Impeachment Powers

A. GENERALLY

§ 1. Constitutional Provisions; House and Senate Functions

The impeachment power is delineated and circumscribed by several provisions of the U.S. Constitution. They state:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. Article II, Section 4.
>
> . . . and [the House of Representatives] shall have the sole Power of Impeachment. Article I, Section 2, clause 5.
>
> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Article I, Section 3, clause 6.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law. Article I, Section 3, clause 7.

Two other sections of the U.S. Constitution also mention impeachment:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. Article II, section 2, clause 1.
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . . Article III, section 2, clause 3.

Since the First Congress of the United States, the House of Representatives has impeached 13 officers of the United States, of whom 10 were federal judges, one was a cabinet officer, one a U.S. Senator, and one the President of the United States.

Conviction has been voted by the Senate in four cases, all involving federal judges. The judges so convicted were John Pickering in 1804, West H. Humphreys in 1862, Robert W. Archbald in 1912, and Halsted L. Ritter in 1936.

On numerous other occasions, the impeachment process has

been initiated in the House as to civil officers and judges but has not resulted in consideration by the House of a report recommending impeachment. In the two most recent cases where investigations have been conducted by the Committee on the Judiciary and its subcommittees, in relation to Supreme Court Associate Justice William O. Douglas in 1970 and in relation to President Richard M. Nixon in 1974, the proceedings have occasioned intense congressional and national debate as to the scope of the impeachment power, the grounds for impeachment and for conviction, the analogy if any between the impeachment process and the judicial criminal process, and the amenability of the impeachment process to judicial review.

It should be noted at this point that of the four judges convicted and removed from office, none has directly sought to challenge through the judicial process his impeachment by the House and conviction by the Senate. Judge Halsted L. Ritter, convicted by the Senate in 1936, indirectly challenged his conviction by filing suit for back salary in the U.S. Court of Claims, where he alleged that the Senate had tried him on grounds not constituting impeachable offenses under the Constitution. The Court of Claims dismissed the claim for want of jurisdiction, holding that the Senate's power to try impeachments was exclusive under the Constitution. The court cited the Supreme Court case of *Mississippi* v *Johnson*, wherein Chief Justice Samuel Chase had stated in dictum that the impeachment process was not subject to judicial review.(1) The Court of Claims opinion read in part:

> While the Senate in one sense acts as a court on the trial of an impeachment, it is essentially a political body and in its actions is influenced by the views of its members on the public welfare. The courts, on the other hand, are expected to render their decisions according to the law regardless of the consequences. This must have been realized by the members of the Constitutional Convention and in rejecting proposals to have impeachments tried by a court composed of regularly appointed judges we think it avoided the possibility of unseemly conflicts between a political body such as the Senate and the judicial tribunals which might determine the case on different principles.(2)

Cross References

Discussions of the impeachment process generally, see §§ 3.6–3.14 and appendix, infra.

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1. *Ritter* v *United States*, 84 Ct. Cls. 293 (1936), cert. denied, 300 U.S. 668 (1937), citing *Mississippi* v *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867).
2. *Ritter* v *United States*, 84 Ct. Cls. 293, 300 (1936).

High privilege of impeachment propositions, see §§ 5, 8, infra.

Pardon of officer who has resigned before his impeachment by the House, see § 15.15. infra.

Collateral References

For early precedents on the impeachment power and process, see the following chapters in Hinds' Precedents: Ch. 63 (Nature of Impeachment); Ch. 64 (Function of the House in Impeachment); Ch. 65 (Function of the Senate in Impeachment); Ch. 66 (Procedure of the Senate in Impeachment); Ch. 67 (Conduct of Impeachment Trials); Ch. 68 (Presentation of Testimony in an Impeachment Trial); Ch. 69 (Rules of Evidence in an Impeachment Trial); Ch. 70 (Impeachment and Trial of William Blount); Ch. 71 (Impeachment and Trial of John Pickering); Ch. 72 (Impeachment and Trial of Samuel Chase); Ch. 73 (Impeachment and Trial of James H. Peck); Ch. 74 (Impeachment and Trial of West H. Humphreys); Ch. 75 (First Attempts to Impeach the President); Ch. 76 (Impeachment and Trial of President Andrew Johnson); Ch. 77 (Impeachment and Trial of William W. Belknap); Ch. 78 (Impeachment and Trial of Charles Swayne); Ch. 79 (Impeachment Proceedings not Resulting in Trial).

See also the following chapters in Cannon's Precedents: Ch. 193 (Nature of Impeachment); Ch. 194 (Function of the House in Impeachment); Ch. 195 (Function of the Senate in Impeachment); Ch. 196 (Procedure of the Senate in Impeachment); Ch. 197 (Conduct of Impeachment Trials); Ch. 198 (Presentation of Testimony in an Impeachment Trial); Ch. 199 (Rules of Evidence in an Impeachment Trial); Ch. 200 (Impeachment and Trial of Robert W. Archbald); Ch. 201 (Impeachment and Trial of Harold Louderback); Ch. 202 (Impeachment Proceedings not Resulting in Trial).

The impeachment power under parliamentary law, see *House Rules and Manual* §§ 601–620 (Jefferson's Manual) (1973).

Impeachment, Selected Materials, Committee on the Judiciary, H. Doc. No. 93–7, 93d Cong. 1st Sess., Oct. 1973 (constitutional provisions and historical precedents and debate).

Impeachment, Selected Materials on Procedure, Committee on the Judiciary, Committee Print, 93d Cong. 2d Sess., Jan. 1974 (relevant extracts from Hinds' and Cannon's Precedents of the House of Representatives).

Impeachment and the Federal Courts

§ 1.1 The Speaker laid before the House a communication from the Clerk, informing the House of the receipt of a summons and complaint naming the House as a defendant in a civil action, instituted in a U.S. District Court, seeking to enjoin impeachment proceedings pending in the House.

On May 28, 1974, Speaker Carl Albert, of Oklahoma, laid before the House a communication from the Clerk, advising of his receipt

of a summons and complaint issued by the U.S. District Court for the Eastern District of Virginia, in connection with Civil Action No. 74–54–NN, *The National Citizens' Committee for Fairness to the President* v *United States House of Representatives.*[3]

Parliamentarian's Note: The plaintiff in this action sought to enjoin the impeachment proceedings pending in the House against President Richard M. Nixon. The Clerk did not request representation by the appropriate U.S. Attorney, under 2 USC § 118, because the House has the sole power of impeachment under the U.S. Constitution and because of the application of the doctrine under the Constitution of the separation of powers of the executive, legislative, and judicial branches of government.

§ 1.2 Where a federal court subpenaed in a criminal case certain evidence gathered by the Committee on the Judiciary in an impeachment inquiry, the House adopted a resolution granting such limited access to the evidence, except executive session materials, as would not violate the privileges of the House or its sole power of impeachment under the U.S. Constitution.

On Aug. 22, 1974,[4] Speaker Carl Albert, of Oklahoma, laid before the House certain subpenas issued by a U.S. District Court in a criminal case, requesting certain evidence gathered by the Committee on the Judiciary and its subcommittee on impeachment, in the inquiry into the conduct of President Richard Nixon. The House adopted House Resolution 1341, which granted such limited access to the evidence as would not violate the privileges or constitutional powers of the House. The resolution read as follows:

H. RES. 1341

Whereas in the case of United States of America against John N. Mitchell et al. (Criminal Case No. 74–110), pending in the United States District Court for the District of Columbia, subpenas duces tecum were issued by the said court and addressed to Representative Peter W. Rodino, United States House of Representatives, and to John Doar, Chief Counsel, House Judicial Subcommittee on Impeachment, House of Representatives, directing them to appear as witnesses before said court at 10:00 antemeridian on the 9th day of September, 1974, and to bring with them certain and sundry papers in the possession and under the control of the

3. 120 CONG. REC. 16496, 93d Cong. 2d Sess.

4. 120 CONG. REC. 30026, 93d Cong. 2d Sess.

House of Representatives: Therefore be it

Resolved, That by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission; be it further

Resolved, That the House of Representatives under Article I, Section 2 of the Constitution has the sole power of impeachment and has the sole power to investigate and gather evidence to determine whether the House of Representatives shall exercise its constitutional power of impeachment; be it further

Resolved, That when it appears by the order of the court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice, or before any judge or such legal officer, for the promotion of justice, this House will take such action thereon as will promote the ends of justice consistently with the privileges and rights of this House; be it further

Resolved, That when said court determines upon the materiality and the relevancy of the papers and documents called for in the subpenas duces tecum, then the said court, through any of its officers or agents, have full permission to attend with all proper parties to the proceeding and then always at any place under the orders and control of this House and take copies of all memoranda and notes, in the files of the Committee on the Judiciary, of interviews with those persons who subsequently appeared as witnesses in the proceedings before the full Committee pursuant to House Resolution 803, such limited access in this instance not being an interference with the Constitutional impeachment power of the House, and the Clerk of the House is authorized to supply certified copies of such documents and papers in possession or control of the House of Representatives that the court has found to be material and relevant (except that under no circumstances shall any minutes or transcripts of executive sessions, or any evidence of witnesses in respect thereto, be disclosed or copied) and which the court or other proper officer thereof shall desire, so as, however, the possession of said papers, documents, and records by the House of Representatives shall not be disturbed, or the same shall not be removed from their place of file or custody under any Members, officer, or employee of the House of Representatives; and be it further

Resolved, That a copy of these resolutions be transmitted to the said court as a respectful answer to the subpenas aforementioned.

Censure of Federal Civil Officers

§ 1.3 In the 72d Congress, the House amended a resolution abating impeachment proceedings against a federal judge where the committee report censured him for improper conduct, and voted to

impeach him by adopting the resolution as amended.

On Feb. 24, 1933, a resolution (H. Res. 387) was called up by Mr. Thomas D. McKeown, of Oklahoma, at the direction of the Committee on the Judiciary; the resolution stated that the evidence against U.S. District Court Judge Harold Louderback did not warrant impeachment. The committee report (H. Rept. No. 2065), censured the judge as follows:

> The committee censures the judge for conduct prejudicial to the dignity of the judiciary in appointing incompetent receivers, for the method of selecting receivers, for allowing fees that seem excessive, and for a high degree of indifference to the interest of litigants in receiverships.(5)

The House rejected the recommendation of the committee by adopting an amendment in the nature of a substitute impeaching the judge for misdemeanors in office. During debate on the resolution, Mr. Earl C. Michener, of Michigan, addressed remarks to the power of censure in relation to civil officers under the United States:

> MR. MICHENER: Mr. Speaker, in answer to the gentleman from Alabama, let me make this observation. The purpose of referring a matter of this kind to the Committee on the Judiciary is to determine whether or not in the opinion of the Committee on the Judiciary there is sufficient evidence to warrant impeachment by the House. If the Committee on the Judiciary finds those facts exist, then the Committee on the Judiciary makes a report to the House recommending impeachment, and that undoubtedly is privileged. However, a custom has grown up recently in the Committee on the Judiciary of including in the report a censure. I do not believe that the constitutional power of impeachment includes censure. We have but one duty, and that is to impeach or not to impeach. Today we find a committee report censuring the judge. The resolution before the House presented by a majority of the committee is against impeachment. The minority members have filed a minority report, recommending impeachment. I am making this observation with the hope that we may get back to the constitutional power of impeachment.

Parliamentarian's Note: On several past occasions, the resolution reported to the House by the committee investigating impeachment has proposed the censure of the officer involved.(6) Such resolu-

5. 76 CONG. REC. 4913, 4914, 72d Cong. 2d Sess. See, generally, 6 Cannon's Precedents §514, and §§17.1, 17.2, infra.

6. See, for example, 3 Hinds' Precedents §§2519, 2520.

When a subcommittee report recommended against the impeachment of Associate Judge William O. Douglas in the 91st Congress, the minority views of Mr. Edward Hutchinson (Mich.) indicated the view that Jus-

tions were not submitted as privileged and were not considered by the House. Although censure of a Member by the House is a privileged matter,(7) censure of an executive official has not been held privileged for consideration by the House and has on occasion been held improper.(8)

tice Douglas could have been censured or officially rebuked for misconduct by the House (see § 14.16, infra).

7. See 3 Hinds' Precedents §§ 2649–2651.

Members of the House are not subject to impeachment under the Constitution (see § 2, infra) but are subject to punishment for disorderly behavior. See U.S. Const. art. I, § 5, clause 2.

8. See 2 Hinds' Precedents §§ 1569–1572.

The issue whether a proposition to censure a federal civil officer would be germane to a proposition for his impeachment has not arisen, but it is not in order to amend a pending privileged resolution by adding or substituting a matter not privileged and not germane to the original proposition. 5 Hinds' Precedents § 5810.

See 6 Cannon's Precedents § 236 for the ruling that a proposition to censure a Member of the House is not germane to a proposition for his expulsion. Speaker Frederick H. Gillett (Mass.) ruled in that instance that although censure and expulsion of a Member were both privileged propositions, they were "intrinsically" different.

§ 2. Who May Be Impeached; Effect of Resignation

Article II, section 4 of the U.S. Constitution subjects the President, Vice President, and all civil officers of the United States to impeachment, conviction, and removal from office. It has been settled that a private citizen is not subject to the impeachment process except for offenses committed while a civil officer under the United States.(9)

In one case, it was determined by the Senate that a U.S. Senator (William Blount [Tenn.]) was not a civil officer under article II, section 4, and the Senate disclaimed jurisdiction to try him.(10)

In view of the fact that the Constitution provides not only for automatic removal of an officer upon impeachment and conviction, but also for the disqualification from holding further office under the United States (art. I, § 3, clause 7), the House and Senate have affirmed their respective power to impeach and try an accused who has resigned.(11)

9. 3 Hinds' Precedents §§ 2315, 2007.

A commissioner of the District of Columbia was held not to be a civil officer subject to impeachment under the Constitution. 6 Cannon's Precedents § 548.

10. 3 Hinds' Precedents §§ 2310, 2316.

11. The question whether the House may impeach a civil officer who has

The latter question first arose in the Blount case, where the Senate expelled Senator Blount after his impeachment by the House but before articles had been drafted and before his trial in the Senate had begun. The House proceeded to adopt articles, and it was conceded in the Senate that a person impeached could not escape punishment by resignation; the Senate decided that it had no jurisdiction, however, to try the former Senator since he had not been a civil officer for purposes of impeachment.(12)

William W. Belknap, Secretary of War, resigned from office before his impeachment by the House and before his trial in the Senate. The House and Senate debated the power of impeachment at length and determined that the former Secretary was amenable to impeachment and trial; at the conclusion of trial the respondent was acquitted of all charges by the Senate.(13)

Cross References

Members of Congress not subject to impeachment but to punishment, censure, or expulsion, see Ch. 12, supra.

Powers of the House as related to the executive generally, see Ch. 13, supra.

resigned is a constitutional issue for the House and not the Chair to decide (see § 2.4, infra).

12. 3 Hinds' Precedents §§ 2317, 2318.

13. 3 Hinds' Precedents §§ 2007, 2467.

Impeachment Proceedings Following Resignation

§ 2.1 President Richard Nixon having resigned following the decision of the Committee on the Judiciary to report to the House recommending his impeachment, the report without an accompanying resolution of impeachment was submitted to the House, and further proceedings were discontinued.

On Aug. 20, 1974, Peter W. Rodino, Jr., of New Jersey, Chairman of the Committee on the Judiciary, submitted a privileged report (H. Rept. No. 93–1305) recommending the impeachment of President Nixon, following a full investigation by the committee, and after its consideration and adoption of articles of impeachment.

The committee had previously (in July 1974) decided to recommend articles of impeachment against President Nixon. The President resigned his office shortly thereafter—on Aug. 9, 1974—by submitting his written resignation to the office of the Secretary of State.(14)

14. 3 USC § 20 provides that the only evidence of the resignation of the office of the President of the United States shall be an instrument in

Upon submission of the report of the Committee on the Judiciary, Speaker Carl Albert, of Oklahoma, ordered it referred to the House Calendar. No separate accompanying resolution of impeachment was reported to the House.

The House adopted without debate a resolution (H. Res. 1333), offered by Mr. Thomas P. O'Neill, Jr., of Massachusetts, under suspension of the rules on Aug. 20, accepting the report. No further action was taken on the proposed impeachment of the President.[15]

§ 2.2 A federal judge having resigned from the bench pending his impeachment trial in the Senate, the House adopted a resolution instructing the managers to advise the Senate that the House declined to further prosecute charges of impeachment, and the Senate dismissed the impeachment proceedings.

On Dec. 11, 1926, the House adopted the following resolution in relation to the impeachment proceedings against Judge George W. English:

> *Resolved*, That the managers on the part of the House of Representatives in the impeachment proceedings now pending in the Senate against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be instructed to appear before the Senate, sitting as a court of impeachment in said cause, and advise the Senate that in consideration of the fact that said George W. English is no longer a civil officer of the United States, having ceased to be a district judge of the United States for the eastern district of Illinois, the House of Representatives does not desire further to urge the articles of impeachment heretofore filed in the Senate against said George W. English.[16]

On Dec. 13, 1926, the Senate adjourned *sine die* as a court of impeachment after agreeing to the following order, which was messaged to the House:

> *Ordered*, That the impeachment proceedings against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be and the same are, duly dismissed.[17]

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writing, signed, and delivered into the office of the Secretary of State.

15. 120 CONG. REC. 29361, 29362, 93d Cong. 2d Sess. For the text of H. Res. 1333 and the events surrounding its adoption, see § 15.13, infra.

For a memorandum prepared for Senate Majority Leader Michael J. Mansfield (Mont.) and inserted in the Record, concluding that Congress could impeach and try the President after he had resigned, see 120 CONG. REC. 31346–48, 93d Cong. 2d Sess., Sept. 17, 1974.

16. 68 CONG. REC. 297, 69th Cong. 2d Sess.

17. *Id.* at p. 344.

§ 2.3 The House discontinued further investigation and proceedings of impeachment against a cabinet official who had resigned his post, after his nomination and confirmation to hold another governmental position.

On Feb. 13, 1932, the House adopted House Resolution 143 offered by Hatton W. Sumners, of Texas, Chairman of the Committee on the Judiciary. The resolution, which discontinued certain impeachment proceedings due to resignation of the officer charged, read as follows:

> Whereas Hon. Wright Patman, Member of the House of Representatives, filed certain impeachment charges against Hon. Andrew W. Mellon, Secretary of the Treasury, which were referred to this committee; and
>
> Whereas pending the investigation of said charges by said committee, and before said investigation had been completed, the said Hon. Andrew W. Mellon was nominated by the President of the United States for the post of ambassador to the Court of St. James and the said nomination was duly confirmed by the United States Senate pursuant to law, and the said Andrew W. Mellon has resigned the position of Secretary of the Treasury: Be it
>
> *Resolved by this committee,* That the further consideration of the said charges made against the said Andrew W. Mellon, as Secretary of the Treasury, be, and the same are hereby, discontinued.

MINORITY VIEWS

> We cannot join in the majority views and findings. While we concur in the conclusions of the majority that section 243 of the Revised Statutes, upon which the proceedings herein were based, provides for action in the nature of an ouster proceeding, it is our view that the Hon. Andrew W. Mellon, the former Secretary of the Treasury, having removed himself from that office, no useful purpose would be served by continuing the investigation of the charges filed by the Hon. Wright Patman. We desire to stress that the action of the undersigned is based on that reason alone, particularly when the prohibition contained in said section 243 is not applicable to the office now held by Mr. Mellon.[18]
>
> FIORELLO H. LAGUARDIA.
> GORDON BROWNING.
> M. C. TARVER.
> FRANCIS B. CONDON.

§ 2.4 Where a point of order was raised that a resolution of impeachment was not privileged because it called for the impeachment of persons no longer civil officers under the United States, the Speaker stated that the question was a constitutional issue for the House and not the Chair to decide.

On May 23, 1933, Mr. Louis T. McFadden, of Pennsylvania, rose to a question of constitutional

18. 75 CONG. REC. 3850, 72d Cong. 1st Sess.

privilege and offered a resolution (H. Res. 158) impeaching numerous members and former members of the Federal Reserve Board. During the reading of the resolution, a point of order against it was raised by Mr. Carl E. Mapes, of Michigan:

> I wish to submit the question to the Speaker as to whether or not a person who is not now in office is subject to impeachment? This resolution of the gentleman from Pennsylvania refers to several people who are no longer holding any public office. They are not now at least civil officers. The Constitution provides that the "President, Vice President, and all civil officers shall be removed from office on impeachment", and so forth. I have had no opportunity to examine the precedents since this matter came up, but it occurs to me that the resolution takes in too much territory to make it privileged.

Speaker Henry T. Rainey, of Illinois, ruled as follows:

> That is a constitutional question which the Chair cannot pass upon, but should be passed upon by the House.

The resolution was referred on motion to the Committee on the Judiciary.[19]

§ 3. Grounds for Impeachment; Form of Articles

Article II, section 4 of the U.S. Constitution defines the grounds for impeachment and conviction as "treason, bribery, or other high crimes and misdemeanors." A further provision of the Constitution which has been construed to bear upon the impeachment of federal judges is article III, section 1, which provides that judges of the supreme and inferior courts "shall hold their offices during good behaviour."

When the House determines that grounds for impeachment exist, and they are adopted by the House, they are presented to the Senate in "articles" of impeachment.[20] Any one of the articles may provide a sufficient basis or ground for impeachment. The impeachment in 1936 of Halsted L. Ritter, a U.S. District Court Judge, was based on seven articles of impeachment as amended by the House. The first six articles charged him with several instances of judicial misconduct, including champerty, corrupt practices, violations of the Judicial Code, and violations of criminal law. Article VII charged actions and conduct, including a restatement of some of the charges con-

19. 77 CONG. REC. 4055, 73d Cong. 1st Sess.

20. Jefferson's Manual states that: [B]y the usage of Parliament, in impeachment for writing or speaking, the particular words need not be specified in the accusation. *House Rules and Manual* (Jefferson's Manual) § 609 (1973).

tained in the preceding articles, "the reasonable and probable consequence" of which was "to bring his court into scandal and disrepute," to the prejudice of his court, of public confidence in his court, and of public respect for and confidence in the federal judiciary.(1) However, in the Senate, Judge Ritter was convicted only on the seventh article. The respondent had moved, before commencement of trial, to strike article I, or in the alternative to require election as to articles I and II, on the ground that the articles duplicated the same offenses, but the presiding officer overruled the motion and his decision was not challenged in the Senate. The respondent also moved to strike article VII, the "general" article, on the ground that it improperly cumulated and duplicated offenses already stated in the preceding articles, but this motion was rejected by the Senate.(2)

At the conclusion of the Ritter trial, and following conviction only on article VII, a point of order was raised against the vote in that the article combined the grounds that were alleged for impeachment. The President pro tempore overruled the point of order.(3)

The various grounds for impeachment and the form of impeachment articles have been documented during recent investigations. Following the inquiry into charges against President Nixon, the Committee on the Judiciary reported to the House a report recommending impeachment, which report included the text of a resolution and articles impeaching the President.(4) As indicated by the articles, and by the conclusions of the report as to the specific articles, the Committee on the Judiciary determined that the grounds for Presidential impeachment need not be indictable or criminal; articles II and III impeached the President for a course of conduct constituting an abuse of power and for failure to comply with subpenas issued by the committee during the impeachment inquiry.(5) The committee also concluded that an article of impeachment could cumulate charges and facts constituting a course of conduct, as in article II.(6)

1. See § 3.2, infra.

2. See § 3.4, infra.

3. See § 3.5, infra.

4. See § 3.1, infra.

5. See § 3.7, infra, for the majority views and § 3.8, infra, for the minority views on the articles of impeachment.

6. See § 3.3, infra, for the majority and minority views on article II.

In its final report the Committee on the Judiciary cited a staff report by the impeachment inquiry staff on

The grounds for impeachment of federal judges were scrutinized in 1970, in the inquiry into the conduct of Associate Justice Douglas of the Supreme Court. Concepts of impeachment were debated on the floor of the House, as to the ascertainability of the definition of an impeachable offense, and as to whether a federal judge could be impeached for conduct not related to the performance of his judicial function or for judicial conduct not criminal in nature.(7)

A special subcommittee of the Committee on the Judiciary was created to investigate and report on the charges of impeachment against Justice Douglas, and submitted to the committee a final report recommending against impeachment, finding the evidence insufficient. The report concluded that a federal judge could be impeached for judicial conduct which is either criminal or a serious abuse of public duty, or for nonjudicial conduct which is criminal.(8)

Cross References

Amendments to articles adopted by the House, see § 10, infra.

Charges not resulting in impeachment, see § 14, infra.

Grounds for conviction in the Ritter impeachment trial, see § 18, infra.

Collateral Reference

Articles of Impeachment Voted by the House of Representatives, see Impeachment, Selected Materials, Committee on the Judiciary, H. Doc. No. 93–7, 93d Cong. 1st Sess., Oct. 1973.

Form of Resolution and Articles of Impeachment

§ 3.1 Articles of impeachment are reported from the Committee on the Judiciary in the form of a resolution.

On Aug. 20, 1974,(9) the Committee on the Judiciary submitted to the House a report on its inves-

the grounds for presidential impeachment, prepared before the committee had proceeded to compile all the evidence and before the committee had proceeded to consider a resolution and articles of impeachment. While the report and its conclusions were not intended to represent the views of the committee or of its individual members, the report is printed in part in the appendix to this chapter as a synopsis of the history, origins, and concepts of the impeachment process and of the grounds for impeachment. See § 3.6, infra, and appendix, infra.

7. See §§ 3.9–3.12, infra.

8. See § 3.13, infra.

9. H. REPT. NO. 93–1305, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29219, 29220, 93d Cong. 2d Sess., Aug. 20, 1974. For complete text of H. REPT. NO. 93–1305, see *id.* at pp. 29219–361.

tigation into charges of impeachable offenses against President Richard Nixon. The committee included in the text of the report a resolution and articles of impeachment which had been adopted by the committee:

Impeaching Richard M. Nixon, President of the United States, of high crimes and misdemeanors.

Resolved, That Richard M. Nixon, President of the United States, is impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and of all of the people of the United States of America, against Richard M. Nixon, President of the United States of America, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, in that:

On June 17, 1972, and prior thereto, agents of the Committee for the Reelection of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

The means used to implement this course of conduct or plan included one or more of the following:

(1) making or causing to be made false or misleading statements to lawfully authorized investigative officers and employees of the United States;

(2) withholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States;

(3) approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements to lawfully authorized investigative officers and employees of the United States and false or misleading testimony in duly instituted judicial and congressional proceedings;

(4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force, and Congressional Committees;

(5) approving, condoning, and acquiescing in, the surreptitious payment of substantial sums of money for the purpose of obtaining the silence or influencing the testimony of

witnesses, potential witnesses or individuals who participated in such unlawful entry and other illegal activities;

(6) endeavoring to misuse the Central Intelligence Agency, an agency of the United States;

(7) disseminating information received from officers of the Department of Justice of the United States to subjects of investigations conducted by lawfully authorized investigative officers and employees of the United States, for the purpose of aiding and assisting such subjects in their attempts to avoid criminal liability;

(8) making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct; or

(9) endeavoring to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their silence or false testimony, or rewarding individuals for their silence or false testimony.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

ARTICLE II

Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.

This conduct has included one or more of the following:

(1) He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.

(2) He misused the Federal Bureau of Investigation, the Secret Service, and other executive personnel, in violation or disregard of the constitutional rights of citizens, by directing or authorizing such agencies or personnel to conduct or continue electronic surveillance or other investigations for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; he did direct, authorize, or permit the use of information obtained thereby for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; and he did direct the concealment of

certain records made by the Federal Bureau of Investigation of electronic surveillance.

(3) He has, acting personally and through his subordinates and agents, in violation or disregard of the constitutional rights of citizens, authorized and permitted to be maintained a secret investigative unit within the office of the President, financed in part with money derived from campaign contributions, which unlawfully utilized the resources of the Central Intelligence Agency, engaged in covert and unlawful activities, and attempted to prejudice the constitutional right of an accused to a fair trial.

(4) He has failed to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial, and legislative entities concerning the unlawful entry into the headquarters of the Democratic National Committee, and the cover-up thereof, and concerning other unlawful activities, including those relating to the confirmation of Richard Kleindienst as Attorney General of the United States, the electronic surveillance of private citizens, the break-in into the offices of Dr. Lewis Fielding, and the campaign financing practices of the Committee to Reelect the President.

(5) In disregard of the rule of law, he knowingly misused the executive power by interfering with agencies of the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Office of Watergate Special Prosecution Force, of the Department of Justice, and the Central Intelligence Agency, in violation of his duty to take care that the laws be faithfully executed.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

ARTICLE III

In his conduct of the office of President of the United States, Richard M. Nixon, contrary to his oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives on April 11, 1974, May 15, 1974, May 30, 1974, and June 24, 1974, and willfully disobeyed such subpoenas. The subpoenaed papers and things were deemed necessary by the Committee in order to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President. In refusing to produce these papers and things, Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

§ 3.2 Articles impeaching Judge Halsted L. Ritter were reported to the House in two separate resolutions.

In March 1936, articles of impeachment against Judge Ritter were reported to the House: [10]

[H. RES. 422]

Resolved, That Halsted L. Ritter, who is a United States district judge for the southern district of Florida, be impeached for misbehavior, and for high crimes and misdemeanors; and that the evidence heretofore taken by the subcommittee of the Committee on the Judiciary of the House of Representatives under H. Res. 163 of the Seventy-third Congress sustains articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Halsted L. Ritter, who was appointed, duly qualified, and commissioned to serve, during good behavior in office, as United States district judge for the southern district of Florida, on February 15, 1929.

ARTICLE I

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of a high crime and misdemeanor in office in manner and form as follows, to wit: On or about October 11, 1929, A. L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge), as solicitor for the plaintiff, filed in the court of the said Judge Ritter a certain foreclosure suit and receivership proceeding, the same being styled "Bert E. Holland and others against Whitehall Building and Operating Company and others" (Number 678–M–Eq.). On or about May 15, 1930, the said Judge Ritter allowed the said Rankin an advance of $2,500 on his fee for his services in said case. On or about July 2, 1930, the said Judge Ritter by letter requested another judge of the United States district court for the southern district of Florida, to wit, Honorable Alexander Akerman, to fix and deter-

10. H. Res. 422, 80 CONG. REC. 3066–68, 74th Cong. 2d Sess., Mar. 2, 1936 (Articles I–IV); H. Res. 471, 80 CONG. REC. 4597–99, 74th Cong. 2d Sess., Mar. 30, 1936 (amending Article III and adding new Articles IV–VII).

mine the total allowance for the said Rankin for his services in said case for the reason as stated by Judge Ritter in said letter, that the said Rankin had formerly been the law partner of the said Judge Ritter, and he did not feel that he should pass upon the total allowance made said Rankin in that case and that if Judge Akerman would fix the allowance it would relieve the writer, Judge Ritter, from any embarrassment if thereafter any question should arise as to his, Judge Ritter's, favoring said Rankin with an exorbitant fee.

Thereafterward, notwithstanding the said Judge Akerman, in compliance with Judge Ritter's request, allowed the said Rankin a fee of $15,000 for his services in said case, from which sum the said $2,500 theretofore allowed the said Rankin by Judge Ritter as an advance on his fee was deducted, the said Judge Ritter, well knowing that at his request compensation had been fixed by Judge Akerman for the said Rankin's services in said case, and notwithstanding the restraint of propriety expressed in his said letter to Judge Akerman, and ignoring the danger of embarrassment mentioned in said letter, did fix an additional and exorbitant fee for the said Rankin in said case. On or about December 24, 1930, when the final decree in said case was signed, the said Judge Ritter allowed the said Rankin, additional to the total allowance of $15,000 theretofore allowed by Judge Akerman, a fee of $75,000 for his services in said case, out of which allowance the said Judge Ritter directly profited. On the same day, December 24, 1930, the receiver in said case paid the said Rankin, as part of his said additional fee, the sum of $25,000, and the said Rankin on the same day privately paid and delivered to the said Judge Ritter the sum of $2,500 in cash; $2,000 of said $2,500 was deposited in bank by Judge Ritter on, to wit, December 29, 1930, the remaining $500 being kept by Judge Ritter and not deposited in bank until, to wit, July 10, 1931. Between the time of such initial payment on said additional fee and April 6, 1931, the said receiver paid said Rankin thereon $5,000. On or about April 6, 1931, the said Rankin received the balance of the said additional fee allowed him by Judge Ritter, said balance amounting to $45,000. Shortly thereafter, on or about April 14, 1931, the said Rankin paid and delivered to the said Judge Ritter, privately, in cash, an additional sum of $2,000. The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said A. L. Rankin the aforesaid sums of money, amounting to $4,500.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor.

ARTICLE II

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

On the 15th day of February 1929 the said Halsted L. Ritter, having been

appointed as United States district judge for the southern district of Florida, was duly qualified and commissioned to serve as such during good behavior in office. Immediately prior thereto and for several years the said Halsted L. Ritter had practiced law in said district in partnership with one A. L. Rankin, which partnership was dissolved upon the appointment of said Ritter as said United States district judge.

On the 18th day of July 1928 one Walter S. Richardson was elected trustee in bankruptcy of the Whitehall Building and Operating Company, which company had been adjudicated in said district as a bankrupt, and as such trustee took charge of the assets of said Whitehall Building and Operating Company, which consisted of a hotel property located in Palm Beach in said district. That the said Richardson as such trustee operated said hotel property from the time of his said appointment until its sales on the 3d of January 1929, under the foreclosure of a third mortgage thereon. On the 1st of November and the 13th of December 1929, the said Judge Ritter made orders in said bankruptcy proceedings allowing the said Walter S. Richardson as trustee the sum of $16,500 as compensation for his services as trustee. That before the discharge of said Walter S. Richardson as such trustee, said Richardson, together with said A. L. Rankin, one Ernest Metcalf, one Martin Sweeney, and the said Halsted L. Ritter, entered into an arrangement to secure permission of the holder or holders of at least $50,000 of first mortgage bonds on said hotel property for the purpose of filing a bill to foreclose the first mortgage on said premises in the court of said Halsted L. Ritter, by which means the said Richardson, Rankin, Metcalf, Sweeney, and Ritter were to continue said property in litigation before said Ritter. On the 30th day of August 1929, the said Walter S. Richardson, in furtherance of said arrangement and understanding, wrote a letter to the said Martin Sweeney, in New York, suggesting the desirability of contacting as many first-mortgage bondholders as possible in order that their cooperation might be secured, directing special attention to Mr. Bert E. Holland, an attorney, whose address was in the Tremont Building in Boston, and who, as co-trustee, was the holder of $50,000 of first-mortgage bonds, the amount of bonds required to institute the contemplated proceedings in Judge Ritter's court.

On October 3, 1929, the said Bert E. Holland, being solicited by the said Sweeney, requested the said Rankin and Metcalf to prepare a complaint to file in said Judge Ritter's court for foreclosure of said first mortgage and the appointment of a receiver. At this time Judge Ritter was holding court in Brooklyn, New York, and the said Rankin and Richardson went from West Palm Beach, Florida, to Brooklyn, New York, and called upon said Judge Ritter a short time previous to filing the bill for foreclosure and appointment of a receiver of said hotel property.

On October 10, 1929, and before the filing of said bill for foreclosure and receiver, the said Holland withdrew his authority to said Rankin and Metcalf to file said bill and notified the said Rankin not to file the said bill. Notwithstanding the said instructions to

said Rankin not to file said bill, said Rankin, on the 11th day of October 1929, filed said bill with the clerk of the United States District Court for the Southern District of Florida but with the specific request to said clerk to lock up the said bill as soon as it was filed and hold until Judge Ritter's return so that there would be no newspaper publicity before the matter was heard by Judge Ritter for the appointment of a receiver, which request on the part of the said Rankin was complied with by the said clerk.

On October 16, 1929, the said Holland telegraphed to the said Rankin, referring to his previous wire requesting him to refrain from filing the bill and insisting that the matter remain in its then status until further instruction was given; and on October 17, 1929, the said Rankin wired to Holland that he would not make an application on his behalf for the appointment of a receiver. On October 28, 1929, a hearing on the complaint and petition for receivership was heard before Judge Halsted L. Ritter at Miami, at which hearing the said Bert E. Holland appeared in person before said Judge Ritter and advised the judge that he wished to withdraw the suit and asked for dismissal of the bill of complaint on the ground that the bill was filed without his authority.

But the said Judge Ritter, fully advised of the facts and circumstances herein before recited, wrongfully and oppressively exercised the powers of his office to carry into execution said plan and agreement theretofore arrived at, and refused to grant the request of the said Holland and made effective the champertous undertaking of the said Richardson and Rankin and appointed the said Richardson receiver of the said hotel property, notwithstanding that objection was made to Judge Ritter that said Richardson had been active in fomenting this litigation and was not a proper person to act as receiver.

On October 15, 1929, said Rankin made oath to each of the bills for intervenors which were filed the next day.

On October 16, 1929, bills for intervention in said foreclosure suit were filed by said Rankin and Metcalf in the names of holders of approximately $5,000 of said first-mortgage bonds, which intervenors did not possess the said requisite $50,000 in bonds required by said first mortgage to bring foreclosure proceedings on the part of the bondholders.

The said Rankin and Metcalf appeared as attorneys for complainants and intervenors, and in response to a suggestion of the said Judge Ritter, the said Metcalf withdrew as attorney for complainants and intervenors and said Judge Ritter thereupon appointed said Metcalf as attorney for the said Richardson, the receiver.

And in the further carrying out of said arrangement and understanding, the said Richardson employed the said Martin Sweeney and one Bemis, together with Ed Sweeney, as managers of said property, for which they were paid the sum of $60,000 for the management of said hotel for the two seasons the property remained in the custody of said Richardson as receiver.

On or about the 15th day of May 1930 the said Judge Ritter allowed the said Rankin an advance on his fee of $2,500 for his services in said case.

On or about July 2, 1930, the said Judge Ritter requested Judge Alex-

ander Akerman, also a judge of the United States District Court for the Southern District of Florida, to fix the total allowance for the said Rankin for his services in said case, said request and the reasons therefor being set forth in a letter by the said Judge Ritter, in words and figures as follows, to wit:

JULY 2, 1930.

Hon. ALEXANDER AKERMAN,
United States District Judge, Tampa, Fla.

MY DEAR JUDGE: In the case of Holland et al. v. Whitehall Building & Operating Co. (No. 678–M–Eq.), pending in my division, my former law partner, Judge A. L. Rankin, of West Palm Beach, has filed a petition for an order allowing compensation for his services on behalf of the plaintiff.

I do not feel that I should pass, under the circumstances, upon the total allowance to be made Judge Rankin in this matter. I did issue an order, which Judge Rankin will exhibit to you, approving an advance of $2,500 on his claim, which was approved by all attorneys.

You will appreciate my position in the matter, and I request you to pass upon the total allowance which should be made Judge Rankin in the premises as an accommodation to me. This will relieve me from any embarrassment hereafter if the question should arise as to my favoring Judge Rankin in this matter by an exorbitant allowance.

Appreciating very much your kindness in this matter, I am,

Yours sincerely,

HALSTED L. RITTER.

In compliance with said request the said Judge Akerman allowed the said Rankin $12,500 in addition to the $2,500 theretofore allowed by Judge Ritter, making a total of $15,000 as the fee of the said Rankin in the said case.

But notwithstanding the said request on the part of said Ritter and the compliance by the said Judge Akerman and the reasons for the making of said request by said Judge Ritter of Judge Akerman, the said Judge Ritter, on the 24th day of December 1930, allowed the said Rankin an additional fee of $75,000.

And on the same date when the receiver in said case paid to the said Rankin as a part of said additional fee the sum of $25,000, said Rankin privately paid and delivered to said Judge Ritter out of the said $25,000 the sum of $2,500 in cash, $2,000 of which the said Judge Ritter deposited in a bank and $500 of which was put in a tin box and not deposited until the 10th day of July 1931, when it was deposited in a bank with an additional sum of $600.

On or about the 6th day of April 1931, the said Rankin received as a part of the $75,000 additional fee the sum of $45,000, and shortly thereafter, on or before the 14th day of April 1931, the said Rankin paid and delivered to said judge Ritter, privately and in cash, out of said $45,000 the sum of $2,000.

The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said Rankin the aforesaid sums of $2,500 in cash and $2,000 in cash, amounting in all to $4,500.

Of the total allowance made to said A.L. Rankin in said foreclosure suit, amounting in all to $90,000, the fol-

lowing sums were paid out by said Rankin with the knowledge and consent of said Judge Ritter, to wit: to said Walter S. Richardson, the sum of $5,000; to said Metcalf, the sum of $10,000; to Shutts and Bowen, also attorneys for the receiver, the sum of $25,000; and to said Halsted L. Ritter, the sum of $4,500.

In addition to the said sum of $5,000 received by the said Richardson as aforesaid, said Ritter by order in said proceedings allowed said Richardson a fee of $30,000 for services as such receiver.

The said fees allowed by said Judge Ritter to A.L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge) as solicitor for the plaintiff in said case were excessive and unwarranted, and said judge profited personally thereby in that out of the money so allowed said solicitor he received personally, privately, and in cash $4,500 for his own use and benefit.

While the Whitehall Hotel was being operated in receivership under said proceeding pending in said court (and in which proceeding the receiver in charge of said hotel by appointment of said Judge was allowed large compensation by said judge) the said judge stayed at said hotel from time to time without cost to himself and received free rooms, free meals, and free valet service, and, with the knowledge and consent of said judge, members of his family, including his wife, his son, Thurston Ritter, his daughter, Mrs. M.R. Walker, his secretary, Mrs. Lloyd C. Hooks, and her husband, Lloyd C. Hooks, each likewise on various occasions stayed at said hotel without cost to themselves or to said judge, and received free rooms, and some or all of them received from said hotel free meals and free valet service; all of which expenses were borne by the said receivership to the loss and damage of the creditors whose interests were involved therein.

The said judge willfully failed and neglected to perform his duty to conserve the assets of the Whitehall Building and Operating Company in receivership in his court, but to the contrary, permitted waste and dissipation of its assets, to the loss and damage of the creditors of said corporation, and was a party to the waste and dissipation of such assets while under the control of his said court, and personally profited thereby, in the manner and form hereinabove specifically set out.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of a high crime and misdemeanor in office.

Articles III and IV in House Resolution 422 are omitted because House Resolution 471, adopted by the House on Mar. 30, 1936, amended Article III, added new Articles IV through VI after Article III, and amended former Article IV to read as new Article VII. Articles III through VII in their amended form follow:

ARTICLE III

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while

acting as a United States District judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373) making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that after the employment of the law firm of Ritter and Rankin (which at the time of the appointment of Halsted L. Ritter to be judge of the United States District Court for the Southern District of Florida, was composed of Halsted L. Ritter and A.L. Rankin) in the case of Trust Company of Georgia and Robert G. Stephens, trustee, against Brazilian Court Building Corporation, and others, numbered 5704, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, and after the fee of $4,000 which had been agreed upon at the outset of said employment had been fully paid to the firm of Ritter and Rankin, and after Halsted L. Ritter had, on, to wit, February 15, 1929, become judge of the United States District Court for the Southern District of Florida, Judge Ritter on, to wit, March 11, 1929, wrote a letter to Charles A. Brodek, of counsel for Mulford Realty Corporation (the client which his former law firm had been representing in said litigation), stating that there had been much extra and unanticipated work in the case, that he was then a Federal Judge; that his partner, A.L. Rankin, would carry through further proceedings in the case, but that he, Judge Ritter, would be consulted about the matter until the case was all closed up; and that "this matter is one among very few which I am assuming to continue my interest in until finally closed up"; and stating specifically in said letter:

"I do not know whether any appeal will be taken in the case or not but, if so, we hope to get Mr. Howard Paschal or some other person as receiver who will be amenable to our directions, and the hotel can be operated at a profit, of course, pending the appeal. We shall demand a very heavy supersedeas bond, which I doubt whether D'Esterre can give"; and further that he was "of course primarily interested in getting some money in the case", and that he thought "$2,000 more by way of attorneys' fees should be allowed", and asked that he be communicated with direct about the matter, giving his post-office-box number. On to wit, March 13, 1929, said Brodek replied favorably, and on March 30, 1929, a check of Brodek, Raphael, and Eisner, a law firm of New York City, representing Mulford Realty Corporation, in which Charles A. Brodek, senior member of the firm of Brodek, Raphael and Eisner, was one of the directors, was drawn, payable to the order of "Honorable Halsted L. Ritter" for $2,000 and which was duly endorsed "Honorable Halsted L. Ritter. H. L. Ritter" and was paid on, to wit, April 4, 1929, and the proceeds thereof were received and appropriated by Judge Ritter to his own individual use and benefit, without advising his said former partner that said $2,000 had been received, without consulting with

his former partner thereabout, and without the knowledge or consent of his said former partner, appropriated the entire amount thus solicited and received to the use and benefit of himself, the said Judge Ritter.

At the time said letter was written by Judge Ritter and said $2,000 received by him, Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District Court, of which Judge Ritter was a judge from, to wit, February 15, 1929.

After writing said letter of March 11, 1929, Judge Ritter further exercised the profession or employment of counsel or attorney, or engaged in the practice of the law, with relation to said case.

Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373), and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE IV

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373), making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that Judge Ritter did exercise the profession or employment of counsel or attorney, or engage in the practice of the law, representing J.R. Francis, with relation to the Boca Raton matter and the segregation and saving of the interest of J.R. Francis herein, or in obtaining a deed or deeds to J.R. Francis from the Spanish River Land Company to certain pieces of realty, and in the Edgewater Ocean Beach Development Company matter for which services the said Judge Ritter received from the said J.R. Francis the sum of $7,500.

Which acts of said judge were calculated to bring his office into disrepute constitute a violation of the law above recited, and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE V

That the said Halsted L. Ritter, having been nominated by the President of

the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146(h) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defend the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1929 said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of some $12,000, yet paid no income tax thereon.

Among the fees included in said gross taxable income for 1929 were the extra fee of $2,000 collected and received by Judge Ritter in the Brazilian Court case as described in article III, and the fee of $7,500 received by Judge Ritter from J.R. Francis.

Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE VI

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146(b) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defeat the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1930 the said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of to wit, $5,300, yet failed to report any part thereof in his income-tax return for the year 1930 and paid no income tax thereon.

Two thousand five hundred dollars of said gross taxable income for 1930 was that amount of cash paid Judge Ritter by A. L. Rankin on December 24, 1930, as described in article I.

Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE VII

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter, hereunder specified or indicated in this article, since he became judge of said court, as an individual or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public con-

fidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge:

1. In that in the Florida Power Company case (Florida Power and Light Company against City of Miami and others, numbered 1138–M–Eq.) which was a case wherein said judge had granted the complainant power company a temporary injunction restraining the enforcement of an ordinance of the city of Miami, which ordinance prescribed a reduction in the rates for electric current being charged in said city, said judge improperly appointed one Cary T. Hutchinson, who had long been associated with and employed by power and utility interests, special master in chancery in said suit, and refused to revoke his order so appointing said Hutchinson. Thereafter, when criticism of such action had become current in the city of Miami, and within two weeks after a resolution (H. Res. 163, Seventy-third Congress) had been agreed to in the House of Representatives of the Congress of the United States, authorizing and directing the Judicial Committee thereof to investigate the official conduct of said judge and to make a report concerning said conduct to said House of Representatives an arrangement was entered into with the city commissioners of the city of Miami or with the city attorney of said city by which the said city commissioners were to pass a resolution expressing faith and confidence in the integrity of said judge, and the said judge recuse himself as judge in said Dower suit. The said agreement was carried out by the parties thereto, and said judge, after the passage of such resolution, recused himself from sitting as judge in said power suit, thereby bartering his judicial authority in said case for a vote of confidence. Nevertheless, the succeeding judge allowed said Hutchinson as special master in chancery in said case a fee of $5,000, although he performed little, if any, service as such, and in the order making such allowance recited: "And it appearing to the court that a minimum fee of $5,000 was approved by the court for the said Cary T. Hutchinson, special master in this cause."

2. In that in the Trust Company of Florida cases (Illick against Trust Company of Florida and others numbered 1043–M–Eq., and Edmunds Committee and others against Marion Mortgage Company and others, numbered 1124–M–Eq.) after the State banking department of Florida, through its comptroller, Honorable Ernest Amos, had closed the doors of the Trust Company of Florida and appointed J.H. Therrell liquidator for said trust company, and had intervened in the said Illick case, said Judge Ritter wrongfully and erroneously refused to recognize the right of said State authority to administer the affairs of the said trust company and appointed Julian E. Eaton and Clark D. Stearns as receivers of the property of said trust company. On appeal, the United States Circuit Court of Appeals for the Fifth Circuit reversed the said order or decree of Judge Ritter and ordered the said property surrendered to the State liquidator. Thereafter, on, to wit, September 12, 1932, there was filed in the United States District Court for the Southern District of Florida the Edmunds Committee case, supra. Mar-

ion Mortgage Company was a subsidiary of the Trust Company of Florida. Judge Ritter being absent from his district at the time of the filing of said case, an application for the appointment of receivers therein was presented to another judge of said district, namely, Honorable Alexander Akerman. Judge Ritter, however, prior to the appointment of such receivers, telegraphed Judge Akerman, requesting him to appoint the aforesaid Eaton and Stearns as receivers in said case, which appointments were made by Judge Akerman. Thereafter the United States Circuit Court of Appeals for the Fifth Circuit reversed the order of Judge Akerman, appointing said Eaton and Stearns as receivers in said case. In November 1932, J.H. Therrell, as liquidator, filed a bill of complaint in the Circuit Court of Dade County, Florida—a court of the State of Florida—alleging that the various trust properties of the Trust Company of Florida were burdensome to the liquidator to keep, and asking that the court appoint a succeeding trustee. Upon petition for removal of said cause from said State court into the United States District Court for the Southern District of Florida, Judge Ritter took jurisdiction, notwithstanding the previous rulings of the United States Circuit Court of Appeals above referred to, and again appointed the said Eaton and Stearns as the receivers of the said trust properties. In December 1932 the said Therrell surrendered all of the trust properties to said Eaton and Stearns as receivers, together with all records of the Trust Company of Florida pertaining thereto. During the time said Eaton and Stearns, as such receivers, were in control of said trust properties, Judge Ritter wrongfully and improperly approved their accounts without notice or opportunity for objection thereto to be heard.

With the knowledge of Judge Ritter, said receivers appointed the sister-in-law of Judge Ritter, namely, Mrs. G.M. Wickard, who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building, one of said trust properties. On, to wit, January 1, 1933, Honorable J.M. Lee succeeded Honorable Ernest Amos as comptroller of the State of Florida and appointed M.A. Smith liquidator in said Trust Company of Florida cases to succeed J.H. Therrell. An appeal was again taken to the United States Circuit Court of Appeals for the Fifth Circuit from the then latest order or decree of Judge Ritter, and again the order or decree of Judge Ritter appealed from was reversed by the said circuit court of appeals which held that the State officer was entitled to the custody of the property involved and that said Eaton and Stearns as receivers were not entitled to such custody. Thereafter, and with the knowledge of the decision of the said circuit court of appeals, Judge Ritter wrongfully and improperly allowed said Eaton and Stearns and their attorneys some $26,000 as fees out of said trust-estate properties and endeavored to require, as a condition precedent to releasing said trust properties from the control of his court, a promise from counsel for the said State liquidator not to appeal from his order allowing the said fees to said Eaton and Stearns and their attorneys.

3. In that the said Halsted L. Ritter, while such Federal judge, accepted, in addition to $4,500 from his former law

partner as alleged in article I hereof other large fees or gratuities, to wit, $7,500 from J.R. Francis, on or about April 19, 1929, J.R. Francis at this time having large property interests within the territorial jurisdiction of the court of which Judge Ritter was a judge; and on, to wit, the 4th day of April 1929 the said Judge Ritter accepted the sum of $2,000 from Brodek, Raphael and Eisner, representing Mulford Realty Corporation, as its attorneys, through Charles A. Brodek, senior member of said firm and a director of said corporation, as a fee or gratuity, at which time the said Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holding being within the territorial jurisdiction of the United States District Court of which Judge Ritter was a judge from, to wit, February 15, 1929.

4. By his conduct as detailed in articles I, II, III, and IV hereof, and by his income-tax evasions as set forth in articles V and VI hereof.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office.

Cumulative and Duplicatory Articles of Impeachment

§ 3.3 Majority views and minority views were included in the report of the Committee on the Judiciary recommending the impeachment of President Richard M. Nixon, such views relating to Article II, containing an accumulation of acts constituting a course of conduct.

On Aug. 20, 1974, the Committee on the Judiciary recommended in its final report to the House, pursuant to its inquiry into charges of impeachable offenses against President Nixon, three articles of impeachment. Article II charged that the President had "repeatedly engaged in conduct" violative of his Presidential oath and of his constitutional duty to take care that the laws be faithfully executed. The article set forth, in five separate paragraphs, five patterns of conduct constituting the offenses charged.

The conclusion of the committee's report on Article II read in part as follows:

> In recommending Article II to the House, the Committee finds clear and convincing evidence that Richard M. Nixon, contrary to his trust as President and unmindful of the solemn duties of his high office, has repeatedly used his power as President to violate the Constitution and the law of the land.
>
> In so doing, he has failed in the obligation that every citizen has to live under the law. But he has done more, for it is the duty of the President not merely to live by the law but to see that law faithfully applied. Richard M. Nixon has repeatedly and willfully

failed to perform that duty. He has failed to perform it by authorizing and directing actions that violated or disregarded the rights of citizens and that corrupted and attempted to corrupt the lawful functioning of executive agencies. He has failed to perform it by condoning and ratifying, rather than acting to stop, actions by his subordinates that interfered with lawful investigations and impeded the enforcement of the laws. . . .

The conduct of Richard M. Nixon has constituted a repeated and continuing abuse of the powers of the Presidency in disregard of the fundamental principle of the rule of law in our system of government. This abuse of the powers of the President was carried out by Richard M. Nixon, acting personally and through his subordinates, for his own political advantage, not for any legitimate governmental purpose and without due consideration for the national good. . . .

The Committee has concluded that, to perform its constitutional duty, it must approve this Article of Impeachment and recommend it to the House. If we had been unwilling to carry out the principle that all those who govern, including ourselves, are accountable to the law and the Constitution, we would have failed in our responsibility as representatives of the people elected under the Constitution. If we had not been prepared to apply the principle of Presidential accountability embodied in the impeachment clause of the Constitution, but had instead condoned the conduct of Richard M. Nixon, then another President, perhaps with a different political philosophy, might have used this illegitimate power for further encroachments on the rights of citizens and further usurpations of the power of other branches of our government. By adopting this Article, the Committee seeks to prevent the recurrence of any such abuse of Presidential power.

The Committee finds that, in the performance of his duties as President, Richard M. Nixon on many occasions has acted to the detriment of justice, right, and the public good, in violation of his constitutional duty to see to the faithful execution of the laws. This conduct has demonstrated a contempt for the rule of law; it has posed a threat to our democratic republic. The Committee finds that this conduct constitutes "high crimes and misdemeanors" within the meaning of the Constitution, that it warrants his impeachment by the House, and that it requires that he be put to trial in the Senate.[11]

Opposing minority views were included in the report on the "duplicity" of offenses charged in Article II. The views (footnotes omitted) below are those of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti, and Latta:

Our opposition to the adoption of Article II should not be misunderstood as condonation of the presidential conduct alleged therein. On the contrary, we

11. H. REPT. No. 93–1305, at pp. 180–183, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29270, 29271, 93d Cong. 2d Sess., Aug. 20, 1974. For complete text of H. REPT. No. 93–1305, see *id.* at pp. 29219–361.

deplore in strongest terms the aspects of presidential wrongdoing to which the Article is addressed. However, we could not in conscience recommend that the House impeach and the Senate try the President on the basis of Article II in its form as proposed, because in our view the Article is duplicitous in both the ordinary and the legal senses of the word. In common usage, duplicity means belying one's true intentions by deceptive words; as a legal term of art, duplicity denotes the technical fault of uniting two or more offenses in the same count of an indictment. We submit that the implications of a vote for or against Article II are ambiguous and that the Committee debate did not resolve the ambiguities so as to enable the Members to vote intelligently. Indeed, this defect is symptomatic of a generic problem inherent in the process of drafting Articles of impeachment, and its significance for posterity may be far greater than the substantive merits of the particular charges embodied in Article II. . . .

We do not take the position that the grouping of charges in a single Article is necessarily always invalid. To the contrary, it would make good sense if the alleged offenses together comprised a common scheme or plan, or even if they were united by a specific legal theory. Indeed, even if there were no logical reason at all for so grouping the charges (as is true of Article II), the Article might still be acceptable if its ambiguous aspects had been satisfactorily resolved. For the chief vice of this Article is that it is unclear from its language whether a Member should vote for its adoption if he believes any one of the five charges to be supported by the evidence; or whether he must believe in the sufficiency of all five; or whether it is enough if he believes in the sufficiency of more than half of the charges. The only clue is the sentence which states, "This conduct has included one or more of the following [five specifications]". This sentence implies that a Member may—indeed, must—vote to impeach or to convict if he believes in the sufficiency of a single specification, even though he believes that the accusations made under the other four specifications have not been proved, or do not even constitute grounds for impeachment. Thus Article II would have unfairly accumulated all guilty votes against the President, on whatever charge. The President could have been removed from office even though no more than fourteen Senators believed him guilty of the acts charged in any one of the five specifications.

Nor could the President have defended himself against the ambiguous charges embodied in Article II. Inasmuch as five specifications are included in support of three legal theories, and all eight elements are phrased in the alternative, Article II actually contains no fewer than fifteen separate counts, any one of which might be deemed to constitute grounds for impeachment and removal. In addition, if the President were not informed which matters included in Article II were thought to constitute "high Crimes and Misdemeanors," he would have been deprived of his right under the Sixth Amendment to "be informed of the nature and cause of the accusation" against him.

This defect of Article II calls to mind the impeachment trial of Judge Halsted Ritter in 1936. Ritter was nar-

rowly acquitted of specific charges of bribery and related offenses set forth in the first six Articles. He was convicted by an exact two-thirds majority, however, under Article VII. That Article charged that because of the specific offenses embodied in the other six Articles, Ritter had "[brought] his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice. . . ." The propriety of convicting him on the basis of this vague charge, after he had been acquitted on all of the specific charges, will long be debated. Suffice it to say that the putative defect of Article VII is entirely different from that of Article II in the present case, and the two should not be confused.

A more relevant precedent may be found in the House debates during the impeachment of Judge Charles Swayne in 1905. In that case the House had followed the earlier practice of voting first on the general question of whether or not to impeach, and then drafting the Articles. Swayne was impeached in December 1904, by a vote of 198–61, on the basis of five instances of misconduct. During January 1905 these five grounds for impeachment were articulated in twelve Articles. In the course of debate prior to the adoption of the Articles, it was discovered that although the general proposition to impeach had commanded a majority, individual Members had reached that conclusion for different reasons. This gave rise to the embarrassing possibility that none of the Articles would be able to command a majority vote. Representative Parker regretted that the House had not voted on each charge separately before voting on impeachment:

> [W]here different crimes and misdemeanors were alleged it was the duty of the House to have voted whether each class of matter reported was impeachable before debating that resolution of impeachment, and that the committee was entitled to the vote of a majority on each branch, and that now for the first time the real question of impeachment has come before this House to be determined—not by five men on one charge, fifteen on another, and twenty on another coming in generally and saying that for one or another of the charges Judge Swayne should be impeached, but on each particular branch of the case.
>
> When we were asked to vote upon ten charges at once, that there was something impeachable contained in one or another of those charges we have already perhaps stultified ourselves in the mode of our procedure. . . .

In order to extricate the House from its quandary, Representative Powers urged that the earlier vote to impeach should be construed to imply that a majority of the House felt that each of the separate charges had been proved;

> At that time the committee urged the impeachment upon five grounds, and those are the only grounds which are covered by the articles . . . and we had assumed that when the House voted the impeachment they practically said that a probable cause was made out in these five subject-matters which were discussed before the House.

Powers' retrospective theory was ultimately vindicated when the House approved all twelve Articles.

If the episode from the Swayne impeachment is accorded any precedential value in the present controversy over Article II, it might be argued by analogy that the Committee's vote to

adopt that Article must be construed to imply that a majority believed that all five specifications had been proved. Because the Committee did not vote separately on each specification, however, it is impossible to know whether those Members who voted for Article II would be willing to accept that construction. If so, then one of our major objections to the Article would vanish. However, it would still be necessary to amend the Article by removing the sentence "This has included one or more of the following," and substituting language which would make it plain that no Member of the House or Senate could vote for the Article unless he was convinced of the independent sufficiency of each of the five specifications.

However, there remains another and more subtle objection to the lumping together of unrelated charges in Article II:

> There is indeed always a danger when several crimes are tied together, that the jury will use the evidence cumulatively; that is, that although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all.

It is thus not enough protection for an accused that the Senate may choose to vote separately upon each section of an omnibus article of impeachment: the prejudicial effect of grouping a diverse mass of factual material under one heading, some of it adduced to prove one proposition and another to prove a proposition entirely unrelated, would still remain.(12)

12. H. REPT. NO. 93–1305, at pp. 427–431, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29332–34, 93d Cong. 2d Sess., Aug. 20, 1974.

§ 3.4 The Senate, sitting as a Court of Impeachment, rejected a motion to strike articles of impeachment on the ground that certain articles were duplicatory and accumulative.

On Apr. 3, 1936,(13) Judge Halsted L. Ritter, respondent in an impeachment trial, moved in the Senate to strike certain articles on the grounds of duplication and accumulation of changes.

The motion as duly filed by counsel for the respondent is as follows:

In the Senate of the United States of America sitting as a Court of Impeachment. *The United States of America* v. *Halsted L. Ritter, respondent*

MOTION TO STRIKE ARTICLE I, OR, IN THE ALTERNATIVE, TO REQUIRE ELECTION AS TO ARTICLES I AND II; AND MOTION TO STRIKE ARTICLE VII

The respondent, Halsted L. Ritter, moves the honorable Senate, sitting as a Court of Impeachment, for an order striking and dismissing article I of the articles of impeachment, or, in the alternative, to require the honorable managers on the part of the House of Representatives to elect as to whether they will proceed upon article I or

13. 80 CONG. REC. 4898, 74th Cong. 2d Sess. The motion was submitted on Mar. 31, 1936, 80 CONG. REC. 4656, 4657, and reserved for decision.

upon article II, and for grounds of such motion respondent says:

1. Article II reiterates and embraces all the charges and allegations of article I, and the respondent is thus and thereby twice charged in separate articles with the same and identical offense, and twice required to defend against the charge presented in article I.

2. The presentation of the same and identical charge in the two articles in question tends to prejudice the respondent in his defense, and tends to oppress the respondent in that the articles are so framed as to collect, or accumulate upon the second article, the adverse votes, if any, upon the first article.

3. The Constitution of the United States contemplates but one vote of the Senate upon the charge contained in each article of impeachment, whereas articles I and II are constructed and arranged in such form and manner as to require and exact of the Senate a second vote upon the subject matter of article I.

MOTION TO STRIKE ARTICLE VII

And the respondent further moves the honorable Senate, sitting as a Court of Impeachment, for an order striking and dismissing article VII, and for grounds of such motion, respondent says:

1. Article VII includes and embraces all the charges set forth in articles I, II, III, IV, V, and VI.

2. Article VII constitutes an accumulation and massing of all charges in preceding articles upon which the Court is to pass judgment prior to the vote on article VII, and the prosecution should be required to abide by the judgment of the Senate rendered upon such prior articles and the Senate ought not to countenance the arrangement of pleading designed to procure a second vote and the collection or accumulation of adverse votes, if any, upon such matters.

3. The presentation in article VII of more than one subject and the charges arising out of a single subject is unjust and prejudicial to respondent.

4. In fairness and justice to respondent, the Court ought to require separation and singleness of the subject matter of the charges in separate and distinct articles, upon which a single and final vote of the Senate upon each article and charge can be had.

FRANK P. WALSH,
CARL T. HOFFMAN,
Of Counsel for Respondent.

Presiding Officer Nathan L. Bachman, of Tennessee, overruled that part of the motion to strike relating to Articles I and II, finding that those articles presented distinct and different bases for impeachment. This ruling was sustained. With respect to the application of the motion to Article VII, the Presiding Officer submitted the question of duplication to the Court of Impeachment for a decision. The motion to strike Article VII was overruled on a voice vote.(14)

§ 3.5 During the Ritter impeachment trial in the Sen-

14. For a summary of the arguments by counsel on the motions, and citations thereto, see § 18.12, infra.

ate, the President pro tempore overruled a point of order against a vote of conviction on the seventh article, where the point of order was based on an accumulation or combination of facts and circumstances.

On Apr. 17, 1936, President pro tempore Key Pittman, of Nevada, stated that the Senate had by a two-thirds vote adjudged the respondent Judge Halsted L. Ritter guilty as charged in Article VII of the articles of impeachment. He over-ruled a point of order against the vote, as follows:

MR. [WARREN R.] AUSTIN [of Vermont]: The first reason for the point of order is that here is a combination of facts in the indictment, the ingredients of which are the several articles which precede article VII, as seen by paragraph marked 4 on page 36. The second reason is contained in the Constitution of the United States, which provides that no person shall be convicted without the concurrence of two-thirds of the members present. The third reason is that this matter has been passed upon judicially, and it has been held that an attempt to convict upon a combination of circumstances——

MR. [GEORGE] MCGILL, [of Kansas]: Mr. President, a parliamentary inquiry.

MR. AUSTIN: Of which the respondent has been found innocent would be monstrous. I refer to the case of *Andrews* v. *King* (77 Maine, 235). . . .

THE PRESIDENT PRO TEMPORE: A point of order is made as to article VII, in which the respondent is charged with general misbehavior. It is a separate charge from any other charge, and the point of order is overruled.(15)

Use of Historical Precedents

§ 3.6 With respect to the conduct of President Richard Nixon, the impeachment inquiry staff of the Committee on the Judiciary reported to the committee on "Constitutional Grounds for Presidential Impeachment," which included references to the value of historical precedents.

During an inquiry into impeachable offenses against President Nixon in the 93d Congress by the Committee on the Judiciary, the committee's impeachment inquiry staff reported to the committee on grounds for impeachment of the President. The report discussed in detail the historical bases and origins, in both English parliamentary practice and in the practice of the U.S. Congress, of the impeachment power, and drew conclusions as to the grounds for impeachment of the President and of other federal civil officers from the history of impeachment proceedings

15. 80 CONG. REC. 5606, 74th Cong. 2d Sess.

and from the history of the U.S. Constitution.(16)

Grounds for Presidential Impeachment

§ 3.7 The Committee on the Judiciary concluded, in recommending articles impeaching President Richard Nixon to the House, that the President could be impeached not only for violations of federal criminal statutes, but also for (1) serious abuse of the powers of his office, and (2) refusal to comply with proper subpoenas of the committee for evidence relevant to its impeachment inquiry.

In its final report to the House pursuant to its impeachment inquiry into the conduct of President Nixon in the 93d Congress, the Committee on the Judiciary set forth the following conclusions (footnotes omitted) on the three articles of impeachment adopted by the committee and included in its report:(17)

[ARTICLE I]

CONCLUSION

After the Committee on the Judiciary had debated whether or not it should recommend Article I to the House of Representatives, 27 of the 38 Members of the Committee found that the evidence before it could only lead to one conclusion; that Richard M. Nixon, using the powers of his high office, engaged, personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of the unlawful entry, on June 17, 1972, into the headquarters of the Democratic National Committee; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

This finding is the only one that can explain the President's involvement in a pattern of undisputed acts that occurred after the break-in and that cannot otherwise be rationally explained. . . .

President Nixon's course of conduct following the Watergate break-in, as described in Article I, caused action not only by his subordinates but by the agencies of the United States, including the Department of Justice, the FBI, and the CIA. It required perjury, destruction of evidence, obstruction of justice, all crimes. But, most important, it required deliberate, contrived, and continuing deception of the American people.

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16. The report is printed in full in the appendix to this chapter, infra. The staff report was printed as a committee print, and the House authorized on June 6, 1974, the printing of 3,000 additional copies thereof. H. Res. 935, 93d Cong. 2d Sess.

17. H. REPT. No. 93–1305, at pp. 133 et seq., Committee on the Judiciary. See the articles and conclusions printed in the Record in full at 120 CONG. REC. 29219–79, 93d Cong. 2d Sess., Aug. 20, 1974.

President Nixon's actions resulted in manifest injury to the confidence of the nation and great prejudice to the cause of law and justice, and was subversive of constitutional government. His actions were contrary to his trust as President and unmindful of the solemn duties of his high office. It was this serious violation of Richard M. Nixon's constitutional obligations as President, and not the fact that violations of Federal criminal statutes occurred, that lies at the heart of Article I.

The Committee finds, based upon clear and convincing evidence, that this conduct, detailed in the foregoing pages of this report, constitutes "high crimes and misdemeanors" as that term is used in Article II, Section 4 of the Constitution. Therefore, the Committee recommends that the House of Representatives exercise its constitutional power to impeach Richard M. Nixon.

On August 5, 1974, nine days after the Committee had voted on Article I, President Nixon released to the public and submitted to the Committee on the Judiciary three additional edited White House transcripts of Presidential conversations that took place on June 23, 1972, six days following the DNC break-in. Judge Sirica had that day released to the Special Prosecutor transcripts of those conversations pursuant to the mandate of the United States Supreme Court. The Committee had subpoenaed the tape recordings of those conversations, but the President had refused to honor the subpoena.

These transcripts conclusively confirm the finding that the Committee had already made, on the basis of clear and convincing evidence, that from shortly after the break-in on June 17, 1972, Richard M. Nixon, acting personally and through his subordinates and agents, made it his plan to and did direct his subordinates to engage in a course of conduct designed to delay, impede and obstruct investigation of the unlawful entry of the headquarters of the Democratic National Committee; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities. . . .

[ARTICLE II]

CONCLUSION

In recommending Article II to the House, the Committee finds clear and convincing evidence that Richard M. Nixon, contrary to his trust as President and unmindful of the solemn duties of his high office, has repeatedly used his power as President to violate the Constitution and the law of the land.

In so doing, he has failed in the obligation that every citizen has to live under the law. But he has done more, for it is the duty of the President not merely to live by that law but to see that law faithfully applied. Richard M. Nixon has repeatedly and willfully failed to perform that duty. He has failed to perform it by authorizing and directing actions that violated or disregarded the rights of citizens and that corrupted and attempted to corrupt the lawful functioning of executive agencies. He has failed to perform it by condoning and ratifying, rather than acting to stop, actions by his subordinates that interfered with lawful investigations and impeded the enforcement of the laws.

Article II, section 3 of the Constitution requires that the President "shall

take Care that the Laws be faithfully executed." Justice Felix Frankfurter described this provision as "the embracing function of the President"; President Benjamin Harrison called it "the central idea of the office." "[I]n a republic," Harrison wrote, "the thing to be executed is the law, not the will of the ruler as in despotic governments. The President cannot go beyond the law, and he cannot stop short of it."

The conduct of Richard M. Nixon has constituted a repeated and continuing abuse of the powers of the Presidency in disregard of the fundamental principle of the rule of law in our system of government. This abuse of the powers of the President was carried out by Richard M. Nixon, acting personally and through his subordinates, for his own political advantage, not for any legitimate governmental purpose and without due consideration for the national good.

The rule of law needs no defense by the Committee. Reverence for the laws, said Abraham Lincoln, should "become the political religion of the nation." Said Theodore Roosevelt, "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it."

It is a basic principle of our government that "we submit ourselves to rulers only if [they are] under rules." "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen," wrote Justice Louis Brandeis. The Supreme Court has said:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations upon the exercise of the authority which it gives.

Our nation owes its strength, its stability, and its endurance to this principle.

In asserting the supremacy of the rule of law among the principles of our government, the Committee is enunciating no new standard of Presidential conduct. The possibility that Presidents have violated this standard in the past does not diminish its current—and future—applicability. Repeated abuse of power by one who holds the highest public office requires prompt and decisive remedial action, for it is in the nature of abuses of power that if they go unchecked they will become overbearing, depriving the people and their representatives of the strength of will or the wherewithal to resist.

Our Constitution provides for a responsible Chief Executive, accountable for his acts. The framers hoped, in the words of Elbridge Gerry, that "the maxim would never be adopted here that the chief Magistrate could do no wrong." They provided for a single executive because, as Alexander Hamilton wrote, "the executive power is more easily confined when it is one" and "there should be a single object for the . . . watchfulness of the people."

The President, said James Wilson, one of the principal authors of the Con-

stitution, "is the dignified, but accountable magistrate of a free and great people." Wilson said, "The executive power is better to be trusted when it has no screen. . . . [W]e have a responsibility in the person of our President . . . he cannot roll upon any other person the weight of his criminality. . . ." As both Wilson and Hamilton pointed out, the President should not be able to hide behind his counsellors; he must ultimately be accountable for their acts on his behalf. James Iredell of North Carolina, a leading proponent of the proposed Constitution and later a Supreme Court Justice, said that the President "is of a very different nature from a monarch. He is to be . . . personally responsible for any abuse of the great trust reposed in him."

In considering this Article the Committee has relied on evidence of acts directly attributable to Richard M. Nixon himself. He has repeatedly attempted to conceal his accountability for these acts and attempted to deceive and mislead the American people about his own responsibility. He governed behind closed doors, directing the operation of the executive branch through close subordinates, and sought to conceal his knowledge of what they did illegally on his behalf. Although the Committee finds it unnecessary in this case to take any position on whether the President should be held accountable, through exercise of the power of impeachment, for the actions of his immediate subordinates, undertaken on his behalf, when his personal authorization and knowledge of them cannot be proved, it is appropriate to call attention to the dangers inherent in the performance of the highest public office in the land in air of secrecy and concealment.

The abuse of a President's powers poses a serious threat to the lawful and proper functioning of the government and the people's confidence in it. For just such Presidential misconduct the impeachment power was included in the Constitution. The impeachment provision, wrote Justice Joseph Story in 1833, "holds out a deep and immediate responsibility, as a check upon arbitrary power; and compels the chief magistrate, as well as the humblest citizen, to bend to the majesty of the law." And Chancellor James Kent wrote in 1826:

> If . . . neither the sense of duty, the force of public opinion, nor the transitory nature of the seat, are sufficient to secure a faithful exercise of the executive trust, but the President will use the authority of his station to violate the Constitution or law of the land, the House of Representatives can arrest him in his career, by resorting to the power of impeachment.

The Committee has concluded that, to perform its constitutional duty, it must approve this Article of Impeachment and recommend it to the House. If we had been unwilling to carry out the principle that all those who govern, including ourselves, are accountable to the law and the Constitution, we would have failed in our responsibility as representatives of the people, elected under the Constitution. If we had not been prepared to apply the principle of Presidential accountability embodied in the impeachment clause of the Constitution, but had instead condoned the conduct of Richard M. Nixon, then another President, perhaps with a different political philos-

ophy, might have used this illegitimate power for further encroachments on the rights of citizens and further usurpations of the power of other branches of our government. By adopting this Article, the Committee seeks to prevent the recurrence of any such abuse of Presidential power.

In recommending Article II to the House, the Committee finds clear and convincing evidence that Richard M. Nixon has not faithfully executed the executive trust, but has repeatedly used his authority as President to violate the Constitution and the law of the land. In so doing, he violated the obligation that every citizen has to live under the law. But he did more, for it is the duty of the President not merely to live by the law but to see that law faithfully applied. Richard M. Nixon repeatedly and willfully failed to perform that duty. He failed to perform it by authorizing and directing actions that violated the rights of citizens and that interfered with the functioning of executive agencies. And he failed to perform it by condoning and ratifying, rather than acting to stop, actions by his subordinates interfering with the enforcement of the laws.

The Committee finds that, in the performance of his duties as President, Richard M. Nixon on many occasions has acted to the detriment of justice, right, and the public good, in violation of his constitutional duty to see to the faithful execution of the laws. This conduct has demonstrated a contempt for the rule of law; it has posed a threat to our democratic republic. The Committee finds that this conduct constitutes "high crimes and misdemeanors" within the meaning of the Constitution, that it warrants his impeachment by the House, and that it requires that he be put to trial in the Senate. . . .

[ARTICLE III]

CONCLUSION

The undisputed facts, historic precedent, and applicable legal principles support the Committee's recommendation of Article III. There can be no question that in refusing to comply with limited, narrowly drawn subpoenas—issued only after the Committee was satisfied that there was other evidence pointing to the existence of impeachable offenses—the President interfered with the exercise of the House's function as the "Grand Inquest of the Nation." Unless the defiance of the Committee's subpoenas under these circumstances is considered grounds for impeachment, it is difficult to conceive of any President acknowledging that he is obligated to supply the relevant evidence necessary for Congress to exercise its constitutional responsibility in an impeachment proceeding. If this were to occur, the impeachment power would be drained of its vitality. Article III, therefore, seeks to preserve the integrity of the impeachment process itself and the ability of Congress to act as the ultimate safeguard against improper presidential conduct.[18]

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18. H. REPT. NO. 93–1305, at p. 213, Committee on the Judiciary. See 120 CONG. REC. 29279, 93d Cong. 2d Sess., Aug. 20, 1974.

See also, for the subpena power of a committee conducting an impeachment investigation, § 6, infra. The House has declined to prosecute for

§ 3.8 In the report of the Committee on the Judiciary recommending the impeachment of President Richard Nixon, the minority took the view that grounds for Presidential impeachment must be criminal conduct or acts with criminal intent.

On Aug. 20, 1974, the Committee on the Judiciary submitted a report recommending the impeachment of President Nixon. In the minority views set out below (footnotes omitted), Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti, and Latta discussed the grounds for presidential impeachment: (19)

B. MEANING OF "TREASON, BRIBERY OR OTHER HIGH CRIMES AND MISDEMEANORS"

The Constitution of the United States provides that the President "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Upon impeachment and conviction, removal of the President from office is mandatory. The offenses for which a President may be impeached are limited to those enumerated in the Constitution, namely "Treason, Bribery, or other high Crimes and Misdemeanors." We do not believe that a President or any other civil officer of the United States government may constitutionally be impeached and convicted for errors in the administration of his office.

1. ADOPTION OF "TREASON, BRIBERY, OR OTHER HIGH CRIMES AND MISDEMEANORS" AT CONSTITUTIONAL CONVENTION

The original version of the impeachment clause at the Constitutional Convention of 1787 had made "malpractice or neglect of duty" the grounds for impeachment. On July 20, 1787, the Framers debated whether to retain this clause, and decided to do so.

Gouverneur Morris, who had moved to strike the impeachment clause altogether, began by arguing that it was unnecessary because the executive "can do no *criminal act* without Coadjutors who may be punished." George Mason disagreed, arguing that "When great *crimes* were committed he [favored] punishing the principal as well as the Coadjutors." Fearing recourse to assassinations, Benjamin Franklin favored impeachment "to provide in the Constitution for the regular *punishment* of the executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused." Gouverneur Morris then admitted that "corruption & some few other offenses" should be impeachable, but thought "the case ought to be enumerated & defined."

Rufus King, a co-sponsor of the motion to strike the impeachment clause,

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contempt of Congress officers charged with impeachable offenses and refusing to comply with subpenas (see § 6.12, infra).

19. H. REPT. NO. 93–1305, at pp. 362372, Committee on the Judiciary, printed at 120 CONG. REC. 29312–15, 93d Cong. 2d Sess., Aug. 20, 1974.

pointed out that the executive, unlike the judiciary, did not hold his office during good behavior, but during a fixed, elective term; and accordingly ought not to be impeachable, like the judiciary, for "misbehaviour:" this would be "destructive of his independence and of the principles of the Constitution." Edmund Randolph, however, made a strong statement in favor of retaining the impeachment clause:

> Guilt wherever found ought to be *punished*. The Executive will have great opportunitys of abusing his power, particularly in time of war when the military force, and in some respects the public money will be in his hands.

> . . . He is aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business. He suggested for consideration . . . requiring some preliminary inquest of whether just grounds for impeachment existed.

Benjamin Franklin again suggested the role of impeachments in releasing tensions, using an example from international affairs involving a secret plot to cause the failure of a rendezvous between the French and Dutch fleets—an example suggestive of treason. Gouverneur Morris, his opinion now changed by the discussion, closed the debate on a note echoing the position of Randolph:

> Our Executive . . . may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst. it by displacing him. . . . The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from his office. . . . When we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the Legislature.

On the question, "Shall the Executive be removable on impeachments," the proposition then carried by a vote of eight states to two.

A review of this debate hardly leaves the impression that the Framers intended the grounds for impeachment to be left to the discretion, even the "sound" discretion, of the legislature. On a fair reading, Madison's notes reveal the Framers' fear that the impeachment power would render the executive dependent on the legislature. The concrete examples used in the debate all refer not only to crimes, but to extremely grave crimes. George Mason mentioned the possibility that the President would corrupt his own electors and then "repeat his guilt," and described grounds for impeachment as "the most extensive injustice." Franklin alluded to the beheading of Charles I, the possibility of assassination, and the example of the French and Dutch fleets, which connoted betrayal of a national interest. Madison mentioned the "perversion" of an "administration into a scheme of peculation or oppression," or the "betrayal" of the executive's "trust to foreign powers." Edmund Randolph mentioned the great opportunities for abuse of the executive power, "particularly in time of war when the military force, and in some respects the public money will be in his hands." He cautioned against "tu-

mults & insurrections." Gouveneur Morris similarly contemplated that the executive might corrupt his own electors, or "be bribed by a greater interest to betray his trust"—just as the King of England had been bribed by Louis XIV—and felt he should therefore be impeachable for "treachery."

After the July 20 vote to retain the impeachment clause, the resolution containing it was referred to the Committee on Detail, which substituted "treason, bribery or corruption" for "malpractice or neglect of duty." No surviving records explain the reasons for the change, but they are not difficult to understand, in light of the floor discussion just summarized. The change fairly captured the sense of the July 20 debate, in which the grounds for impeachment seem to have been such acts as would either cause danger to the very existence of the United States, or involve the purchase and sale of the "Chief of Magistracy," which would tend to the same result. It is *not* a fair summary of this debate—which is the only surviving discussion of any length by the Framers as to the grounds for impeachment—to say that the Framers were principally concerned with reaching a course of conduct whether or not criminal, generally inconsistent with the proper and effective exercise of the office of the presidency. They were concerned with preserving the government from being overthrown by the treachery or corruption of one man. Even in the context of that purpose, they steadfastly reiterated the importance of putting a check on the legislature's use of power and refused to expand the narrow definition they had given to treason in the Constitution. They saw punishment as a significant purpose of impeachment. The changes in language made by the Committee on Detail can be taken to reflect a consensus of the debate that (1) impeachment would be the proper remedy where grave crimes had been committed, and (2) adherence to this standard would satisfy the widely recognized need for a check on potential excesses of the impeachment power itself.

The impeachment clause, as amended by the Committee on Detail to refer to "treason, bribery or corruption," was reported to the full Convention on August 6, 1787, as part of the draft constitution. Together with other sections, it was referred to the Committee of Eleven on August 31. This Committee further narrowed the grounds to "treason or bribery," while at the same time substituting trial by the Senate for trial by the Supreme Court, and requiring a two-thirds vote to convict. No surviving records explain the purpose of this change. The mention of "corruption" may have been thought redundant, in view of the provision for bribery. Or, corruption might have been regarded by the Committee as too broad, because not a well-defined crime. In any case, the change limited the grounds for impeachment to two clearly understood and enumerated crimes.

The revised clause, containing the grounds "treason and bribery," came before the full body again on September 8, late in the Convention. George Mason moved to add to the enumerated grounds for impeachment. Madison's Journal reflects the following exchange:

> COL. MASON. Why is the provision restrained to Treason & bribery

only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—as bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after "bribery" "or maladministration." Mr. Gerry seconded him—

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

MR. GOVR. MORRIS., it will not be put in force & can do no harm—An election of every four years will prevent maladministration.

Col. Mason withdrew "maladministration" & substitutes "other high crimes and misdemeanors" agst. the State.

On the question thus altered, the motion of Colonel Mason passed by a vote of eight states to three.

Madison's notes reveal no debate as to the meaning of the phrase "other high Crimes and Misdemeanors." All that appears is that Mason was concerned with the narrowness of the definition of treason; that his purpose in proposing "maladministration" was to reach *great* and *dangerous* offenses; and that Madison felt that "maladministration," which was included as a ground for impeachment of public officials in the constitutions of six states, including his own, would be too "vague" and would imperil the independence of the President.

It is our judgment, based upon this constitutional history, that the Framers of the United States Constitution intended that the President should be removable by the legislative branch only for serious misconduct dangerous to the system of government established by the Constitution. Absent the element of danger to the State, we believe the Delegates to the Federal Convention of 1787, in providing that the President should serve for a fixed elective term rather than during good behavior or popularity, struck the balance in favor of stability in the executive branch. We have never had a British parliamentary system in this country, and we have never adopted the device of a parliamentary vote of no-confidence in the chief executive. If it is thought desirable to adopt such a system of government, the proper way to do so is by amending our written Constitution—not by removing the President.

2. ARE "HIGH CRIMES AND MISDEMEANORS" NON-CRIMINAL?

a. Language of the Constitution

The language of the Constitution indicates that impeachment can lie only for serious criminal offenses.

First, of course, treason and bribery were indictable offenses in 1787, as they are now. The words "crime" and "misdemeanor", as well, both had an accepted meaning in the English law of the day, and referred to criminal acts. Sir William Blackstone's *Commentaries on the Laws of England*, (1771), which enjoyed a wide circulation in the American colonies, defined the terms as follows:

> I. A crime, or misdemeanor is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms: though, in common usage, the word "crimes" is made to denote

> such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanors" only.

Thus, it appears that the word "misdemeanor" was used at the time Blackstone wrote, as it is today, to refer to less serious crimes.

Second, the use of the word "other" in the phrase "Treason, Bribery or other high Crimes and Misdemeanors" seems to indicate that high Crimes and Misdemeanors had something in common with Treason and Bribery—both of which are, of course, serious *criminal* offenses threatening the integrity of government.

Third, the extradition clause of the Articles of Confederation (1781), the governing instrument of the United States prior to the adoption of the Constitution, had provided for extradition from one state to another of any person charged with "treason, felony or *other* high misdemeanor." If "high misdemeanor" had something in common with treason and felony in this clause, so as to warrant the use of the word "other," it is hard to see what it could have been except that all were regarded as serious crimes. Certainly it would not have been contemplated that a person could be extradited for an offense which was non-criminal.

Finally, the references to impeachment in the Constitution use the language of the criminal law. Removal from office follows "conviction," when the Senate has "tried" the impeachment. The party convicted is "nevertheless . . . liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." The trial of all Crimes is by Jury, "except in cases of Impeachment." The President is given power to grant "Pardons for Offenses against the United States, except in Cases of Impeachment."

This constitutional usage, in its totality, strengthens the notion that the words "Crime" and "Misdemeanor" in the impeachment clause are to be understood in their ordinary sense, i.e., as importing criminality. At the very least, this terminology strongly suggests the criminal or quasi-criminal nature of the impeachment process.

b. English impeachment practice

It is sometimes argued that officers may be impeached for non-criminal conduct, because the origins of impeachment in England in the fourteenth and seventeenth centuries show that the procedure was not limited to criminal conduct in that country.

Early English impeachment practice, however, often involved a straight power struggle between the Parliament and the King. After parliamentary supremacy had been established, the practice was not so open-ended as it had been previously. Blackstone wrote (between 1765 and 1769) that

> [A]n impeachment before the Lords by the commons of Great Britain, in parliament, is a prosecution of *the already known and established law*. . . .

The development of English impeachment practice in the eighteenth century is illustrated by the result of the first major nineteenth century impeachment in that country—that of Lord Melville, Treasurer of the Navy, in 1805–1806. Melville was charged with wrongful use of public moneys. Before passing judgment, the House of

Lords requested the formal opinion of the judges upon the following question:

> Whether it was lawful for the Treasurer of the Navy, before the passing of the Act 25 Geo. 3rd, c. 31, to apply any sum of money [imprested] to him for navy [sumpsimus] services to any other use whatsoever, public or private, without express authority for so doing; *and whether such application by such treasurer would have been a misdemeanor, or punishable by information or indictment?*

The judges replied:

> It was *not unlawful* for the Treasurer of the Navy before the Act 25 Geo. 3rd, c. 31 . . . to apply any sum of money impressed to him for navy services, to other uses . . . without express authority for so doing, *so as to constitute a misdemeanor punishable by information or indictment.*

Upon this ruling by the judges that Melville had committed no crime, he was acquitted. The case thus strongly suggests that the Lords in 1805 believed an impeachment conviction to require a "misdemeanor punishable by information or indictment." The case may be taken to cast doubt on the vitality of precedents from an earlier, more turbid political era and to point the way to the Framers' conception of a valid exercise of the impeachment power in the future. As a matter of policy, as well, it is an appropriate precedent to follow in the latter twentieth century.

The argument that the President should be impeachable for general misbehavior, because some English impeachments do not appear to have involved criminal charges, also takes too little account of the historical fact that the Framers, mindful of the turbulence of parliamentary uses of the impeachment power, cut back on that power in several respects in adapting it to an American context. Congressional bills of attainder and *ex post facto* laws, which had supplemented the impeachment power in England, were expressly forbidden. Treason was defined in the Constitution—and defined narrowly—so that Congress acting alone could not change the definition, as Parliament had been able to do. The consequences of impeachment and conviction, which in England had frequently meant death, were limited to removal from office and disqualification to hold further federal office. Whereas a majority vote of the Lords had sufficed for conviction, in America a two-thirds vote of the Senate would be required. Whereas Parliament had had the power to impeach private citizens, the American procedure could be directed only against civil officers of the national government. The grounds for impeachment—unlike the grounds for impeachment in England—were stated in the Constitution.

In the light of these modifications, it is misreading history to say that the Framers intended, by the mere approval of Mason's substitute amendment, to adopt *in toto* the British grounds for impeachment. Having carefully narrowed the definition of treason, for example, they could scarcely have intended that British treason precedents would guide ours.

c. American impeachment practice

The impeachment of President Andrew Johnson is the most important precedent for a consideration of what constitutes grounds for impeachment of a President, even if it has been his-

torically regarded (and probably fairly so) as an excessively partisan exercise of the impeachment power.

The Johnson impeachment was the product of a fundamental and bitter split between the President and the Congress as to Reconstruction policy in the Southern states following the Civil War. Johnson's vetoes of legislation, his use of pardons, and his choice of appointees in the South all made it impossible for the Reconstruction Acts to be enforced in the manner which Congress not only desired, but thought urgently necessary.

On March 7, 1867, the House referred to the Judiciary Committee a resolution authorizing it

> to inquire into the *official conduct of* Andrew Johnson . . . and to report to this House whether, in their opinion, the said Andrew Johnson, while in said office, has been guilty of acts which were *designed or calculated to overthrow or corrupt the government of the United States* . . . and whether the said Andrew Johnson has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes and misdemeanors, requiring the interposition of the constitutional powers of this House.

On November 25, 1867, the Committee reported to the full House a resolution recommending impeachment, by a vote of 5 to 4. A minority of the Committee, led by Rep. James F. Wilson of Iowa, took the position that there could be no impeachment because the President had committed no crime:

> In approaching a conclusion, we do not fail to recognize two standpoints from which this case can be viewed—the legal and the political.
>
> . . . Judge him politically, we must condemn him. But the day of political impeachments would be a sad one for this country. Political unfitness and incapacity must be tried at the ballot-box, not in the high court of impeachment. A contrary rule might leave to Congress but little time for other business than the trial of impeachments.
>
> . . . [C]rimes and misdemeanors are now demanding our attention. Do these, within the meaning of the Constitution, appear? Rest the case upon political offenses, and we are prepared to pronounce against the President, for such offenses are numerous and grave . . . [yet] we still affirm that the conclusion at which we have arrived is correct.

The resolution recommending impeachment was debated in the House on December 5 and 6, 1867, Rep. George S. Boutwell of Massachusetts speaking for the Committee majority in favor of impeachment, and Rep. Wilson speaking in the negative. Aside from characterization of undisputed facts discovered by the Committee, the only point debated was whether the commission of a crime was an essential element of impeachable conduct by the President. Rep. Boutwell began by saying, "If the theory of the law submitted by the minority of the committee be in the judgment of this House a true theory, then the majority have no case whatsoever." "The country was disappointed, no doubt, in the report of the committee," he continued, "and very likely this House participated in the disappointment, that there was no specific, heinous, novel offense charged upon and proved against the President of the United States." And again, "It may not be possible, by specific charge, to arraign him for this great crime, but is he therefore to escape?"

The House of Representatives answered this question the next day, when the majority resolution recommending, impeachment was defeated by a vote of 57 to 108. The issue of impeachment was thus laid to rest for the time being.

Earlier in 1867, the Congress had passed the Tenure-of-Office Act, which took away the President's authority to remove members of his own Cabinet, and provided that violation of the Act should be punishable by imprisonment of up to five years and a fine of up to ten thousand dollars and "shall be deemed a high misdemeanor"—fair notice that Congress would consider violation of the statute an impeachable, as well as a criminal, offense. It was generally known that Johnson's policy toward Reconstruction was not shared by his Secretary of War, Edwin M. Stanton. Although Johnson believed the Tenure-of-Office Act to be unconstitutional, he had not infringed its provisions at the time the 1867 impeachment attempt against him failed by such a decisive margin.

Two and a half months later, however, Johnson removed Stanton from office, in apparent disregard of the Tenure-of-Office Act. The response of Congress was immediate: Johnson was impeached three days later, on February 24, 1868, by a vote of 128 to 47—an even greater margin than that by which the first impeachment vote had failed.

The reversal is a dramatic demonstration that the House of Representatives believed it had to find the President guilty of a crime before impeaching him. The nine articles of impeachment which were adopted against Johnson, on March 2, 1868, all related to his removal of Secretary Stanton, allegedly in deliberate violation of the Tenure-of-Office Act, the Constitution, and certain other related statutes. The vote had failed less than three months before; and except for Stanton's removal and related matters, nothing in the new Articles charged Johnson with any act committed subsequent to the previous vote.

The only other case of impeachment of an officer of the executive branch is that of Secretary of War William W. Belknap in 1876. All five articles alleged that Belknap "corruptly" accepted and received considerable sums of money in exchange for exercising his authority to appoint a certain person as a military post trader. The facts alleged would have sufficed to constitute the crime of bribery. Belknap resigned before the adoption of the Articles and was subsequently indicted for the conduct alleged.

It may be acknowledged that in the impeachment of federal judges, as opposed to executive officers, the actual commission of a crime does not appear always to have been thought essential. However, the debates in the House and opinions filed by Senators have made it clear that in the impeachments of federal judges, Congress has placed great reliance upon the "good behavior" clause. The distinction between officers tenured during good behavior and elected officers, for purposes of grounds for impeachment, was stressed by Rufus King at the Constitutional Convention of 1787. A judge's impeachment or conviction resting upon "general misbehavior," in whatever degree, cannot be an appropriate guide for the impeachment or conviction of an elected officer serving for a fixed term.

The impeachments of federal judges are also different from the case of a President for other reasons: (1) Some of the President's duties *e.g.*, as chief of a political party, are sufficiently dissimilar to those of the judiciary that conduct perfectly appropriate for him, such as making a partisan political speech, would be grossly improper for a judge. An officer charged with the continual adjudication of disputes labors under a more stringent injunction against the appearance of partisanship than an officer directly charged with the formulation and negotiation of public policy in the political arena—a fact reflected in the adoption of Canons of Judicial Ethics. (2) The phrase "and all civil Officers" was not added until after the debates on the impeachment clause had taken place. The words "high crimes and misdemeanors" were added while the Framers were debating a clause concerned exclusively with the impeachment of the President. There was no discussion during the Convention as to what would constitute impeachable conduct for judges. (3) Finally, the removal of a President from office would obviously have a far greater impact upon the equilibrium of our system of government than the removal of a single federal judge.

d. The need for a standard: criminal intent

When the Framers included the power to impeach the President in our Constitution, they desired to "provide some mode that will not make him dependent on the Legislature." To this end, they withheld from the Congress many of the powers enjoyed by Parliament in England; and they defined the grounds for impeachment in their written Constitution. It is hardly conceivable that the Framers wished the new Congress to adopt as a starting point the record of all the excesses to which desperate struggles for power had driven Parliament, or to use the impeachment power freely whenever Congress might deem it desirable. The whole tenor of the Framers' discussions, the whole purpose of their many careful departures from English impeachment practice, was in the direction of limits and of standards. An impeachment power exercised without extrinsic and objective standards would be tantamount to the use of bills of attainder and *ex post facto* laws, which are expressly forbidden by the Constitution and are contrary to the American spirit of justice.

It is beyond argument that a violation of the President's oath or a violation of his duty to take care that the laws be faithfully executed, must be impeachable conduct or there would be no means of enforcing the Constitution. However, this elementary proposition is inadequate to define the impeachment power. It remains to determine what kind of conduct constitutes a violation of the oath or the duty. Furthermore, reliance on the summary phrase, "violation of the Constitution," would not always be appropriate as a standard, because actions constituting an apparent violation of one provision of the Constitution may be justified or even required by other provisions of the Constitution.

There are types of misconduct by public officials—for example, ineptitude, or unintentional or "technical" violations of rules or statutes, or "maladministration"—which would not be criminal; nor could they be made crimi-

nal, consonant with the Constitution, because the element of criminal intent or *mens rea* would be lacking. Without a requirement of criminal acts or at least criminal intent, Congress would be free to impeach these officials. The loss of this freedom should not be mourned; such a use of the impeachment power was never intended by the Framers, is not supported by the language of our Constitution, and, if history is to guide us, would be seriously unwise as well.

As Alexander Simpson stated in his *Treatise on Federal Impeachments* (1916):

> The Senate must find an intent to do wrong. It is, of course, admitted that a party will be presumed to intend the natural and necessary results of his voluntary acts, but that is a presumption only, and it is not always inferable from the act done. So ancient is this principle, and so universal is its application, that it has long since ripened into the maxim, *Actus non facit reun, [nisi] mens sit rea*, and has come to be regarded as one of the fundamental legal principles of our system of jurisprudence. (p. 29).

The point was thus stated by James Iredell in the North Carolina ratifying convention: "I beg leave to observe that, when any man is impeached, it must be for an error of the heart, and not of the head. God forbid that a man, in any country in the world, should be liable to be punished for want of judgment. This is not the case here.

The minority views did support a portion of Article I on the ground that criminal conduct was alleged therein and sustained by the evidence; but found no impeachable offenses constituted in Articles II and III:

> (1) With respect to proposed Article I, we believe that the charges of conspiracy to obstruct justice, and obstruction of justice, which are contained in the Article in essence, if not in terms, may be taken as substantially confessed by Mr. Nixon on August 5, 1974, and corroborated by ample other evidence in the record. Prior to Mr. Nixon's revelation of the contents of three conversations between him and his former Chief of Staff, H. R. Haldeman, that took place on June 23, 1972, we did not, and still do not, believe that the evidence of presidential involvement in the Watergate cover-up conspiracy, as developed at that time, was sufficient to warrant Members of the House, or dispassionate jurors in the Senate, in finding Mr. Nixon guilty of an impeachable offense beyond a reasonable doubt, which we believe to be the appropriate standard.
>
> (2) With respect to proposed Article II, we find sufficient evidence to warrant a belief that isolated instances of unlawful conduct by presidential aides and subordinates did occur during the five-and-one-half years of the Nixon Administration, with varying degrees of direct personal knowledge or involvement of the President in these respective illegal episodes. We roundly condemn such abuses and unreservedly favor the invocation of existing legal sanctions, or the creation of new ones, where needed, to deter such reprehensible official conduct in the future, no

matter in whose Administration, or by what brand or partisan, it might be perpetrated.

Nevertheless, we cannot join with those who claim to perceive an invidious, pervasive "pattern" of illegality in the conduct of official government business generally by President Nixon. In some instances, as noted below, we disagree with the majority's interpretation of the evidence regarding either the intrinsic illegality of the conduct studied or the linkage of Mr. Nixon personally to it. Moreover, even as to those acts which we would concur in characterizing as abusive and which the President appeared to direct or countenance, neither singly nor in the aggregate do they impress us as being offenses for which Richard Nixon, or any President, should be impeached or removed from office, when considered, *as they must be*, on their own footing, apart from the obstruction of justice charge under proposed Article I which we believe to be sustained by the evidence.

(3) Likewise, with respect to proposed Article III, we believe that this charge, standing alone, affords insufficient grounds for impeachment. Our concern here, as explicated in the discussion below, is that the Congressional subpoena power itself not be too easily abused as a means of achieving the impeachment and removal of a President against whom no other substantive impeachable offense has been proved by sufficient evidence derived from sources other than the President himself. We believe it is particularly important for the House to refrain from impeachment on the sole basis of noncompliance with subpoenas where, as here, colorable claims of privilege have been asserted in defense of nonproduction of the subpoenaed materials, and the validity of those claims has not been adjudicated in any established, lawful adversary proceeding before the House is called upon to decide whether to impeach a President on grounds of noncompliance with subpoenas issued by a Committee inquiring into the existence of sufficient grounds for impeachment.[20]

Grounds for Impeachment of Federal Judges

§ 3.9 Following introduction and referral of impeachment resolutions against a Supreme Court Justice in the 91st Congress, when grounds for impeachment of federal judges were discussed at length in the House, the view was taken that federal civil officers may be impeached for less than indictable offenses; that an impeachable offense is what a majority of the House considers it to be; and that a higher standard of conduct is expected of federal judges than of other federal civil officers.

On Apr. 15, 1970, resolutions relating to the impeachment of

20. H. REPT. NO. 93–1305, at pp. 360, 361, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29311, 93d Cong. 2d Sess., Aug. 20, 1974.

Associate Justice William O. Douglas of the Supreme Court were introduced and referred, following a special-order speech by the Minority Leader, Gerald R. Ford, of Michigan. Mr. Ford discussed the grounds for impeachment of a federal judge, saying in part:[1]

> No, the Constitution does not guarantee a lifetime of power and authority to any public official. The terms of Members of the House are fixed at 2 years; of the President and Vice President at 4; of U.S. Senators at 6. Members of the Federal judiciary hold their offices only "during good behaviour."
>
> Let me read the first section of article III of the Constitution in full:
>
> > The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices *during good Behaviour,* and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. . . .
>
> . . . Thus, we come quickly to the central question: What constitutes "good behaviour" or, conversely, ungood or disqualifying behaviour?
>
> The words employed by the Framers of the Constitution were, as the proceedings of the Convention detail, chosen with exceedingly great care and precision. Note, for example, the word "behaviour." It relates to action, not merely to thoughts or opinions; further, it refers not to a single act but to a pattern or continuing sequence of action. We cannot and should not remove a Federal judge for the legal views he holds—this would be as contemptible as to exclude him from serving on the Supreme Court for his ideology or past decisions. Nor should we remove him for a minor or isolated mistake—this does not constitute behaviour in the common meaning.
>
> What we should scrutinize in sitting Judges is their continuing pattern of action, their behaviour. The Constitution does not demand that it be "exemplary" or "perfect." But it does have to be "good."
>
> Naturally, there must be orderly procedure for determining whether or not a Federal judge's behaviour is good. The courts, arbiters in most such questions of judgment, cannot judge themselves. So the Founding Fathers vested this ultimate power where the ultimate sovereignty of our system is most directly reflected—in the Congress, in the elected Representatives of the people and of the States.
>
> In this seldom-used procedure, called impeachment, the legislative branch exercises both executive and judicial functions. The roles of the two bodies differ dramatically. The House serves as prosecutor and grand jury; the Senate serves as judge and trial jury.
>
> Article I of the Constitution has this to say about the impeachment process:
>
> > The House of Representatives—shall have the sole power of Impeachment.

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1. 116 CONG. REC. 11912–14, 91st Cong. 2d Sess. Charges against Justice Douglas were investigated by a subcommittee of the Committee on the Judiciary, which recommended against impeachment (see §§ 14.14, 14.15, infra).

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

Article II, dealing with the executive branch, states in section 4:

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

This has been the most controversial of the constitutional references to the impeachment process. No consensus exists as to whether, in the case of Federal judges, impeachment must depend upon conviction of one of the two specified crimes of treason or bribery or be within the nebulous category of "other high crimes and misdemeanors." There are pages upon pages of learned argument whether the adjective "high" modifies "misdemeanors" as well as "crimes," and over what, indeed, constitutes a "high misdemeanor."

In my view, one of the specific or general offenses cited in article II is required for removal of the indirectly elected President and Vice President and all appointed civil officers of the executive branch of the Federal Government, whatever their terms of office. But in the case of members of the judicial branch, Federal judges and Justices, I believe an additional and much stricter requirement is imposed by article II, namely, "good behaviour."

Finally, and this is a most significant provision, article I of the Constitution specifies:

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

With this brief review of the law, of the constitutional background for impeachment, I have endeavored to correct two common misconceptions: first, that Federal judges are appointed for life and, second, that they can be removed only by being convicted, with all ordinary protections and presumptions of innocence to which an accused is entitled, of violating the law.

This is not the case. Federal judges can be and have been impeached for improper personal habits such as chronic intoxication on the bench, and one of the charges brought against President Andrew Johnson was that he delivered "intemperate, inflammatory, and scandalous harangues."

I have studied the principal impeachment actions that have been initiated over the years and frankly, there are too few cases to make very good law. About the only thing the authorities can agree upon in recent history, though it was hotly argued up to President Johnson's impeachment and the trial of Judge Swayne, is that an offense need not be indictable to be impeachable. In other words, something less than a criminal act or criminal dereliction of duty may nevertheless be sufficient grounds for impeachment and removal from public office.

What, then, is an impeachable offense?

The only honest answer is that an impeachable offense is whatever a ma-

jority of the House of Representatives considers to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. Again, the historical context and political climate are important; there are few fixed principles among the handful of precedents.

I think it is fair to come to one conclusion, however, from our history of impeachments: a higher standard is expected of Federal judges than of any other "civil officers" of the United States.

The President and Vice President, and all persons holding office at the pleasure of the President, can be thrown out of office by the voters at least every 4 years. To remove them in midterm—it has been tried only twice and never done—would indeed require crimes of the magnitude of treason and bribery. Other elective officials, such as Members of the Congress, are so vulnerable to public displeasure that their removal by the complicated impeachment route has not even been tried since 1798. But nine Federal judges, including one Associate Justice of the Supreme Court, have been impeached by this House and tried by the Senate; four were acquitted; four convicted and removed from office; and one resigned during trial and the impeachment was dismissed.

In the most recent impeachment trial conducted by the other body, that of U.S. Judge Halsted L. Ritter of the southern district of Florida who was removed in 1936, the point of judicial behavior was paramount, since the criminal charges were admittedly thin. This case was in the context of F.D.R.'s effort to pack the Supreme Court with Justices more to his liking; Judge Ritter was a transplanted conservative Colorado Republican appointed to the Federal bench in solidly Democratic Florida by President Coolidge. He was convicted by a coalition of liberal Republicans, New Deal Democrats, and Farmer-Labor and Progressive Party Senators in what might be called the northwestern strategy of that era. Nevertheless, the arguments were persuasive:

In a joint statement, Senators Borah, La Follette, Frazier, and Shipstead said:

> We therefore did not, in passing upon the facts presented to us in the matter of the impeachment proceedings against Judge Halsted L. Ritter, seek to satisfy ourselves as to whether technically a crime or crimes had been committed, or as to whether the acts charged and proved disclosed criminal intent or corrupt motive: we sought only to ascertain from these facts whether his conduct had been such as to amount to misbehavior, misconduct—as to whether he had conducted himself in a way that was calculated to undermine public confidence in the courts and to create a sense of scandal.
>
> There are a great many things which one must readily admit would be wholly unbecoming, wholly intolerable, in the conduct of a judge, and yet these things might not amount to a crime.

Senator Elbert Thomas of Utah, citing the Jeffersonian and colonial antecedents of the impeachment process, bluntly declared:

> Tenure during good behavior . . . is in no sense a guaranty of a life job, and misbehavior in the ordinary,

dictionary sense of the term will cause it to be cut short on the vote, under special oath, of two-thirds of the Senate, if charges are first brought by the House of Representatives. . . . To assume that good behavior means anything but good behavior would be to cast a reflection upon the ability of the fathers to express themselves in understandable language.

But the best summary, in my opinion, was that of Senator William G. McAdoo of California, son-in-law of Woodrow Wilson and his Secretary of the Treasury:

I approach this subject from the standpoint of the general conduct of this judge while on the bench, as portrayed by the various counts in the impeachment and the evidence submitted in the trial. The picture thus presented is, to my mind, that of a man who is so lacking in any proper conception of professional ethics and those high standards of judicial character and conduct as to constitute misbehavior in its most serious aspects, and to render him unfit to hold a judicial office . . .

Good behavior, as it is used in the Constitution, exacts of a judge the highest standards of public and private rectitude. No judge can besmirch the robes he wears by relaxing these standards, by compromising them through conduct which brings reproach upon himself personally, or upon the great office he holds. No more sacred trust is committed to the bench of the United States than to keep shining with undimmed effulgence the brightest jewel in the crown of democracy—justice.

However disagreeable the duty may be to those of us who constitute this great body in determining the guilt of those who are entrusted under the Constitution with the high responsibilities of judicial office, we must be as exacting in our conception of the obligations of a judicial officer as Mr. Justice Cardozo defined them when he said, in connection with fiduciaries, that they should be held "to something stricter than the morals of the market-place. *Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.*" (Meinhard v. Solmon, 249 N.Y. 458.)

§ 3.10 The view has been taken that the term "good behavior," as a requirement for federal judges remaining in office, must be read in conjunction with the standard of "high crimes and misdemeanors," and that the conduct of federal judges to constitute an impeachable offense must be either criminal conduct or serious judicial misconduct.

On Apr. 21, 1970, Mr. Paul N. McCloskey, Jr., of California, took the floor for a special-order speech in which he challenged the hypothesis of Mr. Gerald R. Ford, of Michigan (see § 3.9, supra), as to the grounds for impeachment of federal judges: (2)

I respectfully disagree with the basic premise "that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."

To accept this view, in my judgment, would do grave damage to one of the

2. 116 CONG. REC. 12569–71, 91st Cong. 2d Sess.

most treasured cornerstones of our liberties, the constitutional principle of an independent judiciary, free not only from public passions and emotions, but also free from fear of executive or legislative disfavor except under already-defined rules and precedents. . . .

First, I should like to discuss the concept of an impeachable offense as "whatever the majority of the House of Representatives considers it to be at any given time in history." If this concept is accurate, then of course there are no limitations on what a political majority might determine to be less than good behavior. It follows that judges of the Court could conceivably be removed whenever the majority of the House and two-thirds of the Senate agreed that a better judge might fill the position. But this concept has no basis, either in our constitutional history or in actual case precedent.

The intent of the framers of the Constitution was clearly to protect judges from political disagreement, rather than to simplify their ease of removal.

The Original Colonies had had a long history of difficulties with the administration of justice under the British Crown. The Declaration of Independence listed as one of its grievances against the King:

> He has made Judges dependent on his Will alone, for the tenure of their offices and the amount and payment of their salaries.

The signers of the Declaration of Independence were primarily concerned about preserving the independence of the judiciary from direct or indirect pressures, and particularly from the pressure of discretionary termination of their jobs or diminution of their salaries.

In the debates which took place in the Constitutional Convention 11 years later, this concern was expressed in both of the major proposals presented to the delegates. The Virginia and New Jersey plans both contained language substantively similar to that finally adopted, as follows:

> Article III, Section 1 states "The Judges, both of the Supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The "good behavior" standard thus does not stand alone. It must be read with reference to the clear intention of the framers to protect the independence of the judiciary against executive or legislative action on their compensation, presumably because of the danger of political disagreement.

If, in order to protect judicial independence, Congress is specifically precluded from terminating or reducing the salaries of Judges, it seems clear that Congress was not intended to have the power to designate "as an impeachable offense whatever a majority of the House of Representatives considers it to be at a given moment."

If an independent judiciary is to be preserved, the House must exercise decent restraint and caution in its definition of what is less than good behavior. As we honor the Court's self-imposed doctrine of judicial restraint, so we might likewise honor the principle of legislative restraint in considering serious charges against members of a co-equal branch of Government which we have wished to keep free from political tensions and emotions. . . .

The term "good behavior," as the Founding Fathers considered it, must be taken together with the specific provisions limiting cause for impeachment of executive branch personnel to treason, bribery or other high crimes and misdemeanors. The higher standard of good behavior required of Judges might well be considered as applicable solely to their judicial performance and capacity and not to their private and nonjudicial conduct unless the same is violative of the law. Alcoholism, arrogance, nonjudicial temperament, and senility of course interfere with judicial performance and properly justify impeachment. I can find no precedent, however, for impeachment of a Judge for nonjudicial conduct which falls short of violation of law.

In looking to the nine cases of impeachment of Judges spanning 181 years of our national history, in every case involved, the impeachment was based on either improper judicial conduct or nonjudicial conduct which was considered as criminal in nature. . . .

From the brief research I have been able to do on these nine cases, and as reflected in the Congressional Quarterly of April 17, 1970, the charges were as follows:

District Judge John Pickering, 1804: Loose morals, intemperance, and irregular judicial procedure.

Associate Supreme Court Justice Samuel Chase, 1805: Partisan, harsh, and unfair conduct during trials.

District Judge James H. Peck, 1831: Imposing an unreasonably harsh penalty for contempt of court.

District Judge West H. Humphreys, 1862: Supported secession and served as a Confederate judge.

District Judge Charles Swayne, 1905: Padding expense accounts, living outside his district, misuse of property and of the contempt power.

Associate Court of Commerce Judge Robert Archbald, 1913: Improper use of influence, and accepting favors from litigants.

District Judge George W. English, 1926: Tyranny, oppression, and partiality.

District Judge Harold Louderback, 1933: Favoritism, and conspiracy.

District Judge Halsted L. Ritter, 1936: Judicial improprieties, accepting legal fees while on the bench, bringing his court into scandal and disrepute, and failure to pay his income tax.

The bulk of these challenges to the court were thus on judicial misconduct, with scattered instances of nonjudicial behavior. In all cases, however, insofar as I have been able to thus far determine, the nonjudicial behavior involved clear violation of criminal or civil law, and not just a "pattern of behavior" that others might find less than "good."

If the House accepts precedent as a guide, then, an impeachment of a Justice of the Supreme Court based on charges which are neither unlawful in nature nor connected with the performance of his judicial duties would represent a highly dubious break with custom and tradition at a time when, as the gentleman from New York (Mr. Horton), stated last Wednesday:

> We are living in an era when the institutions of government and the people who man them are undergoing the severest tests in history.

There is merit, I think, in a strict construction of the words "good behav-

ior'' as including conduct which complies with judicial ethics while on the bench and with the criminal and civil laws while off the bench. Any other construction of the term would make judges vulnerable to any majority group in the Congress which held a common view of impropriety of conduct which was admittedly lawful. If lawful conduct can nevertheless be deemed an impeachable offense by a majority of the House, how can any Judge feel free to express opinions on controversial subjects off the bench? Is there anything in our history to indicate that the framers of our Constitution intended to preclude a judge from stating political views publicly, either orally or in writing? I have been unable to find any constitutional history to so indicate.

The gentleman from New Hampshire (Mr. Wyman) suggests that a judge should not publicly declare his personal views on controversies likely to come before the Court. This is certainly true. But it certainly does not preclude a judge from voicing personal political views, since political issues are not within the jurisdiction of the court and thus a judge's opinions on political matters would generally not be prejudicial to interpretations of the law which his jurisdiction is properly limited.

§ 3.11 The view has been taken that a federal judge may be impeached for misbehavior of such nature as to cast substantial doubt upon his integrity.

On Aug. 10, 1970, Minority Leader Gerald R. Ford, of Michigan, inserted in the *Congressional Record* a legal memorandum on impeachment of a federal judge for ''misbehavior,'' the memorandum was prepared by a private attorney and reviewed constitutional provisions, views of commentators, and the precedents of the House and Senate in impeachment proceedings. The memorandum concluded with the following analysis: [3]

> A review of the past impeachment proceedings has clearly established little constitutional basis to the argument that an impeachable offense must be indictable as well. If this were to be the case, the Constitution would then merely provide an additional or alternate method of punishment, in specific instances, to the traditional criminal law violator. If the framers had meant to remove from office only those officials who violated the criminal law, a much simpler method than impeachment could have been devised. Since impeachment is such a complex and cumbersome procedure, it must have been directed at conduct which would be outside the purview of the criminal law. Moreover, the traditionally accepted purpose of impeachment would seem to work against such a construction. By restricting the punishment for impeachment to removal and disqualification from office, impeachment seems to be a protective, rather than a punitive, device. It is meant to protect the public from conduct by high

3. 116 CONG. REC. 28091–96, 91st Cong. 2d Sess.

public officials that undermines public confidence. Since that is the case, the nature of impeachment must be broader than this argument would make it. [Such] conduct on the part of a judge, while not criminal, would be detrimental to the public welfare. Therefore it seems clear that impeachment will lie for conduct not indictable nor even criminal in nature. It will be remembered that Judge Archbald was removed from office for conduct which, in at least one commentator's view, would have been blameless if done by a private citizen. See Brown, *The Impeachment of the Federal Judiciary*, 26 Har. L. Rev. 684, 704–05 (1913).

A sound approach to the Constitutional provisions relating to the impeachment power appears to be that which was made during the impeachment of Judge Archbald. Article I, Sections 2 and 3 give Congress jurisdiction to try impeachments. Article II, Section 4, is a mandatory provision which requires removal of officials convicted of "treason, bribery or other high crimes and misdemeanors". The latter phrase is meant to include conduct, which, while not indictable by the criminal law, has at least the characteristics of a crime. However, this provision is not conclusively restrictive. Congress may look elsewhere in the Constitution to determine if an impeachable offense has occurred. In the case of judges, such additional grounds of impeachment may be found in Article III, Section 1 where the judicial tenure is fixed at "good behavior". Since good behavior is the limit of the judicial tenure, some method of removal must be available where a judge breaches that condition of his office. That method is impeachment. Even though this construction has been criticized by one writer as being logically fallacious, See Simpson, *Federal Impeachments*, 64 U. of Penn. L. Rev. 651, 806–08 (1916), it seems to be the construction adopted by the Senate in the Archbald and Ritter cases. Even Simpson, who criticized the approach, reaches the same result because he argues that "misdemeanor" must, by definition, include misbehavior in office. *Supra* at 812–13.

In determining what constitutes impeachable judicial misbehavior, recourse must be had to the previous impeachment proceedings. Those proceedings fall mainly into two categories, misconduct in the actual administration of justice and financial improprieties off the bench. Pickering was charged with holding court while intoxicated and with mishandling cases. Chase and Peck were charged with misconduct which was prejudicial to the impartial administration of justice and with oppressive and corrupt use of their office to punish individuals critical of their actions. Swayne, Archbald, Louderback and Ritter were all accused of using their office for personal profit and with various types of financial indiscretions. English was impeached both for oppressive misconduct while on the bench and for financial misdealings. The impeachment of Humphries is the only one which does not fall within this pattern and the charges brought against him probably amounted to treason. See Brown, *The Impeachment of the Federal Judiciary*, 26 Har. L. Rev. 684, 704 (1913).

While various definitions of impeachable misbehavior have been advanced, the unifying factor in these definitions is the notion that there must be such

misconduct as to cast doubt on the integrity and impartiality of the Federal judiciary. Brown has defined that misbehavior as follows:

> It must act directly or by reflected influence react upon the welfare of the State. It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute . . . An act or course of misbehavior which renders scandalous the personal life of a public officer, shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness. Brown, *supra* at 692–93.

As Simpson stated with respect to the outcome of the Archbald impeachment:

> It determined that a judge ought not only be impartial, but he ought so demean himself, both in and out of court, that litigants will have no reason to suspect his impartiality and that repeatedly failing in that respect constitutes a "high misdemeanor" in regard to his office. If such be considered the result of that case, everyone must agree that it established a much needed precedent. Simpson, *Federal Impeachments,* 64 U. of Penn. L. Rev. 651, 813 (1916).

John W. Davis, House Manager in the Impeachment of Judge Archbald, defined judicial misbehavior as follows:

> Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing and notorious partiality and favoritism, indolence and neglect, are all violations of his official oath . . . And it is easily possible to go further and imagine . . . such willingness to use his office to serve his personal ends as to be within reach of no branch of the criminal law, yet calculated with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice. 6 Cannon 647.

Representative Summers, one of the managers in the Louderback impeachment gave this definition:

> When the facts proven with reference to a respondent are such as are reasonably calculated to arouse a substantial doubt in the minds of the people over whom that respondent exercises authority that he is not brave, candid, honest, and true, there is no other alternative than to remove such a judge from the bench, because wherever doubt resides, confidence cannot be present. Louderback Proceedings 815.

IV. Conclusion

In conclusion, the history of the constitutional provisions relating to the impeachment of Federal judges demonstrates that only the Congress has the power and duty to remove from office any judge whose proven conduct, either in the administration of justice or in his personal behavior, casts doubt on his personal integrity and thereby on the integrity of the entire judiciary. Federal judges must maintain the highest standards of conduct to preserve the independence of and respect for the judicial system and the rule of law. As Representative Summers stated during the Ritter impeachment:

> Where a judge on the bench, by his own conduct, arouses a substantial doubt as to his judicial integrity he commits the highest crime that a judge can commit under the Con-

stitution. Ritter Proceedings 611 (1936).

Finally, the application of the principles of the impeachment process is left solely to the Congress. There is no appeal from Congress' ultimate judgment. Thus, it can fairly be said that it is the conscience of Congress—acting in accordance with the constitutional limitations—which determines whether conduct of a judge constitutes misbehavior requiring impeachment and removal from office. If a judge's misbehavior is so grave as to cast substantial doubt upon his integrity, he must be removed from office regardless of all other considerations. If a judge has not abused his trust, Congress has the duty to reaffirm public trust and confidence in his actions.

Respectfully submitted,

BETHEL B. KELLEY,
DANIEL G. WYLLIE.

§ 3.12 The view has been taken that the House impeaches federal judges only for misconduct that is both criminal in nature and related to the performance of the judicial function.

On Nov. 16, 1970, Mr. Frank Thompson, Jr., of New Jersey, inserted into the *Congressional Record* a study by a professor of constitutional law of impeachment proceedings against federal judges and the grounds for such proceedings. The memorandum discussed in detail the substance of such charges in all prior impeachment proceedings and concluded as follows: (4)

In summary, the charges against Justice William O. Douglas are unique in our history of impeachment. The House has stood ready to impeach judges for Treason, Bribery, and related financial crimes and misdemeanors. It has refused to impeach judges charged with on-the-job misconduct when that behavior is not also an indictable criminal offense. Only once before has a judge even been charged with impeachment for non-job-related activities—in 1921, when Judge Kenesaw Mountain Landis was charged with accepting the job as Commissioner of big-league baseball—and the House Judiciary Committee refused to dignify the charge with a report pro or con. Never in our impeachment history, until Congressman Ford leveled his charges against Mr. Justice Douglas, has it ever been suggested that a judge could be impeached because, while off the bench, he exercised his First Amendment rights to speak and write on issues of the day, to associate with others in educational enterprises. . . .

This brief history of Congressional impeachment shows several things. First, it shows that it works. It is not a rusty, unused power. Since 1796, fifty-five judges have been charged on the Floor of the House of Representatives, approximately one in every three to four years. Presumably, most of the federal judges who should be impeached, are impeached. Thirty-three judges have been charged with "Trea-

4. 116 CONG. REC. 37464–70, 91st Cong. 2d Sess.

son, Bribery, or other High Crimes and Misdemeanors." Three of them have been found guilty by the Senate and removed from office; twenty-two additional judges have resigned rather than face Senate trial and public exposure. This is one "corrupt" judge for approximately every seven years—hopefully, all there are.

Second, by its deeds and actions, Congress has recognized what Chief Justice Burger recently described as "the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." With a few aberrations in the early 1800's, a period of unprecedented political upheaval, Congress has refused to impeach a judge for lack of "good behaviour" unless the behavior is both job-related and criminal. This is true whether the judge gets drunk on the bench, whether the judge exploits and abuses the authority of his robes, or whether the judge hands down unpopular or wrong decisions.

How could it be otherwise? The purpose of an "independent judiciary" in our system of government by separation of powers, is to check the excesses of the legislative and executive branches of the government, to cry a halt when popular passions grip the Congress and laws are adopted which abridge and infringe upon the rights guaranteed to all citizens by the Constitution. The judges must be strong and secure if they are to do this job well.

John Dickinson proposed at the Constitutional Convention that federal judges should be removed upon a petition by the majority of each House of Congress. This was rejected, because it was contradictory to judicial tenure during good behavior, because it would make the judiciary "dangerously dependent" on the legislature.

During the Jeffersonian purge of the federal bench, Senate leader William Giles proclaimed that "removal by impeachment" is nothing more than a declaration by both Houses of Congress to the judge that "you hold dangerous opinions." This theory of the impeachment power was rejected in 1804 because it would put in peril "the integrity of the whole national judicial establishment."

Now Congressman Ford suggests that "an impeachable offense" is nothing more than "whatever a majority of the House of Representatives considers it to be at a given moment in history."

Does he really mean that Chief Justice Warren might have been impeached because "at a given moment in history" a majority of the House and two-thirds of the Senate objected strongly to his opinion ordering an end to school-segregation, or to his equally controversial decision against school prayer? Does he really mean that Judge Julius Hoffman is impeachable if a majority of this or the next Congress decides that he was wrong in his handling of the Chicago Seven? Does he really want a situation where federal judges must keep one eye on the mood of Congress and the other on the proceedings before them in court, in order to maintain their tenure in office?

If Congressman Ford is right, it bodes ill for the concept of an independent judiciary and the corollary doctrine of a Constitutional government of laws.

In 1835, the French observer de Tocqueville wrote that:

> A decline of public morals in the United States will probably be marked by the abuse of the power of impeachment as a means of crushing political adversaries or ejecting them from office.

Let us hope that that day has not yet arrived.

Mr. Thompson summarized the study as follows:

> . . . [I] requested Daniel H. Pollitt, a professor of constitutional law at the University of North Carolina to survey the 51 impeachment proceedings in this House during the intervening years.
>
> I want to make several comments on this survey.
>
> First, it shows that impeachment works. Thirty-three judges have been charged in this body with "treason, bribery, or other high crimes and misdemeanors." Twenty-two of them resigned rather than face Senate trial; three chose to fight it out in the Senate; and seven were acquitted by the vote of this Chamber against further impeachment proceedings.
>
> Second, it shows that never since the earliest days of this Republic has the House impeached a judge for conduct which was not both job-related and criminal. This body has consistently refused to impeach a judge unless he was guilty of an indictable offense.
>
> Third, it shows that never before Mr. Ford leveled his charges against Justice Douglas has it ever been suggested that a judge could be impeached because, while off the bench, he exercised his first amendment rights to speak and write on issues of the day.

§ 3.13 A special subcommittee of the Committee on the Judiciary found in its final report on charges of impeachment against Associate Justice William O. Douglas of the Supreme Court, that (1) a judge could be impeached for judicial conduct which was criminal or which was a serious dereliction of public duty; (2) that a judge could be impeached for nonjudicial conduct which was criminal; and (3) that the evidence gathered did not warrant the impeachment of Justice Douglas.

On Sept. 17, 1970, the special subcommittee of the Committee on the Judiciary, which had been created to investigate and report on charges of impeachment against Associate Justice Douglas of the Supreme Court, submitted its final report to the full committee. The report reviewed the grounds for impeachment and found the evidence insufficient. The report provided in part: [5]

> II. CONCEPTS OF IMPEACHMENT
>
> The Constitution grants and defines the authority for the use of impeach-

5. Final report by the special subcommittee on H. Res. 920 (Impeachment of Associate Justice Douglas) of the Committee on the Judiciary, Committee Print, 91st Cong. 2d Sess., Sept. 17, 1970.

ment procedures to remove officials of the Federal Government. Offenses subject to impeachment are set forth in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from office on impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

An Associate Justice of the Supreme Court is a civil officer of the United States and is a person subject to impeachment. Article II, Section 2, authorizes the President to appoint ". . . Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . ."

Procedures established in the Constitution vest responsibility for impeachment in the Legislative Branch of the government and require both the House of Representatives and the Senate to participate in the trial and determination of removal from office. Article I, Section 1, provides: "The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."

After the House of Representatives votes to approve Articles of Impeachment, the Senate must hear and decide the issue. Article I, Section 3 provides:

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

Decision for removal in an impeachment proceeding does not preclude trial and punishment for the same offense in a court of law. Article III, Section 3 in this regard provides:

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

Other provisions of the Constitution underscore the exceptional nature of the unique legislative trial. The President's power to grant reprieves and pardons for offenses against the United States does not extend to impeachments. Article 2, Section 2, provides: "The President . . . shall have the power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Inasmuch as the Senate itself hears the evidence and tries the case, the Constitutional right to a trial by jury when a crime has been charged is not available. Article III, Section 2 provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . ."

The Constitution provides only one instrument to remove judges of both the Supreme and inferior courts, and that instrument is impeachment. The provisions of Article II, Section 4, defines the conduct that render federal officials subject to impeachment procedures. For a judge to be impeachable, his conduct must constitute ". . . Treason, Bribery, or other High Crimes and Misdemeanors."

Some authorities on constitutional law have contended that the impeach-

ment device is a cumbersome procedure. Characterized by a high degree of formality, when used it preempts valuable time in both the House and Senate and obstructs accomplishment of the law making function of the legislative branch. In addition to distracting the attention of Congress from its other responsibilities, impeachments invariably are divisive in nature and generate intense controversy in Congress and in the country at large.

Since the adoption of the Constitution in 1787, there have been only 12 impeachment proceedings, nine of which have involved Federal judges. There have been only four convictions, all Federal judges.

The time devoted by the House and Senate to the impeachments that resulted in the trials of the nine Federal judges varied substantially. The impeachment of Robert Archbald in 1912 consumed the shortest time. The Archbald case required three months to be processed in the House, and six months in the Senate. The impeachment of James H. Peck required the most time for trial of a Federal judge. The House took three years and five months to complete its action, and the Senate was occupied for nine months with the trial. The most recent case, Halsted Ritter, in 1933, received the attention of the House for two years and eight months, and required one month and seven days for trial in the Senate.

Although the provisions of Article II, Section 4 define conduct that is subject to impeachment, and Article I establishes the impeachment procedure, impeachments of Federal judges have been complicated by the tenure provision in Article III, Section 1. Article III, Section 1, provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office

The content of the phrase "during good Behaviour" and its relationship to Article II, Section 4's requirement for conduct that amounts to "treason, bribery, or other high crimes and misdemeanors" have been matters of dispute in each of the impeachment proceedings that have involved Federal judges. The four decided cases do not resolve the problems and disputes that this relationship has generated. Differences in impeachment concepts as to the meaning of the phrase "good behavior" in Article III and its relationship to the meaning of the word "misdemeanors" in Article II are apparent in the discussions of the charges that have been made against Associate Justice Douglas.

A primary concern of the Founding Fathers was to assure the creation of an independent judiciary. Alexander Hamilton in *The Federalist Papers* (No. 78) stated this objective:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the

> medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The Federalist Papers (No. 79) discusses the relationship of the impeachment procedures to judicial independence:

> The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.
>
> The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalog of known arts. An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.

The desire of the American people to assure independence of the judiciary and to emphasize the exalted station assigned to the judge by our society, have erected pervasive constitutional and statutory safeguards. The judge of a United States court holds office "during good behavior." Further his salary may not be reduced while he is in office by any branch of Government. A judge may be removed from office only by the cumbersome procedure of impeachment.

Accordingly, when the public is confronted with allegations of dishonesty or venality, and is forced to recognize that judges are human, and hence fallible, the impact is severe. Exposure of infirmities in the judicial system is undertaken only with reluctance. It is an area in which the bar, the judiciary, and the executive and legislative branches alike have seen fit to move cautiously and painstakingly. There must be full recognition of the necessity to proceed in such a manner that will result in the least damage possible to judicial independence, but which, at the same time, will result in correction or elimination of any condition that brings discredit to the judicial system.

Removal of a Federal judge, for whatever reason, historically has been difficult. Constitutional safeguards to assure a free and independent judiciary make it difficult to remove a Federal judge who may be unfit, whether through incompetence, insanity, senility, alcoholism, or corruption.

For a judge to be impeached, it must be shown that he has committed treason, accepted a bribe, or has committed a high crime or misdemeanor. All conduct that can be impeached must at least be a "misdemeanor." A judge is entitled to remain a judge as long as he holds his office "during good behav-

ior." The content of the word "misdemeanor" must encompass some activities which fall below the standard of "good behavior." Conduct which fails to meet the standard of "good behavior" but which does not come within the definition of "misdemeanor" is not subject to impeachment.

In each of the nine impeachments involving judges, there has been controversy as to the meaning of the word "misdemeanor." Primarily the controversy concerned whether the activities being attacked must be criminal or whether the word "misdemeanor" encompasses less serious departures from society norms.

In his memorandum "Opinion on the Impeachment of Halsted L. Ritter," Senator H. W. Johnson described the confusion of thought prevailing in the Senate on these concepts. He stated:

> The confusion of thought prevailing among Senators is evidenced by their varying expressions. One group eloquently argued any gift to a judge, under any circumstances, constituted misbehavior, for which he should be removed from office—and moreover that neither corrupt motive or evil intent need be shown in the acceptance of a gift or in any so-called misbehavior. Another prefaced his opinion with the statement: "I do not take the view that an impeachment proceeding of a judge of the inferior Federal courts under the Constitution of the United States is a criminal proceeding. The Constitution itself has expressly denuded impeachment proceedings of every aspect or characteristic of a criminal proceeding."
>
> And yet another flatly takes a contrary view, and states although finding the defendant guilty on the seventh count: "The procedure is criminal in its nature, for upon conviction, requires the removal of a judge, which is the highest punishment that could be administered such an officer. The Senate, sitting as a court, is required to conduct its proceedings and reach its decisions in accordance with the customs of our law. In all criminal cases the defendant comes into court enjoying the presumption of innocence, which presumption continues until he is proven guilty beyond a reasonable doubt."
>
> And again we find this: "Impeachment, though, must be considered as a criminal proceeding."

In his April 15, 1970, speech, Representative Ford articulated the concept that an impeachable offense need not be indictable and may be something less than a criminal act or criminal dereliction of duty. He said:

> What, then, is an impeachable offense?
>
> The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. Again, the historical context and political climate are important; there are few fixed principles among the handful of precedents.
>
> I think it is fair to come to one conclusion, however, from our history of impeachments: a higher standard is expected of Federal judges than of any other "civil officers" of the United States. (First Report, p. 31).

The "Kelley Memorandum" submitted by Mr. Ford enforces this position. The Kelley Memorandum asserts that misbehavior by a Federal judge may constitute an impeachable offense

though the conduct may not be an indictable crime or misdemeanor. The Kelley Memorandum concludes:

> In conclusion, the history of the constitutional provisions relating to the impeachment of Federal judges demonstrates that only the Congress has the power and duty to remove from office any judge whose proven conduct, either in the administration of justice or in his personal behavior, casts doubt on his personal integrity and thereby on the integrity of the entire judiciary. Federal judges must maintain the highest standards of conduct to preserve the independence of and respect for the judicial system and the rule of law.

On the other hand, Counsel for Associate Justice Douglas, Simon H. Rifkind, has submitted a memorandum that contends that a Federal judge may not be impeached for anything short of criminal conduct. Mr. Rifkind also contends that the other provisions of the Constitution, i.e., the prohibition of *ex post facto* laws, due process notice requirement and the protection of the First Amendment prevent the employment of any other standard in impeachment proceedings. In conclusion Mr. Rifkind stated:

> The constitutional language, in plain terms, confines impeachment to "Treason, Bribery, or other high Crimes and Misdemeanors." The history of those provisions reinforces their plain meaning. Even when the Jeffersonians sought to purge the federal bench of all Federalist judges, they felt compelled to at least assert that their political victims were guilty of "high Crimes and Misdemeanors." The unsuccessful attempt to remove Justice Chase firmly established the proposition that impeachment is for *criminal* offenses only, and is not a "general inquest" into the behavior of judges. There has developed the consistent practice, rigorously followed in every case in this century, of impeaching federal judges only when criminal offenses have been charged. Indeed, the House has never impeached a judge except with respect to a "high Crime" or "Misdemeanor." Characteristically, the basis for impeachment has been the soliciting of bribes, selling of votes, manipulation of receivers' fees, misappropriation of properties in receivership, and willful income tax evasion.

A vast body of literature has been developed concerning the scope of the impeachment power as it pertains to federal judges. The precedents show that the House of Representatives, particularly in the arguments made by its Managers in the Senate trials, favors the conclusion that the phrase "high crimes and misdemeanors" encompasses activity which is not necessarily criminal in nature.

Although there may be divergence of opinion as to whether impeachment of a judge requires conduct that is criminal in nature in that it is proscribed by specific statutory or common law prohibition, all authorities hold that for a judge to be impeached, the term "misdemeanors" requires a showing of misconduct which is inherently serious in relation to social standards. No respectable argument can be made to support the concept that a judge could be impeached if his conduct did not amount at least to a serious dereliction of his duty as a member of society.

The punishment imposed by the Constitution measures how serious misconduct need be to be impeachable. Only serious derelictions of duty owed to society would warrant the punish-

ment provided. An impeachment proceeding is a trial which results in punishment after an appropriate finding by the trier of facts, the Senate. Deprivation of office is a punishment. Disqualification to hold any future office of honor, trust and profit is a greater punishment. The judgment of the Senate confers upon that body discretion, in the words of the *Federalist Papers* ". . . to doom to honor or to infamy the most influential and the most distinguished characters of the community. . . .

Reconciliation of the differences between the concept that a judge has a right to his office during "good behavior" and the concept that the legislature has a duty to remove him if his conduct constitutes a "misdemeanor" is facilitated by distinguishing conduct that occurs in connection with the exercise of his judicial office from conduct that is non-judicially connected. Such a distinction permits recognition that the content of the word "misdemeanor" for conduct that occurs in the course of exercise of the power of the judicial office includes a broader spectrum of action than is the case when non-judicial activities are involved.

When such a distinction is made, the two concepts on the necessity for judicial conduct to be criminal in nature to be subject to impeachment becomes defined and may be reconciled under the overriding requirement that to be a "misdemeanor", and hence impeachable, conduct must amount to a serious dereliction of an obligation owed to society.

To facilitate exposition, the two concepts may be summarized as follows:

Both concepts must satisfy the requirements of Article II, Section 4, that the challenged activity must constitute ". . . Treason, Bribery or High Crimes and Misdemeanors."

Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involve criminal conduct in violation of law, or (2) that involve serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. Sloth, drunkenness on the bench or unwarranted and unreasonable impartiality manifest for a prolonged period are examples of misconduct, not necessarily criminal in nature that would support impeachment. When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses against good morals and injurious to the social body.

Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve criminal acts in violation of law.

The two concepts differ only with respect to impeachability of judicial behavior not connected with the duties and responsibilities of the judicial office. Concept 2 would define "misdemeanor" to permit impeachment for serious derelictions of public duty but not necessarily violations of statutory or common law.

In summary, an outline of the two concepts would look this way:

A judge may be impeached for ". . . Treason, Bribery, or High Crimes or Misdemeanors."

A. Behavior, connected with judicial office or exercise of judicial power.

Concept I

1. Criminal conduct.

2. Serious dereliction from public duty.

Concept II

1. Criminal conduct.

2. Serious dereliction from public duty.

B. Behavior not connected with the duties and responsibilities of the judicial office.

Concept I

1. Criminal conduct.

Concept II

1. Criminal conduct.

2. Serious dereliction from public duty.

Chapter III, Disposition of Charges sets forth the Special Subcommittee's analysis of the charges that involve activities of Associate Justice William O. Douglas. Under this analysis it is not necessary for the members of the Judiciary Committee to choose between Concept I and II.

The theories embodied in Concept I have been articulated by Representative Paul N. McCloskey, Jr. In his speech to the House on April 21, 1970, Mr. McCloskey stated:

> The term "good behavior," as the Founding Fathers considered it, must be taken together with the specific provisions limiting cause for impeachment of executive branch personnel to treason, bribery or other high crimes and misdemeanors. The higher standard of good behavior required of judges might well be considered as applicable solely to their judicial performance and capacity and not to their private and nonjudicial conduct unless the same is violative of the law. Alcoholism, arrogance, nonjudicial temperament, and senility of course interfere with judicial performance and properly justify impeachment. I can find no precedent, however, for impeachment of a Judge for nonjudicial conduct which falls short of violation of law.
>
> In looking to the nine cases of impeachment of Judges spanning 181 years of our national history, in every case involved, the impeachment was based on either improper judicial conduct or non-judicial conduct which was considered as criminal in nature. CONG. REC. 91st Cong., 2nd Sess., H 3327.

In his August 18, 1970, letter to the Special Subcommittee embodying his comments on the "Kelley Memorandum", Mr. McCloskey reaffirmed this concept. He stated:

> Conduct of a Judge, while it may be less than criminal in nature to constitute "less than good behavior", has never resulted in a successful impeachment unless the judge was acting in his *judicial* capacity or misusing his *judicial* power. In other words the precedents suggest that misconduct must either be "*judicial* misconduct" or conduct which constitutes a crime. There is no basis for impeachment on charges of *non*-judicial misconduct which occurs off the bench and does *not* constitute a crime. . . .

IV. RECOMMENDATIONS OF SPECIAL SUBCOMMITTEE TO JUDICIARY COMMITTEE

1. It is not necessary for the members of the Judiciary Committee to take a position on either of the concepts of impeachment that are discussed in Chapter II.

2. Intensive investigation of the Special Subcommittee has not disclosed creditable evidence that would warrant

preparation of charges on any acceptable concept of an impeachable offense.

EMANUEL CELLER,
BYRON G. ROGERS,
JACK BROOKS.

The minority views of Mr. Edward Hutchinson, of Michigan, a member of the special subcommittee, concluded as follows on the "concepts of impeachment":

> The report contains a chapter on the Concepts of Impeachment. At the same time, it takes the position that it is unnecessary to choose among the concepts mentioned because it finds no impeachable offense under any. It is evident, therefore, that while a discussion of the theory of impeachment is interesting, it is unnecessary to a resolution of the case as the Subcommittee views it. This chapter on Concepts is nothing more than dicta under the circumstances. Certainly the Subcommittee should not even indirectly narrow the power of the House to impeach through a recitation of two or three theories and a very apparent choice of one over the others, while at the same time asserting that no choice is necessary. The Subcommittee's report adopts the view that a Federal judge cannot be impeached unless he is found to have committed a crime, or a serious indiscretion in his judicially connected activities. Although it is purely dicta, inclusion of this chapter in the report may be mischievous since it might unjustifiably restrict the scope of further investigation.

Following the submission of the report, further proceedings against Justice Douglas were discontinued.[8]

6. See § 14.16 infra.

Offenses Committed Prior to Term of Office

§ 3.14 The Speaker and the House declined to take any action on a request by the Vice President for an investigation into possible impeachable offenses against him, where the offenses were not related to his term of office as Vice President and where the charges were pending before the courts.

On Sept. 25, 1973,[7] Speaker Carl Albert, of Oklahoma, laid before the House a communication from Vice President Spiro T. Agnew requesting that the House investigate offenses charged to the Vice President in an investigation being conducted by a U.S. Attorney. The alleged offenses related to the Vice President's conduct before he became a civil officer under the United States. No action was taken on the request.

Parliamentarian's Note: The Vice President cited in his letter a request made by Vice President John C. Calhoun in 1826 (discussed at 3 Hinds' Precedents § 1736). On that occasion, the alleged charges related to the Vice President's prior service as Secretary of War. The communication

7. 119 CONG. REC. 31368, 93d Cong. 1st Sess.

was referred on motion to a select committee which investigated the charges and subsequently reported to the House that no impropriety had been found in the Vice President's former conduct as a civil officer under the United States. The report of the select committee was ordered to lie on the table and the House took no further action thereon. The Vice President's letter did not cite the Committee on the Judiciary's recommendation to the House (discussed in 3 Hinds' Precedents § 2510) that conduct of Vice President Colfax allegedly occurring prior to his term as Vice President was not grounds for impeachment, since not "an act done or omitted while the officer was in office." (See § 5.14, infra).

§ 4. Effect of Adjournment

Under parliamentary law, as stated in Jefferson's Manual, "an impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament."[8] Both Judge John Pickering and Judge Harold Louderback were impeached by the House in one Congress and tried by the Senate in the next.[9] The practice at the time of the Pickering impeachment was to present a resolution of impeachment to the Senate and then to prepare and adopt articles of impeachment for presentation to the Senate. In that case, impeachment proceedings begun in the 7th Congress were resumed by the House in the 8th Congress.[10]

The question arose in the 73d Congress whether the appointment in the 72d Congress of House managers to conduct impeachment proceedings against Judge Louderback was such as to permit them to act in that function in the 73d Congress without a further grant of authority. The House adopted in the 73d Congress a resolution filling vacancies, making reappointments, and vesting the managers with powers and granting them funds.[11]

In the case of Judge Halsted L. Ritter, the House authorized and the Committee on the Judiciary conducted an impeachment investigation in the 73d Congress, with

8. *House Rules and Manual* § 620 (Jefferson's Manual) (1973).

9. See 3 Hinds' Precedents §§ 2319, 2320, for the presentation of the resolution impeaching Judge Pickering, and § 4.1, infra, for the presentation to the Senate of the resolution impeaching Judge Louderback.

10. See 3 Hinds' Precedents § 2321. For the later practice of presenting to the Senate a resolution together with articles of impeachment, see § 8.1, infra.

11. See § 4.2, infra.

the resolution and articles of impeachment being reported and adopted in the 74th Congress. Charges of impeachment were offered and referred anew to the Committee on the Judiciary in the 74th Congress, but the resolution reported and adopted by the House specifically referred to the evidence gathered during the 73d Congress as the basis for impeachment.(12)

Cross References

Adjournments generally and their effect on business, see Ch. 40, infra.
Resumption of business in a new Congress, see Ch. 1, supra.
Resumption of committee investigation into conduct of Judge Ritter, see § 18, infra.
Resumption of proceedings against Judge Louderback in succeeding Congress, see § 17, infra.

Impeachment in One Congress and Trial in the Next

§ 4.1 The managers on the part of the House presented articles of impeachment against Judge Harold Louderback on the final day of the 72d Congress, and the Senate organized for and conducted the trial in the 73d Congress.

On Mar. 3, 1933, the last day of the 72d Congress, the managers on the part of the House in the Louderback impeachment proceeding appeared before the Senate and read the resolution and articles of impeachment. The Senate adopted a motion that the proceedings be made a special order of business on the first day of the first session of the 73d Congress.(13)

The only other occasion where impeachment proceedings continued into a new Congress occurred in 1803–04, the resolution of impeachment of Judge John Pickering being carried to the Senate by a House committee of two members on Mar. 3, 1803, the final day of the 7th Congress. The Senate organized for and conducted the trial in the 8th Congress.(14)

It should be noted that in neither the Louderback nor Pickering impeachments did the trial in the Senate begin before the adjournment *sine die* of the Congress. The issue whether the Senate could conduct a bifurcated trial, part in one Congress and part in the next, has not been presented.(15)

12. See §§ 4.3, 4.4, infra.

13. 6 Cannon's Precedents § 515.

14. 3 Hinds' Precedents §§ 2319, 2320. Managers had not been appointed nor articles considered in the House by the end of the 7th Congress.

15. For a memorandum as to whether an impeachment trial begun in one Con-

Authority of Managers Following Expiration of Congress

§ 4.2 Where the House had impeached Judge Louderback in the 72d Congress but the Senate did not organize for or conduct the trial until the 73d Congress, the House in the 73d Congress adopted resolutions (1) appointing Members to fill vacancies for managers not re-elected and reappointing managers elected in the 72d Congress and (2) granting the managers powers and funds.

On Mar. 9, 1933, the first day of the 73d Congress, the Senate sitting as a Court of Impeachment for the trial of Judge Harold Louderback met at 2 p.m., articles of impeachment having been presented in the Senate on the last day of the 72d Congress. On Mar. 13, the managers on the part of the House, being those Members appointed in the 72d Congress to conduct the inquiry and re-elected to the 73d Congress, appeared for the proceedings of the Senate sitting as a Court of Impeachment.(16)

On Mar. 22, the House adopted a resolution electing successors for those managers elected in the 72d Congress who were no longer Members of the House, and reappointing the former managers. The House discussed the power of the House to appoint managers to continue in office in that capacity after the expiration of the term to which elected to the House.(17)

Investigation in One Congress and Impeachment in the Next

§ 4.3 The Committee on the Judiciary determined in the 74th Congress that its authority to report out a resolution impeaching a federal judge expired with the termination of the Congress in which the resolution containing charges was introduced and referred to the committee.

On Mar. 2, 1936, in the 74th Congress, the House was considering a resolution and articles of

gress could be continued into the next, see 120 CONG. REC. 31346–48, 93d Cong. 2d Sess., Sept. 17, 1974 (insertion by Michael J. Mansfield [Mont.], Majority Leader of the Senate).

Under parliamentary law, an impeachment is not discontinued by the dissolution of Parliament but may be resumed by the new Parliament. See *House Rules and Manual* § 620 (Jefferson's Manual) (1973).

16. 6 Cannon's Precedents § 516.

17. 6 Cannon's Precedents § 517.

impeachment, reported by the Committee on the Judiciary, against Judge Halsted L. Ritter, an investigation of his conduct having been made in the 73d Congress. Mr. William V. Gregory, of Kentucky, a member of the committee, remarked on the effect, in the 74th Congress, of an authorizing resolution passed in the 73d Congress: (18)

> MR. GREGORY: Mr. Speaker, in view of the statement made by the gentleman from Florida [Mr. Wilcox], and more recently by the gentleman from New York [Mr. Hancock], with reference to what happened in committee, I think it proper I should make a statement at this time.
>
> The first proceedings in this matter were instituted in the Seventy-third Congress. A simple resolution of investigation was introduced by the gentleman from Florida [Mr. Wilcox]. No one during that session of Congress attempted by resolution or upon his own authority on the floor of the House to prefer impeachment charges against the judge. The Seventy-third Congress died, and the gentleman from Florida [Mr. Green] came before the Seventy-fourth Congress and wanted some action taken upon the resolution which had been introduced in the Seventy-third Congress. I took the position before the Committee—and I think others agreed with me—that with the passing of the Seventy-third Congress it had no power over the resolution of investigation which had been introduced any more than it did in connection with any other bill or resolution that might have been introduced in a previous Congress. Therefore, when the question came up as to voting impeachment charges upon a resolution which was introduced in the Seventy-third Congress, I voted against such action, and I think other Members voted the same way. But when the matter was properly presented at this session of Congress and impeachment charges were made on this floor on the responsibility of the gentleman from Florida [Mr. Green], the matter came before the committee again in regular and proper form, and I then voted to report out this resolution of impeachment.
>
> I want the Members of the House to understand that the Committee on the Judiciary has not changed its position on this proposition at any time. These are the facts.

18. 80 CONG. REC. 3089, 74th Cong. 2d Sess.

§ 4.4 Where the Committee on the Judiciary investigated charges of impeachable offenses against a federal judge in one Congress and reported to the House a resolution of impeachment in the next, the resolution indicated that impeachment was warranted by the evidence gathered in the investigation conducted in the preceding Congress.

On Feb. 20, 1936, the Committee on the Judiciary submitted a privileged report (H. Rept. No. 74–2025) on the impeachment of

District Judge Halsted L. Ritter to the House. The report and the accompanying resolution recited that the evidence taken by the Committee on the Judiciary in the prior Congress, the 73d Congress, pursuant to authorizing resolution, sustained articles of impeachment (the charges of impeachable offenses had been presented anew in the 74th Congress and referred to the committee):

> The Committee on the Judiciary, having had under consideration charges of official misconduct against Halsted L. Ritter, a district judge of the United States for the Southern District of Florida, and having taken testimony with regard to the official conduct of said judge under the authority of House Resolution 163 of the Seventy-third Congress, report the accompanying resolution of impeachment and articles of impeachment against Halsted L. Ritter to the House of Representatives with the recommendation that the same be adopted by the House and presented to the Senate.
>
> [H. Res. 422, 74th Cong., 2d sess. (Rept. No. 2025)]
>
> RESOLUTION
>
> *Resolved*, That Halsted L. Ritter, who is a United States district judge for the southern district of Florida, be impeached for misbehavior, and for high crimes and misdemeanors; and that the evidence heretofore taken by the subcommittee of the Committee on the Judiciary of the House of Representatives under House Resolution 163 of the Seventy-third Congress sustains articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit: . . .[19]

Parliamentarian's Note: No resolution was adopted in the 74th Congress to specifically authorize an investigation in that Congress by the Committee on the Judiciary of charges of impeachment against Judge Ritter, the investigation apparently having been completed in the 73d Congress but not reported on to the House. Charges were introduced in the 74th Congress against Judge Ritter and referred to the committee, since the committee could not report resolutions and charges referred in the 73d Congress, all business expiring in the House with a Congress.[20]

19. 80 CONG. REC. 2528, 74th Cong. 2d Sess. (report submitted); 80 CONG. REC. 3066, 74th Cong. 2d Sess., Mar. 2, 1936 (report considered in the House).

For detailed discussion of committee consideration and report in the Ritter impeachment proceedings, see §§ 18.1–18.4, infra.

20. For introduction of charges and a resolution impeaching Judge Ritter in the 74th Congress, see §§ 18.2, 18.3, infra.

B. INVESTIGATION AND IMPEACHMENT

§ 5. Introduction and Referral of Charges

In the majority of cases, impeachment proceedings in the House have been initiated either by introducing resolutions of impeachment by placing them in the hopper, or by offering charges on the floor of the House under a question of constitutional privilege. Resolutions dropped in the hopper were used to initiate impeachment proceedings against Associate Justice William O. Douglas and President Richard M. Nixon. Where such resolutions have directly impeached federal civil officers, they have been referred by the Speaker to the Committee on the Judiciary, which has jurisdiction over federal judges and presidential succession; where they have called for an investigation into such charges by the Committee on the Judiciary or by a select committee they have been referred by the Speaker to the Committee on Rules, which has had jurisdiction over resolutions authorizing investigations by committees of the House.[1]

Where a Member raises a question of constitutional privilege to present impeachment proceedings on the floor of the House, he must in the first instance offer a resolution, which resolution must directly call for impeachment, rather than call for an investigation.[2]

Impeachment proceedings in the House have been set in motion by memorial or petition,[3] and on one occasion by message from the President.[4] In the 93d Congress the Vice President sought to initiate an investigation by the House into charges pending

1. See §§ 5.10, 5.11, infra. In the case of Justice Douglas, the Committee on the Judiciary authorized a special subcommittee to investigate the charges, without the adoption by the House of a resolution specifically authorizing an investigation (see § 6.11, infra). In the case of President Nixon, the Committee on the Judiciary reported a resolution which was adopted by the House, specifically conferring on the committee the power to investigate the charges (see § 6.2, infra).
2. See § 5.4, infra. But see § 18.2, infra, for one occasion where a Member gained the floor under a question of privilege and offered charges but not a resolution of impeachment.
3. 3 Hinds' Precedents §§ 2364, 2469 (memorial from state legislature initiating proceedings against Judge Charles Swayne, resulting in his impeachment), 2491, 2494, 2496; 6 Cannon's Precedents § 552.
4. 3 Hinds' Precedents § 2294 (Senator William Blount).

against him in the courts, but no action was taken on his request (by letter to the Speaker).[5]

Cross References

Initiation of specific impeachment proceedings, see §§ 15–18, infra.
Jurisdiction of House committees generally, see Ch. 17, infra.
Privilege for consideration of amendments to articles of impeachment, see § 10, infra.
Privilege of reports on impeachment, see § 8, infra.
Questions of privilege of the House, raising and substance of, see Ch. 11, supra.
Resolutions, petitions and memorials generally, see Ch. 24, infra.

Privilege of Impeachment Charges and Resolutions

§ 5.1 A proposition impeaching a federal civil officer is privileged when offered on the floor of the House.

On Jan. 6, 1932,[6] Mr. Wright Patman, of Texas, rose to a question of constitutional privilege, impeached Secretary of the Treasury Andrew W. Mellon, and offered a resolution authorizing an investigation:

IMPEACHMENT OF ANDREW W. MELLON, SECRETARY OF THE TREASURY

MR. PATMAN: Mr. Speaker, I rise to a question of constitutional privilege. On my own responsibility as a Member of this House, I impeach Andrew William Mellon, Secretary of the Treasury of the United States, for high crimes and misdemeanors, and offer the following resolution:

Whereas . . .

Resolved, That the Committee on the Judiciary is authorized and directed, as a whole or by subcommittee, to investigate the official conduct of Andrew W. Mellon, Secretary of the Treasury, to determine whether, in its opinion, he has been guilty of any high crime or misdemeanor which, in the contemplation of the Constitution, requires the interposition of the constitutional powers of the House. Such committee shall report its findings to the House, together with such resolution of impeachment or other recommendation as it deems proper.

Sec. 2. For the purposes of this resolution, the committee is authorized to sit and act during the present Congress at such times and places in the District of Columbia or elsewhere, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to employ such experts, and such clerical, stenographic, and other assistants, to require the attendance of such witnesses and the production of such books, papers, and documents, to take such testimony, to have such printing and binding done, and to make such expenditures not exceeding $5,000, as it deems necessary.

5. See § 5.14, infra, for Vice President Spiro T. Agnew's request and for a discussion of other cases where federal civil officers have sought to initiate investigations into charges against them.

6. 75 CONG. REC. 1400, 72d Cong. 1st Sess.

§ 5.2 Although a resolution of impeachment is privileged, it may not be called up in the House while another Member has the floor and does not yield for that purpose, but it may be introduced for reference through the hopper at the Clerk's desk.

On Apr. 15, 1970, Mr. Louis C. Wyman, of New Hampshire, had the floor for a special-order speech and yielded to Mr. Andrew Jacobs, Jr., of Indiana:

> MR. JACOBS: Mr. Speaker, will the gentleman yield for a three-sentence statement?
>
> MR. WYMAN: I yield to the gentleman from Indiana.
>
> MR. JACOBS: Mr. Speaker, the gentleman from Michigan has stated publicly that he favors impeachment of Justice Douglas.
>
> He, therefore, has a duty to this House and this country to file a resolution of impeachment.
>
> Since he refuses to do so and since he raises grave questions, the answers to which I do not know, but every American is entitled to know, I introduce at this time the resolution of impeachment in order that a proper and dignified inquiry into this matter might be held.

Mr. Jacobs then introduced his resolution (H. Res. 920) through the hopper and it was subsequently referred to the Committee on the Judiciary.[7]

> THE SPEAKER PRO TEMPORE:[8] The gentleman from New Hampshire has the floor.
>
> MR. WYMAN: I did not yield for that purpose.
>
> THE SPEAKER PRO TEMPORE: The gentleman from Indiana has introduced a resolution.[9]

§ 5.3 The Speaker ruled that whether or not a resolution of impeachment was privileged was a constitutional question for the House and not the Chair to decide, where the resolution included charges against former civil officers.

On May 23, 1933, Mr. Louis T. McFadden, of Pennsylvania, rose to a question of constitutional privilege and offered House Resolution 158, impeaching numerous members and former members of the Federal Reserve Board. During the reading of the resolution Mr. Carl E. Mapes, of Michigan, made a point of order against the resolution:

> I wish to submit the question to the Speaker as to whether or not a person who is not now in office is subject to impeachment? This resolution of the gentleman from Pennsylvania refers to several people who are no longer holding any public office. They are not now at least civil officers. The Constitution

7. 116 CONG. REC. 11942, 91st Cong. 2d Sess.

8. Charles M. Price (Ill.).

9. 116 CONG. REC. 11920, 91st Cong. 2d Sess.

provides that the "President, Vice President, and all civil officers shall be removed from office on impeachment", and so forth. I have had no opportunity to examine the precedents since this matter came up, but it occurs to me that the resolution takes in too much territory to make it privileged.

Speaker Henry T. Rainey, of Illinois, ruled as follows:

That is a constitutional question which the Chair cannot pass upon, but should be passed upon by the House.

The resolution was referred on motion to the Committee on the Judiciary.(10)

Initiation of Impeachment Charges by Motion or Resolution

§ 5.4 In impeaching an officer of the United States as a matter of constitutional privilege, a Member must in the first instance present a motion or resolution.

On Jan. 18, 1933, Mr. Louis T. McFadden, of Pennsylvania, attempted to impeach President Herbert Hoover by presenting a question of constitutional privilege. Speaker John N. Garner, of Texas, ruled that a resolution or motion must first be presented:(11)

QUESTION OF PRIVILEGE

MR. MCFADDEN: Mr. Speaker, I rise to a question of constitutional privilege.

THE SPEAKER: The gentleman will state it.

MR. MCFADDEN: Mr. Speaker, on December 13, 1932——

MR. [ROBERT] LUCE [of Massachusetts: Mr. Speaker, a point of order.

THE SPEAKER: The gentleman will state it.

MR. LUCE: Mr. Speaker, the raising of a question of constitutional privilege must be preceded by a resolution or motion

THE SPEAKER: As the Chair understands it, the gentleman is stating his constitutional question. Has the gentleman a resolution?

MR. MCFADDEN: I am trying to communicate to the House what I propose to do here, Mr. Speaker.

MR. LUCE: I insist on the point of order, Mr. Speaker.

THE SPEAKER: The rules of the House provide that the gentleman must send a resolution to the Clerk's desk in raising a question of constitutional privilege.

MR. MCFADDEN: If the Speaker will permit, I am attempting to make a privileged statement to the House, and I believe I am within my rights in doing this.

THE SPEAKER: In order for the gentleman to have the right to make such a statement to the House, he must send a resolution to the Clerk's desk and have it read, on which the House may then act. The gentleman would then have one hour in which to address the House, if he presented a

10. 77 CONG. REC. 4055, 73d Cong. 1st Sess.

11. 76 CONG. REC. 2041, 2042, 72d Cong. 2d Sess.

question of constitutional privilege. That is the only way the gentleman can obtain the floor.

MR. MCFADDEN: Mr. Speaker, I believe under the rules I am entitled to make a statement.

THE SPEAKER: Not prior to the submission of a resolution.

MR. MCFADDEN: If the Speaker will pardon me, I have not offered a resolution. I rise to a question of constitutional privilege, and I believe I have the right to communicate to the House a constitutional privilege.

MR. [THOMAS L.] BLANTON [of Texas]: Mr. Speaker, I make the point of order that if the integrity of the gentleman has been impugned in any way by anyone, this would give him a constitutional privilege, and he has the right to rise to that privilege and state it without offering a resolution.

THE SPEAKER: That is true of a question of personal privilege, but the gentleman rises to a question of constitutional privilege. This can only be done, as the Chair understands it, by the presentation of a resolution upon which the constitutional question is based. A mere statement by the gentleman does not comply with the rules of the House. If the gentleman has no resolution involving a constitutional question, the Chair thinks he is not entitled to recognition.

MR. MCFADDEN: May I point out, Mr. Speaker, that impeachment proceedings are brought by other ways than formal whereases. It has been done at times by a memorial. I insist, Mr. Speaker, I am within my rights in communicating my statement to the House of Representatives.

THE SPEAKER: The Chair wants to give the gentleman all the privileges he is entitled to under the rules of the House, but at the same time it is the duty of the Chair to maintain the rules, and it is the impression of the Chair from observation during the last 20 years that whenever a Member states a question of constitutional privilege it must be done in the form of a resolution. If a Member raises a question of personal privilege, the Member may then state the question of personal privilege and is entitled to an hour. Questions of personal privilege are on a different footing from a constitutional question of privilege.

MR. MCFADDEN: Mr. Speaker, I am still of the opinion that I am within my constitutional rights and am entitled to communicate a statement to the House of Representatives.

THE SPEAKER: The Parliamentarian has just called the attention of the Chair to a decision by Speaker Longworth, of February 16, 1929 (70th Cong., 2d sess., Record, p. 3602), in which he says:

> In presenting a question of the privilege of the House a Member, in the first instance, must present a motion or resolution. Of course, this rule does not apply to a Member rising to a question of personal privilege.

This is a decision of Speaker Longworth, rendered in 1929, which is on all fours with this situation. The gentleman is not presenting a question of personal privilege but a question of constitutional privilege, and, in the instance referred to, following a number of precedents, it was held that the Member must present a resolution in the first instance on which to base his statement to the House, and then would be entitled to one hour.

MR. MCFADDEN: Mr. Speaker, I again call attention to the fact that impeachments may be brought by memorials and by other methods than that which has been stated in the decision referred to.

THE SPEAKER: When such memorials and petitions are presented to the House they are referred to the committee having jurisdiction of the particular subject. If a Member of the House bases his question of privilege on a memorial or petition, the memorial or petition must first be reported by the Clerk, and then the House may take such action as it sees fit.

MR. MCFADDEN: May not a Member of the House, under the right given him by the Constitution, present a communication to the House of Representatives which might later result in an impeachment?

THE SPEAKER: If the gentleman has a communication of that character, let him send it to the Clerk's desk and the Clerk will report it. Then the House can take such action as it deems proper. The Chair wants to be perfectly frank, and if the gentleman from Pennsylvania is undertaking to address the House for one hour, the Chair has no objection to that; but the Chair must maintain the rules and precedents of the House as the Chair finds them, and the gentleman can not get the floor under the proposition he has presented at the present time unless he sends up a resolution or motion.

Offering Articles of Impeachment

§ 5.5 In presenting impeachment charges as privileged, a Member need not offer articles of impeachment, which are prepared by the appropriate committee.

On May 7, 1935,[12] Mr. Everett M. Dirksen, of Illinois, rose to a question of constitutional privilege and impeached Judge Samuel Alschuler; he offered House Resolution 214, authorizing an investigation by the Committee on the Judiciary. During his remarks, Speaker Joseph W. Byrns, of Tennessee, upheld the privileged nature of the charges:

MR. [DONALD C.] DOBBINS [of Illinois]: Mr. Speaker, a point of order. I have heard no articles of impeachment read. As I have listened to the matter presented by the gentleman from Illinois [Mr. Dirksen], it is nothing more nor less than a resolution asking for an inquiry, and not articles of impeachment. It seems to me that it is not a privileged matter, and the gentleman is not entitled to occupy the time of the House in this manner. The gentleman has not offered any articles of impeachment.

THE SPEAKER: The gentleman has offered no articles of impeachment. He is simply making charges.

MR. DOBBINS: I assumed he had finished. There have been no articles of impeachment presented.

THE SPEAKER: Charges of impeachment; not articles of impeachment.

MR. DOBBINS: I have heard no articles of impeachment read.

12. 79 CONG. REC. 7081–86, 74th Cong. 1st Sess.

MR. DIRKSEN: It seems to me this was in its entirety articles of impeachment.

MR. DOBBINS: It is nothing more that a resolution of inquiry.

MR. DIRKSEN: Perhaps the gentleman did not hear the first part of my remarks. I will read the first paragraph of this report:

> Samuel Alschuler, justice of the Circuit Court of Appeals, Seventh Circuit, is impeached for high crimes and misdemeanors in said office upon the following specific charges.

MR. DOBBINS: As I understand articles of impeachment, Mr. Speaker, that does not amount to an impeachment at all.

THE SPEAKER: The gentleman does not prepare articles of impeachment. That is done by the committee.

MR. DOBBINS: It is simply a resolution of inquiry such as we have offered here every day, and is not a privileged matter.

THE SPEAKER: The Chair can only state what the gentleman said when he took the floor; that is, that he was preferring charges of impeachment against a certain United States circuit judge.

MR. DOBBINS: But there have been no such charges; simply a resolution of inquiry.

THE SPEAKER: The gentleman is making his charges now.

Debate on Question of Privilege to Present Impeachment Charges

§ 5.6 A Member recognized on a question of privilege to present impeachment charges against an officer of the government is entitled to an hour for debate.

On Jan. 14, 1936, Mr. Robert A. Green, of Florida, rose to a question of constitutional privilege and presented charges of impeachment against Judge Halsted L. Ritter. During the course of his remarks, Speaker Joseph W. Byrns, of Tennessee, ruled as follows on recognition and time for debate:

> THE SPEAKER: The Chair will state to the gentleman from Michigan [Mr. Carl E. Mapes] that the gentleman from Florida having raised a question of privilege and having made these charges is entitled to 1 hour on the charges. The gentleman has been recognized and may use all or any portion of the hour he sees fit.(13)

§ 5.7 In presenting impeachment charges as privileged, a Member is not necessarily confined to a bare statement of the facts but may supplement them with argumentative statements.

On May 7, 1935, Mr. Everett M. Dirksen, of Illinois, rose to a question of constitutional privilege and impeached Circuit Judge Samuel Alschuler. He was recognized for an hour and during his remarks Speaker Joseph W. Byrns, of Ten-

13. 80 CONG. REC. 404, 406, 74th Cong. 2d Sess.

nessee, overruled a point of order against the content of his remarks:(14)

MR. [HATTON W.] SUMNERS of Texas: I am not familiar with the precedents, but I have the impression that in preferring charges of impeachment, argumentative statements should be avoided as much as possible. If I am wrong in that statement with reference to what the precedents and custom have established, I of course withdraw the observation.

MR. DIRKSEN: Mr. Speaker, I have no desire to violate the precedents, and if I have done so it is only because I have not had an opportunity to examine them thoroughly, but if the objection is well taken, I should prefer not to present argumentative matters to the House.

MR. SUMNERS of Texas: I am sure the gentleman does not propose to violate the precedents, and unfortunately I do not know about the matter myself. I am not advised as to what the precedents establish, but without looking them up, merely from the standpoint of what would seem to be proper procedure, it occurs to me that all argumentative statements be omitted in preferring impeachment charges.

MR. DIRKSEN: Mr. Speaker, there are two more pages of explanatory matter which perhaps I should not present to the House at this time if the point is well taken. I would, however, like to put them into the Record as elaborating the statement of specific charges that have been made.

THE SPEAKER: The Chair thinks it is entirely up to the gentleman from Illinois so far as the propriety of his statement is concerned.

MR. DIRKSEN: I do not want to violate any of the proprieties of the House, Mr. Speaker.

MR. SUMNERS of Texas: I do not know what they are myself.

THE SPEAKER: The gentleman from Illinois is making his statement on his own responsibility as a Member of the House.

On Jan. 14, 1936, Mr. Robert A. Green, of Florida, rose to a question of constitutional privilege and presented charges of impeachment against Judge Halsted L. Ritter. During the course of his remarks, Speaker Byrns overruled a point of order against the personal nature of Mr. Green's remarks:(15)

MR. [CARL E.] MAPES [of Michigan]: Mr. Speaker, as I understand, the gentleman has made his impeachment charges, and for the last 10 minutes has been proceeding almost entirely with an argument and a personal statement which I do not think are in order under the circumstances. I think I will make the point of order, Mr. Speaker.

THE SPEAKER: The Chair will state to the gentleman from Michigan that the gentleman from Florida having raised a question of privilege and having made these charges is entitled to 1 hour on the charges. The gentleman has been recognized and may use all or any portion of the hour he sees fit.

MR. MAPES: Is the gentleman entitled during that hour to engage in a general discussion of the charges?

14. 79 CONG. REC. 7081–86, 74th Cong. 1st Sess.

15. 80 CONG. REC. 404, 406, 74th Cong. 2d Sess.

THE SPEAKER: He is, under all the precedents with which the Chair is familiar.

Privilege of Questions Incidental to Impeachment

§5.8 Where privileged resolutions for the impeachment of a federal civil officer have been referred to a committee, that committee may report and call up as privileged resolutions incidental to consideration of the impeachment question, including those pertaining to subpena authority and funding of an investigation.

On Feb. 6, 1974, Peter W. Rodino, Jr., of New Jersey, Chairman of the Committee on the Judiciary, called up as privileged House Resolution 803, authorizing that committee to investigate the sufficiency of grounds for impeachment of President Richard Nixon. Various resolutions of impeachment of the President had previously been referred to the committee.(16)

Parliamentarian's Note: Resolutions authorizing a committee to conduct investigations with subpena power and resolutions funding such investigations from the contingent fund of the House are normally only privileged when respectively reported and called up by the Committee on Rules or the Committee on House Administration.(17) But a committee to which resolutions of impeachment have been referred may report and call up as privileged resolutions incidental to the consideration of the impeachment question. For example, charges of impeachable offenses were referred to the Committee on the Judiciary in 1927, in relation to the conduct of District Judge Frank Cooper. The Committee on the Judiciary subsequently called up as privileged a resolution authorizing an investigation by the committee and funding such investigation from the contingent fund of the House. In response to a parliamentary inquiry, Speaker Nicholas Longworth, of Ohio, ruled that the resolution was privileged "because it relates to impeachment proceedings." (18) If, however, such a

16. 120 CONG. REC. 2349, 2350, 93d Cong. 2d Sess. For the events leading up to the presentation and adoption of H. Res. 803, and the reasons for its presentation, see §15, infra.

17. See Rule XI clause 22, *House Rules and Manual* §726 (1973), giving privileged status to reports of the Committee on House Administration on matters of expenditure of the contingent fund.

18. 6 Cannon's Precedents §549. For other occasions where the Committee on the Judiciary has reported and

resolution is offered on the floor by a Member on his own initiative and not reported from the committee to which the impeachment has been referred, it is not privileged for immediate consideration, since not directly calling for impeachment.(19)

§ 5.9 Resolutions proposing the discontinuation of impeachment proceedings are privileged for immediate consideration when reported from the committee charged with the investigation.

On Feb. 13, 1932, Mr. Hatton W. Sumners, of Texas, offered House Report No. 444 and House Resolution 143, discontinuing impeachment proceedings against Secretary of the Treasury Andrew W. Mellon. He offered the report as privileged and it was immediately considered and adopted by the House.(20)

On Feb. 24, 1933, Speaker John N. Garner, of Texas, held that a resolution reported from the Committee on the Judiciary, proposing the discontinuance of an impeachment proceeding, was privileged for immediate consideration: (1)

THE SPEAKER: The Clerk will report the resolution.

The Clerk read the resolution, as follows:

HOUSE RESOLUTION 387

Resolved, That the evidence submitted on the charges against Hon. Harold Louderback, district judge for the northern district of California, does not warrant the interposition of the constitutional powers of impeachment of the House.

MR. [BERTRAND H.] SNELL [of New York]: Mr. Speaker, when they report back a resolution of that kind, is it a privileged matter?

THE SPEAKER: It is not only a privileged matter but a highly privileged matter.

MR. [LEONIDAS C.] DYER [of Missouri]: Mr. Speaker, this is the first instance to my knowledge, in my service here, where the committee has reported adversely on an impeachment charge.

THE SPEAKER: The gentleman's memory should be refreshed. The Mellon case was reported back from the committee, recommending that impeachment proceedings be discontinued.

MR. SNELL: Was that taken up on the floor as a privileged matter?

THE SPEAKER: It was.

On Mar. 24, 1939, Mr. Sam Hobbs, of Alabama, called up a re-

called up as privileged resolutions authorizing the committee to conduct impeachment investigations, see 3 Hinds' Precedents § 2029 and 6 Cannon's Precedents §§ 498, 528.

19. 6 Cannon's Precedents § 468.

20. 75 CONG. REC. 3850, 72d Cong. 1st Sess.

1. 76 CONG. REC. 4913, 72d Cong. 2d Sess. (also cited at 6 Cannon's Precedents § 514).

port of the Committee on the Judiciary on House Resolution 67, which report recommended against the impeachment of Secretary of Labor Frances Perkins. The report was called up as privileged and the House immediately agreed to Mr. Hobbs' motion to lay the report on the table.(2)

Referral of Resolutions Introduced Through Hopper

§ 5.10 Resolutions introduced through the hopper under Rule XXII which directly called for the impeachment or censure of President Richard Nixon in the 93d Congress were referred by the Speaker to the Committee on the Judiciary, while resolutions calling for an investigation by that committee or by a select committee with a view toward impeachment were referred to the Committee on Rules.

On Oct. 23, 1973, resolutions relating to the impeachment of President Nixon were introduced (placed in the hopper pursuant to Rule XXII clause 4) and severally referred as follows: (3)

By Mr. Long of Maryland:

H. Con. Res. 365. Concurrent resolution of censureship without prejudice to impeachment; to the Committee on the Judiciary.

By Ms. Abzug:

H. Res. 625. Resolution impeaching Richard M. Nixon, President of the United States, for high crimes and misdemeanors; to the Committee on the Judiciary.

By Mr. Ashley:

H. Res. 626. Resolution directing the Committee on the Judiciary to investigate whether there are grounds for the impeachment of Richard M. Nixon; to the Committee on Rules.

By Mr. Bingham:

H. Res. 627. Resolution directing the Committee on the Judiciary to inquire into and investigate whether grounds exist for the impeachment of Richard M. Nixon; to the Committee on Rules.

By Mr. Burton (for himself, Ms. Abzug, Mr. Anderson of California, Mr. Aspin, Mr. Bergland, Mr. Bingham, Mr. Brasco, Mr. Brown of California, Mr. Boland, Mr. Brademas, Mrs. Chisholm, Mr. Culver, Mr. Conyers, Mr. Dellums, Mr. Drinan, Mr. Eckhardt, Mr. Edwards of California, Mr. Evans of Colorado, Mr. Fascell, Mr. Fauntroy, Mr. Foley, Mr. William D. Ford, Mr. Fraser, Mr. Giaimo, and Ms. Grasso):

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2. 84 CONG. REC. 3273, 76th Cong. 1st Sess.

3. 119 CONG. REC. 34873, 93d Cong. 1st Sess. See also 116 CONG. REC. 11941, 11942, 91st Cong. 2d Sess., Apr. 15, 1970 (resolution impeaching Associate Justice William O. Douglas of the Supreme Court, referred to the Committee on the Judiciary). See also *House Rules and Manual* § 854 (1973) .

H. Res. 628. Resolution directing the Committee on the Judiciary to inquire into and investigate whether grounds exist for the impeachment of Richard M. Nixon; to the Committee on Rules. . . .

By Mr. Hechler of West Virginia:

H. Res. 631. Resolution that Richard M. Nixon, President of the United States, is impeached of high crimes and misdemeanors; to the Committee on the Judiciary.

By Mrs. Heckler of Massachusetts:

H. Res. 632. Resolution to appoint a Special Prosecutor; to the Committee on the Judiciary. . . .

By Mr. McCloskey:

H. Res. 634. Resolution of inquiry; to the Committee on the Judiciary.

H. Res. 635. Resolution for the impeachment of Richard M. Nixon; to the Committee on the Judiciary.

By Mr. Mazzoli:

H. Res. 636. Resolution: an inquiry into the existence of grounds for the impeachment of Richard M. Nixon, President of the United States; to the Committee on Rules.

By Mr. Milford:

H. Res. 637. Resolution providing for the establishment of an Investigative Committee to investigate alleged Presidential misconduct; to the Committee on Rules.

By Mr. Mitchell of Maryland (for himself, Mr. Burton, and Mr. Fauntroy):

H. Res. 638. Resolution impeaching Richard M. Nixon, President of the United States, of high crimes and misdemeanors; to the Committee on the Judiciary.

§ 5.11 The Committee on Rules has jurisdiction of resolutions authorizing the Committee on the Judiciary to investigate the conduct of federal officials and directing said committee to report its findings to the House "together with such resolutions of impeachment as it deems proper."

On Feb. 22, 1966,[4] a resolution (H. Res. 739) "authorizing the Committee on the Judiciary to conduct certain investigations" was referred to the Committee on Rules. The resolution called for an investigation into the official conduct of Federal District Court Judges Alfred P. Murrah, Stephen S. Chandler, and Luther Bohannon, in Oklahoma, and directed the Committee on the Judiciary to report its findings to the House "together with such resolutions of impeachment as it deems proper."

Motions to Lay on the Table or to Refer

§ 5.12 The motion to lay on the table applies to resolutions proposing impeachment and may deprive a Member who has offered such a resolution of recognition for debate thereon.

4. 112 CONG. REC. 3665, 89th Cong. 2d Sess.

On Jan. 17, 1933,[5] Speaker John N. Garner, of Texas, held that the motion to table applied to resolutions of impeachment and could deprive the proponent of debate on such a resolution:

MR. [LOUIS T.] MCFADDEN [of Pennsylvania]: On my own responsibility, as a Member of the House of Representatives, I impeach Herbert Hoover, President of the United States, for high crimes and misdemeanors.

THE SPEAKER: The Clerk will report the resolutions.

MR. MCFADDEN: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. MCFADDEN: Am I not entitled to an hour to discuss the resolution?

THE SPEAKER: The gentleman is entitled to an hour, but first the Clerk must report the resolution of impeachment.

MR. MCFADDEN: I offer the following resolution.

THE SPEAKER: The Clerk will report the resolution.

The Clerk read as follows: . . .

MR. [ROBERT] LUCE [of Massachusetts] (interrupting the reading of the resolution): Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. LUCE: On a previous occasion charges apparently of the same purport were laid on the table by the House. Is it within the province of any Member to evade the rules and to take a matter from the table by proceeding with a second movement of the same sort?

THE SPEAKER: The Chair, of course, has not heard the resolution read. Probably if it was identical with the resolution submitted some time ago and laid on the table there would be some question whether or not a second impeachment could be had. But the President can be impeached, or any person provided for by the Constitution, a second time, and the Chair thinks the better policy would be to have the resolution read and determine whether or not it is the same.

MR. [FRED A.] BRITTEN [of Illinois]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. BRITTEN: Would a motion be in order at this time?

THE SPEAKER: No. The Chair would not recognize any Member to make a motion until the resolution is read.

MR. BRITTEN: Mr. Speaker, I ask unanimous consent that the resolution be considered as having been read.

THE SPEAKER: The Chair thinks the resolution should be read.

MR. MCFADDEN (again interrupting the reading of the resolution): Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. MCFADDEN: I understand that at the completion of the reading of this resolution it is planned——

THE SPEAKER: That is not a parliamentary inquiry. That is a statement.

MR. MCFADDEN: I am attempting to state a parliamentary inquiry, Mr. Speaker.

5. 76 CONG. REC. 1965–68, 72d Cong. 2d Sess.

THE SPEAKER: The gentleman will state it. The Chair will hear the gentleman.

MR. MCFADDEN: During the opening I addressed the Speaker to ascertain whether or not I would be protected in one hour time for debate. I am prepared to debate. I understand a certain motion will be made which will deprive me of that right.

THE SPEAKER: The Chair can not control 434 Members of the House in the motions they will make. The Chair must recognize them and interpret the rules as they are written. That is what the Chair intends to do. The gentleman from Pennsylvania would have an opportunity to discuss this matter for an hour under the rules of the House, if some gentleman did not take him off his feet by a proper motion. [Applause.]

MR. MCFADDEN: That is what I was attempting to ascertain.

The Clerk concluded the reading of the resolution.

MR. [HENRY T.] RAINEY [of Illinois]: Mr. Speaker, I move to lay the resolution of impeachment on the table.

THE SPEAKER: The gentleman from Illinois moves to lay the resolution of impeachment on the table.

May the Chair be permitted to make a statement with reference to the rule applying to that motion? The Parliamentarian has examined the precedents with reference to the motion. Speaker Clark and Speaker Gillette, under identical conditions, held that a motion to lay on the table took a Member off the floor of the House, although the general rules granted him one hour in which to discuss the resolution of impeachment or privileges of the House. Therefore the motion is in order.

MR. [BERTRAND H.] SNELL [of New York]: Mr. Speaker, I demand the yeas and nays.

Parliamentarian's Note: Under Rule XVI clause 4, the motion to lay on the table may be offered while a question is under debate, including a question of privilege, and is not debatable. The motion to refer is also in order under the rule and is debatable within narrow limits. The question of consideration may also be raised under Rule XVI clause 3; it is not debatable, but may be demanded before debate on the pending question, and may be raised against a question of the highest privilege.(6)

§ 5.13 Resolutions authorizing investigations into charges of impeachment have been referred, on motion, to the Committee on the Judiciary.

On Jan. 24, 1939,(7) a Member declared his impeachment of certain officials of the executive branch, including Secretary of Labor Frances Perkins:

MR. [J. PARNELL] THOMAS of New Jersey: Mr. Speaker, on my own responsibility as a Member of the House

6. See Rule XVI clauses 3, 4 and notes thereto, *House Rules and Manual* §§ 778–787 (1973).

7. 84 CONG. REC. 702–11, 76th Cong. 1st Sess.

of Representatives, I impeach Frances Perkins, Secretary of Labor of the United States; James L. Houghteling, Commissioner of the Immigration and Naturalization Service of the Department of Labor; and Gerard D. Reilly, Solicitor of the Department of Labor, as civil officers of the United States, for high crimes and misdemeanors in violation of the Constitution and laws of the United States, and I charge that the aforesaid Frances Perkins, James L. Houghteling, and Gerard D. Reilly, as civil officers of the United States, were and are guilty of high crimes and misdemeanors in office in manner and form as follows, to wit: . . .

Mr. Thomas offered a resolution authorizing an investigation of charges, which resolution was referred, on motion, to the Committee on the Judiciary:

Resolved, That the Committee on the Judiciary be and is hereby authorized and directed, as a whole or by subcommittee, to investigate the official conduct of Frances Perkins, Secretary of Labor; James L. Houghteling, Commissioner of Immigration and Naturalization Service, Department of Labor; and Gerard D. Reilly, Solicitor, Department of Labor, to determine whether, in its opinion, they have been guilty of any high crimes or misdemeanors which, in the contemplation of the Constitution, requires the interposition of the constitutional powers of the House. Such committee shall report its findings to the House together with such articles of impeachment as the facts may warrant.

For the purposes of this resolution the committee is authorized and directed to sit and act, during the present session of Congress, at such times and places in the District of Columbia, or elsewhere, whether or not the House is sitting, has recessed, or has adjourned; to hold hearings; to employ such experts and such clerical, stenographic and other assistance; and to require the attendance of such witnesses and the production of such books, papers, and documents; and to take such testimony and to have such printing and binding done; and to make such expenditures not exceeding $10,000, as it deems necessary. . . .

MR. [SAM] RAYBURN [of Texas]: Mr. Speaker, I move that the resolution be referred to the Committee on the Judiciary of the House and upon that I desire to say just a word. A great many suggestions have been made as to what should be done with this resolution, but I think this would be the orderly procedure so that the facts may be developed. The resolution will come out of that committee or remain in it according to the testimony adduced.

I therefore move the previous question on my motion to refer, Mr. Speaker.

The previous question was ordered.

The motion was agreed to.

On Jan. 6, 1932,[8] a privileged resolution proposing an investigation directed towards impeachment, offered as privileged on the floor, was on motion referred to the Committee on the Judiciary:

IMPEACHMENT OF ANDREW W. MELLON, SECRETARY OF THE TREASURY

MR. [WRIGHT] PATMAN [of Texas]: Mr. Speaker, I rise to a question of

8. 75 CONG. REC. 1400, 72d Cong. 1st Sess.

constitutional privilege. On my own responsibility as a Member of this House, I impeach Andrew William Mellon, Secretary of the Treasury of the United States for high crimes and misdemeanors, and offer the following resolution: . . .

Resolved, That the Committee on the Judiciary is authorized and directed, as a whole or by subcommittee, to investigate the official conduct of Andrew W. Mellon, Secretary of the Treasury, to determine whether, in its opinion, he has been guilty of any high crime or misdemeanor which, in the contemplation of the Constitution, requires the interposition of the constitutional powers of the House. Such committee shall report its findings to the House together with such resolution of impeachment or other recommendation as it deems proper.

Sec. 2. For the purposes of this resolution, the committee is authorized to sit and act during the present Congress at such times and places in the District of Columbia or elsewhere, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to employ such experts and such clerical, stenographic, and other assistants, to require the attendance of such witnesses and the production of such books, papers, and documents, to take such testimony, to have such printing and binding done, and to make such expenditures not exceeding $5,000, as it deems necessary.

MR. [JOSEPH W.] BYRNS [of Tennessee]: Mr. Speaker, I move that the articles just read be referred to the Committee on the Judiciary, and upon that motion I demand the previous question.

The previous question was ordered.

THE SPEAKER:[9] The question is on the motion of the gentleman from Tennessee, that the articles be referred to the Committee on the Judiciary. The motion was agreed to.

Initiation of Investigation by Accused

§ 5.14 The Vice President sought to initiate an investigation by the House of certain charges brought against him, but the House took no action on the request.

On Sept. 25, 1973,[10] Speaker Carl Albert, of Oklahoma, laid before the House a communication from Vice President Spiro T. Agnew requesting that the House investigate charges which might "assume the character of impeachable offenses" made against him by a U.S. Attorney in the course of a criminal investigation. The House took no action on the request by motion or otherwise.

Parliamentarian's Note: Several resolutions were introduced on Sept. 26, 1973, to authorize investigations into the charges referred to, both by the Committee on the Judiciary and by a select committee. The resolutions were referred to the Committee on Rules.[11]

The Vice President cited in his letter a request made by Vice

9. John N. Garner (Tex.).

10. 119 CONG. REC. 31368, 93d Cong. 1st Sess.

11. See H. Res. 566 and H. Res. 567, 93d Cong. 1st Sess.

President John C. Calhoun in 1826 and discussed at 3 Hinds' Precedents § 1736. On that occasion, the alleged charges related to the Vice President's former tenure as Secretary of War. The communication was referred on motion to a select committee which investigated the charges and subsequently reported to the House that no impropriety had been found in the Vice President's former conduct as a civil officer under the United States. The report of the select committee was ordered to lie on the table and the House took no further action thereon.

Vice President Agnew did not cite a precedent occurring in 1873, however, where the Committee on the Judiciary reported that a civil officer—Vice President Schuyler Colfax—could not be impeached for offenses allegedly committed prior to his term of office as a civil officer under the United States. The committee had investigated at his request whether Vice President Colfax had, during his prior term as Speaker of the House, been involved in bribes of Members. As reported in 3 Hinds' Precedents § 2510, the committee concluded as follows in its report to the House:

> But we are to consider, taking the harshest construction of the evidence, whether the receipt of a bribe by a person who afterwards becomes a civil officer of the United States, even while holding another official position, is an act upon which an impeachment can be grounded to subject him to removal from an office which he afterwards holds. To elucidate this we first turn to the precedents.
>
> Your committee find that in all cases of impeachment or attempted impeachment under our Constitution there is no instance where the accusation was not in regard to an act done or omitted to be done while the officer was in office. In every case it has been heretofore considered material that the articles of impeachment should allege in substance that, being such officer, and while in the exercise of the duties of his office, the accused committed the acts of alleged inculpation.

The report was never finally acted upon by the House.

§ 6. Committee Investigations

The conduct of impeachment investigations is governed by those portions of Rule XI relating to committee investigatory and hearing procedure, and by any rules and special procedures adopted by the committee for the inquiry.[12] An investigatory subcommittee charged with an impeachment inquiry is limited to the powers expressly authorized by the committee.[13]

12. See §§ 6.3 et seq.

13. See § 6.11, infra, for the creation of a subcommittee to investigate and to

Forms

Form of resolution authorizing an investigation of the sufficiency of grounds for impeachment (of President Richard Nixon) and conferring subpena power and authority to take testimony: (14)

H. RES. 803

Resolved, That the Committee on the Judiciary, acting as a whole or by any subcommittee thereof appointed by the chairman for the purposes hereof and in accordance with the rules of the committee, is authorized and directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America. The committee shall report to the House of Representatives such resolutions, articles of impeachment, or other recommendations as it deems proper.

Sec. 2. (a) For the purpose of making such investigation, the committee is authorized to require—

(1) by subpena or otherwise—

(A) the attendance and testimony of any person (including at a taking of a deposition by counsel for the committee); and

(B) the production of such things; and

(2) by interrogatory, the furnishing of such information;

as it deems necessary to such investigation.

(b) Such authority of the committee may be exercised—

(1) by the chairman and the ranking minority member acting jointly, or, if either declines to act, by the other acting alone, except that in the event either so declines, either shall have the right to refer to the committee for decision the question whether such authority shall be so exercised and the committee shall be convened promptly to render that decision; or

(2) by the committee acting as a whole or by subcommittee.

Subpenas and interrogatories so authorized may be issued over the signature of the chairman, or ranking minority member, or any member designated by either of them, and may be served by any person designated by the chairman, or ranking minority member, or any member designated by either of them. The chairman, or ranking minority member, or any member designated by either of them (or, with respect to any deposition, answer to interrogatory, or affidavit, any person authorized by law to administer oaths) may administer oaths to any witness. For the purposes of this section, "things" includes, without limitation, books, records, correspondence, logs, journals, memorandums, papers, documents, writings, drawings, graphs, charts, photographs, reproductions, recordings, tapes, transcripts, printouts, data compilations from which informa-

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report to the Committee on the Judiciary on charges against Justice William O. Douglas. No authorizing resolution for a committee investigation had been adopted by the House, but resolutions of impeachment had been referred to the committee.

14. 120 CONG. REC. 2349, 2350, 93d Cong. 2d Sess., Feb. 6, 1974.

tion can be obtained (translated if necessary, through detection devices into reasonably usable form), tangible objects, and other things of any kind.

Sec. 3. For the purpose of making such investigation, the committee, and any subcommittee thereof, are authorized to sit and act, without regard to clause 31 of rule XI of the Rules of the House of Representatives, during the present Congress at such times and places within or without the United States, whether the House is meeting, has recessed, or has adjourned, and to hold such hearings, as it deems necessary.

Sec. 4. Any funds made available to the Committee on the Judiciary under House Resolution 702 of the Ninety-third Congress, adopted November 15, 1973, or made available for the purpose hereafter, may be expended for the purpose of carrying out the investigation authorized and directed by this resolution.

Form of resolution authorizing a committee to investigate whether a judge (Halsted Ritter) has been guilty of high crimes or misdemeanors requiring impeachment: (15)

HOUSE RESOLUTION 163

Resolved, That the Committee on the Judiciary is authorized and directed, as a whole or by subcommittee, to inquire into and investigate the official conduct of Halsted L. Ritter, a district judge for the United States District Court for the Southern District of Florida, to determine whether in the opinion of said committee he has been guilty of any high crime or misdemeanor which in the contemplation of the Constitution requires the interposition of the Constitutional powers of the House. Said committee shall report its findings to the House, together with such resolution of impeachment or other recommendation as it deems proper.

Sec. 2. For the purpose of this resolution, the committee is authorized to sit and act during the present Congress at such times and places in the District of Columbia and elsewhere, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearing, to employ such clerical, stenographic, and other assistance, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, to have such printing and binding done, and to make such expenditures, not exceeding $5,000, as it deems necessary.

With the following committee amendments:

Page 2, line 5, strike out the words "to employ such clerical, stenographic, and other assistance"; and in line 9, on page 2, strike out "to have such printing and binding done, and to make such expenditures, not exceeding $5,000."

Form of subpena issued by the Committee on the Judiciary (to President Richard Nixon) in the course of its impeachment inquiry: (16)

15. H. Res. 163, 77 CONG. REC. 4784, 4785, 73d Cong. 1st Sess., June 1, 1933.

16. Impeachment of Richard Nixon, President of the United States, H.

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Benjamin Marshall, or his duly authorized representative:

You are hereby commanded to summon Richard M. Nixon, President of the United States of America, or any subordinate officer, official or employee with custody or control of the things described in the attached schedule, to be and appear before the Committee on the Judiciary of the House of Representatives of the United States, of which the Hon. Peter W. Rodino, Jr. is chairman, and to bring with him the things specified in the schedule attached hereto and made a part hereof, in their chamber in the city of Washington, on or before April 25, 1974, at the hour of 10:00 a.m. then and there to produce and deliver said things to said Committee, or their duly authorized representative, in connection with the Committee's investigation authorized and directed by H. Res. 803, adopted February 6, 1974.

Herein fail not, and make return of this summons.

Cross References

House inquiries and the executive branch, see Ch. 15, infra.

Power of the House to punish for contempt, see Ch. 13, supra.

Referral of charges and resolutions authorizing investigations, see § 5, supra.

REPT. NO. 93–1305, p. 234 (see pp. 234–78), Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29282, 93d Cong. 2d Sess., Aug. 20, 1974. For complete text of H. REPT. No. 93–1305, see *id.* at pp. 29219–361.

Referral of Resolutions Authorizing Impeachment Investigations

§ 6.1 Resolutions introduced which directly called for the impeachment or censure of President Richard Nixon in the 93d Congress were referred by the Speaker to the Committee on the Judiciary, whereas resolutions calling for an investigation by that committee or by a select committee with a view toward impeachment were referred to the Committee on Rules.

On Oct. 23, 1973, several resolutions relating to the impeachment of President Nixon were introduced and referred. Examples of those referrals are as follows: (17)

By Mr. Long of Maryland:

H. Con. Res. 365. Concurrent resolution of censureship without prejudice to impeachment; to the Committee on the Judiciary.

By Ms. Abzug:

17. 119 CONG. REC. 34873, 93d Cong. 1st Sess. For a comprehensive listing, see §§ 5.10, supra (resolutions authorizing investigations referred to Committee on Rules) and 5.13, supra (resolutions authorizing investigations referred, on motion, to the Committee on the Judiciary).

H. Res. 625. Resolution impeaching Richard M. Nixon, President of the United States, for high crimes and misdemeanors; to the Committee on the Judiciary.

By Mr. Ashley:

H. Res. 626. Resolution directing the Committee on the Judiciary to investigate whether there are grounds for the impeachment of Richard M. Nixon; to the Committee on Rules.

Report and Consideration of Resolutions Authorizing Impeachment Investigations

§ 6.2 Although the House had adopted a resolution authorizing the Committee on the Judiciary to conduct investigations within its area of jurisdiction as defined in Rule XI clause 13, and although the House had adopted a resolution intended to fund expenses of the Richard Nixon impeachment inquiry by the committee, the Committee on the Judiciary reported and called up as privileged a subsequent resolution specifically mandating an impeachment investigation and continuing the availability of funds, in order to confirm the delegation of authority from the House to that committee to conduct the investigation.

On Feb. 6, 1974, Peter W. Rodino, Jr., of New Jersey, Chairman of the Committee on the Judiciary, called up for immediate consideration House Resolution 803, authorizing the Committee on the Judiciary to investigate the sufficiency of grounds for the impeachment of President Nixon, which resolution had been reported by the committee on Feb. 1, 1974. The resolution read as follows: [18]

H. RES. 803

Resolved, That the Committee on the Judiciary, acting as a whole or by any subcommittee thereof appointed by the chairman for the purposes hereof and in accordance with the rules of the committee, is authorized and directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America. The committee shall report to the House of Representatives such resolutions, articles of impeachment, or other recommendations as it deems proper.

Sec. 2. (a) For the purpose of making such investigation, the committee is authorized to require—

(1) by subpena or otherwise—

(A) the attendance and testimony of any person (including at a taking of a deposition by counsel for the committee); and

18. 120 CONG. REC. 2349–51, 93d Cong. 2d Sess.

(B) the production of such things; and

(2) by interrogatory, the furnishing of such information;

as it deems necessary to such investigation.

(b) Such authority of the committee may be exercised—

(1) by the chairman and the ranking minority member acting jointly, or, if either declines to act, by the other acting alone, except that in the event either so declines, either shall have the right to refer to the committee for decision the question whether such authority shall be so exercised and the committee shall be convened promptly to render that decision; or

(2) by the committee acting as a whole or by subcommittee.

Subpenas and interrogatories so authorized may be issued over the signature of the chairman, or ranking minority member, or any member designated by either of them, and may be served by any person designated by the chairman, or ranking minority member, or any member designated by either of them. The chairman, or ranking minority member, or any member designated by either of them (or, with respect to any deposition, answer to interrogatory, or affidavit, any person authorized by law to administer oaths) may administer oaths to any witness. For the purposes of this section, "things" includes, without limitation, books, records, correspondence, logs, journals, memorandums, papers, documents, writings, drawings, graphs, charts, photographs, reproductions, recordings, tapes, transcripts, printouts, data compilations from which information can be obtained (translated if necessary, through detection devices into reasonably usable form), tangible objects, and other things of any kind.

Sec. 3. For the purpose of making such investigation, the committee, and any subcommittee thereof, are authorized to sit and act, without regard to clause 31 of rule XI of the Rules of the House of Representatives, during the present Congress at such times and places within or without the United States, whether the House is meeting, has recessed, or has adjourned, and to hold such hearings, as it deems necessary.

Sec. 4. Any funds made available to the Committee on the Judiciary under House Resolution 702 of the Ninety-third Congress, adopted November 15, 1973, or made available for the purpose hereafter, may be expended for the purpose of carrying out the investigation authorized and directed by this resolution.

Chairman Rodino and Mr. Edward Hutchinson, of Michigan, ranking minority member of the Committee on the Judiciary, explained the purpose of the resolution, which had been adopted unanimously by the committee, as follows:

MR. RODINO: Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, the English statesman Edmund Burke said, in addressing an important constitutional question, more than 200 years ago:

> We stand in a situation very honorable to ourselves and very useful to our country, if we do not abuse or

abandon the trust that is placed in us.

We stand in such a position now, and—whatever the result—we are going to be just, and honorable, and worthy of the public trust.

Our responsibility in this is clear. The Constitution says, in article I, section 2, clause 5:

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

A number of impeachment resolutions were introduced by Members of the House in the last session of the Congress. They were referred to the Judiciary Committee by the Speaker.

We have reached the point when it is important that the House explicitly confirm our responsibility under the Constitution.

We are asking the House of Representatives, by this resolution, to authorize and direct the Committee on the Judiciary to investigate the conduct of the President of the United States, to determine whether or not evidence exists that the President is responsible for any acts that in the contemplation of the Constitution are grounds for impeachment, and if such evidence exists, whether or not it is sufficient to require the House to exercise its constitutional powers.

As part of that resolution, we are asking the House to give the Judiciary Committee the power of subpena in its investigations.

Such a resolution has always been passed by the House. The committee has voted unanimously to recommend that the House of Representatives adopt this resolution. It is a necessary step if we are to meet our obligations. . . .

MR. HUTCHINSON: Mr. Speaker, the first section of this resolution authorizes and directs your Judiciary Committee to investigate fully whether sufficient grounds exist to impeach the President of the United States. This constitutes the first explicit and formal action in the whole House to authorize such an inquiry.

The last section of the resolution validates the use by the committee of that million dollars allotted to it last November for purposes of the impeachment inquiry. Members will recall that the million dollar resolution made no reference to the impeachment inquiry but merely allotted that sum of money to the committee to be expended on matters within its jurisdiction. All Members of the House understood its intended purpose.

But the rule of the House defining the jurisdiction of committees does not place jurisdiction over impeachment matters in the Judiciary Committee. In fact, it does not place such jurisdiction anywhere. So this resolution vests jurisdiction in the committee over this particular impeachment matter, and it ratifies the authority of the committee to expend for the purpose those funds allocated to it last November, as well as whatever additional funds may be hereafter authorized.

Parliamentarian's Note: Prior to the passage of House Resolution 803, the Committee on the Judiciary had been conducting an investigation into the charges of impeachment against President Nixon under its general investigatory authority, as extended by resolution (H. Res. 74) of the House

on Feb. 28, 1973. House Resolution 74 authorized the Committee on the Judiciary to conduct investigations, and to issue subpenas during such investigations, within its jurisdiction "as set forth in clause 13 of Rule XI of the Rules of the House of Representatives" [*House Rules and Manual* § 707 (1973)]. That clause did not specifically mention impeachments as within the jurisdiction of the Committee on the Judiciary. The House had provided for payment, from the contingent fund, of further expenses of the Committee on the Judiciary in conducting investigations, following the introduction and referral to the committee of various resolutions proposing the impeachment of President Nixon. Debate on those resolutions and the reports of the Committee on House Administration, which had reported them to the House, indicated that the additional funds for the investigations of the Committee on the Judiciary were intended in part for use in conducting an impeachment inquiry in relation to the President.[19]

Interrogations and Depositions of Witnesses

§ 6.3 The House agreed to a resolution authorizing the counsel to the Committee on the Judiciary to take depositions of witnesses in an impeachment investigation when authorized by the chairman and ranking minority member of the committee, notwithstanding a House rule requiring at least two committee members to be present during the taking of testimony at a formal committee hearing.

On Feb. 6, 1974, the House agreed to House Resolution 803, called up as privileged by the Committee on the Judiciary, authorizing it to investigate the sufficiency of grounds for the impeachment of President Richard Nixon. The resolution authorized the taking of depositions as follows: [1]

> Sec. 2. (a) For the purpose of making such investigation, the committee is authorized to require—

19. See H. Res. 702, 93d Cong. 1st Sess., Nov. 15, 1973, and H. Res. 1027, 93d Cong. 2d Sess., Apr. 29, 1974, and H. REPT. NO. 93–1009, Committee on House Administration, to accompany the latter resolution. The report included a statement by Chairman Rodino, of the Committee on the Judiciary, on the status of the impeachment investigation and on the funds required to defray the expenses and salaries of the impeachment inquiry staff.

1. 120 CONG. REC. 2349, 2350, 93d Cong. 2d Sess.

(1) by subpena or otherwise—

(A) the attendance and testimony of any person (including at a taking of a deposition by counsel for the committee); and

(B) the production of such things; and

(2) by interrogatory, the furnishing of such information as it deems necessary to such investigation.

(b) Such authority of the committee may be exercised—

(1) by the chairman and the ranking minority member acting jointly, or, if either declines to act, by the other acting alone, except that in the event either so declines, either shall have the right to refer to the committee for decision the question whether such authority shall be so exercised and the committee shall be convened promptly to render that decision; or

(2) by the committee acting as a whole or by subcommittee.

In explanation of the provisions of the resolution, Chairman Peter W. Rodino, Jr., of New Jersey, of the Committee on the Judiciary, stated that the taking of depositions by counsel was intended to expedite the proceedings and investigation.

Parliamentarian's Note: Rule XI clause 27(h) *House Rules and Manual* §735 (1973), provided that each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall not be less than two.

§6.4 The House in the 93d Congress failed to suspend the rules and agree to a resolution authorizing the Committee on the Judiciary, in holding hearings in its impeachment inquiry into the conduct of President Richard Nixon, to proceed without regard to the House rule requiring the application of the five-minute rule in the interrogation of witnesses.

On July 1, 1974, Chairman Peter W. Rodino, Jr., of New Jersey, moved to suspend the rules and sought agreement to a resolution governing the Committee on the Judiciary in hearings conducted in its impeachment inquiry against President Nixon:

H. RES. 1210

Resolved, That in conducting hearings held pursuant to House Resolution 803, 93d Congress, the Committee on the Judiciary is authorized to proceed without regard to the second sentence of clause 27(f) (4) of rule XI of the rules of the House.

Mr. Rodino explained the purpose of the resolution:

MR. RODINO: Mr. Speaker, this is a simple resolution which was voted by the House Committee on the Judiciary by an overwhelming vote of 31 to 6. The committee is attempting to meet its responsibilities and to exercise its responsibilities under House Resolution 803 with an eye toward achieving two objectives: conducting the fairest and most thorough inquiry, and arriv-

ing at the same time at a prompt conclusion to that inquiry as is consistent with our responsibility.

I believe this resolution authorizing the committee to proceed without regard to the 5-minute rule in the interrogation of witnesses would greatly facilitate the achievement of those objectives. It would permit both probing and orderly examination of witnesses and still provide great flexibility to Members seeking answers to specific relevant questions.

Mr. David W. Dennis, of Indiana, also of the Committee on the Judiciary, demanded a second on the motion and opposed it on the ground that abrogating the five-minute rule for witness interrogation derogated the privileges and duties of the individual Members of the House.

On a recorded vote, two-thirds did not vote in favor of the motion to suspend the rules, and it was rejected.(2)

Evidentiary Hearing Procedures

§ 6.5 The Committee on the Judiciary adopted procedures in the 93d Congress for presenting evidence and holding hearings in its inquiry into the conduct of President Richard Nixon.

On May 2, 1974, the Committee on the Judiciary unanimously adopted procedures for presenting evidentiary materials to the committee in hearings during its inquiry into charges of impeachable conduct against President Nixon:(3)

IMPEACHMENT INQUIRY PROCEDURES

The Committee on the Judiciary states the following procedures applicable to the presentation of evidence in the impeachment inquiry pursuant to H. Res. 803, subject to modification by the Committee as it deems proper as the presentation proceeds.

A. The Committee shall receive from Committee counsel at a hearing an initial presentation consisting of (i) a written statement detailing, in paragraph form, information believed by the staff to be pertinent to the inquiry, (ii) a general description of the scope and manner of the presentation of evidence, and (iii) a detailed presentation of the evidentiary material, other than the testimony of witnesses.

1. Each Member of the Committee shall receive a copy of (i) the statement of information, (ii) the related documents and other evidentiary material, and (iii) an index of all testimony, papers, and things that have been obtained by the Committee, whether or not relied upon in the statement of information.

2. Each paragraph of the statement of information shall be annotated to related evidentiary material (e.g., documents, recordings and transcripts

2. 120 CONG. REC. 21849–55, 93d Cong. 2d Sess.

3. See H. REPT. NO. 93–1305, at p. 8, Committee on the Judiciary, 93d Cong. 2d Sess., reported Aug. 20, 1974.

thereof, transcripts of grand jury or congressional testimony, or affidavits). Where applicable, the annotations will identify witnesses believed by the staff to be sources of additional information important to the Committee's understanding of the subject matter of the paragraph in question.

3. On the commencement of the presentation, each Member of the Committee and full Committee staff, majority and minority, as designated by the Chairman and the Ranking Minority Member, shall be given access to and the opportunity to examine all testimony, papers and things that have been obtained by the inquiry staff, whether or not relied upon in the statement of information.

4. The President's counsel shall be furnished a copy of the statement of information and related documents and other evidentiary material at the time that those materials are furnished to the Members and the President and his counsel shall be invited to attend and observe the presentation.

B. Following that presentation the Committee shall determine whether it desires additional evidence, after opportunity for the following has been provided:

1. Any Committee Member may bring additional evidence to the Committee's attention.

2. The President's counsel shall be invited to respond to the presentation, orally or in writing as shall be determined by the Committee.

3. Should the President's counsel wish the Committee to receive additional testimony or other evidence, he shall be invited to submit written requests and precise summaries of what he would propose to show, and in the case of a witness precisely and in detail what it is expected the testimony of the witness would be, if called. On the basis of such requests and summaries and of the record then before it, the Committee shall determine whether the suggested evidence is necessary or desirable to a full and fair record in the inquiry, and, if so, whether the summaries shall be accepted as part of the record or additional testimony or evidence in some other form shall be received.

C. If and when witnesses are to be called, the following additional procedures shall be applicable to hearings held for that purpose:

1. The President and his counsel shall be invited to attend all hearings, including any held in executive session.

2. Objections relating to the examination of witnesses or to the admissibility of testimony and evidence may be raised only by a witness or his counsel, a Member of the Committee, Committee counsel or the President's counsel and shall be ruled upon [by] the Chairman or presiding Member. Such rulings shall be final, unless overruled by a vote of a majority of the Members present. In the case of a tie vote, the ruling of the Chair shall prevail.

3. Committee Counsel shall commence the questioning of each witness and may also be permitted by the Chairman or presiding Member to question a witness at any point during the appearance of the witness.

4. The President's counsel may question any witness called before the Committee, subject to instructions from the

Chairman or presiding Member respecting the time, scope and duration of the examination.

D. The Committee shall determine, pursuant to the Rules of the House, whether and to what extent the evidence to be presented shall be received in executive session.

E. Any portion of the hearings open to the public may be covered by television broadcast, radio broadcast, still photography, or by any of such methods of coverage in accord with the Rules of the House and the Rules of Procedure of the Committee as amended on November 13, 1973.

F. The Chairman shall make public announcement of the date, time, place and subject matter of any Committee hearing as soon as practicable and in no event less than twenty-four hours before the commencement of the hearing.

G. The Chairman is authorized to promulgate additional procedures as he deems necessary for the fair and efficient conduct of Committee hearings held pursuant to H. Res. 803, provided that the additional procedures are not inconsistent with these Procedures, the Rules of the Committee, and the Rules of the House. Such procedures shall govern the conduct of the hearings, unless overruled by a vote of a majority of the Members present.

H. For purposes of hearings held pursuant to these rules, a quorum shall consist of ten Members of the Committee.

§ 6.6 In its impeachment inquiry into the conduct of President Richard Nixon, the Committee on the Judiciary held hearings in executive session for the presentation of statements of information and supporting evidentiary material by the inquiry staff and for the presentation of materials by the President's counsel.

In its final report recommending the impeachment of President Nixon in the 93d Congress, the Committee on the Judiciary summarized the proceedings of the committee which had been conducted in executive session: (4)

> From May 9, 1974 through June 21, 1974, the Committee considered in executive session approximately six hundred fifty "statements of information" and more than 7,200 pages of supporting evidentiary material presented by the inquiry staff. The statements of information and supporting evidentiary material, furnished to each Member of the Committee in 36 notebooks, presented material on several subjects of the inquiry: the Watergate break-in and its aftermath, ITT, dairy price supports, domestic surveillance, abuse of the IRS, and the activities of the Special Prosecutor. The staff also presented to the Committee written reports on President Nixon's income taxes, presidential impoundment of funds appropriated by Congress, and the bombing of Cambodia.

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4. H. REPT. NO. 93–1305, at p. 9, Committee on the Judiciary, 93d Cong. 2d Sess., reported Aug. 20, 1974, printed at 120 CONG. REC. 29221, 93d Cong. 2d Sess., Aug. 20, 1974.

In each notebook, a statement of information relating to a particular phase of the investigation was immediately followed by supporting evidentiary material, which included copies of documents and testimony (much of it already on public record), transcripts of presidential conversations, and affidavits. A deliberate and scrupulous abstention from conclusions, even by implication, was observed.

The Committee heard recordings of nineteen presidential conversations and dictabelt recollections. The presidential conversations were neither paraphrased nor summarized by the inquiry staff. Thus, no inferences or conclusions were drawn for the Committee. During the course of the hearings, Members of the Committee listened to each recording and simultaneously followed transcripts prepared by the inquiry staff.

On June 27 and 28, 1974, Mr. James St. Clair, Special Counsel to the President made a further presentation in a similar manner and form as the inquiry staff's initial presentation. The Committee voted to make public the initial presentation by the inquiry staff, including substantially all of the supporting materials presented at the hearings, as well as the President's response.

Evidence in Impeachment Inquiries

§ 6.7 During an investigation into charges of impeachable offenses against a Supreme Court Justice, the Committee on the Judiciary authorized its subcommittee to request and inspect federal tax data, and the President promulgated an executive order permitting such inspection.

On May 26, 1970, the Committee on the Judiciary authorized by resolution a subcommittee investigation of federal tax records of Justice William O. Douglas and others:

RESOLUTION FOR SPECIAL SUBCOMMITTEE TO CONSIDER HOUSE RESOLUTION 920

Resolved, That the Special Subcommittee to consider H. Res. 920, a resolution impeaching William O. Douglas, Associate Justice of the Supreme Court of the United States, of high crimes and misdemeanors in office, hereby is authorized and directed to obtain and inspect from the Internal Revenue Service any and all materials and information relevant to its investigation in the files of the Internal Revenue Service, including tax returns, investigative reports, or other documents, that the Special Subcommittee to consider H. Res. 920 determines to be within the scope of H. Res. 920 and the various related resolutions that have been introduced into the House of Representatives.

The Special Subcommittee on H. Res. 920 is authorized to make such requests to the Internal Revenue Service as the Subcommittee determines to be appropriate, and the Subcommittee is authorized to amend its requests to designate such additional persons, taxpayers, tax returns, investigative reports, and other documents as the Subcommittee determines to be appro-

priate during the course of this investigation.

The Special Subcommittee on H. Res. 920 may designate agents to examine and receive information from the Internal Revenue Service.

This resolution specifically authorizes and directs the Special Subcommittee to obtain and inspect from the Internal Revenue Service the documents and other file materials described in the letter dated May 12, 1970, from Chairman Emanuel Celler to the Honorable Randolph Thrower. The tax returns for the following taxpayers, and the returns for such additional taxpayers as the Subcommittee subsequently may request, are included in this resolution:

Associate Justice William O. Douglas, Supreme Court of the United States, Washington, D.C. 20036.

Albert Parvin, 1900 Avenue of the Stars, Suite 1790, Century City, Calif. 90067.

Albert Parvin Foundation, c/o Arnold & Porter, 1229 19th Street, N.W., Washington, D.C. 20036.

The Center for the Study of Democratic Institutions, Box 4068, Santa Barbara, Calif. 93103.

Fund for the Republic, 136 East 57th Street, New York, N.Y. 10022.

Parvin-Dohrmann Corp. (Now Recrion Corp.), 120 N. Robertson Blvd., Los Angeles, Calif. 90048.

On June 12, 1970, President Richard Nixon promulgated Executive Order No. 11535 to allow such inspection:

INSPECTION OF TAX RETURNS BY THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES

By virtue of the authority vested in me by sections 55(a) and 1604(c) of the Internal Revenue Code of 1939, as amended (26 U.S.C. (1952 Ed.) 55(a), 1604(c)), and by sections 6103(a) and 6106 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6103(a), 6106), it is hereby ordered that any income, excess-profits, estate, gift, unemployment, or excise tax return, including all reports, documents, or other factual data relating thereto, shall, during the Ninety-first Congress, be open to inspection by the Committee on the Judiciary, House of Representatives, or any duly authorized subcommittee thereof, in connection with its consideration of House Resolution 920, a resolution impeaching William O. Douglas, Associate Justice of the Supreme Court of the United States. Whenever a return is open to inspection by such Committee or subcommittee, a copy thereof shall, upon request, be furnished to such Committee or subcommittee. Such inspection shall be in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury in Treasury Decisions 6132 and 6133, relating to the inspection of returns by committees of the Congress, approved by the President on May 3, 1955.[5]

§ 6.8 During an impeachment investigation in the House into the conduct of the President, the Senate adopted a resolution releasing records

5. See first report by the special subcommittee on H. Res. 920 of the Committee on the Judiciary, committee print, 91st Cong. 2d Sess., June 20, 1970, at pp. 14–20.

of a Senate select committee on Presidential campaign activities to congressional committees and other persons and agencies with a legitimate need therefore.

On July 29, 1974,[6] Senator Samuel J. Ervin, Jr., of North Carolina, offered in the Senate a resolution (S. Res. 369), relative to the records of a Senate select committee. The Senate adopted the resolution following Senator Ervin's explanation as to the needs and requests of the Committee on the Judiciary of the House:

> MR. ERVIN: Mr. President, under its present charter, the Senate Select Committee on Presidential Campaign Activities has 90 days after the 28th day of June of this year in which to wind up its affairs. This resolution is proposed with the consent of the committee, and its immediate consideration has been cleared by the leadership on both sides of the aisle.
>
> The purpose of this resolution is to facilitate the winding up of the affairs of the Senate Select Committee. The resolution provides that all of the records of the committee shall be transferred to the Library of Congress which shall hold them subject to the control of the Senate Committee on Rules and Administration.
>
> It provides that after these records are transferred to the Library of Congress the Senate Committee on Rules and Administration shall control the access to the records and either by special orders or by general regulations shall make the records available to courts, congressional committees, congressional subcommittees, Federal departments and agencies, and any other persons who may satisfy the Senate Committee on Rules and Administration that they have a legitimate need for the records.
>
> It provides that the records shall be maintained intact and that none of the original records shall be released to any agency or any person.
>
> It provides further that pending the transfer of the records to the Library of Congress and the assumption of such control by the Senate Committee on Rules and Administration, that the Select Committee, acting through its chairman or through its vice chairman, can make these records available to courts or to congressional committees or subcommittees or to other persons showing a legitimate need for them.
>
> I might state this is placed in here because of the fact that we have had many requests from congressional committees for the records. We have had requests from the Special Prosecutor and from the courts. . . .
>
> I might state in the past the committee has made available some of the records to the House Judiciary Committee, at its request, and to the Special Prosecutor at his request. The resolution also provides that the action of the committee in doing so is ratified by the Senate.

§ 6.9 In its inquiry into charges of impeachable of-

6. 120 CONG. REC. 25392, 25393, 93d Cong. 2d Sess.

fenses against President Richard Nixon, the Committee on the Judiciary adopted procedures which ensured the confidentiality of impeachment inquiry materials and which limited access to such materials.

On Feb. 22, 1974, the Committee on the Judiciary unanimously adopted a set of procedures to preserve the confidentiality of evidentiary and other materials compiled in its impeachment inquiry relating to the conduct of President Nixon: (7)

PROCEDURES FOR HANDLING IMPEACHMENT INQUIRY MATERIAL

1. The chairman, the ranking minority member, the special counsel, and the counsel to the minority shall at all times have access to and be responsible for all papers and things received from any source by subpena or otherwise. Other members of the committee shall have access in accordance with the procedures hereafter set forth.

2. At the commencement of any presentation at which testimony will be heard or papers and things considered, each committee member will be furnished with a list of all papers and things that have been obtained by the committee by subpena or otherwise. No member shall make the list or any part thereof public unless authorized by a majority vote of the committee, a quorum being present.

3. The special counsel and the counsel to the minority, after discussion with the chairman and the ranking minority member, shall initially recommend to the committee the testimony, papers, and things to be presented to the committee. The determination as to whether such testimony, papers, and things shall be presented in open or executive session shall be made pursuant to the rules of the House.

4. Before the committee is called upon to make any disposition with respect to the testimony or papers and things presented to it, the committee members shall have a reasonable opportunity to examine all testimony, papers, and things that have been obtained by the inquiry staff. No member shall make any of that testimony or those papers or things public unless authorized by a majority vote of the committee, a quorum being present.

5. All examination of papers and things other than in a presentation shall be made in a secure area designated for that purpose. Copying, duplicating, or removal is prohibited.

6. Any committee member may bring additional testimony, papers, or things to the committee's attention.

7. Only testimony, papers, or things that are included in the record will be reported to the House; all other testi-

7. See H. REPT. NO. 93–1305, at p. 8, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29219, 29221, 93d Cong. 2d Sess., Aug. 20, 1974, for brief discussion of the adoption of the procedures.

The House had authorized the printing of additional copies of the procedures for handling impeachment inquiry materials. See H. Res. 1072, 93d Cong. 2d Sess., May 23, 1974.

mony, papers, or things will be considered as executive session material.

RULES FOR THE IMPEACHMENT INQUIRY STAFF

1. The staff of the impeachment inquiry shall not discuss with anyone outside the staff either the substance or procedure of their work or that of the committee.

2. Staff offices on the second floor of the Congressional Annex shall operate under strict security precautions. One guard shall be on duty at all times by the elevator to control entry. All persons entering the floor shall identify themselves. An additional guard shall be posted at night for surveillance of the secure area where sensitive documents are kept.

3. Sensitive documents and other things shall be segregated in a secure storage area. They may be examined only at supervised reading facilities within the secure area. Copying or duplicating of such documents and other things is prohibited.

4. Access to classified information supplied to the committee shall be limited by the special counsel and the counsel to the minority to those staff members with appropriate security clearances and a need to know.

5. Testimony taken or papers and things received by the staff shall not be disclosed or made public by the staff unless authorized by a majority of the committee.

6. Executive session transcripts and records shall be available to designated committee staff for inspection in person but may not be released or disclosed to any other person without the consent of a majority of the committee.

Parliamentarian's Note: On June 21, 1974, a Member, John N. Erlenborn, of Illinois, took the floor to allege that he was being denied permission to study files and records gathered by the Committee on the Judiciary in its impeachment inquiry into the conduct of the President, in violation of Rule XI clause 27(c) of the House rules.[8] Rule XI clause 27(c) provided that committee hearings and records are to be kept separate from the records of the committee chairman and that all Members of the House have access to such records. Other provisions of the rule require that a committee may receive testimony or evidence in executive session, and that the proceedings of such sessions may not be released unless the committee so determines. And non-committee Members of the House are not permitted to attend executive committee sessions.[9]

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8. 120 CONG. REC. 20624, 93d Cong. 2d Sess.

9. Although Jefferson's Manual states that any Member may be present at "any select committee" (*House Rules and Manual* §410 [1973]), a select committee appointed in 1834 held that its proceedings should be confidential, not to be attended by any person not invited or required. 3 Hinds' Precedents §1732. See also 4 Hinds' Precedents §4540 for the

§ 6.10 The Speaker laid before the House a communication from the Chairman of the Committee on the Judiciary, submitting to the House a "statement of information" concerning the income tax returns of President Richard Nixon examined by that committee in executive session during its impeachment inquiry, in order to comply with a Treasury Department regulation requiring submission of Internal Revenue Service files to the House prior to public release.

On July 25, 1974, Speaker Carl Albert, of Oklahoma, laid before the House a communication from Chairman Peter W. Rodino, Jr., of New Jersey, of the Committee on the Judiciary: (10)

COMMUNICATTON FROM THE CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY

The Speaker laid before the House the following communication from the chairman of the Committee on the Judiciary:

WASHINGTON, D.C., *July 26, 1974.*
Hon. CARL ALBERT,
Speaker, House of Representatives, Washington, D.C.

DEAR MR. SPEAKER: On February 6, 1974, the House of Representatives adopted H. Res. 803, which authorized and directed the Committee on the Judiciary to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise under Article I, Section 2 of the Constitution, its power to impeach President Richard M. Nixon.

In carrying out its responsibility under H. Res. 803, the Judiciary Committee investigated allegations regarding President Nixon's income tax returns. The Committee requested access to the President's returns and reports on those returns in the files of the Internal Revenue Service. This access was granted by the President in Executive Order 11786, dated June 7, 1974, and information from the returns and IRS documents was subsequently presented to the Committee in executive session.

The Committee is now publicly debating whether to report various articles of impeachment to the House. In the course of this debate reference will surely be made to income tax information regarding the President. Under the Constitution and H. Res. 803, it is appropriate, indeed necessary, to refer to this information in a debate which is of the highest Constitutional significance.

Commissioner Donald Alexander of the Internal Revenue Service has requested that before information from IRS files is released publicly it be submitted to the House, thus complying with Treasury Department regulations. While this procedure is undoubtedly unnecessary in view of this Committee's Constitutional responsibility and the authority granted it by H. Res. 803, in consideration of the Commissioner's position, I am herewith submitting the enclosed Statement of Information, Book X. This Book will be part of the Committee's record when it makes its recommendation to the House.

Sincerely,

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principle that committees may make their sessions executive and exclude persons not members thereof.

10. 120 CONG. REC. 25306, 25307, 93d Cong. 2d Sess.

PETER W. RODINO, Jr.,
Chairman.

Subcommittee Procedures

§ 6.11 The Committee on the Judiciary authorized a special subcommittee to investigate and report on charges of impeachable offenses against a federal judge.

On June 20, 1970, a special subcommittee of the Committee on the Judiciary, investigating charges of impeachment against Associate Justice William O. Douglas, made an interim report to the committee as to its authority and procedures: (11)

I. AUTHORITY

On April 21, 1970, the Committee on the Judiciary adopted a resolution to authorize the appointment of a Special Subcommittee on H. Res. 920, a resolution impeaching William O. Douglas, Associate Justice of the Supreme Court of the United States, of high crimes and misdemeanors in office. Pursuant to this resolution, the following members were appointed: Emanuel Celler (New York), Chairman; Byron G. Rogers (Colorado); Jack Brooks (Texas); William M. McCulloch (Ohio); and Edward Hutchinson (Michigan).

The Special Subcommittee on H. Res. 920 is appointed and operates under the Rules of the House of Representatives. Rule XI 13(f) empowers the Committee on the Judiciary to act on all proposed legislation, messages, petitions, memorials, or other matters relating to ". . . Federal courts and judges." In the 91st Congress, Rule XI has been implemented by H. Res. 93, February 5, 1969. H. Res. 93 authorizes the Committee on the Judiciary, acting as a whole or by subcommittee, to conduct full and complete investigations and studies on the matters coming within its jurisdiction, specifically ". . . (4) relating to judicial proceedings and the administration of Federal courts and personnel thereof, including local courts in territories and possessions".

H. Res. 93 empowers the Committee to issue subpenas, over the signature of the Chairman of the Committee or any Member of the Committee designated by him. Subpenas issued by the Committee may be served by any person designated by the Chairman or such designated Member.

On April 28, 1970, the Special Subcommittee on H. Res. 920 held its organization meeting, appointed staff, and adopted procedures to be applied during the investigation. Although the power to issue subpenas is available, and the Subcommittee is prepared to use subpenas if necessary to carry out this investigation, thus far all potential witnesses have been cooperative and it has not been necessary to employ this investigatory tool. The Special Subcommittee operates under procedures established in paragraph 27, Rules of Committee Procedure, of Rule XI of the House of Representatives. These procedures will be followed until additional rules are adopted, which, on the basis

11. First report of the special subcommittee on H. Res. 920 of the Committee on the Judiciary, committee print, 91st Cong. 2d Sess., June 20, 1970.

of precedent in other impeachment proceedings, are determined by the Special Subcommittee to be appropriate.

Issuance of Subpenas; Effect of Noncompliance

§ 6.12 The Committee on the Judiciary determined in the 93d Congress that a federal civil officer could be impeached for failing to comply with duly authorized subpenas issued by the committee in the course of its investigation into impeachment charges against him.

On Aug. 20, 1974, the Committee on the Judiciary submitted to the House a report (H. Rept. No. 93–1305) recommending the impeachment of President Richard Nixon on three articles of impeachment, without an accompanying resolution of impeachment, the President having resigned. Article III, adopted by the committee on July 30, 1974, impeached the former President for failing without lawful cause or excuse to comply with subpenas issued by the committee for things and papers relative to the impeachment inquiry.(12)

Parliamentarian's Note: The House has in the past considered the question whether a federal civil officer was subject to contempt proceedings for declining to honor a subpena issued in the course of an impeachment investigation or investigation directed toward impeachment. In 1879, a committee of the House was conducting an investigation, as authorized by the House, into the conduct of the then Minister to China, George Seward. In the course of its impeachment inquiry, the committee issued subpenas to Mr. Seward commanding him to produce papers in relation to the inquiry. Upon his refusal, he was arraigned at the bar of the House for contempt. The contempt charge was referred to the investigating committee, which concluded in its report (not considered by the House) that an official threatened with impeachment was not in contempt for declining to be sworn as a witness or to produce documentary evidence.(13) Likewise, in 1837, a committee was investigating expenditures in cer-

12. H. REPT. NO. 93–1305, Committee on the Judiciary, 93d Cong. 2d Sess., Aug. 20, 1974, printed in full in the Record at 120 CONG. REC. 29219–361, 93d Cong. 2d Sess., Aug. 20, 1974. For the articles impeaching President Nixon, see § 3.1, supra. The minority views challenge such a refusal to comply with a subpena as grounds for impeachment (see § 3.8, supra).

13. 3 Hinds' Precedents §§ 1699, 1700.

tain executive departments, with a view towards impeachment (of heads of departments or of President Andrew Jackson). The committee adopted a resolution requesting papers from the President, who declined to produce them and submitted a letter criticizing the committee for requesting that he and the department heads "become our own accusers." The committee laid on the table resolutions censuring the President for such action and the committee report concluded that there was no privilege of the House to compel public officers to furnish evidence against themselves.(14)

Court Access to Committee Evidence

§ 6.13 Where a federal court subpenaed in a criminal case certain evidence gathered by the Committee on the Judiciary in an impeachment inquiry, the House adopted a resolution granting such limited access to the evidence as would not violate the privileges of the House or its sole power of impeachment under the United States Constitution.

On Aug. 22, 1974,(15) Speaker Carl Albert, of Oklahoma, laid before the House subpenas issued by a federal district court in a criminal case, requesting certain evidence gathered by the Committee on the Judiciary and its subcommittee on impeachment, in the inquiry into the conduct of President Richard Nixon. The House adopted a resolution (H. Res. 1341) which granted such limited access to the evidence as would not violate the privileges or constitutional powers of the House. The resolution read as follows:

H. RES. 1341

Whereas in the case of United States of America against John N. Mitchell et al. (Criminal Case No. 74–110), pending in the United States District Court for the District of Columbia, subpenas duces tecum were issued by the said court and addressed to Representative Peter W. Rodino, United States House of Representatives, and to John Doar, Chief Counsel, House Judicial Subcommittee on Impeachment, House of Representatives, directing them to appear as witnesses before said court at 10:00 antemeridian on the 9th day of September, 1974, and to bring with them certain and sundry papers in the possession and under the control of the House of Representatives: Therefore be it

Resolved, That by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or pos-

14. 3 Hinds' Precedents § 1737.

15. 120 CONG REC. 30026, 93d Cong. 2d Sess.

session but by its permission; be it further

Resolved, That the House of Representatives under Article I, Section 2 of the Constitution has the sole power of impeachment and has the sole power to investigate and gather evidence to determine whether the House of Representatives shall exercise its constitutional power of impeachment; be it further

Resolved, That when it appears by the order of the court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice, or before any judge or such legal officer, for the promotion of justice, this House will take such action thereon as will promote the ends of justice consistently with the privileges and rights of this House; be it further

Resolved, That when said court determines upon the materiality and the relevancy of the papers and documents called for in the subpenas duces tecum, then the said court, through any of its officers or agents, have full permission to attend with all proper parties to the proceeding and then always at any place under the orders and control of this House and take copies of all memoranda and notes, in the files of the Committee on the Judiciary, of interviews with those persons who subsequently appeared as witnesses in the proceedings before the full Committee pursuant to House Resolution 803, such limited access in this instance not being an interference with the Constitutional impeachment power of the House, and the Clerk of the House is authorized to supply certified copies of such documents and papers in possession or control of the House of Representatives that the court has found to be material and relevant (except that under no circumstances shall any minutes or transcripts of executive sessions, or any evidence of witnesses in respect thereto, be disclosed or copied) and which the court or other proper officer thereof shall desire, so as, however, the possession of said papers, documents, and records by the House of Representatives shall not be disturbed, or the same shall not be removed from their place of file or custody under any Members, officer, or employee of the House of Representatives; and be it further

Resolved, That a copy of these resolutions be transmitted to the said court as a respectful answer to the subpenas aforementioned.

§ 7. Committee Consideration; Reports

Under Rule XI, the rules of the House are the rules of its committees and subcommittees where applicable.[1] Consideration by committees of impeachment propositions to be reported to the House is therefore generally governed by the principles of consideration and debate that are normally followed in taking up any proposition. Thus, in the 93d Congress, the

1. Rule XI clause 27(a), *House Rules and Manual* § 735 (1973).

Committee on the Judiciary adopted a resolution for the consideration of articles impeaching President Richard Nixon, providing for general debate, and permitting amendment under the five-minute rule.(2)

Cross References

Committee consideration and reports generally, see Ch. 17, infra.

Committee powers and procedures as to impeachment investigations, see § 6, supra.

Committee procedure generally, see Ch. 17, infra.

Committee reports on grounds for impeachment, see § 3, supra.

Management by reporting committee of impeachment propositions in the House, see § 8, infra.

Collateral References

Debates on Articles of Impeachment, Hearings of the Committee on the Judiciary pursuant to H. Res. 803, July 24, 25, 26, 27, 29, and 30, 1974, 93d Cong. 2d Sess.

Impeachment of Richard M. Nixon, President of the United States, H. REPT. NO. 93–1305, Committee on the Judiciary, 93d Cong. 2d Sess., Aug. 20, 1974.

Associate Justice William O. Douglas, final report by the Special Subcommittee on H. Res. 920, Committee on the Judiciary, 91st Cong. 2d Sess., Sept. 17 1970.

2. See § 7.2. infra.

Consideration of Resolution and Articles of Impeachment

§ 7.1 Under the modern practice, the Committee on the Judiciary may report to the House, when recommending impeachment, both a resolution and articles of impeachment, to be considered together by the House.

On July 8, 1912, Mr. Henry D. Clayton, of Alabama, of the Committee on the Judiciary reported to the House a resolution (H. Res. 524) impeaching Judge Robert Archbald. The resolution not only impeached but set out articles of impeachment which the resolution stated were sustained by the evidence.(3) A similar procedure was followed in the impeachment of certain other judges—George English,(4) Harold Louderback,(5) and Halsted Ritter. The resolution of impeachment in the Ritter case incorporated the articles (the articles themselves which followed the text below have been omitted):(6)

3. 48 CONG. REC. 8697, 8698, 62d Cong. 2d Sess. (report and resolution printed in full in the Record).

4. 67 CONG. REC. 6280, 69th Cong. 1st Sess., Mar. 25, 1926.

5. 76 CONG. REC. 4913, 4914, 72d Cong. 2d Sess., Feb. 24, 1933.

6. 80 CONG. REC. 3066, 74th Cong. 2d Sess., Mar. 2, 1936.

[H. RES. 422, 74TH CONG., 2D SESS. (Rept. No. 2025)]

RESOLUTION

Resolved, That Halsted L. Ritter, who is a United States district judge for the southern district of Florida, be impeached for misbehavior, and for high crimes and misdemeanors; and that the evidence heretofore taken by the subcommittee of the Committee on the Judiciary of the House of Representatives under House Resolution 163 of the Seventy-third Congress sustains articles of impeachment, which are hereinafter set out, and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Halsted L. Ritter, who was appointed, duly qualified, and commissioned to serve, during good behavior in office, as United States district judge for the southern district of Florida, on February 15, 1929.

Resolutions for Committee Consideration

§ 7.2 The Committee on the Judiciary adopted in the 93d Congress a resolution governing its consideration of a motion to report to the House a resolution and articles impeaching President Richard Nixon; the resolution provided for general debate on the resolution, reading the articles for amendment under the five-minute rule, and considering the original motion as adopted should any article be agreed to.

On July 23, 1974, the Committee on the Judiciary adopted a resolution providing that on July 24 the committee should commence general debate on reporting to the House a resolution and articles of impeachment against President Nixon; the resolution provided for general debate and reading of the articles for amendment under the five-minute rule: (7)

Resolved, That at a business meeting on July 24, 1974, the Committee shall commence general debate on a motion to report to the House a Resolution, together with articles of impeachment, impeaching Richard M. Nixon, President of the United States. Such general debate shall consume no more than ten hours, during which time no Member shall be recognized for a period to exceed 15 minutes. At the conclusion of general debate, the proposed articles shall be read for amendment and Members shall be recognized for a period of five minutes to speak on each

7. H. REPT. NO. 93–1305, at p. 10, Committee on the Judiciary, 93d Cong. 2d Sess., reported Aug. 20, 1 1974.

proposed article and on any and all amendments thereto, unless by motion debate is terminated thereon. Each proposed article, and any additional article, shall be separately considered for amendment and immediately thereafter voted upon as amended for recommendation to the House. At the conclusion of consideration of the articles for amendment and recommendation to the House, if any article has been agreed to, the original motion shall be considered as adopted and the Chairman shall report to the House said Resolution of impeachment, together with such articles as have been agreed to, or if no article is agreed to, the Committee shall consider such resolutions or other recommendations as it deems proper.

Broadcasting Committee Meetings During Consideration of Impeachment

§ 7.3 The House in the 93d Congress amended Rule XI of the rules of the House to provide for broadcasting of meetings, as well as hearings, of committees, thereby permitting radio and television coverage of the consideration by the Committee on the Judiciary of a resolution and articles of impeachment against President Richard Nixon.

On July 22, 1974, Mr. B.F. Sisk, of California, called up by direction of the Committee on Rules a resolution (H. Res. 1107) amending the rules of the House.[8]

Debate on the resolution indicated that it was intended to clarify the rules of the House to permit all committees to allow broadcasting of their meetings as well as hearings by majority vote, but that its immediate purpose was to allow the broadcasting of the proceedings of the Committee on the Judiciary in considering a resolution and articles of impeachment against President Nixon (to commence on July 24, 1974). The House discussed the advisability of, and procedures for, televising the proceedings of the Committee on the Judiciary, and adopted the resolution.[9]

Privilege of Reports on Impeachment Questions

§ 7.4 The reports of a committee to which has been referred resolutions for the impeachment of a federal civil officer are privileged for immediate consideration.

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8. 120 CONG. REC. 24436, 93d Cong. 2d Sess.

9. Speaker Carl Albert (Okla.) overruled a point of order against consideration of the resolution and held that the question whether a committee meeting was properly called was a matter for the committee and not the House to consider. 120 CONG. REC. 24437, 93d Con. 2d Sess.

Resolutions impeaching federal civil officers, or resolutions incidental to an impeachment question, are highly privileged under the U.S. Constitution (§ 5, supra); reports thereon are likewise considered as privileged.[10]

Privilege of Reports as to Discontinuance of Impeachment Proceedings

§ 7.5 Reports proposing discontinuance of impeachment proceedings are privileged for immediate consideration when reported from the Committee on the Judiciary.

On Feb. 13, 1932, Mr. Hatton W. Sumners, of Texas, offered House Report No. 444 and House Resolution 143, discontinuing impeachment proceedings against Secretary of the Treasury Andrew Mellon. He offered the report as privileged and it was immediately considered and adopted by the House.[11]

On Mar. 24, 1939, Mr. Sam Hobbs, of Alabama, called up a privileged report of the Committee on the Judiciary on House Resolution 67, which report recommended against the impeachment of Secretary of Labor Frances Perkins. The report was called up as privileged and the House immediately agreed to Mr. Hobbs' motion to lay the report on the table.[12]

Calendaring and Printing of Impeachment Reports

§ 7.6 Reports of the Committee on the Judiciary recommending impeachment of civil officers and judges of

10. Rule XI clause 27 (d) (4), *House Rules and Manual* § 735 (1973) requires that, with certain exceptions, a measure not be considered in the House until the third calendar day on which the report thereon has been available to Members. However, on July 13, 1971, Speaker Carl Albert (Okla.) held that a committee report relating to the refusal of a witness to respond to a subpena was not subject to the three-day rule. See 117 CONG. REC. 24720–23, 92d Cong. 1st Sess. (H. REPT. NO. 92–349). The Speaker held in that case that "the report is of such high privilege under the inherent constitutional powers of the House and under Rule IX that the provisions of clause 27(d) (4) of Rule XI are not applicable."

See also the dicta of Speaker Frederick H. Gillett (Mass.), at 6 Cannon's Precedents § 48, that impeachment charges were privileged for immediate consideration due to their particularly privileged status under the U.S. Constitution.

These arguments seem persuasive with respect to impeachment cases when reported.

11. 75 CONG. REC. 3850, 72d Cong. 1st Sess.

12. 84 CONG. REC. 3273, 76th Cong. 1st Sess.

the United States are referred to the House Calendar and ordered printed.

A committee report on the impeachment of a federal civil officer is referred to the House Calendar, ordered printed, and may be printed in full in the Record either by resolution or pursuant to a unanimous consent request.[13]

Report Submitted Without Resolution of impeachment

§ 7.7 President Richard Nixon having resigned following the decision of the Committee on the Judiciary to report to the House recommending his impeachment, the committee's report, without an accompanying resolution, was submitted to and accepted by the House.

The Committee on the Judiciary considered proposed articles of impeachment against President Nixon and adopted articles, as amended, on July 27, 29, and 30, 1974. Before the committee report with articles of impeachment were reported to the House, the President resigned his office. The committee's report was therefore submitted to the House without an accompanying resolution of impeachment. The report summarized in detail the evidence against the President and the committee's investigation and consideration of impeachment charges, and included supplemental, additional, separate, dissenting, minority, and concurring views as to the separate articles, the evidence before the committee and its sufficiency for impeachment, and the standards and grounds for impeachment of federal and civil officers.

The committee's recommendation read as follows:

> The Committee on the Judiciary, to whom was referred the consideration of recommendations concerning the exercise of the constitutional power to impeach Richard M. Nixon, President of the United States, having considered the same, reports thereon pursuant to H. Res. 803 as follows and recommends that the House exercise its constitutional power to impeach Richard M. Nixon, President of the United States, and that articles of impeachment be exhibited to the Senate as follows: . . .[14]

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13. 48 CONG. REC. 8697, 8698, 62d Cong. 2d Sess., July 8, 1912 (Judge Robert Archbald); see also H. REPT. No. 653, 67 CONG. REC. 6280, 69th Cong. 1st Sess., Mar. 25, 1926 (Judge George English), printed in full in the Record by unanimous consent; H. REPT. No. 2025, 80 CONG. REC. 2528, 74th Cong. 2d Sess., Feb. 20, 1936 (Judge Halsted Ritter); H. REPT. No. 1305, 120 CONG. REC. 29219, 93d Cong. 2d Sess., Aug. 20, 1974 (President Richard Nixon), printed in full in the Record pursuant to H. Res. 1333, 120 CONG. REC. 29361, 29362.

14. H. REPT. NO. 93–1305, at p. 1, Committee on the Judiciary, printed in

The report was referred by the Speaker to the House Calendar, and accepted and ordered printed in full in the Record pursuant to the following resolution, agreed to under suspension of the rules, which acknowledged the intervening resignation of the President:

H. RES. 1333

Resolved, That the House of Representatives

(1) takes notice that

(a) the House of Representatives, by House Resolution 803, approved February 6, 1974, authorized and directed the Committee on the Judiciary to investigate fully and completely whether sufficient grounds existed for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America; and

(b) the Committee on the Judiciary, after conducting a full and complete investigation pursuant to House Resolution 803, voted on July 27, 29, and 30, 1974 to recommend Articles of impeachment against Richard M. Nixon, President of the United States of America; and

(c) Richard M. Nixon on August 9, 1974 resigned the Office of President of the United States of America;

(2) accepts the report submitted by the Committee on the Judiciary pursuant to House Resolution 803 (H. Rept. 93–1305) and authorizes and directs that the said report, together with supplemental, additional, separate, dissenting, minority, individual and concurring views, be printed in full in the Congressional Record and as a House Document; and

(3) commends the chairman and other members of the Committee on the Judiciary for their conscientious and capable efforts in carrying out the Committee's responsibilities under House Resolution 803.(15)

Reports Discontinuing Impeachment Proceedings

§ 7.8 The Committee on the Judiciary unanimously agreed to report adversely a resolution authorizing an impeachment investigation into the conduct of the Secretary of Labor.

On Mar. 24, 1939,(16) a privileged report of the Committee on the Judiciary was presented to the House; the report was adverse to a resolution (H. Res. 67) authorizing an investigation of impeachment charges against Secretary of Labor Frances Perkins and two other officials of the Labor Department:

IMPEACHMENT PROCEEDINGS—FRANCES PERKINS

MR. [SAM] HOBBS [of Alabama]: Mr. Speaker, by direction of the Committee

the Record at 120 CONG. REC. 29219, 93d Cong. 2d Sess., Aug. 20, 1974. For complete text of H. REPT. No. 93–1305, see *id.* at pp 29219–361.

15. 120 CONG. REC. 29361, 93d Cong. 2d Sess., Aug. 20, 1974.

16. 84 CONG. REC. 3273, 76th Cong. 1st Sess.

on the Judiciary I present a privileged report upon House Resolution 67, which I send to the desk.

THE SPEAKER:[17] The Clerk will report the resolution.

The Clerk read House Resolution 67.

MR. HOBBS: Mr. Speaker, this is a unanimous report from the Committee on the Judiciary adversing this resolution. I move to lay the resolution on the table.

THE SPEAKER: The question is on the motion of the gentleman from Alabama to lay the resolution on the table.

The motion was agreed to.

§ 7.9 Where an impeachment resolution was pending before the Committee on the Judiciary, and the official charged resigned, the committee reported out a resolution recommending that the further consideration of the charges be discontinued.

On Feb. 13, 1932,[18] the Committee on the Judiciary reported adversely on impeachment charges and its resolution was adopted by the House:

IMPEACHMENT CHARGES—REPORT FROM COMMITTEE ON THE JUDICIARY

MR. [HATTON W.] SUMNERS of Texas: Mr. Speaker, I offer a report from the Committee on the Judiciary, and I would like to give notice that immediately upon the reading of the report I shall move the previous question.

THE SPEAKER:[19] The gentleman from Texas offers a report, which the Clerk will read.

The Clerk read the report, as follows:

HOUSE OF REPRESENTATIVES—RELATIVE TO THE ACTION OF THE COMMITTEE ON THE JUDICIARY WITH REFERENCE TO HOUSE RESOLUTION 92

Mr. Sumners of Texas, from the Committee on the Judiciary, submitted the following report (to accompany H. Res. 143):

I am directed by the Committee on the Judiciary to submit to the House, as its report to the House, the following resolution adopted by the Committee on the Judiciary indicating its action with reference to House Resolution No. 92 heretofore referred by the House to the Committee on the Judiciary:

Whereas Hon. Wright Patman, Member of the House of Representatives, filed certain impeachment charges against Hon. Andrew W. Mellon, Secretary of the Treasury, which were referred to this committee; and

Whereas pending the investigation of said charges by said committee, and before said investigation had been completed, the said Hon. Andrew W. Mellon was nominated by the President of the United States for the post of ambassador to the Court of St. James and the said nomination was duly confirmed by the United States Senate pursuant to law, and the said Andrew W. Mellon has resigned the position of Secretary of the Treasury: Be it

Resolved by this committee, That the further consideration of the said charges made against the said Andrew W. Mellon, as Secretary of the Treasury, be, and the same are hereby discontinued.

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17. William B. Bankhead (Ala.).

18. 75 CONG. REC. 3850, 72d Cong. 1st Sess.

19. John N. Garner (Tex.).

MINORITY VIEWS

We can not join in the majority views and findings. While we concur in the conclusions of the majority that section 243 of the Revised Statutes, upon which the proceedings herein were based, provides for action in the nature of an ouster proceeding, it is our view that the Hon. Andrew W. Mellon, the former Secretary of the Treasury, having removed himself from that office, no useful purpose would be served by continuing the investigation of the charges filed by the Hon. Wright Patman. We desire to stress that the action of the undersigned is based on that reason alone, particularly when the prohibition contained in said section 243 is not applicable to the office now held by Mr. Mellon.

FIORELLO H. LAGUARDIA.
GORDON BROWNING.
M. C. TARVER.
FRANCIS B. CONDON.

MR. SUMNERS of Texas: Mr. Speaker I think the resolution is fairly explanatory of the views held by the different members of the committee. No useful purpose could be served by the consumption of the usual 40 minutes, so I move the previous question.

The previous question was ordered.

THE SPEAKER: The question is on agreeing to the resolution.

The resolution was agreed to.

§ 7.10 On one occasion, the Committee on the Judiciary reported adversely on impeachment charges, finding the evidence did not warrant impeachment, but the House rejected the report and voted for impeachment.

On Feb. 24, 1933, the House considered House Resolution 387 (H. Rept. No. 2065) from the Committee on the Judiciary, which included the finding that charges against Judge Harold Louderback did not warrant impeachment. Under a previous unanimous-consent agreement, an amendment in the nature of a substitute, recommended by the minority of the committee and impeaching the accused, was offered. The previous question was ordered on the amendment and it was adopted by the House.[20]

§ 8. Consideration and Debate in the House

Reports on impeachment are privileged for immediate consideration in the House.[1] Unless the House otherwise provides by special order, propositions of impeachment are considered under

20. 76 CONG. REC. 4913–25, 72d Cong. 2d Sess. For analyses of the Louderback proceedings in the House, see §§ 17.1–17.4, infra, and 6 Cannon's Precedents § 514.

1. See § 8.2, infra, for the privilege of impeachment reports and § 7.6, supra, for their referral to the House Calendar. Impeachment reports have usually been printed in full in the *Congressional Record* and have laid over for a period of days before consideration by the House, so that Members could acquaint themselves with the contents of the reports.

the general rules of the House applicable to other simple House resolutions. Since 1912, the House has considered together the resolution and articles of impeachment, although prior practice was to adopt a resolution of impeachment and later to consider separate articles of impeachment.(2)

The House has typically considered the resolution and articles under unanimous-consent agreements, providing for a certain number of hours of debate, equally divided and controlled by the proponents and opposition, at the conclusion of which the previous question was considered as ordered. In one case, an amendment was specifically made in order under the unanimous-consent agreement governing consideration of the resolution.(3)

The motion for the previous question and the motion to recommit are applicable to a resolution and articles of impeachment being considered in the House, and a separate vote may be demanded on substantive propositions contained in the resolution.(4)

Cross References

Amendments generally, see Ch. 27, infra.
Consideration in the House of amendments to articles, see § 10, infra.
Consideration of resolutions electing managers, granting them powers and funds, and notifying the Senate, see § 9, infra.
Consideration and debate in Committee of the Whole generally, see Ch. 19, infra.
Consideration and debate in the House generally, see Ch. 29, infra.
Division of the question for voting, see Ch. 30, infra.
Privileged questions and reports interrupting regular order of business, see Ch. 21, infra.
Summary of House consideration of specific impeachment resolutions, see §§ 14–18, infra.

Controlling Time for Debate

§ 8.1 Under the later practice, resolutions and articles of impeachment have been considered together in the House pursuant to unanimous-consent agreements fixing the time for and control of debate.

On Mar. 2, 1936, the House considered House Resolution 422, impeaching Judge Halsted Ritter, pursuant to a unanimous-consent agreement propounded by Chairman Hatton W. Sumners, of Texas, of the Committee on the Judiciary, who had called up the report:(5)

2. See § 8.1, infra.
3. §§ 8.1, 8.4, infra.
4. See §§ 8.8–8.10, infra.
5. 80 CONG. REC. 3066, 3069, 74th Cong. 2d Sess.

THE SPEAKER:[6] The gentleman from Texas asks unanimous consent that debate on this resolution be continued for 4½ hours, 2½ hours to be controlled by himself and 2 hours by the gentleman from New York [Mr. Hancock]; and at the expiration of the time the previous question shall be considered as ordered. Is there objection?

There was no objection.

On Feb. 24, 1933, House Resolution 387, recommending against the impeachment of Judge Harold Louderback, was considered pursuant to a unanimous-consent agreement, propounded by Mr. Thomas D. McKeown, of Oklahoma, who called up the resolution, to allow a substitute amendment recommending impeachment to be offered:[7]

MR. MCKEOWN: Mr. Speaker, I ask unanimous consent that the time for debate be limited to two hours to be controlled by myself, that during that time the gentleman from New York [Mr. La Guardia] be permitted to offer a substitute for the resolution and at the conclusion of the time for debate the previous question be considered as ordered.

THE SPEAKER:[8] Then the Chair submits this: The gentleman from Oklahoma asks unanimous consent that debate be limited to two hours, to be controlled by the gentleman from Oklahoma, that at the end of that time the previous question shall be considered as ordered, with the privilege, however, of a substitute resolution being offered, to be included in the previous question. Is there objection?

MR. [WILLIAM B.] BANKHEAD [of Alabama]: Mr. Speaker, reserving the right to object for the purpose of getting the parliamentary situation clarified before we get to the merits, is there any question in the mind of the Speaker, if it is fair to submit such a suggestion, as to whether or not the substitute providing for absolute impeachment would be in order as a substitute for this report?

THE SPEAKER: That is the understanding of the Chair, that the unanimous-consent agreement is, that the gentleman from New York [Mr. LaGuardia] may offer a substitute, the previous question to be considered as ordered on the substitute and the original resolution at the expiration of the two hours. Is there objection?

There was no objection.

On Mar. 30, 1926, the House by unanimous consent agreed to a procedure for the consideration of a resolution impeaching Judge George English; the request was propounded by Chairman George S. Graham, of Pennsylvania, of the Committee on the Judiciary:

THE SPEAKER:[9] The gentleman from Pennsylvania [Mr. Graham] asks unanimous consent that during today the debate be equally divided between the affirmative and the negative, and that he control one-half of the time and

6. Joseph W. Byrns (Tenn.).

7. 76 CONG. REC. 4914, 72d Cong. 2d Sess.

8. John N. Garner (Tex.).

9. Nicholas Longworth (Ohio).

that the other half be controlled by the gentleman from Alabama [Mr. Bowling].(10)

In earlier practice, resolutions and articles were considered separately, the articles being considered in the Committee of the Whole on occasion. For example, the articles of impeachment against Justice Samuel Chase were considered in the Committee of the Whole and were read for amendment, although the resolution to impeach was earlier considered in the House.(11) Again, during proceedings against President Andrew Johnson, the House adopted a resolution which provided for consideration and amendment of the articles in the Committee of the Whole under the five-minute rule, at the conclusion of general debate.(12)

The resolution and the articles of impeachment against Judge Charles Swayne (1904, 1905) were considered separately but were both considered in the House.(13)

In the impeachment of Judge Robert Archbald (1912) the House instituted the modern practice of considering the resolution and the articles of impeachment together in the House, as opposed to the Committee of the Whole.(14)

Reports Privileged for Immediate Consideration

§ 8.2 Resolutions of impeachment, resolutions proposing abatement of proceedings, and resolutions incidental to the question of impeachment are privileged for immediate consideration when reported from the committee to which propositions of impeachment have been referred

On Mar. 2, 1936, Chairman Hatton W. Sumners, of Texas, of the Committee on the Judiciary, called up as privileged House Resolution 422, impeaching Judge Halsted Ritter, and the House proceeded to its immediate consideration.(15)

On Feb. 24, 1933, Speaker John N. Garner, of Texas, held that a resolution reported from the Committee on the Judiciary, proposing discontinuance of impeachment proceedings, was privileged for immediate consideration:

THE SPEAKER: The Clerk will report the resolution.

The Clerk read the resolution, as follows:

10. 67 CONG. REC. 6585–90, 69th Cong. 1st Sess. New agreements were obtained on each succeeding day during debate on the resolution.

11. 3 Hinds' Precedents §§ 2343, 2344.

12. 3 Hinds' Precedents § 2414.

13. 3 Hinds' Precedents §§ 2472, 2474.

14. 6 Cannon's Precedents §§ 499, 500.

15. 80 CONG. REC. 3066, 74th Cong. 2d Sess.

HOUSE RESOLUTION 387

Resolved, That the evidence submitted on the charges against Hon. Harold Louderback, district judge for the northern district of California, does not warrant the interposition of the constitutional powers of impeachment of the House.

MR. [BERTRAND H.] SNELL [of New York]: Mr. Speaker, when they report back a resolution of that kind, is it a privileged matter?

THE SPEAKER: It is not only a privileged matter but a highly privileged matter.

MR. [LEONIDAS C.] DYER [of Missouri]: Mr. Speaker, this is the first instance to my knowledge, in my service here, where the committee has reported adversely on an impeachment charge.

THE SPEAKER: The gentleman's memory should be refreshed. The Mellon case was reported back from the committee, recommending that impeachment proceedings be discontinued.

MR. SNELL: Was that taken up on the floor as a privileged matter?

THE SPEAKER: It was.(16)

On Mar. 24, 1939, Mr. Sam Hobbs, of Alabama, called up a report of the Committee on the Judiciary, which report was adverse to House Resolution 67, on the impeachment of Secretary of Labor Frances Perkins. The report was called up as privileged and the House immediately agreed to Mr. Hobbs' motion to lay the resolution on the table.(17)

On Feb. 6, 1974, Chairman Peter W. Rodino, Jr., of New Jersey, of the Committee on the Judiciary, called up as privileged House Resolution 803, authorizing that committee to investigate the sufficiency of grounds for impeachment of President Richard Nixon, various resolutions of impeachment having been referred to the committee. The House proceeded to its immediate consideration.(18)

Motion to Discharge Committee From Consideration of Impeachment Proposal

§ 8.3 A Member announced his filing of a motion to discharge the Committee on the Judiciary from further consideration of a resolution proposing impeachment of the President.

16. 76 CONG. REC. 4913, 72d Cong. 2d Sess. (See also 6 Cannon's Precedents § 514.)

17. 84 CONG. REC. 3273, 76th Cong. 1st Sess.

18. 120 CONG. REC. 2349–63, 93d Cong. 2d Sess. For additional discussion as to high privilege for consideration of impeachment resolutions notwithstanding the normal application of House rules, and of other resolutions incidental to impeachment called up by the investigating committee, see § 7.4, supra.

On June 17, 1952,[19] a Member made an announcement relating to impeachment charges against President Harry S. Truman:

MR. [PAUL W.] SHAFER [of Michigan]: Mr. Speaker, on April 28 of this year I introduced House Resolution 614, to impeach Harry S. Truman, President of the United States, of high crimes and misdemeanors in office. This resolution was referred to the Committee on the Judiciary, which committee has failed to take action thereon.

Thirty legislative days having now elapsed since introduction of this resolution, I today have placed on the Clerk's desk a petition to discharge the committee from further consideration of the resolution.

In my judgment, developments since I introduced the Resolution April 28 have immeasurably enlarged and strengthened the case for impeachment and have added new urgency for such action by this House.

First. Since the introduction of this resolution, the United States Supreme Court, by a 6-to-3 vote, has held that in his seizure of the steel mills Harry S. Truman, President of the United States, exceeded his authority and powers, violated the Constitution of the United States, and flouted the expressed will and intent of the Congress—and, in so finding, the Court gave unprecedented warnings against the threat to freedom and constitutional government implicit in his act.

Second. Despite the President's technical compliance with the finding of the Court, prior to the Court decision he reasserted his claim to the powers then in question, and subsequent to that decision he has contemptuously called into question "the intention of the Court's majority" and contemptuously attributed the limits set on the President's powers not to Congress, or to the Court, or to the Constitution, but to "the Court's majority."

Third. The Court, in its finding in the steel case, emphasized not only the unconstitutionality of the Presidential seizure but also stressed his failure to utilize and exhaust existing and available legal resources for dealing with the situation, including the Taft-Hartley law.

Fourth. The President's failure and refusal to utilize and exhaust existing and available legal resources for dealing with the emergency has persisted since the Court decision and in spite of clear and unmistakable evidences of the will and intent of Congress given in response to his latest request for special legislation authorizing seizure or other special procedures.

The discharge petition did not gain the requisite number of signatures for its consideration by the House.

Amendment of Resolution and Articles

§ 8.4 A resolution with articles of impeachment, being considered in the House under a unanimous-consent agreement fixing control of debate, is not subject to amend-

19. 98 CONG. REC. 7424, 82d Cong. 2d Sess.

ment unless the agreement allows an amendment to be offered, or the Member in control offers an amendment or yields for amendment.

On Apr. 1, 1926, the House was considering a resolution impeaching Judge George English. Pursuant to a unanimous-consent agreement, the time for debate was being controlled by two Members. Following the ordering of the previous question on the resolution, Speaker Nicholas Longworth, of Ohio, answered a parliamentary inquiry propounded by Mr. Tom T. Connally, of Texas:

> Under the rules of the House would not this resolution be subject to consideration under the five-minute rule for amendment?
>
> THE SPEAKER: The Chair thinks not.[20]

In the Harold Louderback impeachment proceedings in the House, the resolution reported by the Committee on the Judiciary recommended against impeachment, but the minority of the committee proposed a resolution impeaching Judge Louderback. The substitute impeaching the accused was offered and adopted by the House, pursuant to a unanimous-consent agreement which fixed control and time of debate, but specifically allowed the substitute resolution to be offered and voted upon.[1]

In the Charles Swayne impeachment, Mr. Henry W. Palmer, of Pennsylvania, of the Committee on the Judiciary called up the resolution of impeachment and controlled the time thereon. Before moving the previous question, he offered an amendment to the resolution of impeachment, to add clarifying and technical changes. The amendment was agreed to.[2]

Debate on Impeachment Resolutions and Articles

§ 8.5 In debating articles of impeachment, a Member may refer to the political, social, and family background of the accused.

On Mar. 2, 1936,[3] the House was debating articles of impeachment against Judge Halsted Ritter. Mr. Louis Ludlow, of Indiana, had the floor, and Speaker Joseph W. Byrns, of Tennessee, overruled

20. 67 CONG. REC. 6733, 69th Cong. 1st Sess.

1. 76 CONG. REC. 4913, 4914, 72d Cong. 2d Sess., Feb. 24, 1933. For a complete analysis of the procedure followed for consideration of the Louderback impeachment, see §§ 17.1 et seq., infra.

2. 39 CONG. REC. 248, 58th Cong. 3d Sess., Dec. 13, 1904.

3. 80 CONG. REC. 3069, 74th Cong. 2d Sess.

a point of order based on the irrelevancy of his remarks. The proceedings were as follows:

MR. LUDLOW: . . . I feel there is imposed upon me today a duty and a responsibility to raise my voice in this case if for no other purpose than to present myself as a character witness—a duty which I could not conscientiously avoid and which I am very glad to perform. Judge Ritter was born in Indianapolis, Ind. He springs from a long and honored Hoosier ancestry, rooted in the pioneer life of our Commonwealth. There are no better people than those who comprised his ancestral train. People do not come any better anywhere on this globe. Rugged honesty, outspoken truthfulness, and high ideals are characteristics of his family. His father, Col. Eli F. Ritter, was a man of outstanding character and personality, one of the most public-spirited men I ever have known, a lawyer of distinction, ranking high in a bar of great brilliancy that included such stellar lights as Thomas A. Hendricks, Joseph E. McDonald, and Benjamin Harrison, an unofficial advocate of the people's cause in many a fight against vice and privilege, for whom even those who felt his steel had a wholesome respect because of his militant ardor on the side of right and civic virtue.

MR. [MALCOLM C.] TARVER [of Georgia]: Mr. Speaker, I rise to a point of order.

THE SPEAKER PRO TEMPORE: The gentleman will state it.

MR. TARVER: The gentleman is endeavoring to read into the Record a statement with regard to the progenitors of the gentleman against whom these impeachment proceedings are pending. He is referring to something that should not affect the judgment of the House one way or the other, and, in my judgment, it is highly improper, and the gentleman should not be allowed to continue.

THE SPEAKER PRO TEMPORE: The chairman understands the gentleman is proceeding under the order of the House, which provided for two hours and a half on one side and 2 hours on the other. Of course, the Chair cannot dictate to the gentleman just how he shall proceed in his discussion of this resolution.

MR. TARVER: It is then the ruling of the Speaker that during the time for general debate Members may address themselves to whatever subject they desire.

THE SPEAKER: Members must address themselves to the resolution.

MR. LUDLOW: That is what I am trying to do, Mr. Speaker.

THE SPEAKER: The gentleman will proceed in order.

§ 8.6 During debate on a resolution of impeachment, the Speaker ruled that unparliamentary language, even if a recitation of testimony or evidence, could not be used in debate.

On Mar. 30, 1926, during debate on the resolution and articles of impeachment against Judge George English, Speaker Nicholas Longworth, of Ohio, delivered a ruling on the use of unparliamentary language in debate, and the House discussed his decision:

THE SPEAKER: The Chair desires to make a statement. The Chair has been in doubt on one or two occasions this afternoon whether he should permit the use of certain language even by way of quotation. The Chair at the time realized, of course, that the members of the majority of the committee might think the use of this language would be material in describing an individual. The Chair hopes that it will not be used further during this debate and suggests also that those words be stricken from the Record. [Applause.]

MR. [JOHN N.] TILLMAN [of Arkansas]: I think the Speaker will remember I stated when I put the speech in the Record that I intended to strike out those words.

THE SPEAKER: There were other occasions besides that to which the gentleman refers.

MR. [EDWARD J.] KING [of Illinois]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. KING: Will the language also be stricken out of the evidence in the case and in the report of the committee?

THE SPEAKER: The Chair does not think that has anything to do with the use of language on the floor of the House.

MR. [TOM T.] CONNALLY of Texas: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. CONNALLY of Texas: Without taking any exception to the Chair's views as to striking from the printed Record what has already happened, it seems to me the Chair ought to make clear his ruling so that we may know as to how far it shall be regarded as a precedent in the future. The House, as I understand it, at the present moment is proceeding as an inquisitorial body, somewhat as a grand jury, as in a semijudicial proceeding; and if we have unpleasant matters in court, the court can not avoid its duty because they are unpleasant, and if it becomes necessary in this Chamber for Members to properly present this case or to quote the testimony in the record to use unpleasant and offensive language to establish the truth, I think the House ought to hear it. It is neither wise nor safe to censor the evidence. We must hear it, good or bad, because it is the evidence. If it is suppressed or colored, it is no longer the true evidence in the case. I sympathize with the Chair's position, and I know he is prompted by the best motives, by a sense of delicacy and consideration for the galleries. I think it is well for the House and Chair now to understand that the ruling of the Chair ought not to be regarded as a precedent in the future which might operate to exclude competent evidence, because when we are dealing with a matter of this kind, serious and important as it is, we want to know the truth, whatever it may be, and those who come here to hear these proceedings of course do so at their own risk. [Laughter.]

THE SPEAKER: The Chair thinks his ruling ought to be regarded as a precedent as far as these proceedings in the House are concerned. If the Chair should be officially advised that the use of this language is actually necessary, he might order the galleries cleared.

MR. [FIORELLO H.] LAGUARDIA [of New York]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. LAGUARDIA: The Chair's ruling, as I understand it, is that under the rules of the House language that is not parliamentary should not be used; but that does not prevent the consideration of whether or not a particular judge whose case we are trying used the language or not?

THE SPEAKER: Not at all. It is simply the use of certain language on the floor of the House.

MR. [CHARLES R.] CRISP [of Georgia]: Mr. Speaker, I want to enter my approval of the course the Speaker has taken. Members of this House, if they desire to know what the language is, can read the record, and I thoroughly endorse the course the Speaker pursued.

§ 8.7 During debate in the House objection was made to extensions of remarks in the Congressional Record in order that an accurate record of impeachment proceedings be preserved.

In April 1926,[4] the House was considering a resolution impeaching Judge George English. When a Member asked unanimous consent to revise and extend his remarks in the Record, Mr. C. William Ramseyer, of Iowa, objected stating that his object was to "have the Record, preceding the vote, show exactly what transpired and what was said." He indicated that no objection would be made to the extension of remarks after the vote had occurred on the resolution of impeachment.[5]

Motion for Previous Question

§ 8.8 The motion for the previous question is applicable to a resolution of impeachment.

On Dec. 13, 1904, the House was considering a resolution impeaching Judge Charles Swayne of high crimes and misdemeanors. The manager of the resolution, Mr. Henry W. Palmer, of Pennsylvania, moved the previous question on the resolution at the conclusion of debate thereon. Mr. Richard Wayne Parker, of New Jersey, made a point of order against the offering of the motion, on the ground that the previous question should not be directly ordered upon a question of high privilege such as impeachment. Speaker Joseph G. Cannon, of Illinois, ruled that under the precedents the previous question was in order.[6]

Motion to Recommit

§ 8.9 After the previous question has been ordered on a

4. 67 CONG. REC. 6602, 69th Cong. 1st Sess.

5. *Id.* at p. 6717.

6. 39 CONG. REC. 248, 58th Cong. 3d Sess.

resolution of impeachment, a motion to recommit, with or without instructions, is in order, but is not debatable.

On Apr. 1, 1926, the House was considering House Resolution 195, impeaching Judge George English, United States District Judge for the Eastern District of Illinois. After the previous question was ordered, a motion was offered to recommit the resolution with instructions. The instructions directed the Committee on the Judiciary to take the testimony of certain persons and authorized the committee to send for persons and papers, administer oaths, and report at any time.

The motion was rejected on a yea and nay vote.(7)

Parliamentarian's Note: A motion to recommit, with or without instructions, on a resolution of impeachment, is not debatable. Rule XVI clause 4, *House Rules and Manual* § 782 (1973), amended in the 92d Congress to allow debate on certain motions to recommit with instructions, does not apply to simple resolutions but only to bills or joint resolutions.(8)

Division of the Question

§ 8.10 A separate vote may be demanded on any substantive proposition contained in a resolution of impeachment, when the question recurs on the resolution.

On Mar. 30, 1926, the House was considering a resolution and articles of impeachment against Judge George English. Mr. Charles R. Crisp, of Georgia, inquired whether, under Rule XVI clause 6, a separate vote could be demanded on any substantive proposition contained in the resolution of impeachment. Speaker Nicholas Longworth, of Ohio, responded in the affirmative.(9)

When the vote recurred on the resolution of impeachment, on Apr. 1, 1926, a separate vote was demanded on Article I. The House rejected the motion to strike the article.(10)

Parliamentarian's Note: A division of the question may be demanded at any time before the question is put on the resolution. During the Judge English proceedings, the Speaker put the question on the resolution and announced that it was adopted. A Member objected that he had meant to ask for a separate vote and the Speaker allowed such a

7. 67 CONG. REC. 6734, 69th Cong. 1st Sess.

8. See Ch. 23, infra, for the motion to recommit and debate thereon.

9. 67 CONG. REC. 6589, 6590, 69th Cong. 1st Sess. See *House Rules and Manual* § 791 (1973).

10. 67 CONG. REC. 6734, 69th Cong. 1st Sess.

demand (thereby vacating the proceedings by unanimous consent) because of confusion in the Chamber, although he stated that the demand was untimely.(11)

Broadcasting House Proceedings

§ 8.11 The House adopted a resolution in the 93d Congress authorizing television, radio, and photographic coverage of projected House consideration of a resolution impeaching President Richard Nixon, thereby waiving rulings of the Speaker prohibiting such coverage of House proceedings.

On Aug. 7, 1974,(12) Mr. Ray J. Madden, of Indiana, called up by direction of the Committee on Rules House Resolution 802, with committee amendments, for the broadcasting of House proceedings on the impeachment of President Nixon, the Committee on the Judiciary having decided on July 27, 29, and 30 to report to the House recommending the President's impeachment. The House agreed to the resolution as amended by the committee amendments:

> That, notwithstanding any rule, ruling, or custom to the contrary, the proceedings in the Chamber of the House of Representatives relating to the resolution reported from the Committee on the Judiciary, recommending the impeachment of Richard M. Nixon, President of the United States, may be broadcast by radio and television and may be open to photographic coverage, subject to the provisions of section 2 of this resolution.
>
> Sec. 2. A special committee of four members, composed of the majority and minority leaders of the House, and the majority and minority whips of the House, is hereby authorized to arrange for the coverage made in order by this resolution and to establish such regulations as they may deem necessary and appropriate with respect to such broadcast or photographic coverage: *Provided, however,* That any such arrangements or regulations shall be subject to the final approval of the Speaker; and if the special committee or the Speaker shall determine that the actual coverage is not in conformity with such arrangements and regulations, the Speaker is authorized and directed to terminate or limit such coverage in such manner as may protect the interests of the House of Representatives.

The House briefly debated the resolution before adopting it, and discussed suitable restrictions on broadcast coverage as well as the broadcasting of the Committee on the Judiciary meetings on the resolution and articles of impeachment pursuant to House Resolution 1107, adopted on July 18, 1974.(13)

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11. *Id.* at pp. 6734, 6735.

12. 120 CONG. REC. 27266–69, 93d Cong. 2d Sess.

13. See § 7.3, Supra, for the adoption of H. Res. 1107, amending the rules of the House.

Parliamentarian's Note: The Speaker of the House has consistently ruled that coverage of House proceedings, either by radio, television or still photography, was prohibited under the rules and precedents of the House. See for example, the statements of Speaker Sam Rayburn, of Texas, on Feb. 25, 1952, and on Jan. 24, 1955.(14)

§ 9. Presentation to Senate; Managers

Following the adoption of a resolution and articles of impeachment, the House proceeds to the adoption of privileged resolutions (1) appointing managers to conduct the trial on the part of the House and directing them to present the articles to the Senate; (2) notifying the Senate of the adoption of articles and appointment of managers; and (3) granting the managers necessary powers and funds.(15)

The managers have jurisdiction over the answer of the respondent to the articles impeaching him, and may prepare the replication of the House to the respondent's answer. The replication has not in the last two impeachment cases been submitted to the House for approval.(16)

In the Harold Louderback proceedings, where the accused was impeached in one Congress and tried in the next, the issue arose as to the authority of the managers beyond the expiration of the Congress in which elected. In that case, the resolution authorizing the managers powers and funds was not offered and adopted until the succeeding Congress.(17)

Forms

Form of resolution appointing managers to conduct an impeachment trial: (18)

HOUSE RESOLUTION 439

Resolved, That Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida; that said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Rep-

14. 98 CONG. REC. 1334, 1335, 82d Cong. 2d Sess.; 101 CONG. REC. 628, 629, 84th Cong. 1st Sess.

15. See § 9.1, infra.

In former Congresses, managers were elected by ballot or appointed by the Speaker pursuant to an authorizing resolution (see § 9.3, infra).

16. See § 10, infra.

17. See § 4.2, supra.

18. 80 CONG. REC. 3393, 74th Cong. 2d Sess., Mar. 6, 1936.

resentatives and of all the people of the United States to impeach the said Halsted L. Ritter of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Halsted L. Ritter to answer said impeachment, and demand his impeachment, conviction, and removal from office.

Form of resolution notifying the Senate of the adoption of articles and the appointment of managers: (19)

HOUSE RESOLUTION 440

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors Halsted L. Ritter, United States District Judge for the southern district of Florida, and that the House adopted articles of impeachment against said Halsted L. Ritter, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, have been appointed such managers.

Form of resolution empowering managers: (20)

HOUSE RESOLUTION 441

Resolved, That the managers on the part of the House in the matter of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers, and the managers have power to send for persons and papers, and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary: *Provided,* That the total expenditures authorized by this resolution shall not exceed $2,500.

Cross References

Arguments and conduct of trial by managers, see § 12, infra.

Effect of adjournment on managers' authority, see § 4, supra.

Managers' appearance and functions in the Senate sitting as a Court of Impeachment, see §§ 11–13, infra.

Managers' jurisdiction over replication and amendments to articles, see § 10, infra.

Electing and Empowering Managers; Notifying the Senate

§ 9.1 After the House has adopted a resolution and articles of impeachment, the House considers resolutions appointing managers to ap-

19. *Id.*

20. *Id.* at p. 3394.

pear before the Senate, notifying the Senate of the adoption of articles and election of managers, and authorizing the managers to prepare for and conduct the trial in the Senate, to employ assistants, and to incur expenses payable from the contingent fund of the House.

On Feb. 27, 1933, the House having adopted articles of impeachment against Judge Harold Louderback on Feb. 24, Mr. Hatton W. Sumners, of Texas, offered resolutions electing managers and notifying the Senate of House action:

IMPEACHMENT OF JUDGE HAROLD LOUDERBACK

MR. SUMNERS of Texas: Mr. Speaker, I offer the following privileged report from the Committee on the Judiciary, which I send to the desk and ask to have read, and ask its immediate adoption.

The Clerk read as follows:

HOUSE RESOLUTION 402

Resolved, That Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Harold Louderback, United States district judge for the northern district of California; and said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Harold Louderback of misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by the House; and that the said managers do demand the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and demand his impeachment, conviction, and removal from office.

THE SPEAKER PRO TEMPORE: The question is on agreeing to the resolution. . . .

The resolution was agreed to.

A motion to reconsider the vote by which the resolution was agreed to was laid on the table.

MR. SUMNERS of Texas: Mr. Speaker, I desire to present a privileged resolution.

The Clerk read as follows:

HOUSE RESOLUTION 403

Resolved, That a message be sent to the Senate to inform them that this House has impeached Harold Louderback, United States district judge for the Northern District of California, for misdemeanors in office, and that the House has adopted articles of impeachment against said Harold Louderback, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of this House, have been appointed such managers.

The resolution was agreed to.[1]

On Mar. 6, 1936, Mr. Sumners offered three resolutions relating

1. 76 CONG. REC. 5177, 5178, 72d Cong. 2d Sess.

to the impeachment proceedings against Judge Halsted Ritter, the House having adopted articles of impeachment on Mar. 2. The resolutions elected managers, informed the Senate that articles had been adopted and managers appointed, and gave the managers powers and funds: (2)

IMPEACHMENT OF HALSTED L. RITTER

MR. SUMNERS of Texas: Mr. Speaker, I send to the desk the three resolutions which are the usual resolutions offered when an impeachment has been voted by the House, and I ask unanimous consent that they may be read and considered en bloc. . . .

HOUSE RESOLUTION 439

Resolved, That Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida; that said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Halsted L. Ritter of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Halsted L. Ritter to answer said impeachment, and demand his impeachment, conviction, and removal from office.

HOUSE RESOLUTION 440

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors Halsted L. Ritter, United States district judge for the southern district of Florida, and that the House adopted articles of impeachment against said Halsted L. Ritter, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, have been appointed such managers.

HOUSE RESOLUTION 441

Resolved, That the managers on the part of the House in the matter of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers, and the managers have power to send for persons and papers, and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary: *Provided,* That the total expenditures authorized by this resolution shall not exceed $2,500.

MR. [BERTRAND H.] SNELL [of New York]: Mr. Speaker, may I ask the gentleman from Texas one further question? Is this exactly the procedure that has always been followed by the House under similar conditions?

2. 80 CONG. REC. 3393, 3394, 74th Cong. 2d Sess.

MR. SUMNERS of Texas: Insofar as I know, it does not vary from the procedure that has been followed since the beginning of the Government.

MR. SNELL: If that is true, while, of course, I think the House made a mistake, I have no desire to delay carrying out the will of the majority of the House in the matter.

MR. [THOMAS L.] BLANTON [of Texas]: Mr. Speaker, will the gentleman yield?

MR. SUMNERS of Texas: I yield to the gentleman from Texas.

MR. BLANTON: The only difference between this and other such cases is that our colleague from Texas has asked only for $2,500, which is very small in comparison with amounts heretofore appropriated under such conditions.

The resolutions were agreed to.

Composition and Number of Managers

§ 9.2 Managers elected by the House, or appointed by the Speaker, have always been Members of the House and have always constituted an odd number.(3)

In 1933, in the Harold Louderback impeachment five managers were elected by resolution—all from the Committee on the Judiciary—three from the majority party and two from the minority party.(4) In the Halsted Ritter impeachment in 1936, three managers were elected from the Committee on the Judiciary, two from the majority party and one from the minority party.(5) In both the Louderback and Ritter impeachments, the Chairman of the Committee on the Judiciary, Hatton W. Sumners, of Texas, was elected as a manager. Ordinarily, the managers are chosen from among those Members who have voted for the resolution and articles of impeachment.(6)

Appointment of Managers by Resolution

§ 9.3 In the later practice, managers on the part of the House to conduct impeachment trials have been appointed by resolution.

On Mar. 6, 1936, the House adopted a resolution offered by

3. For a summary of the composition of managers from the William Blount impeachment in 1797 through the Robert Archbald impeachment in 1912, see 6 Cannon's Precedents § 467.

4. Cannon's Precedents § 514.

5. 80 CONG. REC. 3393, 74th Cong. 2d Sess.

6. During the Belknap proceedings, it was proposed to elect a minority Member to fill a vacancy created when a manager was excused from service. The House discussed the principle that managers should be in accord with the sentiments of the House. 3 Hinds' Precedents § 2448.

Hatton W. Sumners, of Texas, Chairman of the Committee on the Judiciary, appointing Members of the House to serve as managers in the impeachment trial of Judge Halsted Ritter:

HOUSE RESOLUTION 439

Resolved, That Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida; that said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Halsted L. Ritter of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Halsted L. Ritter to answer said impeachment, and demand his impeachment, conviction, and removal from office.(7)

This method, of appointing managers by House resolution, was also used in 1912 in the Robert Archbald impeachment, in 1926 in the George English impeachment, and in 1933 in the Harold Louderback impeachment.(8)

On two occasions, in the Charles Swayne and West Humphreys impeachments, managers were appointed by the Speaker pursuant to authorizing resolution.(9)

In other impeachments, managers were elected by ballot, a procedure largely obsolete in the House, its last use having been for the election of managers in the Andrew Johnson impeachment. In that case, the motion adopted by the House providing for the consideration of the articles against President Johnson provided that in the event any articles were adopted, the House was to proceed by ballot to elect managers.(10)

Managers, Excused From Attending House Sessions

§ 9.4 Managers on the part of the House to conduct impeachment proceedings may be excused from attending the sessions of the House by unanimous consent.

On Apr. 10, 1933, Mr. Hatton W. Sumners, of Texas, one of the managers on the part of the House for impeachment pro-

7. 80 CONG. REC. 3393, 74th Cong. 2d Sess.

8. 6 Cannon's Precedents §§ 500, 514, 545. Managers for the trial of former Secretary of War William Belknap were also chosen by resolution. See 3 Hinds' Precedents § 2448.

9. 3 Hinds' Precedents §§ 2388, 2475.

10. 3 Hinds' Precedents § 2414.

ceedings against Judge Harold Louderback, made a unanimous-consent request:[11]

MR. SUMNERS of Texas: Mr. Speaker, I ask unanimous consent that the managers on the part of the House in the Louderback impeachment matter be excused from attending upon the sessions of the House during this week.

THE SPEAKER:[12] Is there objection to the request of the gentleman from Texas?

There was no objection.

Appearance of Managers in Senate

§ 9.5 The managers on the part of the House appear in the Senate for the opening of an impeachment trial on the date messaged by the Senate.

On Mar. 9, 1936,[13] the Senate messaged to the House the date the Senate would be ready to receive the managers on the part of the House for the impeachment trial of Judge Halsted Ritter:

A message from the Senate, by Mr. Horne, its enrolling clerk, announced that the Senate had—

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida, agreeably to the notice communicated to the Senate, and that at the hour of 1 o'clock p.m. on Tuesday, March 10, 1936, the Senate will receive the honorable managers on the part of the House of Representatives, in order that they may present and exhibit the said articles of impeachment against the said Halsted L. Ritter, United States district judge for the southern district of Florida.[14]

Jurisdiction of Managers Over Related Matters

§ 9.6 Where the House has empowered its managers in an impeachment proceeding to take all steps necessary in the prosecution of the case, the managers may report to the House a resolution proposing to amend the original articles of impeachment.

On Mar. 30, 1936,[15] Mr. Hatton W. Sumners, of Texas, one of the managers on the part of the House to conduct the impeachment trial against Judge Halsted Ritter, reported House Resolution 471, which amended the articles

11. 77 CONG. REC. 1449, 73d Cong. 1st Sess.
12. Henry T. Rainey (Ill.).
13. 80 CONG. REC. 3449, 74th Cong. 2d Sess.
14. For the proceedings in the Senate upon the appearance of the managers for the presentation of articles, see § 11.4, infra (Ritter proceedings).
15. 80 CONG. REC. 4597–99, 74th Cong. 2d Sess.

originally voted by the House on Mar. 2, 1936. Mr. Sumners discussed the power and jurisdiction of the managers to consider and report amendments to the original articles:

MR. [BERTRAND H.] SNELL [of New York]: Mr. Speaker, will the gentleman yield?

MR. SUMNERS of Texas: Yes.

MR. SNELL: I may not be entirely familiar with all this procedure, but as I understand, what the gentleman is doing here today, is to amend the original articles of impeachment passed by the House.

MR. SUMNERS of Texas: That is correct.

MR. SNELL: The original articles of impeachment came to the House as a result of the evidence before the gentleman's committee. Has the gentleman's committee had anything to do with the change or amendment of these charges?

MR. SUMNERS of Texas: No; just the managers.

MR. SNELL: As a matter of procedure, would not that be the proper thing to do?

MR. SUMNERS of Texas: I do not think it is at all necessary, for this reason: The managers are now acting as the agents of the House, and not as the agents of the Committee on the Judiciary. Mr. Manager Perkins and Mr. Manager Hobbs have recently extended the investigation made by the committee.

MR. SNELL: Mr. Speaker, will the gentleman yield further?

MR. SUMNERS of Texas: Yes.

MR. SNELL: Do I understand that the amendments come because of new information that has come to you as managers that never was presented to the Committee on the Judiciary?

MR. SUMNERS of Texas: Perhaps it would not be true to answer that entirely in the affirmative, but the changes are made largely by reason of new evidence which has come to the attention of the committee, and some of these changes, more or less changes in form, have resulted from further examination of the question. This is somewhat as lawyers do in their pleadings. They often ask the privilege of making an amendment.

MR. SNELL: And the gentleman's position is that as agents of the House it is not necessary to have the approval of his committee, which made the original impeachment charges?

MR. SUMNERS of Texas: I have no doubt about that; I have no doubt about the accuracy of that statement.[16]

Parliamentarian's Note: After articles of impeachment had been adopted against President Andrew Johnson in 1868, the managers on the part of the House reported to the House, as privileged, an additional article of impeachment. A point of order was made that the managers could not so report, their functions being different from those of a standing committee. Speaker Schuyler Colfax,

16. See also 6 Cannon's Precedents § 520 (amendment to articles of impeachment against Judge Harold Louder back prepared and called up by House managers).

of Indiana, overruled the point of order on two grounds: (1) the answer of the respondent is always, when messaged to the House, referred to the managers, who then prepare a replication to the House and (2) any Member of the House, whether a manager or not, may propose additional articles of impeachment.(17)

§ 9.7 The answer of the respondent to articles of impeachment, and supplemental rules to govern the trial, are messaged to the House by the Senate and referred to the managers on the part of the House.

On Apr. 6, 1936, the answer of respondent Judge Halsted Ritter to the articles of impeachment against him, and supplemental Senate rules, were messaged to the House by the Senate and referred to the managers on the part of the House.(18)

§ 10. Replication; Amending Adopted Articles

The replication is the answer of the House to the respondents' answer to the articles of impeachment. In recent instances, the managers on the part of the House have submitted the replication to the Senate on their own initiative, without the House voting thereon.(19)

The House has always reserved the right to amend the articles of impeachment presented to the Senate and has frequently so amended the articles pursuant to the recommendations of the managers on the part of the House.(20)

Cross References

Managers and their powers generally, see § 9, supra.
Motions to strike articles of impeachment in the Senate, see § 12, infra.
Respondent's answer filed in the Senate, see § 11, infra.

Reservation of Right to Amend Articles

§ 10.1 In the later practice, the reservation by the House of the right to amend articles of impeachment presented to the Senate has been delivered orally in the Senate by the House managers, and has

17. 3 Hinds' Precedents § 2418.
For preparation of the replication in the later practice see § 10.3, infra.

18. See 110.2, infra.

19. See § 10.3, infra.

20. See § 10.1, infra, for the reservation of the right to amend articles and §§ 10.4–10.6, infra, for the procedure in so amending them.

not been included in the resolution of impeachment.

On Mar. 10, 1936, the managers on the part of the House to conduct the trial of impeachment against Judge Halsted Ritter appeared in the Senate. After the articles of impeachment adopted by the House had been read to the Senate, Manager Hatton W. Sumners, of Texas, orally reserved the right of the House to further amend or supplement them:

> MR. MANAGER SUMNERS: Mr. President, the House of Representatives, by protestation, saving themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Halsted L. Ritter, district judge of the United States for the southern district of Florida, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Halsted L. Ritter may be put to answer the misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.
>
> Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives by the adoption of the articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of the said Halsted L. Ritter to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.(1)

A similar procedure had been followed in the Robert Archbald and Harold Louderback impeachment proceedings, with the managers orally reserving in the Senate the right of the House to amend articles, without such reservation being included in the resolution and articles of impeachment.(2)

Prior to the Archbald impeachment, language reserving the right of the House to amend articles was voted on by the House and included at the end of the articles presented to the Senate. For example, the House in the Andrew Johnson impeachment agreed to a reservation-of-amendment clause by unanimous consent following the adoption of articles against the President, and it was included in the formal articles presented to the Senate.(3)

Answer of Respondent and Replication of House

§ 10.2 The answer of the respondent in impeachment

1. 80 CONG. REC. 3488, 74th Cong. 2d Sess.
2. 6 Cannon's Precedents §§ 501, 515.
3. 3 Hinds' Precedents § 2416.

proceedings is messaged by the Senate to the House together with any supplemental Senate rules therefore, and are referred to the managers on the part of the House.

On Apr. 6, 1936,[4] the answer of respondent Judge Halsted Ritter to the articles of impeachment against him and the supplemental rules adopted by the Senate for the trial were messaged to the House by the Senate and referred to the managers on the part of the House:

IMPEACHMENT OF HALSTED L. RITTER

The Speaker laid before the House the following order from the Senate of the United States:

In the Senate of the United States sitting for the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida

APRIL 3, 1936.

Ordered, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Halsted L. Ritter United States district judge for the southern district of Florida, to the articles of impeachment, as amended, and also a copy of the order entered on the 12th ultimo prescribing supplemental rules for the said impeachment trial.

The answer and the supplemental rules to govern the impeachment trial were referred to the House managers and ordered printed.

§ 10.3 In the Halsted Ritter and Harold Louderback impeachments, the managers on the part of the House prepared the replication of the House to the respondent's answer; in contrast to earlier practice, the replication was submitted to the Senate without being voted on by the House.

On Apr. 6, 1936, Mr. Hatton W. Sumners, of Texas, one of the managers on the part of the House in the impeachment trial of Judge Ritter, filed in the Senate the replication of the House to the answer filed by the respondent, the answer having been referred in the House to the managers. The replication had been prepared and submitted to the Senate by the managers alone, and it was not reported to or considered by the House for adoption.[5]

Similarly, the replication in the impeachment of Judge Louderback was filed in the Senate by the managers without being reported to or considered by the House.[6] In the impeachment trial of Judge Robert Archbald in

4. 80 CONG. REC. 5020, 74th Cong. 2d Sess.

5. 80 CONG. REC. 4971, 4972, 74th Cong. 2d Sess.

6. 6 Cannon's Precedents § 522.

1912, however, the replication was reported by the managers to the House where it was considered and adopted.(7)

Procedure in Amending Articles of Impeachment

§ 10.4 Articles of impeachment which have been exhibited to the Senate may be subsequently modified or amended by the adoption of a resolution in the House.

On Mar. 30, 1936,(8) a resolution (H. Res. 471) was offered in the House by Mr. Hatton W. Sumners, of Texas, a manager on the part of the House for the impeachment trial against Judge Halsted Ritter. The resolution amended the articles voted by the House against Judge Ritter on Mar. 2, 1936, by adding three new articles. The House agreed to the resolution after a discussion by Mr. Sumners of the nature of the changes and of the power of the managers to report amendments to the articles. Mr. Sumners summarized the changes as follows:

> MR. SUMNERS of Texas: Mr. Speaker, the resolution which has just been read proposes three new articles. The change is not as important as that statement would indicate. Two of the new articles deal with income taxes, and one with practicing law by Judge Ritter, after he went on the bench. In the original resolution, the charge is made that Judge Ritter received certain fees or gratuities and had written a letter, and so forth. No change is proposed in articles 1 and 2. In article 3, as stated, Judge Ritter is charged with practicing law after he went on the bench. That same thing, in effect, was charged, as members of the committee will remember, in the original resolution, but the form of the charge, in the judgment of the managers, could be improved. These charges go further and charge that in the matter connected with G.R. Francis, the judge acted as counsel in two transactions after he went on the bench, and received $7,500 in compensation. Article 7 is amended to include a reference to these new charges. There is a change in the tense used with reference to the effect of the conduct alleged. It is charged, in the resolution pending at the desk, that the reasonable and probable consequence of the alleged conduct is to injure the confidence of the people in the courts—I am not attempting to quote the exact language—which is a matter of form, I think, more than a matter of substance.(9)

§ 10.5 A resolution reported by the managers proposing amendments to the articles of impeachment previously adopted by the House is privileged.

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7. 6 Cannon's Precedents § 506.

8. 80 CONG. REC. 4597–99, 74th Cong. 2d Sess.

9. For discussion of the power of the managers on the part of the House to prepare amendments to the articles and to report them to the House, see § 9, supra.

On Mar. 30, 1936,[10] Mr. Hatton W. Sumners, of Texas, one of the managers on the part of the House for the Halsted Ritter impeachment trial, offered as privileged a resolution amending the articles of impeachment that had been adopted by the House.[11]

§ 10.6 Where the House agrees to an amendment to articles of impeachment it has adopted, the House directs the Clerk by resolution to so inform the Senate.

On Mar. 30, 1936,[12] the House adopted amendments to the articles previously adopted in the impeachment of Judge Halsted Ritter. Mr. Hatton W. Sumners, of Texas, offered and the House adopted a privileged resolution informing the Senate of such action:

MR. SUMNERS of Texas: Mr. Speaker, I offer the following privileged resolution.

The Clerk read as follows:

HOUSE RESOLUTION 472

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted an amendment to the articles of impeachment heretofore exhibited against Halsted L. Ritter, United States district judge for the southern district of Florida, and that the same will be presented to the Senate by the managers on the part of the House.

And also, that the managers have authority to file with the Secretary of the Senate, on the part of the House any subsequent pleadings they shall deem necessary.

The resolution was agreed to.

C. TRIAL IN THE SENATE

§ 11. Organization and Rules

The standing Senate rules governing procedure in impeachment trials originally date from 1804 and continue from Congress to Congress unless amended; the rules are set forth in the Senate Manual as "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials."[13] The last amendment to the impeachment trial rules was

10. 80 CONG. REC. 4597, 74th Cong. 2d Sess.

11. For a discussion of the power of the managers to prepare and report to the House amendments to the articles of impeachment, see § 9, supra.

12. 80 CONG. REC. 4601, 74th Cong. 2d Sess.

13. See *Senate Manual* §§ 100–126 (1973). The rules are set out in full below.

For adoption of rules to govern impeachment trials in 1804, see 3 Hinds' Precedents § 2099.

adopted in 1935, to allow the appointment of a committee to receive evidence (Rule XI). Amendments to the rules were also reported in the 93d Congress, pending impeachment proceedings in the House in relation to President Richard Nixon, but the Senate did not formally consider them.(14) The Senate has also, when commencing a particular impeachment trial, adopted supplemental rules governing pleadings, requests, stipulations, and motions.(15)

When the Senate is notified by the House of the adoption of a resolution and articles of impeachment, the Senate messages to the House, pursuant to Rule I of the impeachment trial rules, its readiness to receive the managers for the presentation of articles; Rule II provides the procedure for the appearance of the managers and exhibition of the articles to the Senate.(16)

Rules VIII through X of the rules for impeachment trials provide that a summons be issued to the person impeached, that the summons be returned, and that the respondent appear and answer the articles against him. Under Rules VIII and X, the trial proceeds as on a plea of not guilty if the respondent does not appear either in person or by attorney.(17)

Under Rule III, the Senate proceeds to consider the articles of impeachment on the day following the presentation of articles. Organizational questions arising before the actual commencement of an impeachment trial have been held debatable and not subject to Rule XXIV of the rules for impeachment trials, which prohibits debate except when the doors of the Senate are closed for deliberation.(18)

Senate Rules for Impeachment Trials

Senate Manual §§ 100–126 (1973). For amendments to the rules for impeachment trials, reported in the 93d Congress but not considered by the Senate, see § 11.2, infra.

I. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the

14. See § 11.2, infra.

15. See §§ 11.7, 11.8, infra.

16. See § 111.4, infra.

17. See §§ 11.5, 11.9, infra, for the summons and its return. As indicated in § 11.9, the respondent has not always appeared in person before the Senate sitting as a Court of Impeachment.

18. See § 11.11, infra.

Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to such notice.

II. When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit articles of impeachment against any person, the Presiding Officer of the Senate shall direct the Sergeant at Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: ''All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against ——— ———'': after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

III. Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if ordered by the Senate, proceed to the consideration of such articles and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the Presiding Officer shall administer the oath hereinafter provided to the members of the Senate then present and to the other members of the Senate as they shall appear, whose duty it shall be to take the same.

IV. When the President of the United States or the Vice President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

V. The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the Sergeant at Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the law-

ful orders, mandates, writs, and precepts of the Senate.

VII. The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may at his option, in the first instance, submit any such question to a vote of the members of the Senate. Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the members present, when the same shall be taken.

VIII. Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept, either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefore as aforesaid, or, appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

IX. At 12:30 o'clock afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: "I, ——— ———, do solemnly swear that the return made by me upon the process issued on the ——— day of ———, by the Senate of the United States, against ——— ———, is truly made, and that I have performed such service as therein described: So help me God." Which oath shall be entered at large on the records.

X. The person impeached shall then be called to appear and answer the articles of impeachment against him. If

he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

XI. That in the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

XII. At 12:30 o'clock afternoon of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ——— ———, in the Senate Chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

XIII. The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m.; and when the hour for such thing shall arrive, the Presiding Officer of the Senate shall so announce; and thereupon the Presiding Officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

XIV. The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

XV. Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

XVI. All motions made by the parties or their counsel shall be addressed to the Presiding Officer, and if he, or any Senator, shall require it, they shall be

committed to writing, and read at the Secretary's table.

XVII. Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

XVIII. If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

XIX. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer.

XX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

XXI. All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

XXII. The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

XXIII. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

XXIV. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not on the final question on each article of impeachment.

XXV. Witnesses shall be sworn in the following form, viz: "You, ——— ———, do swear (or affirm, as the case may be) that the evidence you shall give in the case now pending between the United States and ——— ———, shall be the truth, the whole truth, and nothing but the truth: So help you God." Which oath shall be administered by the Secretary, or any other duly authorized person.

Form of a subpena be issued on the application of the managers of the impeachment, or of the party impeached, or of his counsel

To ——— ———, greeting:

You and each of you are hereby commanded to appear before the Senate of

the United States, on the ——— day of ———, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate in which the House of Representatives have impeached ——— ———.

Fail not.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

———— ————,
Presiding Officer of the Senate.

Form of direction for the service of said subpena

The Senate of the United States to ——— ———, greeting:

You are hereby commanded to serve and return the within subpena according to law.

Dated at Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

———— ————,
Secretary of the Senate.

Form of oath to be administered to the members of the Senate sitting in the trial of impeachments

"I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of ——— ———, now pending, I will do impartial justice according to the Constitution and laws: So help me God."

Form of summons to be issued and served upon the person impeached

THE UNITED STATES OF AMERICA, *ss:*
The Senate of the United States to ——— ———, greeting:

Whereas the House of Representatives of the United States of America did, on the ——— day of ———, exhibit to the Senate articles of impeachment against you, the said ——— ———, in the words following:

[Here insert the articles]

And demand that you, the said ——— ———, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice.

You, the said ——— ———, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the ——— day of ———, at 12:30 o'clock afternoon, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness ——— ———, and Presiding Officer of the said Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

———— ————,
Presiding Officer of the Senate.

Form of precept to be indorsed on said writ of summons

THE UNITED STATES OF AMERICA, *ss:*
The Senate of the United States to ——— ———, greeting:

You are hereby commanded to deliver to and leave with ——— ———, if

conveniently to be found, or if not, to leave at his usual place of abode, or at his usual place of business in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least ——— days before the appearance day mentioned in the said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

———— ————,
Presiding Officer of the Senate.

All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the court.

XXVI. If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

Cross References

Functions of the Senate in impeachment generally, see § 1, supra.

House-Senate relations generally, see Ch. 32, infra.

Senate notified of adoption of impeachment resolution and election of managers by the House, see § 9, supra.

Collateral References

Functions and practice of the Senate in impeachments, see Riddick, Senate Procedure 495–504, S. Doc. No. 93–21, 93d Cong. 1st Sess. (1973); Riddick, Procedure and Guidelines for Impeachment Trials in the United States Senate, S. Doc. No. 93–102, 93d Cong. 2d Sess. (1974).

Standing rules of the Senate generally, see Riddick, Senate Procedure 774–779, S. Doc. No. 93–21, 93d Cong. 1st Sess. (1973).

Senate Rules for Impeachment Trials

§ 11.1 After impeachment proceedings had been instituted in the House against President Richard Nixon, the Senate adopted a resolution for the study and review of Senate rules and precedents applicable to impeachment trials.

On July 29, 1974,[19] during the pendency of an investigation in the House of alleged impeachable offenses committed by President Nixon, the Senate adopted a resolution related to its rules on impeachment:

> MR. [MICHAEL J.] MANSFIELD [of Montana]: Mr. President, I have at the desk a resolution, submitted on behalf of the distinguished Republican leader, the Senator from Pennsylvania (Mr. Hugh Scott), the assistant majority leader, the distinguished Senator from

19. 120 CONG. REC. 25468, 93d Cong. 2d Sess.

West Virginia (Mr. Robert C. Byrd), the assistant Republican leader, the distinguished Senator from Michigan (Mr. Griffin), and myself, and I ask that it be called up and given immediate consideration.

THE PRESIDING OFFICER:[20] The clerk will state the resolution.

The legislative clerk read as follows:

S. RES. 370

Resolved, That the Committee on Rules and Administration is directed to review any and all existing rules and precedents that apply to impeachment trials with a view to recommending any revisions, if necessary, which may be required if the Senate is called upon to conduct such a trial.

Resolved further, That the Committee on Rules and Administration is instructed to report back no later than 1 September 1974, or on such earlier date as the Majority and Minority Leaders may designate, and

Resolved further, That such review by that Committee shall be held entirely in executive sessions.

THE PRESIDING OFFICER: Without objection, the Senate will proceed to its immediate consideration.

The question is on agreeing to the resolution.

The resolution (S. 370) was agreed to.

Parliamentarian's Note: The Senate, unlike the House, is a continuing legislative body. Therefore, the standing rules of the Senate, including the rules for impeachment trials, continue from Congress to Congress unless amended.[21]

20. Jesse Helms (N.C.).

21. See Rule XXXII, *Senate Manual* § 32.2 (1973).

§ 11.2 The Senate having directed its Committee on Rules and Administration to review Senate rules and precedents applicable to impeachment trials (pending impeachment proceedings in the House against President Richard Nixon), the committee reported back various amendments to those Senate rules, which amendments were not considered in the Senate.

On July 29, 1974, during the pendency of an investigation in the House of alleged impeachable offenses committed by President Nixon, the Senate adopted Senate Resolution 370, directing its Committee on Rules and Administration to review any and all existing rules and precedents that apply to impeachment trials, with a view to recommending any necessary revisions.

The Committee on Rules and Administration reported (S. Rept. No. 93–1125) on Aug. 22, 1974, a resolution (S. Res. 390) amending the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials. The resolution was not considered by the Senate.

The amendments provided: (1) that the Chief Justice, when presiding over impeachment trials of

the President or Vice President, be administered the oath by the Presiding Officer; (2) that the term "person accused" in reference to the respondent, be changed in all cases to "person impeached"; (3) that the Presiding Officer rule on all questions of evidence "including, but not limited to, questions of relevancy, materiality, and redundancy," such decision to be voted upon on demand "without debate" and such vote to be "taken in accordance with the Standing Rules of the Senate"; (4) that a committee of 12 Senators may receive evidence "if the Senate so orders" the appointment of such a committee by the Presiding Officer; (5) that the Senate may order another hour than 12:30 m. o'clock for commencing impeachment proceedings; and other clarifying changes. Other amendments proposed certain rules governing the trial and procedures for voting on the articles: (1)

> XVI. All motions, objections, requests, or applications whether relating to the procedure of the Senate or relating immediately to the trial (including questions with respect to admission of evidence or other questions arising during the trial) made by the parties or their counsel shall be addressed to the Presiding Officer only, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table. . . .
>
> XIX. If a Senator wishes a question to be put to a witness, or to a manager, or to counsel of the person impeached, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer. The parties or their counsel may interpose objections to witnesses answering questions propounded at the request of any Senator and the merits of any such objection may be argued by the parties or their counsel. Ruling on any such objection shall be made as provided in Rule VII. It shall not be in order for any Senator to engage in colloquy.
>
> XX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions. A motion to close the doors may be acted upon without objection, or, if objection is heard, the motions shall be voted on without debate by the yeas and nays, which shall be entered on the record.
>
> XXI. All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour (unless the Senate otherwise orders) on each side. . . .
>
> XXIII. An article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial. Once voting has commenced on an article of impeachment, voting shall be continued until voting has been completed on all articles of impeachment unless the Senate adjourns for a period not to exceed one day or ad-

1. S. Res. 390, 120 CONG. REC. 29811–13, 93d Cong. 2d Sess., Aug. 22, 1974.

journs sine die. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person impeached shall be convicted upon any such article by the votes of two-thirds of the members present, the Senate may proceed to the consideration of such other matters as may be determined to be appropriate prior to pronouncing judgment. Upon pronouncing judgment, a certified copy of such judgment shall be deposited in the office of the Secretary of State. A motion to reconsider the vote by which any article of impeachment is sustained or rejected shall not be in order.

FORM OF PUTTING THE QUESTION ON EACH ARTICLE OF IMPEACHMENT

The Presiding Officer shall first state the question; thereafter each Senator, as his name is called, shall rise in his place and answer: guilty or not guilty.

XXIV. All the orders and decisions may be acted upon without objection, or, if objection is heard, the orders and decisions shall be voted on without debate by yeas and nays, which shall be entered on the record, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes here in allowed shall be for the whole deliberation on the final question, and not on the final question on each article of impeachment.

§ 11.3 The Senate amended its rules for impeachment trials in the 74th Congress to allow a committee of 12 Senators to receive evidence and take testimony.

On May 28, 1935, the Senate considered and agreed to a resolution (S. Res. 18) amending the rules of procedure and practice in the Senate when sitting on impeachment trials. The resolution added a new rule relating to the reception of evidence by a committee appointed by the Presiding Officer:

> *Resolved,* That in the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.[2]

Appearance of Managers

§ 11.4 The managers on the part of the House appear in the Senate to exhibit the articles of impeachment at the time messaged for that purpose by the Senate.

On Mar. 9, 1936,[3] the Senate messaged to the House its readiness to receive the managers on the part of the House to present articles of impeachment against U.S. District Judge Halsted Ritter at a specified time:

A message from the Senate, by Mr. Horne, its enrolling clerk, announced that the Senate had—

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida, agreeably to the notice communicated to the Senate and that at the hour of 1 o'clock p.m. on Tuesday, March 10, 1936, the Senate will receive the honorable managers on the part of the House of Representatives, in order that they may present and exhibit the said articles of impeachment against the said Halsted L. Ritter, United States district judge for the southern district of Florida.

On Mar. 10, the managers on the part of the House appeared in the Senate pursuant to the order and the following proceedings took place:

THE VICE PRESIDENT:[4] Will the Senator from North Carolina suspend in order to permit the managers on the part of the House of Representatives in the impeachment proceedings to appear and present the articles of impeachment?

MR. [JOSIAH W.] BAILEY [of North Carolina]: Mr. President, may I take my seat with the right to resume at the end of the impeachment proceedings?

THE VICE PRESIDENT: The Senator will have the floor when the Senate resumes legislative session.

2. 79 CONG. REC. 8309, 8310, 74th Cong. 1st Sess.

3. 80 CONG. REC. 3449, 74th Cong. 2d Sess.

4. John N. Garner (Tex.).

IMPEACHMENT OF HALSTED L. RITTER

At 1 o'clock p.m. the managers on the part of the House of Representatives of the impeachment of Halsted L. Ritter appeared below the bar of the Senate, and the secretary to the majority, Leslie L. Biffle, announced their presence, as follows:

I have the honor to announce the managers on the part of the House of Representatives to conduct the proceedings in the impeachment of Halsted L. Ritter, United States district judge in and for the southern district of Florida.

THE VICE PRESIDENT: The managers on the part of the House will be received and assigned their seats.

The managers, accompanied by the Deputy Sergeant at Arms of the House of Representatives, William K. Weber, were thereupon escorted by the secretary to the majority to the seats assigned to them in the area in front and to the left of the Chair.

THE VICE PRESIDENT: The Chair understands the managers on the part of the House of Representatives are ready to proceed with the impeachment. The Sergeant at Arms will make proclamation.

The Sergeant at Arms, Chesley W. Jurney, made proclamation, as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Halsted L. Ritter, United States district judge in and for the southern district of Florida.

MR. [JOSEPH T.] ROBINSON [of Arkansas]: I suggest the absence of a quorum.

THE VICE PRESIDENT: The clerk will call the roll.

The legislative clerk (Emery L. Frazier) galled the roll, and the following Senators answered to their names. . . .

THE VICE PRESIDENT: Eighty-six Senators have answered to their names. A quorum is present. The managers on the part of the House will proceed.

MR. MANAGER [HATTON W.] SUMNERS [of Texas]: Mr. President, the managers on the part of the House of Representatives are here present and ready to present the articles of impeachment which have been preferred by the House of Representatives against Halsted L. Ritter, a district judge of the United States for the southern district of Florida.

The House adopted the following resolution, which, with the permission of the Senate, I will read:

HOUSE RESOLUTION 439

IN THE HOUSE
OF REPRESENTATIVES,
March 6, 1936.

Resolved, That Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida; that said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Halsted L. Ritter of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment

against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Halsted L. Ritter to answer said impeachment, and demand his impeachment, conviction, and removal from office.

JOSEPH W. BYRNS,
Speaker of the House of Representatives.

Attest:

SOUTH TRIMBLE, *Clerk.*

[Seal of the House of Representatives.]

Mr. President, with the permission of the Vice President and the Senate, I will ask Mr. Manager Hobbs to read the articles of impeachment.

THE VICE PRESIDENT: Mr. Manager Hobbs will proceed, and the Chair will take the liberty of suggesting that he stand at the desk in front of the Chair, as from that position the Senate will probably be able to hear him better.

Mr. Manager Hobbs, from the place suggested by the Vice President, said:

Mr. President and gentlemen of the Senate:

ARTICLES OF IMPEACHMENT AGAINST HALSTED L. RITTER

House Resolution 422, Seventy-fourth Congress, second session, Congress of the United States of America

[Mr. Hobbs read the resolution and articles of impeachment].

MR. MANAGER SUMNERS: Mr. President, the House of Representatives, by protestation, saving themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Halsted L. Ritter, district judge of the United States for the southern district of Florida, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Halsted L. Ritter may be put to answer the misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives by the adoption of the articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of the said Halsted L. Ritter to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

THE VICE PRESIDENT: The Senate will take proper order and notify the House of Representatives.[5]

Organization of Senate as Court of Impeachment

§ 11.5 Following the appearance of the managers and their presentation of the articles of impeachment to the Senate, the oath is adminis-

5. 80 CONG. REC. 3485–89, 74th Cong. 2d Sess.

tered, the Senate organizes for the trial of impeachment and notifies the House thereof, the articles are printed for the use of the Senate, a summons is issued for the appearance of the respondent, and provision is made for payment of trial expenses.

On Mar. 10, 1936,[6] immediately following the presentation of articles of impeachment against Judge Halsted Ritter by the managers on the part of the House to the Senate, the following proceedings took place in the Senate:

MR. [HENRY F.] ASHURST [of Arizona]: Mr. President, I move that the senior Senator from Idaho [Mr. Borah], who is the senior Senator in point of service in the Senate, be now designated by the Senate to administer the oath to the Presiding Officer of the Court of Impeachment.

The motion was agreed to; and Mr. Borah advanced to the Vice President's desk and administered the oath to Vice President Garner as Presiding Officer, as follows:

> You do solemnly swear that in all things appertaining to the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

MR. ASHURST: Mr. President, at this time the oath should be administered to all the Senators, but I should make the observation that if any Senator desires to be excused from this service, now is the appropriate time to make known such desire. If there be no Senator who desires to be excused, I move that the Presiding Officer administer the oath to the Senators, so that they may form a Court of Impeachment.

THE VICE PRESIDENT:[7] Is there objection? The Chair hears none, and it is so ordered. Senators will now be sworn.

Thereupon the Vice President administered the oath to the Senators present, as follows:

> You do each solemnly swear that in all things appertaining to the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

THE VICE PRESIDENT: The Sergeant at Arms will now make proclamation that the Senate is sitting as a Court of Impeachment.

THE SERGEANT AT ARMS: Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Halsted L. Ritter, United States district judge for the southern district of Florida.

MR. ASHURST: Mr. President, I send to the desk an order, which I ask to have read and agreed to.

THE VICE PRESIDENT: The clerk will read.

6. 80 CONG. REC. 3488, 3489, 74th Cong. 2d Sess.

7. John N. Garner (Tex.).

The Chief Clerk (John C. Crockett) read as follows:

> *Ordered*, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida.

THE VICE PRESIDENT: Without objection, the order will be entered.

MR. ASHURST: Mr. President, I send another proposed order to the desk, and ask for its adoption.

THE VICE PRESIDENT: The clerk will read the proposed order.

The Chief Clerk read as follows:

> *Ordered*, That the articles of impeachment presented against Halsted L. Ritter, United States district judge for the southern district of Florida, be printed for the use of the Senate.

THE VICE PRESIDENT: Without objection, the order will be entered.

MR. ASHURST: Mr. President, I send a further order to the desk, and ask for its adoption.

THE VICE PRESIDENT: The clerk will read the proposed order.

The Chief Clerk read as follows:

> *Ordered*, That a summons to the accused be issued as required by the rules of procedure and practice in the Senate, when sitting for the trial of the impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida, returnable on Thursday, the 12th day of March 1936, at 1 o'clock in the afternoon.

THE VICE PRESIDENT: Is there objection? Without objection, the order will be entered.

MR. [CHARLES L.] MCNARY [of Oregon]: Mr. President, permit me to make an inquiry.

THE VICE PRESIDENT: The Senator will make it.

MR. MCNARY: What record is being made of the Senators who have taken their oaths as jurors?

THE VICE PRESIDENT: No record has been made so far as the Chair knows; but the Chair assumes that any Senator who was not in the Senate Chamber at the time the oath was administered to Senators en bloc will make the fact known to the Chair, so that he may take the oath at some future time.

MR. ASHURST: The Chair is correct in his statement in that any Senator who was not I resent when the oath was taken en bloc, and who desires to take the oath, may do so at any time before the admission of evidence begins.

MR. MCNARY subsequently said: Mr. President, I am advised that the able Senator from New Jersey [Mr. Barbour] will be absent from the city on next Thursday, and would like to be sworn at this time.

THE VICE PRESIDENT: The Senator from Oregon asks unanimous consent that the Senator from New Jersey may take the oath at this time as a juror in the impeachment trial of Halsted L. Ritter.

MR. [ELLISON D.] SMITH [of South Carolina]: Mr. President, in order to save time, I ask the same privilege. I was absent when Senators were sworn as jurors en bloc.

THE VICE PRESIDENT: If there are any other Senators in the Senate Chamber at the moment who did not take their oaths as jurors when Senators were sworn en bloc, it would be advisable that they make it known; and, if agreeable to the Senate, they may all be sworn as jurors at one time.

MR. ASHURST: The Senator from Texas [Mr. Sheppard], who was not present when other Senators were sworn, is now present, and wishes to be sworn.

THE VICE PRESIDENT: Is there objection to such action being taken at this time? The Chair hears none. Such Senators as are in the Chamber at this time who were not present when Senators were sworn en bloc as jurors will raise their right hands and be sworn.

Mr. Barbour, Mr. Overton, Mr. Sheppard, Mr. Smith, and Mr. Townsend rose, and the oath was administered to them by the Vice President.

MR. ASHURST: Mr. President, I move that the Senate, sitting as a Court of Impeachment, adjourn until Thursday next at 1 p.m.

The motion was agreed to; and (at 1 o'clock and 50 minutes p.m.) the Senate, sitting as a Court of Impeachment, adjourned until Thursday, March 12, 1936, at 1 p.m.

IMPEACHMENT OF HALSTED L. RITTER—EXPENSES OF TRIAL

MR. [JAMES F.] BYRNES [of South Carolina]: From the Committee to Audit and Control the Contingent Expenses of the Senate, I report back favorably, without amendment, Senate Resolution 244, providing for defraying the expenses of the impeachment proceedings relative to Halsted L. Ritter. I ask unanimous consent for the present consideration of the resolution.

THE VICE PRESIDENT: The resolution will be read.

The Chief Clerk read Senate Resolution 244, submitted by Mr. Ashurst on the 9th instant, and it was considered by unanimous consent and agreed to, as follows:

Resolved, That not to exceed $5,000 is authorized to be expended from the appropriation for miscellaneous items, contingent expenses of the Senate, to defray the expenses of the Senate in the impeachment trial of Halsted L. Ritter.

§ 11.6 Senators who have not taken the oath following the commencement of the trial take the oath not in legislative session but while the Senate is sitting as a Court of Impeachment, and the Journal Clerk maintains records of those Senators who have taken the oath.

On Mar. 12, 1936, the Senate was conducting legislative business before resolving itself into a Court of Impeachment for further proceedings in the trial of Judge Halsted L. Ritter. When a Senator who had not yet taken the oath for the impeachment trial indicated he wished to be sworn at that time, Vice President John N. Garner, of Texas, ruled as follows:

> THE VICE PRESIDENT: After a thorough survey of the situation, the best judgment of the Chair is that Senators who have not heretofore taken the oath as jurors of the court should take it after the Senate resolves itself into a court; all Senators who have not as yet taken the oath as jurors will take the oath at that time.[8]

Later on the same day, it was announced that the Journal Clerk

8. 80 CONG. REC. 3641, 74th Cong. 2d Sess.

had the duty to record the names of those Senators already having taken the oath, there being no other record thereof.(9)

Supplemental Rules for Trial

§ 11.7 For the Halsted Ritter impeachment trial, the Senate sitting as a Court of Impeachment adopted supplemental rules similar to those in the Harold Louderback trial.

On Mar. 12, 1936, the Court of Impeachment in the impeachment trial of Judge Ritter adopted supplemental rules:

> MR. [HENRY F.] ASHURST [of Arizona]: . . . Mr. President, in order that Senators, sitting as judges and jurors, may have an opportunity to study this matter, I ask for the adoption, after it shall have been read, of the order which I send to the desk. This is in haec verba the same order that was adopted in the Louderback case.
>
> THE VICE PRESIDENT:(10) The clerk will read.
>
> The Chief Clerk read as follows:
>
> *Ordered*, That in addition to the rules of procedure and practice in the Senate when sitting on impeachment trials, heretofore adopted, and supplementary to such rules, the following rules shall be applicable in the trial of the impeachment of Halsted L. Ritter, United States judge for the southern district of Florida:
>
> 1. In all matters relating to the procedure of the Senate, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.
>
> 2. In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers on the part of the House or counsel representing the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.
>
> 3. It shall not be in order for any Senator, except as provided in the rules of procedure and practice in the Senate when sitting on impeachment trials, to engage in colloquy or to address questions either to the managers on the part of the House or to counsel for the respondent, nor shall it be in order for Senators to address each other; but they shall address their remarks directly to the Presiding Officer and not otherwise.
>
> 4. The parties may, by stipulation in writing filed with the Secretary of the Senate and by him laid before the Senate or presented at the trial, agree upon any facts involved in the trial; and such stipulation shall be received by the Senate for all intents and purposes as though the facts therein agreed upon had been established by legal evidence adduced at the trial.
>
> 5. The parties or their counsel may interpose objection to witnesses answering questions propounded at the request of any Senator, and the merits of any such objection may be argued by the parties or their counsel; and the Presiding Officer may rule on any such objection, which ruling

9. *Id.* at p. 3646.

10. John N. Garner (Tex.).

shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without debate and without a division, unless the ayes and nays be demanded by one-fifth of the Members present, when the same shall be taken.(11)

§ 11.8 Supplemental rules adopted by the Senate for an impeachment trial are messaged to the House and referred to the managers on the part of the House.

On Apr. 6, 1936,(12) there was laid before the House a message from the Senate informing the House of the adoption of supplemental rules to govern the impeachment trial against Judge Halsted Ritter. They were referred to the managers:

The Speaker laid before the House the following order from the Senate of the United States:

In the Senate of the United States sitting for the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida

APRIL 3, 1936.

Ordered, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Halsted L. Ritter, United States district judge for the southern district of Florida, to the articles of impeachment, as amended, and also a copy of the order entered on the 12th ultimo prescribing supplemental rules for the said impeachment trial.

The answer and the supplemental rules to govern the impeachment trial were referred to the House managers and ordered printed.

Appearance and Answer of Respondent

§ 11.9 When and if the respondent appears before the Court of Impeachment, the return of the summons by the Sergeant at Arms is presented and the respondent files an entry of appearance.

On Mar. 12, 1936,(13) the following proceedings took place before the Court of Impeachment in the Halsted Ritter case:

THE VICE PRESIDENT:(14) . . . The Secretary will read the return of the Sergeant at Arms.

The Chief Clerk read as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE
SERGEANT AT ARMS.

The foregoing writ of summons addressed to Halsted L. Ritter and the

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11. 80 CONG. REC. 3648, 3649, 74th Cong. 2d Sess. For the adoption of identical supplemental rules in the Louderback case, see 6 Cannon's Precedents § 519.

12. 80 CONG. REC. 5020, 74th Cong. 2d Sess.

13. 80 CONG. REC. 3646, 3647, 74th Cong. 2d Sess.

14. John N. Garner (Tex.).

foregoing precept, addressed to me, were duly served upon the said Halsted L. Ritter by me by delivering true and attested copies of the same to the said Halsted L. Ritter at the Carlton Hotel, Washington, D.C., on Thursday, the 12th day of March 1936, at 11 o'clock in the forenoon of that day.

CHESLEY W. JURNEY,
Sergeant at Arms,
United States Senate.

THE VICE PRESIDENT: The Secretary of the Senate will administer the oath to the Sergeant at Arms.

The Secretary of the Senate, Edwin A. Halsey, administered the oath to the Sergeant at Arms, as follows:

You, Chesley W. Jurney, do solemnly swear that the return made by you upon the process issued on the 10th day of March 1936 by the Senate of the United States against Halsted L. Ritter, United States district judge for the southern district of Florida, is truly made, and that you have performed such service as therein described. So help you God.

THE VICE PRESIDENT: The Sergeant at Arms will make proclamation.

The Sergeant at Arms made proclamation as follows:

Halsted L. Ritter! Halsted L. Ritter! Halsted L. Ritter! United States district judge for the southern district of Florida, appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The respondent, Halsted L. Ritter, and his counsel, Frank P. Walsh, Esq., of New York City, N.Y., and Carl T. Hoffman, Esq., of Miami, Fla., entered the Chamber and were conducted to the seats assigned them in the space in front of the Secretary's desk, on the right of the Chair.

THE VICE PRESIDENT: Counsel for the respondent are advised that the Senate is now sitting for the trial of articles of impeachment exhibited by the House of Representatives against Halsted L. Ritter, United States district judge for the southern district of Florida.

MR. WALSH (of counsel): May it please you, Mr. President, and honorable Members of the Senate, I beg to inform you that, in response to your summons, the respondent, Halsted L. Ritter, is now present with his counsel and asks leave to file a forma1 entry of appearance.

THE VICE PRESIDENT: Is there objection? The Chair hears none, and the appearance will be filed with the Secretary, and will be read.

The Chief Clerk read as follows:

IN THE SENATE OF THE UNITED STATES OF AMERICA SITTING AS A COURT OF IMPEACHMENT

MARCH 12, 1936.

The United States of America v.
Halsted L. Ritter

The respondent, Halsted L. Ritter, having this day been served with a summons requiring him to appear before the Senate of the United States of America in the city of Washington, D.C., on March 12, 1936, at 1 o'clock afternoon to answer certain articles of impeachment presented against him by the House of Representatives of the United States of America, now appears in his proper person and also by his counsel, who are instructed by this respondent to inform the Senate that respondent stands ready to file his pleadings to such articles of impeachment within such reasonable period of time as may be fixed.

Dated March 12, 1936.

HALSTED L. RITTER,
Respondent.
CARL T. HOFFMAN,
FRANK P. WALSH,
Counsel for Respondent.

Parliamentarian's Note: The respondent has not appeared in all cases before the Senate. In this century, Judges Ritter, Harold Louderback, and Robert Archbald appeared in person, but Judge Charles Swayne appeared by attorney. President Andrew Johnson did not appear in 1868. Pursuant to Rule X of the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials, the respondent may appear by attorney, and if neither the respondent or his counsel appear, the trial proceeds as upon a plea of not guilty, under Rule VIII.

§ 11.10 The answer of the respondent in an impeachment proceeding is messaged to the House and referred to the managers on the part of the House.

On Apr. 6, 1936,[15] the answer of Judge Halsted Ritter to the articles of impeachment against him was messaged by order from the Senate to the House.

The answer was referred to the managers on the part of the House and ordered printed.

15. 80 CONG. REC. 5020, 74th Cong. 2d Sess.

Debate on Organizational Questions

§ 11.11 Where the Senate is sitting as a Court of Impeachment, organizational questions arising prior to trial are debatable.

On May 5, 1926, Vice President Charles G. Dawes, of Illinois, held that debate was in order on a motion to fix the opening date of an impeachment trial (of Judge George English), notwithstanding Rule XXIII (now Rule XIV), precluding debate during impeachment trials:

> The Chair will state that in impeachment trials had heretofore such questions have been considered as debatable, and that Rule XXIII, which refers to the decision of questions without debate, has been held to apply after the trial has actually commenced. The Senate has always debated the question of the time at which the trial should start, and the Chair is inclined to hold that debate is in order on a question of this sort.[16]

Likewise, the rule on debate was held not applicable to an organizational question preceding the trial of President Andrew Johnson.[17]

On Mar. 3, 1933, however, following the presentation to the

16. 67 CONG. REC. 8725, 69th Cong. 1st Sess.

17. 3 Hinds' Precedents § 2100.

Senate of articles of impeachment against Judge Harold Louderback by the managers on the part of the House, the Vice President, Charles Curtis, of Kansas, held that a motion to defer further consideration of the impeachment charges was not debatable.[18]

Appointment of Presiding Officer

§ 11.12 The Senate adopted in the Harold Louderback impeachment trial an order authorizing the Vice President or President pro tempore to name a Presiding Officer to perform the duties of the Chair.

On May 15, 1933, in the Senate sitting as a Court of Impeachment for the trial of Judge Louderback, the following order was adopted:

> *Ordered*, That during the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, the Vice President, in the absence of the President pro tempore, shall have the right to name in open Senate, sitting for said trial, a Senator to perform the duties of the Chair.
>
> The President pro tempore shall likewise have the right to name in open Senate, sitting for said trial, or, if absent, in writing, a Senator to perform the duties of the Chair; but such substitution in the case of either the Vice President or the President pro tempore shall not extend beyond an adjournment or recess, except by unanimous consent.[19]

Floor Privileges

§ 11.13 The Senate sitting as a Court of Impeachment may allow floor privileges during the trial to assistants and clerks, to the managers, and to the respondent's counsel.

On Apr. 8, 1936, requests were made in the Senate, sitting as a Court of Impeachment in the trial of Judge Halsted Ritter, to allow certain assistants and others the privilege of the Senate floor. By unanimous consent, the Senate extended floor privileges to the clerk of the House Committee on the Judiciary, a special agent of the FBI, and an assistant to the respondent's counsel.[20]

In the Louderback trial, requests were made by the House managers that the clerk of the House Committee on the Judiciary and a member of the bar be permitted to sit with the managers during the trial. The Senate voted to allow the requests, after the Presiding Officer of the Senate

18. 76 CONG. REC. 5473, 72d Cong. 2d Sess.

19. 77 CONG. REC. 3394, 73d Cong. 1st Sess.

20. 80 CONG. REC. 5132, 74th Cong. 2d Sess.

indicated he wished to submit the question to the Senate.[1]

Parliamentarian's Note: In an impeachment trial, the managers on the part of the House and counsel for the respondent have the privilege of the Senate floor under the Senate rules for impeachment trials.

§ 12. Conduct of Trial

The conduct of an impeachment trial is governed by the standing rules of the Senate on impeachment trials and by any supplemental rules or orders adopted by the Senate for a particular trial.[2]

An impeachment trial is a full adversary proceeding, and counsel are admitted to appear, to be heard, to argue on preliminary and interlocutory questions, to deliver opening and final arguments, to submit motions, and to present evidence and examine and cross-examine witnesses.[3]

The Presiding Officer rules on questions of evidence and on incidental questions subject to a demand for a formal vote, or may submit questions in the first instance to the Senate under Rule VII of the rules for impeachment trials.[4]

The trial may be temporarily suspended for the transaction of legislative business or for the reception of messages.[5]

Collateral Reference

Riddick, Procedure and Guidelines for Impeachment Trials in the United States Senate, S. Doc. No. 93–102 93d Cong. 2d Sess. (1974).

Opening Arguments

§ 12.1 The Senate sitting as a Court of Impeachment customarily adopts an order providing for opening arguments to be made by one person on behalf of the man-

1. 6 Cannon's Precedents § 522.
2. For the text of the rules for impeachment trials, see § 11, supra. For supplemental rules adopted by the Senate, see §§ 11.7, 11.8, supra. For examples of orders adopted during or for the trial, see §§ 11.12, supra (appointment of Presiding Officer), 12.1, infra (opening arguments), 12.9, infra (return of evidence), and 12.12, infra (final arguments).
3. See Rules XV–XXII of the rules for impeachment trials set out in § 11, supra.
4. See § 12.7, infra, for rulings on admissibility of evidence and §§ 12.3, 12.4, infra, for rulings on motions to strike articles.
5. See §§ 12.5, 12.6, infra. Rule XIII of the rules for impeachment trials provides that the adjournment of the Senate sitting as a Court of Impeachment shall not operate to adjourn the Senate, but that the Senate may then resume consideration of legislative and executive business.

agers and one person on behalf of the respondent.

On Apr. 6, 1936, the Senate sitting as a Court of Impeachment for the trial of Judge Halsted L. Ritter adopted the following order on opening arguments:

> *Ordered*, That the opening statement on the part of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.[6]

Identical orders had been adopted in past impeachment trials.[7]

Motions to Strike

§ 12.2 During an impeachment trial, the managers on the part of the House made and the Senate granted a motion to strike certain specifications from an article of impeachment.

On Apr. 3, 1936,[8] the following proceedings occurred on the floor of the Senate during the impeachment trial of Judge Halsted L. Ritter:

> MR. MANAGER [HATTON W.] SUMNERS [of Texas] (speaking from the desk in front of the Vice President): Mr. President, the suggestion which the managers desire to make at this time has reference to specifications 1 and 2 of article VII. These two specifications have reference to what I assume counsel for respondent and the managers as well, recognize are rather involved matters, which would possibly require as much time to develop and to argue as would be required on the remainder of the case.
>
> The managers respectfully move that those two counts be stricken. If that motion shall be sustained, the managers will stand upon the other specifications in article VII to establish article VII. The suggestion on the part of the managers is that those two specifications in article VII be stricken from the article.
>
> THE PRESIDING OFFICER:[9] What is the response of counsel for the respondent?
>
> MR. [CHARLES L.] MCNARY [of Oregon]: Mr. President, there was so much rumbling and noise in the Chamber that I did not hear the position taken by the managers on the part of the House.
>
> THE PRESIDING OFFICER: The managers on the part of the House have suggested that specifications 1 and 2 of article VII be stricken on their motion. . . .
>
> MR. HOFFMAN [of counsel]: Mr. President, the respondent is ready to file his answer to article I, to articles II and III as amended, and to articles IV, V, and VI. In view of the announcement just made asking that specifications 1 and 2 of article VII be stricken, it will be necessary for us to revise our

6. 80 CONG. REC. 4971, 74th Cong. 2d Sess.

7. See, for example, 6 Cannon's Precedents § 524 (Harold Louderback); 6 Cannon's Precedents § 509 (Robert Archbald).

8. 80 CONG. REC. 4899, 74th Cong. 2d Sess.

9. Nathan L. Bachman (Tenn.).

answer to article VII and to eliminate paragraphs 1 and 2 thereof. That can be very speedily done with 15 or 20 minutes if it can be arranged for the Senate to indulge us for that length of time.

THE PRESIDING OFFICER: Is there objection to the motion submitted on the part of the managers?

MR. HOFFMAN: We have no objection.

THE PRESIDING OFFICER: The motion is made. Is there objection? The Chair hears none, and the motion to strike is granted.

§ 12.3 Where the respondent in an impeachment trial moves to strike certain articles or, in the alternative, to require election as to which articles the managers on the part of the House will stand upon, the Presiding Officer may rule on the motion in the first instance subject to the approval of the Senate.

On Mar. 31, 1936, the respondent in an impeachment trial, Judge Halsted Ritter, offered a motion to strike certain articles, his purpose being to compel the House to proceed on the basis of Article I or Article II, but not both. On Apr. 3, the Chair (Presiding Officer Nathan L. Bachman, of Tennessee) ruled that the motion was not well taken and overruled it. The proceedings were as follows: [10]

The motion as duly filed by counsel for the respondent is as follows:

IN THE SENATE OF THE UNITED STATES OF AMERICA SITTING AS A COURT OF IMPEACHMENT. *The United States of America* v *Halsted L. Ritter, respondent*

MOTION TO STRIKE ARTICLE I, OR, IN THE ALTERNATIVE, TO REQUIRE ELECTION AS TO ARTICLES I AND II; AND MOTION TO STRIKE ARTICLE VII

The respondent, Halsted L. Ritter, moves the honorable Senate, sitting as a Court of Impeachment, for an order striking and dismissing article I of the articles of impeachment, or, in the alternative, to require the honorable managers on the part of the House of Representatives to elect as to whether they will proceed upon article I or upon article II, and for grounds of such motion respondent says:

1. Article II reiterates and embraces all the charges and allegations of article I, and the respondent is thus and thereby twice charged in separate articles with the same and identical offense, and twice required to defend against the charge presented in article I.

2. The presentation of the same and identical charge in the two articles in question tends to prejudice the respondent in his defense, and tends to oppress the respondent in that the articles are so framed as to collect, or accumulate upon the second article, the adverse votes, if any, upon the first article.

3. The Constitution of the United States contemplates but one vote of the Senate upon the charge contained in each article of impeachment, whereas articles I and II are constructed and arranged in such

10. 80 CONG. REC. 4656, 4657, 74th Cong. 2d Sess., Mar. 31, 1936, and 80 CONG. REC. 4898, 74th Cong. 2d Sess., Apr. 3, 1936.

form and manner as to require and exact of the Senate a second vote upon the subject matter of article I.

MOTION TO STRIKE ARTICLE VII

And the respondent further moves the honorable Senate, sitting as a Court of Impeachment, for an order striking and dismissing article VII, and for grounds of such motion, respondent says:

1. Article VII includes and embraces all the charges set forth in articles I, II, III, IV, V, and VI.

2. Article VII constitutes an accumulation and massing of all charges in preceding articles upon which the Court is to pass judgment prior to the vote on article VII, and the prosecution should be required to abide by the judgment of the Senate rendered upon such prior articles and the Senate ought not to countenance the arrangement of pleading designed to procure a second vote and the collection or accumulation of adverse votes, if any, upon such matters.

3. The presentation in article VII of more than one subject and the charges arising out of a single subject is unjust and prejudicial to respondent.

4. In fairness and justice to respondent, the Court ought to require separation and singleness of the subject matter of the charges in separate and distinct articles, upon which a single and final vote of the Senate upon each article and charge can be had.

FRANK P. WALSH,
CARL T. HOFFMAN,
Of Counsel for Respondent.

RULING ON THE MOTION OF RESPONDENT TO STRIKE OUT

THE PRESIDING OFFICER: On the motion of the honorable counsel for the respondent to strike article I of the articles of impeachment or, in the alternative, to require the honorable managers on the part of the House to make an election as to whether they will stand upon article I or upon article II, the Chair is ready to rule.

The Chair is clearly of the opinion that the motion to strike article I or to require an election is not well taken and should be overruled.

His reason for such opinion is that articles I and II present entirely different bases for impeachment.

Article I alleges the illegal and corrupt receipt by the respondent of $4,500 from his former law partner, Mr. Rankin.

Article II sets out as a basis for impeachment an alleged conspiracy between Judge Ritter; his former partner, Mr. Rankin; one Richardson, Metcalf & Sweeney; and goes into detail as to the means and manner employed whereby the respondent is alleged to have corruptly received the $4,500 above mentioned.

The two allegations, one of corrupt and illegal receipt and the other of conspiracy to effectuate the purpose, are, in the judgment of the Chair, wholly distinct, and the respondent should be called to answer each of the articles.

What is the judgment of the Court with reference to that particular phase of the motion to strike?

MR. [WILLIAM H.] KING [of Utah]: Mr. President, if it be necessary, I move that the ruling of the honorable Presiding Officer be considered as and stand for the judgment of the Senate sitting as a Court of Impeachment.

THE PRESIDING OFFICER: Is there objection? The Chair hears none, and the ruling of the Chair is sustained by the Senate.

§ 12.4 Where the respondent in an impeachment trial moves to strike an article on grounds that have not been previously presented in impeachment proceedings in the Senate, the Presiding Officer may submit the motion to the Senate sitting as a Court of Impeachment for decision.

On Mar. 31, 1936,[11] Judge Halsted Ritter, the respondent in an impeachment trial, moved to strike Article VII of the articles presented against him, on the following grounds:

1. Article VII includes and embraces all the charges set forth in articles I, II, III, IV, V, and VI.

2. Article VII constitutes an accumulation and massing of all charges in preceding articles upon which the Court is to pass judgment prior to the vote on article VII, and the prosecution should be required to abide by the judgment of the Senate rendered upon such prior articles and the Senate ought not to countenance the arrangement of pleading designed to procure a second vote and the collection or accumulation of adverse votes, if any, upon such matters.

3. The presentation in article VII of more than one subject and the charges arising out of a single subject is unjust and prejudicial to respondent.

4. In fairness and justice to respondent, the Court ought to require separation and singleness of the subject matter of the charges in separate and distinct articles, upon which a single and final vote of the Senate upon each article and charge can be had.

On Apr. 3, 1936, Presiding Officer Nathan L. Bachman, of Tennessee, submitted the motion to the Court of Impeachment for decision:[12]

THE PRESIDING OFFICER: . . . With reference to article VII of the articles of impeachment, formerly article IV, the Chair desires to exercise his prerogative of calling on the Court for a determination of this question.

His reason for so doing is that an impeachment proceeding before the Senate sitting as a Court is sui generis, partaking neither of the harshness and rigidity of the criminal law nor of the civil proceedings requiring less particularity.

The question of duplicity in impeachment proceedings presented by the honorable counsel for the respondent is a controversial one, and the Chair feels that it is the right and duty of each Member of the Senate, sitting as a Court, to express his views thereon.

Precedents in proceedings of this character are rare and not binding upon this Court in any course that it might desire to pursue.

The question presented in the motion to strike article VII on account of duplicity has not, so far as the Chair is advised, been presented in any impeachment proceeding heretofore had before this body.

The Chair therefore submits the question to the Court.

11. 80 CONG. REC. 4656, 4657, 74th Cong. 2d Sess.

12. *Id.* at p. 4898.

MR. [HENRY F.] ASHURST [of Arizona]: Mr. President, under the rules of the Senate, sitting as a Court of Impeachment, all such questions, when submitted by the Presiding Officer, shall be decided without debate and without division, unless the yeas and nays are demanded by one-fifth of the Members present, when the yeas and nays shall be taken.

THE PRESIDING OFFICER: The Chair, therefore, will put the motion. All those in favor of the motion of counsel for the respondent to strike article VII will say "aye." Those opposed will say "no."

The noes have it, and the motion in its entirety is overruled.

Suspension of Trial for Messages and Legislative Business

§ 12.5 While the Senate is sitting as a Court of Impeachment, the impeachment proceedings may be suspended by motion in order that legislative business be considered.

On Apr. 6, 1936, the Senate was sitting as a Court of Impeachment in the trial of Judge Halsted Ritter. A motion was made and adopted to proceed to the consideration of legislative business, the regular order for the termination of the session (5 :30 p.m.) not having arrived:

MR. [JOSEPH T.] ROBINSON [of Arkansas]: Mr. President, I move that the Court suspend its proceedings and that the Senate proceed to the consideration of legislative business; and I should like to make a brief statement as to the reasons for the motion. Some Senators have said that they desire an opportunity to present amendments to general appropriation bills which are pending, and that it will be necessary that the amendments be presented today in order that they may be considered by the committee having jurisdiction of the subject matter. I make the motion.

The motion was agreed to; and the Senate proceeded to the consideration of legislative business.[13]

§ 12.6 Impeachment proceedings in the Senate, sitting as a Court of Impeachment, may be suspended for the reception of a message from the House.

On Apr. 8, 1936, the Senate was sitting as a Court of Impeachment in the trial of Judge Halsted Ritter and examination of witnesses was in progress. A message was then received:

MR. [JOSEPH T.] ROBINSON [of Arkansas]: Mr. President, may I interrupt the proceedings for a moment? In order that a message may be received from the House of Representatives, I ask that the proceedings of the Senate sitting as a Court of Impeachment be suspended temporarily, and that the Senate proceed with the consideration of legislative business.

13. 80 CONG. REC. 4994, 74th Cong. 2d Sess.

THE PRESIDENT PRO TEMPORE:[14] Is there objection?

There being no objection, the Senate resumed the consideration of legislative business.

(The message from the House of Representatives appears elsewhere in the legislative proceedings of today's RECORD.)

IMPEACHMENT OF HALSTED L. RITTER

MR. ROBINSON: I move that the Senate, in legislative session, take a recess in order that the Court may resume its business.

The motion was agreed to; and the Senate, sitting as a Court of Impeachment, resumed the trial of the articles of impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida.[15]

Evidence

§ 12.7 The Presiding Officer at an impeachment trial rules on the admissibility of documentary evidence when a document is offered and specific objection is made thereto.

During the impeachment trial of Judge Halsted Ritter in the 74th Congress, the Presiding Officer set out guidelines under which rulings on the admissibility of evidence would be made. At issue was a large number of letters, to which a general objection was raised:[16]

MR. WALSH (of counsel): For the sake of saving time, we have these letters which have gotten into our possession, which have been given to us, and I suggest to the House managers that we have copies of this entire correspondence, a continuous list of them chronologically copied. We are going to ask you, if you will agree, that instead of reading these letters to Mr. Sweeny we be permitted to offer them all in evidence and give you copies of them.

MR. MANAGER [RANDOBPH] PERKINS [of New Jersey]: Mr. President, the managers on the part of the House object to that procedure. These letters are incompetent, immaterial, and irrelevant, and will only encumber the record.

MR. WALSH (of counsel): I desire to say that these letters predate and antedate this transaction. They show the effort that was being made, and they throw a strong light upon the proposition that this was not a champertous proceeding, but that it was a proceeding started by these men who had invested their money, and upon whose names and credit these bonds were sold. It is in answer to that.

THE PRESIDING OFFICER:[17] It is the ruling of the Chair that the letters shall be exhibited to the managers on the part of the House, and that the managers on the part of the House may make specific objections to each document to which they wish to lodge

14. Key Pittman (Nev.).

15. 80 CONG. REC. 5129, 74th Cong. 2d Sess.

16. 80 CONG. REC. 5245–53, 74th Cong. 2d Sess., Apr. 9, 1936.

17. Walter F. George (Ga.).

objection. There can be no ruling with respect to a large number of documents without specific objection.

MR. WALSH (of counsel): Will you take that suggestion of the Presiding Officer and go through these documents?

MR. MANAGER PERKINS: Mr. President, we understand that these letters are to be offered, and objection made as they are offered; or are we to examine the file and find out what documents we object to?

THE PRESIDING OFFICER: The ruling of the Chair was that the letters shall be exhibited to the managers on the part of the House, and that specific objection shall be lodged to documents to which the managers wish to lodge objections.

MR. MANAGER PERKINS: Mr. President, we will examine them during the recess and be prepared to follow that procedure. . . .

MR. MANAGER [SAM] HOBBS [of Alabama]: . . .

Q. Judge, I will ask you if the matter of the requirement of a supersedeas bond, and fixing the amount thereof, was one of the questions which would probably come up immediately after the final decree was rendered.

MR. WALSH (of counsel): I wish to object to that question for the reason that the record in the case and the papers in the case are the best evidence. I should like to have them here. I should like to have them identified, so that, if we thought it necessary, we could interrogate the witness on cross-examination.

THE PRESIDENT PRO TEMPORE:[18] The Presiding Officer thinks, if the witness knows matters that he himself attended to, the original documents not being in question, he has a right to answer the question.

[JUDGE RITTER]: A. I have no independent recollection of the matter at all. The official court records or this memorandum would have to control.

§ 12.8 Exhibits in evidence in an impeachment trial should be identified and printed in the Record if necessary.

On Apr. 8, 1936, a proposal was made in the Senate, sitting as a Court of Impeachment in the Halsted Ritter trial, as to the identification of certain exhibits:[19]

MR. WALSH (of counsel): Have you the letter that is referred to in that letter?

MR. MANAGER [RANDOLPH] PERKINS [of New Jersey]: I have not it at hand at this moment, but I have it here somewhere.

MR. WALSH (of counsel): I should like to see the letter if it is here.

MR. MANAGER PERKINS: I understood that Mr. Rankin would resume the stand at this time.

MR. [SHERMAN] MINTON [of Indiana]: Mr. President, far be it from me to suggest to eminent counsel engaged in this case how they should conduct a lawsuit, but I respectfully suggest that they identify their exhibits in some way, and also the papers that are introduced in the record, so that we may keep track of them.

18. Key Pittman (Nev.).

19. 80 CONG. REC. 5137, 74th Cong. 2d Sess.

THE PRESIDING OFFICER:[20] The Chair takes the liberty of suggesting that the statement made by the Senator from Indiana is a wise one, and is followed in court. The Chair sees no reason why identification should not be made of the exhibits which are received in evidence. Counsel will proceed.

Certain exhibits were ordered printed, while others were merely introduced in evidence. One exhibit was printed in the Record by unanimous consent.[21]

MR. [HOMER T.] BONE [of Washington]: Mr. President, may I inquire of the Chair if all the exhibits counsel are introducing are to be printed in the daily Record?

THE PRESIDING OFFICER:[1] The Chair thinks not.

MR. BONE: I am wondering how we may later scrutinize them if counsel are going to rely on them.

THE PRESIDING OFFICER: Some of the exhibits are being ordered printed and others are merely introduced in evidence for the use of counsel upon argument and consideration of the court.

MR. WALSH (of counsel): I had supposed that all correspondence would be printed in full in the Record.

THE PRESIDING OFFICER: The Chair assumes that all documents and correspondence which have been read or which have been ordered printed have been or will be printed in the Record.

MR. WALSH (of counsel): I think perhaps a mere reference to this order would be sufficient to advise those of the Senators who have not heard it. However, as to this particular order, I will ask that it be printed in the Record.

THE PRESIDING OFFICER: Is there objection?

Federal income-tax returns of the respondent, offered in evidence by the managers, were printed in full in the, Record.[2]

§ 12.9 The Senate sitting as a Court of Impeachment may at the conclusion of the trial provide by order for the return of evidence to proper owners or officials.

On Apr. 16, 1936, the Senate sitting as a Court of Impeachment in the trial of Judge Halsted Ritter adopted, at the conclusion of trial, orders for the return of evidence:[3]

Ordered, That the Secretary be, and he is hereby, directed to return to A. L. Rankin, a witness on the part of the United States, the two documents showing the lists of cases, pending and closed, in the law office of said A. L. Rankin, introduced in evidence during the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida. . . .

Ordered, That the Secretary of the Senate be, and he is hereby, directed

20. William H. King (Utah).

21. 80 CONG. REC. 5341, 74th Cong. 2d Sess., Apr. 10, 1936.

1. Matthew M. Neely (W. Va.).

2. 80 CONG. REC. 5256–61, 74th Cong. 2d Sess., Apr. 9, 1936.

3. 80 CONG. REC. 5558, 5559, 74th Cong. 2d Sess.

to return to the clerk of the United States District Court for the Southern District of Florida and the clerk of the circuit court, Palm Beach County, Fla., sitting in chancery, the original papers filed in said courts which were offered in evidence during the proceedings of the Senate sitting for the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida.

In the Harold Louderback trial, the Senate returned papers by order to a U.S. District Court.[4]

Witnesses

§ 12.10 The Senate sitting as a Court of Impeachment has adopted orders requiring witnesses to stand while giving testimony during impeachment trials.

On Apr. 6, 1936, during the trial of Judge Halsted Ritter before the Senate sitting as a Court of Impeachment, an order was adopted as to the position of witnesses while testifying:[5]

MR. [WILLIAM H.] KING [of Utah]: Pursuant to the practice heretofore observed in impeachment cases, I send to the desk an order, and ask for its adoption.

THE VICE PRESIDENT:[6] The order will be stated.

The legislative clerk read as follows:

Ordered, That the witnesses shall stand while giving their testimony.

THE VICE PRESIDENT: Is there objection to the adoption of the order? The Chair hears none, and the order is entered.

§ 12.11 The respondent may take the stand and be examined and cross-examined at his impeachment trial.

On Apr. 11, 1936, Judge Halsted Ritter, the respondent in a trial of impeachment, was called as a witness by his counsel. He was cross examined by the managers on the part of the House and by Senators sitting on the Court of Impeachment, who submitted their questions in writing.[7]

Parliamentarian's Note: The respondent in an impeachment trial is not required to appear, and the trial may proceed in his absence. Impeachment rules VIII and IX provide for appearance and answer by attorney and provide for continuance of trial in the absence of any appearance. The respondent first testified in his own behalf in the Robert Archbald impeachment trial in 1913, and Judge Harold Louderback testified at his trial in 1933.[8]

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4. 77 CONG. REC. 4142, 73d Cong. 1st Sess., May 25, 1933.

5. 80 CONG. REC. 4971, 74th Cong. 2d Sess. See also 6 Cannon's Precedents § 488.

6. John N. Garner (Tex.).

7. 80 CONG. REC. 5370–86, 74th Cong. 2d Sess.

8. See 6 Cannon's Precedents §§ 511 (Archbald), 524 (Louderback).

Final Arguments

§ 12.12 Following the presentation of evidence in an impeachment trial, the Court of Impeachment adopts an order setting the time to be allocated for final arguments.

On Apr. 13, 1936, the Senate sitting as a Court of Impeachment in the trial of Judge Halsted Ritter adopted, at the close of the presentation of evidence, an order limiting final arguments:

> *Ordered*, That the time for final argument of the case of Halsted L. Ritter shall be limited to 4 hours, which said time shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, and the time thus assigned to each side shall be divided as each side for itself may determine.(9)

9. 80 CONG. REC. 5401, 74th Cong. 2d Sess. An identical order was adopted in the Harold Louderback impeachment trial (see 6 Cannon's Precedents § 524).

Orders for final arguments have varied as to the time and number of arguments permitted, although in one instance—the trial of President Andrew Johnson—no limitations were imposed as to the time for and number of final arguments. See 3 Hinds' Precedents § 2434.

§ 13. Voting; Deliberation and Judgment

The applicable rules on impeachment trials provide for deliberation behind closed doors, for a vote on the articles of impeachment, and for pronouncement of judgment. (See Rules XXIII and XXIV.)(10) Except for organizational questions, debate is in order during an impeachment trial only while the Senate is deliberating behind closed doors, at which time the respondent, his counsel, and the managers are not present. Rule XXIV, of the rules for impeachment trials, provides that orders and decisions shall be determined by the yeas and nays without debate.(11)

Under article I, section 3, clause 6 of the U.S. Constitution, a two-thirds vote is required to convict the respondent on an article of impeachment, the articles being voted on separately under Rule XXIII of the rules for impeachment trials.(12)

10. The Senate rules on impeachment are set out in § 11, supra.

11. For debate on organizational questions before trial commences, see § 11.11, supra.

12. Overruled in the Ritter impeachment trial was a point of order that the respondent was not properly convicted, a two-thirds vote having been obtained on an article which cumulated offenses (see §§ 13.5, 13.6, infra).

Article I, section 3, clause 7 provides for removal from office upon conviction and also allows the further judgment of disqualification from holding and enjoying "any office of honor, trust or profit under the United States." In the most recent conviction by the Senate, of Judge Ritter in 1936, it was held for the first time that no vote was required on removal following conviction, inasmuch as removal follows automatically from conviction under article II, section 4.(13) But the further judgment of disqualification requires a majority vote.(14)

Cross References

Constitutional provisions governing judgment in impeachment trials, see § 1, supra.

Deliberation, vote and judgment in the Ritter impeachment trial, see § 18, infra.

Grounds for impeachment and conviction generally, see § 3, supra.

Judicial review of impeachment convictions, see § 1, supra.

Trial and judgment where person impeached has resigned, see § 2, supra.

Collateral Reference

Riddick, Procedure and Guidelines for Impeachment Trials in the United States Senate, S. Doc. No. 93–102, 93d Cong. 2d Sess. (1974).

13. See § 13.9, infra.

14. See § 13.10, infra.

Deliberation Behind Closed Doors

§ 13.1 Final arguments having been presented to a Court of Impeachment, the Senate closes the doors in order to deliberate in closed session, and the respondent, his counsel, and the managers withdraw.

On Apr. 15, 1936, the Senate convened sitting as a Court of Impeachment in the trial of Judge Halsted Ritter. Final arguments had been completed on the preceding day. The following proceedings took place:

IMPEACHMENT OF HALSTED L. RITTER

The Senate, sitting for the trial of the articles of impeachment against Halsted L. Ritter, judge of the United States District Court for the Southern District of Florida, met at 12 o'clock meridian.

The respondent, Halsted L. Ritter, with his counsel, Frank P. Walsh, Esq., and Carl T. Hoffman, Esq., appeared in the seats assigned them.

THE VICE PRESIDENT:(15) The Sergeant at Arms by proclamation will open the proceedings of the Senate sitting for the trial of the articles of impeachment.

The Sergeant at Arms made the usual proclamation.

On request of Mr. Ashurst, and by unanimous consent, the reading of the

15. John N. Garner (Tex.).

Journal of the proceedings of the Senate, sitting for the trial of the articles of impeachment, for Tuesday, April 14, 1936, was dispensed with, and the Journal was approved. . . .

THE VICE PRESIDENT: Eighty-six Senators have answered to their names. A quorum is present.

DELIBERATION WITH CLOSED DOORS

MR. [HENRY F.] ASHURST [of Arizona]: I move that the doors of the Senate be closed for deliberation.

THE VICE PRESIDENT: The question is on the motion of the Senator from Arizona.

The motion was agreed to.

The respondent and his counsel withdrew from the Chamber.

The galleries having been previously cleared, the Senate (at 12 o'clock and 8 minutes p.m.) proceeded to deliberate with closed doors.

At 4 o'clock and 45 minutes p.m. the doors were opened.(16)

Rule XX of the rules of the Senate on impeachment trials provides: "At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions."

Rule XXIV provides for debate, during impeachment trials, only when the Senate is deliberating in closed session, wherein "no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate. . . . The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not on the final question on each article of impeachment."

Orders for Time and Method of Voting

§ 13.2 Following or during deliberation behind closed doors, the Senate sitting as a Court of Impeachment adopts orders to provide the time and method of voting.

On Apr. 15, 1936, the Senate, sitting as a Court of Impeachment in the trial of Judge Halsted Ritter, opened its doors after having deliberated in closed session. By unanimous consent, the order setting a date for the taking of a vote was published in the Record:

Ordered, by unanimous consent, That when the Senate, sitting as a Court, concludes its session on today it take a recess until 12 o'clock tomorrow, and that upon the convening of the

16. 80 CONG. REC. 5505, 74th Cong. 2d Sess. In the Ritter case, the managers on the part of the House were not present when the Senate closed its doors. Where they are present, they withdraw. See, for example, 6 Cannon's Precedents § 524 (Harold Louderback).

Court on Friday it proceed to vote upon the various articles of impeachment.

Senate Majority Leader Joseph T. Robinson, of Arkansas, explained the purpose of the agreement, which was to postpone the vote until Friday so that a number of Senators who wished to vote could be present for that purpose.(17)

On Apr. 16, 1936, the Senate, after deliberating behind closed doors, agreed to an order providing a method of voting:

Ordered, That upon the final vote in the pending impeachment of Halsted L. Ritter, the Secretary shall read the articles of impeachment separately and successively, and when the reading of each article shall have been concluded the Presiding Officer shall state the question thereon as follows:

"Senators, how say you? Is the respondent, Halsted L. Ritter, guilty or not guilty?"

Thereupon the roll of the Senate shall be called, and each Senator as his name is called, unless excused, shall arise in his place and answer "guilty" or "not guilty." (18)

This method of consideration—that of reading and voting on the articles separately and in sequence—has been used consistently in impeachment proceedings, though in the Andrew Johnson trial Article XI was first voted on.(19)

The form of putting the question and calling the roll in the Johnson trial also differed from current practice, the Chief Justice in that case putting the question "Mr. Senator ———, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?" (20)

Recognition of Pairs

§ 13.3 Pairs are not recognized during the vote by a Court of Impeachment on articles of impeachment.

On Apr. 17, 1936, the Senate sitting as a Court of Impeachment in the trial of Judge Halsted Ritter convened to vote on the articles of impeachment. Preceding the vote, Senator Joseph T. Robinson, of Arkansas, the Majority Leader, announced as follows:

I have been asked to announce also that pairs are not recognized in this proceeding. (1)

Likewise, it was announced on May 23, 1933, preceding the vote

17. 80 CONG. REC. 5505, 74th Cong. 2d Sess.

18. Id. at p. 5558.

19. See 3 Hinds' Precedents §§ 2439–2443. 6 Cannon's Precedents § 524.

20. 3 Hinds' Precedents § 2440.

1. 80 CONG. REC. 5602, 74th Cong. 2d Sess.

on the articles impeaching Judge Harold Louderback, that pairs would not be recognized.(2)

Excuse or Disqualification From Voting

§ 13.4 Members of the House and Senate have been excused but not disqualified from voting on articles of impeachment.

On Mar. 12, 1936, preceding the appearance of respondent Judge Halsted Ritter before the Senate sitting as a Court of Impeachment, Senator Edward P. Costigan, of Colorado, asked to be excused from participation in the impeachment proceedings. He inserted in the Record a statement assigning the reasons for his request, based on personal acquaintance with the respondent.(3) Similarly, on Mar. 31, Senator Millard E. Tydings, of Maryland, asked to be excused from participating in the proceedings and from voting on the ground of family illness.(4)

During the consideration in the House of the resolution impeaching Senator William Blount, of Tennessee, his brother, Mr. Thomas Blount, of North Carolina, a Member of the House, asked to be excused from voting on any matter affecting his brother.(5)

In the impeachment of Judge Harold Louderback, two Members of the Senate were excused from voting thereon since they had been Members of the House when Judge Louderback was impeached.(6)

The issue of disqualification from voting either in the House on impeachment or in the Senate on conviction has not been directly presented. During the trial of President Andrew Johnson, a Senator offered and then withdrew a challenge to the competency of the President pro tempore of the Senate, Benjamin F. Wade, of Ohio, to preside over or vote in the trial of the President. Before withdrawing his objection, Senator Thomas A. Hendricks, of Indiana, argued that the President pro tempore was an interested party because of his possible succession to the Presidency. The President pro tempore voted on that occasion.(7)

2. 77 CONG. REC. 4083, 73d Cong. 1st Sess.

3. 80 CONG. REC. 3646, 74th Cong. 2d Sess.

4. *Id.* at p. 4654.

5. 3 Hinds' Precedents § 2295.

6. 6 Cannon's Precedents § 516.

7. 3 Hinds' Precedents § 2061.

During the Johnson impeachment, succession to the Presidency was governed by an Act of 1792 providing that the President pro tempore and then the Speaker of the House should succeed to the Presidency,

Speaker Schuyler Colfax, of Indiana, chose to vote on the resolution impeaching President Johnson in 1868, and delivered the following explanatory statement:

> The Speaker said: The occupant of the Chair cannot consent that his constituents should be silent on so grave a question, and therefore, as a member of this House, he votes "ay." On agreeing to the resolution, there are—yeas 126, nays 47. So the resolution is adopted.(8)

It has been generally determined in the House that the individual Member should decide the question whether he is disqualified from voting because of a personal interest in the vote.(9)

after the Vice President. 1 Stat. 239. Presently, 3 USC § 19 provides for the Speaker and then the President pro tempore to succeed to the Presidency after the Vice President, but the 25th amendment to the U.S. Constitution provides a mechanism for selection of a Vice President upon vacancy in that office, by succession to the Presidency or otherwise.

8. 66 CONG. GLOBE 1400, 40th Cong. 2d Sess., Feb. 24, 1868.

In the Johnson impeachment, the minority party members generally refrained from voting on the ballot for the choice of managers following the adoption of articles, where a request to excuse all who sought to be excused had been objected to. 3 Hinds' Precedents § 2417.

9. See Rule VIII clause 1 and comments thereto, *House Rules and Manual* §§ 656–659 (1973).

Points of Order Against Vote

§ 13.5 In making a point of order against the result of a vote on an article of impeachment, a Senator may state the grounds for his point of order but debate or argument thereon is not in order.

On Apr. 17, 1936, following a two-thirds vote for conviction by the Senate, sitting as a Court of Impeachment in the trial of Judge Halsted Ritter, Senator Warren R. Austin, of Vermont, made a point of order against the vote. The President pro tempore, Key Pittman, of Nevada, subsequently ruled against allowing debate or argument on that point of order: (10)

> MR. AUSTIN: Mr. President, a point of order.
>
> THE PRESIDENT PRO TEMPORE: The Senator will state the point of order.
>
> MR. AUSTIN: I make the point of order that the respondent is not guilty, not having been found guilty by a vote of two-thirds of the Senators present.
>
> Article VII is an omnibus article, the ingredients of which, as stated on page 36, paragraph 4, are——

In Senate practice, no rule requires a Member of the Senate to withdraw from voting because of personal interest, but a Member may be excused from voting under Rule XII clause 2, *Senate Manual* § 12.2 (1973).

10. 80 CONG. REC. 5606, 74th Cong. 2d Sess.

MR. [ROBERT M.] LA FOLLETTE [Jr., of Wisconsin]: Mr. President, I rise to a parliamentary inquiry.

THE PRESIDENT PRO TEMPORE: The Senator will state it.

MR. LA FOLLETTE: Is debate upon the point of order in order?

THE PRESIDENT PRO TEMPORE: It is not in order.

MR. LA FOLLETTE: I ask for the regular order.

MR. AUSTIN: Mr. President, a parliamentary inquiry.

THE PRESIDENT PRO TEMPORE: The Senator will state it.

MR. AUSTIN: In stating a point of order, is it not appropriate to state the grounds of the point of order?

THE PRESIDENT PRO TEMPORE: Providing the statement is not argument.

MR. AUSTIN: That is what the Senator from Vermont is undertaking to do, and no more.

THE PRESIDENT PRO TEMPORE: If the statement is argument, the point of order may be made against the argument.

MR. AUSTIN: The first reason for the point of order is that here is a combination of facts in the indictment, the ingredients of which are the several articles which precede article VII, as seen by paragraph marked 4 on page 36. The second reason is contained in the Constitution of the United States, which provides that no person shall be convicted without the concurrence of two-thirds of the members present. The third reason is that this matter has been passed upon judicially, and it has been held that an attempt to convict upon a combination of circumstances——

MR. [GEORGE] MCGILL [of Kansas]: Mr. President, a parliamentary inquiry.

MR. AUSTIN: Of which the respondent has been found innocent would be monstrous. I refer to the case of *Andrews* v. *King* (77 Maine, 235).

MR. [JOSEPH T.] ROBINSON [of Arkansas]: Mr. President, I rise to a point of order.

THE PRESIDENT PRO TEMPORE: The Senator from Arkansas will state the point of order.

MR. ROBINSON: The Senator from Vermont is not in order.

THE PRESIDENT PRO TEMPORE: The point of order is sustained. The Senator from Vermont is making an argument on the point of order he has made.

§ 13.6 During the Halsted Ritter impeachment trial, the President pro tempore overruled a point of order against a vote of conviction on the seventh article (charging general misbehavior), where the point of order was based on the contention that the article repeated and combined facts, circumstances, and charges contained in the preceding articles.

On Apr. 17, 1936,(11) the President pro tempore, Key Pittman, of Nevada, stated that the Senate had by a two-thirds vote adjudged the respondent Judge Ritter guilty as charged in Article VII of the articles of impeachment. He over-

11. 80 CONG. REC. 5606, 74th Cong. 2d Sess.

ruled a point of order that had been raised against the vote, as follows:

MR. [WARREN R.] AUSTIN [of Vermont]: Mr. President, a point of order.

THE PRESIDENT PRO TEMPORE: The Senator will state the point of order.

MR. AUSTIN: I make the point of order that the respondent is not guilty, not having been found guilty by a vote of two-thirds of the Senators present.

Article VII is an omnibus article, the ingredients of which, as stated on page 36, paragraph 4, are——

A point of order was made against debate or argument on the point of order.(12)

MR. AUSTIN: The first reason for the point of order is that here is a combination of facts in the indictment, the ingredients of which are the several articles which precede article VII, as seen by paragraph marked 4 on page 36. The second reason is contained in the Constitution of the United States, which provides that no person shall be convicted without the concurrence of two-thirds of the members present. The third reason is that this matter has been passed upon judicially, and it has been held that an attempt to convict upon a combination of circumstances——

MR. [GEORGE] MCGILL [of Kansas]: Mr. President, a parliamentary inquiry.

MR. AUSTIN: Of which the respondent has been found innocent would be monstrous. I refer to the case of *Andrews* v. *King* (77 Maine, 235).

MR. [JOSEPH T.] ROBINSON [of Arkansas]: Mr. President, I rise to a point of order.

THE PRESIDENT PRO TEMPORE: The Senator from Arkansas will state the point of order.

MR. ROBINSON: The Senator from Vermont is not in order.

THE PRESIDENT PRO TEMPORE: The point of order is sustained. The Senator from Vermont is making an argument on the point of order he has made.

MR. AUSTIN: Mr. President, I have concluded my motion.

THE PRESIDENT PRO TEMPORE: A point of order is made as to article VII, in which the respondent is charged with general misbehavior. It is a separate charge from any other charge, and the point of order is overruled.

Judgment as Debatable

§ 13.7 An order of judgment in an impeachment trial is not debatable.

On Apr. 17, 1936, the President pro tempore, Key Pittman, of Nevada, answered a parliamentary inquiry relating to debate on an order of judgment in the impeachment trial of Halsted Ritter:

THE PRESIDENT PRO TEMPORE: The Senator from Arizona submits an order, which will be read.

The legislative clerk read as follows:

Ordered further, That the respondent, Halsted L. Ritter, United States district judge for the southern district of Florida, be forever disqualified from holding and enjoying any

12. See § 13.5 supra.

office of honor, trust, or profit under the United States.

MR. [DANIEL O.] HASTINGS [of Delaware]: Mr. President, I understand that matter is subject to debate.

MR. [HENRY F.] ASHURST [of Arizona]: No, Mr. President. The yeas and nays are in order, if Senators wish, but it is not subject to debate.

MR. HASTINGS: Will the Chair state just why it is not subject to debate?

THE PRESIDENT PRO TEMPORE: The Chair is of opinion that the rules governing impeachment proceedings require that all orders or decisions be determined without debate, but the yeas and nays may be ordered.(13)

Divisibility of Order of Judgment

§ 13.8 An order of judgment on conviction in an impeachment trial is divisible where it contains provisions for removal from office and for disqualification of the respondent.

On Apr. 17, 1936, Senator Henry F. Ashurst, of Arizona, offered an order of judgment following the conviction of Halsted Ritter on an article of impeachment. It was agreed, before the order was withdrawn, that it was divisible:(14)

The Senate hereby orders and decrees and it is hereby adjudged that the respondent, Halsted L. Ritter, United States district judge for the southern district of Florida, be, and he is hereby, removed from office, and that he be, and is hereby, forever disqualified to hold and enjoy any office of honor, trust, or profit under the United States, and that the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate, and transmit a copy of same to each.

MR. [ROBERT M.] LA FOLLETTE [Jr., of Wisconsin]: Mr. President, I ask for a division of the question.

MR. ASHURST: Mr. President, to divide the question is perfectly proper. Any Senator who desires that the order be divided is within his rights in thus asking that it be divided. The judgment of removal from office would ipso facto follow the vote of guilty.

MR. [WILLIAM E.] BORAH [of Idaho]: Mr. President, do I understand there is to be a division of the question?

MR. LA FOLLETTE: I have asked for a division of the question.

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13. 80 CONG. REC. 5607, 74th Cong. 2d Sess.

14. 80 CONG. REC. 5606, 5607, 74th Cong. 2d Sess.

In the trial of Judge Robert Archbald, a division was demanded on the order of judgment, which both removed and disqualified the respondent. 6 Cannon's Precedents § 512. A division of the question was likewise demanded in the West Humphreys impeachment. See 3 Hinds' Precedents § 2397. In the John Pickering impeachment, the Court of Impeachment voted on removal but did not consider disqualification. See 3 Hinds' Precedents § 2341.

MR. [GEORGE W.] NORRIS [of Nebraska]: Mr. President, it seems to me the chairman of the Committee on the Judiciary should submit two orders. One follows from what we have done. The other does not follow, but we ought to vote on it.

MR. ASHURST: I accept the suggestion. I believe the Senator from Nebraska is correct. Therefore, I withdraw the order sent to the desk.

Vote on Removal Following Conviction

§ 13.9 On conviction of the respondent on an article of impeachment, no vote is required on judgment of removal, since removal follows automatically after conviction under section 4, article II, of the U.S. Constitution.

On Apr. 17, 1936, following the conviction by the Senate, sitting as a Court of Impeachment, of Halsted Ritter on Article VII of the articles of impeachment, President pro tempore Key Pittman, of Nevada, ruled that no vote was required on judgment of removal: (15)

THE PRESIDENT PRO TEMPORE: The Senator from Arizona, having withdrawn the first order, submits another one, which the clerk will read.

The legislative clerk read as follows:

Ordered, That the respondent, Halsted L. Ritter, United States district judge for the southern district of Florida, be removed from office.

THE PRESIDENT PRO TEMPORE: Are the yeas and nays desired on the question of agreeing to the order?

MR. [HENRY F.] ASHURST [of Arizona]: The yeas and nays are not necessary.

MR. [HIRAM W.] JOHNSON [of California]: Mr. President, how, affirmatively, do we adopt the order, unless it is put before the Senate, and unless the roll be called upon it or the Senate otherwise votes?

THE PRESIDENT PRO TEMPORE: The Chair is of the opinion that the order would follow the final vote as a matter of course, and no vote is required.

MR. ASHURST: Mr. President, the vote of guilty, in and of itself, is sufficient without the order, under the Constitution, but to be precisely formal I have presented the order, in accordance with established precedent, and I ask for a vote on its adoption.

MR. [DANIEL O.] HASTINGS [of Delaware]: Mr. President, will the Senator yield?

MR. ASHURST: I yield.

MR. HASTINGS: Just what is the language in the Constitution as to what necessarily follows conviction on an article of impeachment?

MR. [GEORGE] MCGILL, [of Kansas]: It is found in section 4, article II, of the Constitution.

MR. HASTINGS: What is the language of the Constitution which makes removal from office necessary, and to follow as a matter of course?

MR. MCGILL: Mr. President——

MR. ASHURST: If the Senator from Kansas has the reference, I shall ask him to read it.

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15. 80 CONG. REC. 5607, 74th Cong. 2d Sess.

MR. MCGILL: Section 4 of article II of the constitution reads:

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

MR. HASTINGS: I thank the Senator. Then may I suggest was not the Chair correct in the first instance? Does not the removal from office follow without any vote of the Senate?

THE PRESIDENT PRO TEMPORE: That was the opinion of the Chair.

MR. HASTINGS: I think the President pro tempore was correct.

THE PRESIDENT PRO TEMPORE: The Chair will then direct that the order be entered.

MR. [GEORGE W.] NORRIS [of Nebraska]: Mr. President, upon the action of the Senate why does not the Chair make the proper declaration without anything further?

THE PRESIDENT PRO TEMPORE: The Chair was about to do so. The Chair directs judgment to be entered in accordance with the vote of the Senate, as follows:

JUDGMENT

> The Senate having tried Halsted L. Ritter, United States district judge for the southern district of Florida, upon seven several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of charges contained therein: It is therefore
>
> *Ordered and adjudged,* That the said Halsted L. Ritter be, and he is hereby, removed from office.

Parliamentarian's Note: The procedure and ruling in the Ritter impeachment trial, for automatic removal on conviction of at least one article of impeachment, differs from the practice in three prior cases where the Senate sitting as a Court of Impeachment has voted to convict. In the John Pickering trial, the vote was taken, in the affirmative, on the question of removal, following the vote on the articles; the question of disqualification was apparently not considered.(16) In the West Humphreys impeachment, following conviction on five articles of impeachment, the Court of Impeachment proceeded to vote, under a division of the question, on removal and disqualification, both decided in the affirmative.(17) And in the Robert Archbald impeachment, the Court of Impeachment voted first on removal and then on disqualification, under a division of the question. Both orders were voted in the affirmative.(18)

Vote Required for Disqualification

§ 13.10 The question of disqualification from holding an office of honor, trust, or profit under the United States, following conviction and

16. 3 Hinds' Precedents § 2341.

17. 3 Hinds' Precedents § 2397.

18. 6 Cannon's Precedents § 512.

judgment of removal in an impeachment trial, requires only a majority vote of the Senate sitting as a Court of Impeachment.

On Apr. 17, 1936, the Senate sitting as a Court of Impeachment in the trial of Halsted Ritter proceeded to consider an order disqualifying the respondent from ever holding an office of honor, trust, or profit under the United States; the court had convicted the respondent and he had been ordered removed from office.

A parliamentary inquiry was propounded as to the vote required on the question of disqualification:

THE PRESIDENT PRO TEMPORE:[19] The Senator from Arizona submits an order, which will be read.

The legislative clerk read as follows:

Ordered further, That the respondent, Halsted L. Ritter, United States district judge for the southern district of Florida, be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States. . . .

MR. [F. RYAN] DUFFY [of Wisconsin]: A parliamentary inquiry.

THE PRESIDENT PRO TEMPORE: The Senator will state it.

MR. DUFFY: Upon this question is a majority vote sufficient to adopt the order, or must there be a two-thirds vote?

MR. [HENRY F.] ASHURST [of Arizona]: Mr. President, in reply to the inquiry, I may say that in the Archbald case that very question arose. A Senator asked that a question be divided, and on the second part of the order, which was identical with the order now proposed, the yeas and nays were ordered, and the result was yeas 39, nays 35, so the order further disqualifying respondent from holding any office of honor, trust, or profit under the United States was entered. It requires only a majority vote.

THE PRESIDENT PRO TEMPORE: The question is on agreeing to the order submitted by the Senator from Arizona.[20]

Parliamentarian's Note: In the impeachment trial of Robert Archbald, a division of the question was demanded on an order removing and disqualifying the respondent. Removal was agreed to by voice vote and disqualification was agreed to by the yeas and nays—yeas 39, nays 35.[21]

Filing of Separate Opinions

§ 13.11 The Senate, sitting as a Court of Impeachment, may provide by order at the conclusion of the trial for Senators to file written opinions following the final vote.

On Apr. 16, 1936, the Senate sitting as a Court of Impeachment in the trial of Judge Halsted Rit-

19. Key Pittman (Nev.).

20. 80 CONG. REC. 5607, 74th Cong. 2d Sess.

21. 6 Cannon's Precedents § 512.

ter adopted the following order at the conclusion of the trial:

Ordered, That upon the final vote in the pending impeachment of Halsted L. Ritter each Senator may, within 4 days after the final vote, file his opinion in writing, to be published in the printed proceedings in the case.[22]

House Informed of Judgment

§ 13.12 The Senate informs the President and the House of the order and judgment of the Senate in an impeachment trial.

On Apr. 20, 1936,[1] a message from the Senate was received in the House informing the House of the order and judgment in the impeachment trial of Judge Halsted Ritter:

MESSAGE FROM THE SENATE

A message from the Senate, by Mr. Horne, its enrolling clerk, announced that the Senate had ordered that the Secretary be directed to communicate to the President of the United States and to the House of Representatives the order and judgment of the Senate in the case of Halsted L. Ritter, and transmit a certified copy of same to each, as follows:

I, Edwin A. Halsey, Secretary of the Senate of the United States of America, do hereby certify that the hereto attached document is a true and correct copy of the order and judgment of the Senate, sitting for the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, entered in the said trial on April 17, 1936.

In testimony whereof, I hereunto subscribe my name and affix the seal of the Senate of the United States of America, this the 18th day of April, A. D. 1936.

EDWIN A. HALSEY,
Secretary of the Senate
of the United States.

In the Senate of the United States of America, sitting for the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida

JUDGMENT

APRIL 17, 1936.

The Senate having tried Halsted L. Ritter, United States district judge for the southern district of Florida, upon seven several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of charges contained therein: It is therefore

Ordered and adjudged, That the said Halsted L. Ritter be, and he is hereby removed from office.

Attest:

EDWIN A. HALSEY,
Secretary.

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22. 80 CONG. REC. 5558, 74th Cong. 2d Sess.

1. 80 CONG. REC. 5703, 5704, 74th Cong. 2d Sess.

D. HISTORY OF PROCEEDINGS

§ 14. Charges Not Resulting in Impeachment

The following is a compilation of impeachment charges made from 1932 to the present which did not result in impeachment by the House.

Cross References

Committee reports adverse to impeachment, their privilege and consideration, see §§ 7.8–7.10, 8.2, supra.

House proceedings against Associate Justice Douglas, discussion in the House, and portions of final subcommittee report relative to grounds for impeachment of federal judges, see §§ 3.9–3.13, supra.

House proceedings on impeachment discontinued against President Nixon, following his resignation, see § 15, infra.

Resignations and effect on impeachment and trial, see § 2, supra.

Trial of Judge English dismissed following his resignation, see § 16, infra.

Charges Against Secretary of the Treasury Mellon

§ 14.1 In the 72d Congress a Member rose to a question of constitutional privilege, impeached Secretary of the Treasury Andrew Mellon, and submitted a resolution authorizing the Committee on the Judiciary to investigate the charges, which resolution was referred to the Committee on the Judiciary.

On Jan. 6, 1932, Mr. Wright Patman, of Texas, rose to impeach Mr. Mellon, Secretary of the Treasury:

IMPEACHMENT OF ANDREW W. MELLON, SECRETARY OF THE TREASURY

MR. PATMAN: Mr. Speaker, I rise to a question of constitutional privilege. On my own responsibility as a Member of this House, I impeach Andrew William Mellon, Secretary of the Treasury of the United States for high crimes and misdemeanors, and offer the following resolution:

> Whereas the said Andrew William Mellon, of Pennsylvania, was nominated Secretary of the Treasury of the United States by the then Chief Executive of the Nation, Warren G. Harding, March 4, 1921; his nomination was confirmed by the Senate of the United States on March 4, 1921; he has held said office since March 4, 1921, without further nominations or confirmations.
>
> Whereas section 243 of title 5 of the Code of Laws of the United States provides:
>
> "Sec. 243. Restrictions upon Secretary of Treasury: No person appointed to the office of Secretary of the Treasury, or Treasurer, or register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea vessel, or purchase by himself, of another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public secu-

rities of any State, or of the United States, or take or apply to his own use any emolument or gain for negotiating or transacting any business in the Treasury Department other than what shall be allowed by law; and every person who offends against any of the prohibitions of this section shall be deemed guilty of a high misdemeanor and forfeit to the United States the penalty of $3,000, and shall upon conviction be removed from office, and forever thereafter be incapable of holding any office under the United States; and if any other person than a public prosecutor shall give information of any such offense, upon which a prosecution and conviction shall be had, one-half the aforesaid penalty of $3,000 when recovered shall be for the use of the person giving such information.

Whereas the said Andrew William Mellon has not only been indirectly concerned in carrying on the business of trade and commerce in violation of the above-quoted section of the law but has been directly interested in carrying on the business of trade and commerce in that he is now and has been since taking the oath of office as Secretary of the Treasury of the United States the owner of a substantial interest in the form of voting stock in more than 300 corporations with resources aggregating more than $3,000,000,000, being some of the largest corporations on earth, and he and his family and close business associates in many instances own a majority of the stock of said corporations and, in some instances, constitute ownership of practically the entire outstanding capital stock; said corporations are engaged in the business of trade and commerce in every State, county, and village in the United States, every country in the world, and upon the Seven Seas; said corporations are extensively engaged in the following businesses: Mining properties, bauxite, magnesium, carbon electrodes, aluminum, sales, railroads, Pullman cars, gas, electric light, street railways, copper, glass, brass, steel, tar, banking, locomotives, water power, steamship, shipbuilding, oil, coke, coal, and many other different industries; said corporations are directly interested in the tariff, in the levying and collections of Federal taxes, and in the shipping of products upon the high seas; many of the products of these corporations are protected by our tariff laws and the Secretary of the Treasury has direct charge of the enforcement of these laws.

MELLON'S OWNERSHIP OF SEA VESSELS AND CONTROL OF UNITED STATES COAST GUARD

Whereas the Coast Guard (sec. 1, ch. 1, title 14, of the United States Code) is a part of the military forces of the United States and is operated under the Treasury Department in time of peace; that the Secretary of the Treasury directs the performance of the Coast Guard (sec. 51, ch. 1, title 14, of the Code of Laws of the United States); that officers of the Coast Guard are deemed officers of the customs (sec. 6, ch. 2, title 14, United States Code), and it is their duty to go on board the vessels which arrive within the United States, or within 4 leagues of the coast thereof, and search and examine the same, and every part thereof, and shall demand, receive, and certify the manifests required to be on board certain vessels shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessels until they arrive at the port of their destination; that the said Andrew William Mellon is now, and has been since becoming Secretary of the Treasury, the owner in whole or in part of many sea vessels operating to and from the United States, and in competition

with other steamship lines; that his interest in the sea vessels and his control over the Coast Guard represent a violation of section 243 of title 5 of the Code of Laws of the United States.

CUSTOMS OFFICERS

Whereas the Secretary of the Treasury of the United States superintends the collection of the duties on imports (sec. 3, ch. 1, title 19, Code of Laws of the United States); he establishes and promulgates rules and regulations for the appraisement of imported merchandise and the classification and assessment of duties thereon at various ports of entry (sec. 382, ch. 3, title 19, Code of Laws of United States); that the present Secretary of the Treasury, Andrew W. Mellon, is now and has been since becoming Secretary of the Treasury personally interested in the importation of goods, wares, articles, and merchandise in substantial quantities and large amounts; that it is repugnant to American principles and a violation of the laws of the United States for such an officer to hold the dual position of serving two masters—himself and the United States.

OWNERSHIP OF SEA VESSELS

Whereas the said Andrew W. Mellon is now, and has been since becoming Secretary of the Treasury of the United States, holding said office in violation of that part of section 243 of title 5 of the Code of Laws of the United States, which provides that "no person appointed to the office of Secretary of the Treasury . . . shall be the owner in whole or in part of any sea vessel," in that he was and is now the owner in whole or in part of the following sea vessels:

Registered in Norway: *Austvangen, Nordvangen, Sorvangen, Vestvangen.*

Venezuelan flag: 14 tankers, of 36,654 gross tons.

United States flag: *S. Haiti;* 13 general cargo vessels, *Conemaugh, Gulf of Mexico, Gulfbird, Gulfcoast, Gulfgem, Gulfking, Gulflight, Gulfoil, Gulfpoint, Gulfprince, Gulfstar, Gulfstream, Gulfwax, Harmony, Ligonier, Ohio, Susquehanna, Winifred, Currier, Gulf of Venezuela, Gulf breeze, Gulfcrest, Gulfhawk, Gulfland, Gulfmaid, Gulfpenn, Gulfpride, Gulfqueen, Gulfstate, Gulftrade, Gulfwing, Juniata, Monongahela, Supreme, Trinidadian.*

INCOME TAXES PAID BY MELLON COMPANIES AND REFUNDS MADE TO THEM—BY HIMSELF

Whereas section 1 (2), chapter 1, title 26, of the Code of laws of the United States, provides "The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes imposed by any law providing internal revenue. . . ." The tax laws of the United States, including the granting of refunds, credits, and abatements, are administered in secret under the direction of the Secretary of the Treasury; that income-tax returns and evidence upon which refunds are made, or granted, to taxpayers are not subject to public inspection; that under the direction of the present Secretary of the Treasury, Andrew W. Mellon, many hundred corporations that are substantially owned by him annually make settlement for their taxes and many such corporations have been granted under his direction large tax refunds amounting to tens of millions of dollars.

OWNERSHIP OF BANK STOCK

Whereas section 244, chapter 3, title 12, of the Code of Laws of the United States, provides:

"Sec. 244. Chairman of the board; qualifications of members; vacancies.—The Secretary of the Treasury shall be ex officio chairman of the Federal Reserve Board. No member of the Federal Reserve Board shall be an officer or director of any bank, banking institution, trust company, or Federal reserve bank, nor hold stock in any bank, banking institution, or trust company. . . ."

That the present Secretary of the Treasury, Andrew W. Mellon, is now and has been since-becoming Secretary of the Treasury the owner of stock in a bank, banking institution, and trust company in violation of this law.

WHISKY BUSINESS

Whereas the said Andrew W. Mellon has held the office of Secretary of the Treasury in violation of section 243 of title 5 of the Code of Laws of the United States, in that from March 4, 1921, to October 2, 1928, he was interested in and received his share of the proceeds and profits from the sale of distilled whisky, which said whisky was sold as a commodity in trade and commerce.

ALUMINUM IN PUBLIC BUILDINGS

Whereas the said Andrew W. Mellon has further violated the law which prohibits the Secretary of the Treasury from being directly or indirectly interested or concerned in the carrying on of business or trade or commerce, in that as Secretary of the Treasury he controls the construction and maintenance of public buildings; the Office of the Supervising Architect is subject to the direction and approval of the Secretary of the Treasury; the duties performed by the Supervising Architect embrace the following: Preparation of drawings, estimates, specifications, etc., for and the superintendence of the work of constructing, rebuilding, extending, or repairing public buildings; under the supervision of the Supervising Architect and subject to the direction and approval of the Secretary of the Treasury the Government of the United States has spent and will soon spend several hundred million dollars in the construction of public buildings. The said Andrew W. Mellon is the principal owner and controls the Aluminum Co. of America, which produces and markets practically all of the aluminum in the United States used for all purposes. The said Andrew W. Mellon has, while occupying the position as Secretary of the Treasury, directly interested himself in the carrying on and promotion of the business of the Aluminum Co. of America by causing to be published in Room 410 of the Treasury Building of the United States, located between the United States Capitol and the White House, a magazine known as the Federal Architect, published quarterly, which carries the pictures of public buildings in which aluminum is used in their construction and carries articles concerning the use of aluminum in architecture which suggest how aluminum can be used for different purposes in the construction of public buildings for the purpose of convincing the architects who draw the plans and specifications for public buildings that aluminum can and should be used for certain construction work and ornamental purposes. The use of aluminum in the construction of public buildings displaces materials which can be purchased on competitive bids, whereas the Aluminum Co. of America holds a monopoly and has no competitors. Said magazine is published by employees of the United States Government in the Office of the Supervising

Architect and distributed to the architects of the Nation, many of whom have been or will be employed by the Supervising Architect to draw plans and specifications for public buildings in their local communities. More aluminum is now being used in the construction of public buildings, under the direction of the Secretary of the Treasury, than has ever before been used, as a result of this advantage.

MELLON INTEREST IN SOVIET UNION (RUSSIA)

Whereas section 140 of title 19 of the Code of Laws of the United States provides—

"Sec. 140. Goods manufactured by convict labor prohibited.—All goods, wares, articles, and merchandise manufactured wholly or in part in any foreign country by convict labor shall not be entitled to entry at any of the ports of the United States, and the importation thereof is prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision"—

charges are now being made that goods, wares, articles, and merchandise are being transported to the United States from the Soviet Union (Russia) in violation of this act; the present Secretary of the Treasury, Andrew W. Mellon, whose duty it is to enforce this provision of the law, is one of the principal owners of the Koppers Co., a company with resources amounting to $143,379,352, which is carrying on trade and commerce in all parts of the world; that said company during the year 1930 made a contract with the Soviet Union whereby the Koppers Co. obligated itself to build coke ovens and steel mills in the Soviet Union aggregating in value $200,000,000, in furtherance of the Soviet's 5-year plan; that said contract is now being carried into effect, and the said Andrew W. Mellon is financially interested in its success; that his interest in this contract with the Soviet Union destroys his impartiality as an officer of the United States to enforce the above-quoted law; his interest in said company, which is engaged in the business of carrying on trade and commerce, disqualifies him as Secretary of the Treasury under section 243 of title 5 of the Code of Laws of the United States and makes him guilty of a high misdemeanor and subject to impeachment: Therefore be it

Resolved, That the Committee on the Judiciary is authorized and directed, as a whole or by subcommittee, to investigate the official conduct of Andrew W. Mellon, Secretary of the Treasury, to determine whether, in its opinion, he has been guilty of any high crime or misdemeanor which, in the contemplation of the Constitution, requires the interposition of the constitutional powers of the House. Such committee shall report its findings to the House together with such resolution of impeachment or other recommendation as it deems proper.

Sec. 2. For the purposes of this resolution, the committee is authorized to sit and act during the present Congress at such times and places in the District of Columbia or elsewhere, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to employ such experts, and such clerical, stenographic, and other assistants, to require the attendance of such witnesses and the production of such books, papers, and documents, to take such testimony, to have such printing and binding done, and to make such expenditures not exceeding $5,000, as it deems necessary.

MR. [JOSEPH W.] BYRNS [of Tennessee]: Mr. Speaker, I move that the articles just read be referred to the

Committee on the Judiciary, and upon that motion I demand the previous question.

The previous question was ordered.

THE SPEAKER:[2] The question is on the motion of the gentleman from Tennessee, that the articles be referred to the Committee on the Judiciary.

The motion was agreed to.[3]

§ 14.2 The House discontinued by resolution further proceedings of impeachment against Secretary of the Treasury Andrew Mellon, after he had been nominated and confirmed for another position and had resigned his Cabinet post.

On Feb. 13, 1932, Mr. Hatton W. Sumners, of Texas, presented House Report No. 444 and House Resolution 143, discontinuing proceedings against Secretary of the Treasury Mellon:

IMPEACHMENT CHARGES—REPORT FROM COMMITTEE ON THE JUDICIARY

MR. SUMNERS of Texas: Mr. Speaker, I offer a report from the Committee on the Judiciary, and I would like to give notice that immediately upon the reading of the report I shall move the previous question.

THE SPEAKER:[4] The gentleman from Texas offers a report, which the Clerk will read.

The Clerk read the report, as follows:

HOUSE OF REPRESENTATIVES—RELATIVE TO THE ACTION OF THE COMMITTEE ON THE JUDICIARY WITH REFERENCE TO HOUSE RESOLUTION 92

Mr. Sumners of Texas, from the Committee on the Judiciary, submitted the following report (to accompany H. Res. 143):

I am directed by the Committee on the Judiciary to submit to the House, as its report to the House, the following resolution adopted by the Committee on the Judiciary indicating its action with reference to House Resolution No. 92 heretofore referred by the House to the Committee on the Judiciary:

Whereas Hon. Wright Patman, Member of the House of Representatives, filed certain impeachment charges against Hon. Andrew W. Mellon, Secretary of the Treasury, which were referred to this committee; and

Whereas pending the investigation of said charges by said committee, and before said investigation had been completed, the said Hon. Andrew W. Mellon was nominated by the President of the United States for the post of ambassador to the Court of St. James and the said nomination was duly confirmed by the United States Senate pursuant to law, and the said Andrew W. Mellon has resigned the position of Secretary of the Treasury: Be it

Resolved by this committee, That the further consideration of the said charges made against the said Andrew W. Mellon, as Secretary of the Treasury, be, and the same are hereby, discontinued.

MINORITY VIEWS

We cannot join in the majority views and findings. While we concur in the conclusions of the majority

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2. John N. Garner (Tex.).

3. 75 CONG REC. 1400 72d Cong. 1st Sess.

4. John N. Garner (Tex.).

that section 243 of the Revised Statutes, upon which the proceedings herein were based, provides for action in the nature of an ouster proceeding, it is our view that the Hon. Andrew W. Mellon, the former Secretary of the Treasury, having removed himself from that office, no useful purpose would be served by continuing the investigation of the charges filed by the Hon. Wright Patman. We desire to stress that the action of the undersigned is based on that reason alone, particularly when the prohibition contained in said section 243 is not applicable to the office now held by Mr. Mellon.

FIORELLO H. LAGUARDIA.
GORDON BROWNING.
M. C. TARVER.
FRANCIS B. CONDON.

MR. SUMNERS of Texas: Mr. Speaker, I think the resolution is fairly explanatory of the views held by the different members of the committee. No useful purpose could be served by the consumption of the usual 40 minutes, so I move the previous question.

The previous question was ordered.

THE SPEAKER: The question is on agreeing to the resolution.

The resolution was agreed to.(5)

Charges Against President Hoover

§ 14.3 Impeachment of President Herbert Hoover was proposed but not considered by the House or by committee in the 72d Congress.

On Jan. 17, 1933, Mr. Louis T. McFadden, of Pennsylvania, rose and on his own responsibility as a Member of the House impeached President Hoover as follows:

MR. MCFADDEN: On my own responsibility, as a Member of the House of Representatives, I impeach Herbert Hoover, President of the United States, for high crimes and misdemeanors.

He offered a resolution with a lengthy preamble, which concluded as follows:

Resolved, That the Committee on the Judiciary is authorized to investigate the official conduct of Herbert Hoover, President of the United States, and all matters related thereto, to determine whether, in the opinion of the said committee, he has been guilty of any high crime or misdemeanor which, in the contemplation of the Constitution, requires the interposition of the constitutional powers of the House. Such committee shall report its findings to the House, together with such resolution of impeachment or other recommendation as it deems proper, in order that the House of Representatives may, if necessary, present its complaint to the Senate, to the end that Herbert Hoover may be tried according to the manner prescribed for the trial of the Executive by the Constitution and the people be given their constitutional remedy and be relieved of their present apprehension that a criminal may be in office.

For the purposes of this resolution the committee is authorized to sit and

5. 75 CONG. REC. 3850, 72d Cong. 1st Sess.

The House Journal (p. 382) for this date indicates that Mr. Sumners called up H. Res. 143 which was debated prior to its adoption.

act during the present Congress at such times and places in the District of Columbia or elsewhere, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to employ such experts, and such clerical, stenographic, and other assistants, to require the attendance of such witnesses and the production of such books, papers, and documents, to take such testimony, to have such printing and binding done, and to make such expenditures as it deems necessary.

Mr. Henry T. Rainey, of Illinois, moved that the resolution be laid on the table and the House adopted the motion, precluding any debate by Mr. McFadden on his resolution of impeachment.

Pending a vote on the motion, Speaker John N. Garner, of Texas, stated in response to a parliamentary inquiry that the language which had transpired could not be expunged from the *Congressional Record* by motion but must be done by unanimous consent since no unparliamentary language was involved.(6)

On Jan. 18, 1933, Mr. McFadden rose to state a question of privilege, with the intention of impeaching President Hoover. In response to a point of order, Speaker Garner held that a question of constitutional privilege or a question of privilege of the House, as distinguished from a question of personal privilege, could not be presented until a motion or resolution was submitted. He declined to recognize Mr. McFadden since no resolution was presented.(7)

Charges Against U.S. District Judge Lowell

§ 14.4 In the 73d Congress the Committee on the Judiciary conducted an investigation into impeachment charges against District Judge James Lowell and later recommended that further proceedings be discontinued.

On Apr. 26, 1933, Mr. Howard W. Smith, of Virginia, rose to a question of constitutional privilege and impeached Mr. Lowell, a U.S. District Judge for the District of Massachusetts. He specified the following charges:

First. I charge that the said James A. Lowell, having been nominated by the President of the United States and confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as district judge for the district of Massachusetts, did on divers and various occasions so abuse the powers of his high office and so misconduct himself as to be guilty of favoritism, oppression, and judicial misconduct, whereby he has brought the administration of justice in said

6. 76 CONG. REC. 1965–68, 72d Cong. 2d Sess.

7. *Id.* at pp. 2041, 2042.

district in the court of which he is judge into disrepute by his aforesaid misconduct and acts, and is guilty of misbehavior and misconduct, falling under the constitutional provision as ground for impeachment and removal from office.

Second. I charge that the said James A. Lowell did knowingly and willfully violate his oath to support the Constitution in his refusal to comply with the provisions of article IV, section 2, clause 2, of the Constitution of the United States, wherein it is provided:

> A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Third. I charge that the said James A. Lowell did, on the 24th day of April, 1933, unlawfully, willfully, and contrary to well-established law, order the discharge from custody of one George Crawford, who had been regularly indicted for first-degree murder in Loudoun County, Va., had confessed his crime, and whose extradition from the State of Massachusetts had, after full hearing and investigation, been officially ordered by Joseph B. Ely, Governor of the State of Massachusetts.

Fourth. I charge that the said James A. Lowell did deliberately and willfully by ordering the release of said George Crawford, unlawfully and contrary to the law in such cases made and provided, seek to defeat the ends of justice and to prevent the said George Crawford from being duly and regularly tried in the tribunal having jurisdiction thereof for the crime with which he is charged, to which he had confessed.

Fifth. I charge that the said James A. Lowell did on the said 24th day of April 1933 willfully, deliberately, and viciously attempt to nullify the operation of the laws for the punishment of crime of the State of Virginia and many other States in the Union, notwithstanding numerous decisions directly to the contrary by the Supreme Court of the United States, all of which decisions were brought to the attention of the said judge by the attorney general of Massachusetts and the Commonwealth's attorney of Loudoun County, Va., at the time of said action.

Sixth. I further charge that the said James A. Lowell, on the said 24th day of April 1933, in rendering said decision did use his judicial position for the unlawful purpose of casting aspersions upon and attempting to bring disrepute upon the administration of law in the Commonwealth of Virginia and various other States in this Union, and that in so doing he used the following language:

> I say this whole thing is absolutely wrong. It goes against my Yankee common sense to have a case go on trial for 2 or 3 years and then have the whole thing thrown out by the Supreme Court.
>
> They say justice is blind. Justice should not be as blind as a bat. In this case it would be if a writ of habeas corpus were denied.
>
> Why should I send a negro back from Boston to Virginia, when I know and everybody knows that the Supreme Court will say that the trial is illegal? The only persons who would get any good out of it would be the lawyers.
>
> Governor Ely in signing the extradition papers was bound only by the

question of whether the indictment from Virginia is in order. But why shouldn't I, sitting here in this court, have a different constitutional outlook from the governor who sits on the case merely to see if the indictment satisfies the law in Virginia?

I keep on good terms with Chief Justice Rugg, of the Massachusetts Supreme Court, but I don't have to keep on good terms with the chief justice of Virginia, because I don't have to see him.

I'd rather be wrong on my law than give my sanction to legal nonsense.

Seventh. I further charge that the said James A. Lowell has been arbitrary, capricious, and czarlike in the administration of the duties of his high office and has been grossly and willfully indifferent to the rights of litigants in his court, particularly in the case of George Crawford against Frank G. Hale.(8)

The charges were referred to the Committee on the Judiciary. Mr. Smith then offered House Resolution 120, authorizing an investigation of such charges, which resolution was adopted by the House:

Resolved, That the Committee on the Judiciary is authorized and directed, as a whole or by subcommittee, to inquire into and investigate the official conduct of James A. Lowell, a district judge for the United States District Court for the District of Massachusetts, to determine whether in the opinion of said committee he has been guilty of any high crime or misdemeanor which in the contemplation of the Constitution requires the interposition of the constitutional powers of the House. Said committee shall report its findings to the House, together with such resolution of impeachment or other recommendation as it deems proper.

Sec. 2. For the purpose of this resolution the committee is authorized to sit and act during the present Congress at such times and places in the District of Columbia and elsewhere, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to employ such clerical, stenographic, and other assistance, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, to have such printing and binding done, and to make such expenditures, not exceeding $5,000, as it deems necessary.(9)

On May 4, 1933, Mr. Smith offered House Resolution 132, providing for payment out of the contingent fund for the expenses of the Committee on the Judiciary incurred under House Resolution 120. The resolution was referred to the Committee on Accounts and was called up by that committee on May 8, when it was adopted by the House.(10)

On Feb. 6, 1934, the House agreed to House Resolution 226, reported by Mr. Gordon Browning, of Tennessee, of the Committee on

8. H. JOUR. 205, 206, 73d Cong. 1st Sess.

9. *Id.* at p. 206.

10. *Id.* at pp. 233, 238.

the Judiciary, providing that no further proceedings be had under House Resolution 120:

> *Resolved,* That no further proceedings be had under H. Res. 120, agreed to April 26, 1933, providing for an investigation of the official conduct of James A. Lowell, United States district judge for the district of Massachusetts, and that the Committee on the Judiciary be discharged.(11)

Charges Against Federal Reserve Board Members

§ 14.5 After a Member of the House offered a resolution to impeach various members and former members of the Federal Reserve Board, and Federal Reserve agents, his resolution was referred to the Committee on the Judiciary and not acted upon.

On May 23, 1933, Mr. Louis T. McFadden, of Pennsylvania, rose to a question of constitutional privilege and impeached on his own responsibility Eugene Meyer, former member of the Federal Reserve Board, and a number of other former members, members, and Federal Reserve agents. His resolution, House Resolution 1458, was referred to the Committee on the Judiciary, pursuant to a motion to refer offered by Mr. Joseph W. Byrns, of Tennessee. The committee took no action on the resolution.

During debate on the resolution, Mr. Carl E. Mapes, of Michigan, rose to a point of order against the resolution, claiming it was not privileged because it called for the impeachment of various persons who were no longer U.S. civil officers. Speaker Henry T. Rainey, of Illinois, held that the issue presented was a constitutional question upon which the House and not the Chair should pass.(12)

Charges Against U.S. District Judge Molyneaux

§ 14.6 Impeachment of U.S. District Judge Joseph Molyneaux was proposed in the 73d Congress but not acted upon by the House or the Committee on the Judiciary, to which the charges were referred.

On Jan. 22, 1934, Mr. Francis H. Shoemaker, of Minnesota, introduced House Resolution 233, authorizing an investigation by the Committee on the Judiciary into the official conduct of Mr. Molyneaux, a U.S. District Judge for the District of Minnesota, to determine whether he was guilty of high crimes or misdemeanors

11. H. JOUR. 137, 73d Cong. 2d Sess.

12. H. JOUR. 298–302, 73d Cong. 1st Sess.

requiring the "interposition of the constitutional powers of the House." The resolution was referred to the Committee on the Judiciary.(13)

The Committee on the Judiciary having taken no action on his resolution, Mr. Shoemaker rose to a question of constitutional privilege on Apr. 20, 1934, and impeached Judge Molyneaux on his own responsibility. He offered charges and a resolution (H. Res. 344) impeaching the judge, which resolution was referred on motion to the Committee on the Judiciary. The resolution charged corruption in the appointment of receivers, in the disposal of estates, interference with justice, and mental senility, and dishonesty. The committee took no action thereon.(14)

Charges Against U.S. Circuit Judge Alschuler

§ 14.7 A Member having impeached Judge Samuel Alschuler, a Circuit Judge for the seventh circuit, the Committee on the Judiciary reported adversely on the resolution authorizing an investigation, and the resolution was laid on the table.

On May 7, 1935, Mr. Everett M. Dirksen, of Illinois, rose to a question of "high constitutional privilege" and impeached Samuel Alschuler, U.S. Circuit Judge for the seventh circuit. He discussed his charges (principally that the accused improperly favored a litigant before his court) and offered House Resolution 214, authorizing an investigation by the Committee on the Judiciary. The resolution was referred on motion of Mr. Hatton W. Sumners, of Texas, to the Committee on the Judiciary.(15)

On Aug. 15, 1935, Mr. Sumners reported adversely (H. Rept. No. 1802) on House Resolution 214, by direction of the Committee on the Judiciary. Mr. Sumners moved to lay the resolution on the table, and the House agreed to the motion.(16)

Charges Against Secretary of Labor Perkins

§ 14.8 In the 76th Congress, a resolution was offered impeaching Secretary of Labor Frances Perkins and two other officials of the Department of Labor, and was referred on motion to the Committee on the Judiciary.

On Jan. 24, 1939,(17) a Member impeached certain officials of the

13. H. JOUR. 87, 73d Cong. 2d Sess.
14. *Id.* at p. 423.
15. H. JOUR. 668–71, 74th Cong. 1st Sess.
16. *Id.* at p. 1093.
17. 84 CONG. REC. 702–11, 76th Cong. 1st Sess.

executive branch and introduced a resolution authorizing an investigation:

IMPEACHMENT OF FRANCES PERKINS, SECRETARY OF LABOR; JAMES L. HOUGHTELING; AND GERARD D. REILLY

MR. [J. PARNELL] THOMAS of New Jersey: Mr. Speaker, on my own responsibility as a Member of the House of Representatives, I impeach Frances Perkins, Secretary of Labor of the United States; James L. Houghteling, Commissioner of the Immigration and Naturalization Service of the Department of Labor; and Gerard D. Reilly, Solicitor of the Department of Labor, as civil officers of the United States, for high crimes and misdemeanors in violation of the Constitution and laws of the United States, and I charge that the aforesaid Frances Perkins, James L. Houghteling, and Gerard D. Reilly, as civil officers of the United States, were and are guilty of high crimes and misdemeanors in office in manner and form as follows, to wit: That they did willfully, unlawfully, and feloniously conspire, confederate, and agree together from on or about September 1, 1937, to and including this date, to commit offenses against the United States and to defraud the United States by failing, neglecting, and refusing to enforce the immigration laws of the United States, including to wit section 137, title 8, United States Code, and section 156, title 8, United States Code, against Alfred Renton Bryant Bridges, alias Harry Renton Bridges, alias Harry Dorgan, alias Canfield, alias Rossi, an alien, who advises, advocates, or teaches and is a member of or affiliated with an organization, association, society, or group that advises, advocates, or teaches the overthrow by force or violence of the Government of the United States, or the unlawful damage, injury, or destruction of property, or sabotage; and that the aforesaid Frances Perkins, James L. Houghteling, and Gerard D. Reilly have unlawfully conspired together to release said alien after his arrest on his own recognizance, without requiring a bond of not less than $500; and that said Frances Perkins, James L. Houghteling, and Gerard D. Reilly and each of them have committed many overt acts to effect the object of said conspiracy, all in violation of the Constitution of the United States in such cases made and provided.

And I further charge that Frances Perkins, James L. Houghteling, and Gerard D. Reilly, as civil officers of the United States, were and are guilty of high crimes and misdemeanors by unlawfully conspiring together to commit offenses against the United States and to defraud the United States by causing the Strecker case to be appealed to the Supreme Court of the United States, and by failing, neglecting, and refusing to enforce section 137, United States Code, against other aliens illegally within the United States contrary to the Constitution of the United States and the statutes of the United States in such cases made and provided.

In support of the foregoing charges and impeachment, I now present a resolution setting forth specifically, facts, circumstances, and allegations with a view to their consideration by a committee of the House and by the House itself to determine their truth or falsity.

Mr. Speaker, I offer the following resolution and ask that it be considered at this time.

THE SPEAKER:[18] The Clerk will report the resolution.

The Clerk read as follows:

HOUSE RESOLUTION 67

Whereas Frances Perkins, of New York, was nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned on March 4, 1933, and has since March 4, 1933, without further nominations or confirmations, acted as Secretary of Labor and as a civil officer of the United States.

Whereas James L. Houghteling, of Illinois, was nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned on August 4, 1937, as Commissioner of the Immigration and Naturalization Service of the Department of Labor and has since August 4, 1937, without further nominations or confirmations, acted as Commissioner of the Immigration and Naturalization Service of the Department of Labor and as a civil officer of the United States.

Whereas Gerard D. Reilly, of Massachusetts, was nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned on August 10, 1937, as Solicitor of the Department of Labor, and has since August 10, 1937, without further nominations or confirmations, acted as Solicitor of the Department of Labor and as a civil officer of the United States.

Resolved, That the Committee on the Judiciary be and is hereby authorized and directed, as a whole or by subcommittee, to investigate the official conduct of Frances Perkins, Secretary of Labor; James L. Houghteling, Commissioner of Immigration and Naturalization Service, Department of Labor; and Gerard D. Reilly, Solicitor, Department of Labor, to determine whether, in its opinion, they have been guilty of any high crimes or misdemeanors which, in the contemplation of the Constitution, requires the interposition of the constitutional powers of the House. Such committee shall report its findings to the House, together with such articles of impeachment as the facts may warrant.

For the purposes of this resolution the committee is authorized and directed to sit and act, during the present session of Congress, at such times and places in the District of Columbia, or elsewhere, whether or not the House is sitting, has recessed, or has adjourned; to hold hearings; to employ such experts and such clerical, stenographic and other assistance; and to require the attendance of such witnesses and the production of such books, papers, and documents; and to take such testimony and to have such printing and binding done; and to make such expenditures not exceeding $10,000, as it deems necessary.

The resolution was referred as follows:

MR. [SAM] RAYBURN [of Texas]: Mr. Speaker, I move that the resolution be referred to the Committee on the Judiciary of the House and upon that I desire to say just a word. A great many suggestions have been made as to what should be done with this resolution, but I think this would be the orderly procedure so that the facts may be developed. The resolution will come out of that committee or remain in it according to the testimony adduced.

I therefore move the previous question on my motion to refer, Mr. Speaker.

18. William B. Bankhead (Ala.).

The previous question was ordered.

The motion was agreed to.

§ 14.9 The Committee on the Judiciary agreed unanimously to report adversely the resolution urging an investigation of Secretary of Labor Frances Perkins and the House agreed to a motion to lay the resolution on the table.

On Mar. 24, 1939,[19] charges of impeachment against Secretary of Labor Perkins were finally and adversely disposed of:

IMPEACHMENT PROCEEDINGS—FRANCES PERKINS

MR. [SAM] HOBBS [of Alabama]: Mr. Speaker, by direction of the Committee on the Judiciary I present a privileged report upon House Resolution 67, which I send to the desk.

THE SPEAKER:[20] The Clerk will report the resolution.

The Clerk read House Resolution 67.

MR. HOBBS: Mr. Speaker, this is a unanimous report from the Committee on the Judiciary adversing this resolution. I move to lay the resolution on the table.

THE SPEAKER: The question is on the motion of the gentleman from Alabama to lay the resolution on the table.

The motion was agreed to.

19. 84 CONG. REC. 3273, 76th Cong. 1st Sess.

20. William B. Bankhead (Ala.).

Charges Against U.S. District Judges Johnson and Watson

§ 14.10 The House authorized the Committee on the Judiciary to investigate allegations of impeachable offenses charged against U.S. District Court Judges Johnson and Watson but no final report was submitted.

On Jan. 24, 1944, Mr. Hatton W. Sumners, of Texas, introduced House Resolution 406 authorizing an investigation by the Committee on the Judiciary into the conduct of U.S. District Court Judges Albert Johnson and Albert Watson from Pennsylvania. The resolution was referred to the Committee on the Judiciary. House Resolution 407, also introduced by Mr. Sumners and providing for the expenses of the committee in conducting such an investigation, was referred to the Committee on the Judiciary.[1]

On Jan. 26, 1944, Mr. Sumners called up by direction of the Committee on the Judiciary House Resolution 406, authorizing the investigation and the House agreed thereto.[2]

Parliamentarian's Note: Extensive hearings, presided over by Mr. Estes Kefauver, of Tennessee,

1. H. JOUR. 46, 78th Cong. 2d Sess.

2. *Id.* at p. 57.

were held relative to the conduct of Judge Johnson. The subcommittee report recommended impeachment based on evidence of corrupt practices and acts including corrupt appointment to court offices. Judge Johnson having resigned, the Committee on the Judiciary discontinued the proceedings.

Charges Against President Truman

§ 14.11 In the 82d Congress, a resolution proposing an inquiry as to whether President Harry Truman should be impeached was referred to the Committee on the Judiciary, which took no action thereon.

On Apr. 23, 1952,[3] a resolution relating to impeachment was referred to the Committee on the Judiciary, which took no action thereon:

> By Mr. [George H.] Bender [of Ohio]:
>
> H. Res. 607. Resolution creating a select committee to inquire and report to the House whether Harry S. Truman, President of the United States, shall be impeached; to the Committee on the Judiciary.

§ 14.12 A petition was filed to discharge the Committee on the Judiciary from the further consideration of a resolution impeaching President Harry Truman but did not gain the requisite number of signatures.

On June 17, 1952, Mr. John C. Schafer, of Wisconsin, announced that he was filing a petition to discharge the Committee on the Judiciary from the further consideration of House Resolution 614, impeaching President Truman:[4]

> MR. SCHAFER: Mr. Speaker, on April 28 of this year I introduced House Resolution 614, to impeach Harry S. Truman, President of the United States, of high crimes and misdemeanors in office. This resolution was referred to the Committee on the Judiciary, which committee has failed to take action thereon.
>
> Thirty legislative days having now elapsed since introduction of this resolution, I today have placed on the Clerk's desk a petition to discharge the committee from further consideration of the resolution.
>
> In my judgment, developments since I introduced the Resolution April 28 have immeasurably enlarged and strengthened the case for impeachment and have added new urgency for such action by this House.
>
> First. Since the introduction of this resolution, the United States Supreme Court, by a 6-to-3 vote, has held that in his seizure of the steel mills Harry S. Truman, President of the United

3. 98 CONG. REC. 4325, 82d Cong. 2d Sess.

4. 98 CONG. REC. 7424, 82d Cong. 2d Sess.

States, exceeded his authority and powers, violated the Constitution of the United States, and flouted the expressed will and intent of the Congress—and, in so finding, the Court gave unprecedented warnings against the threat to freedom and constitutional government implicit in his act.

Second. Despite the President's technical compliance with the finding of the Court, prior to the Court decision he reasserted his claim to the powers then in question, and subsequent to that decision he has contemptuously called into question "the intention of the Court's majority" and contemptuously attributed the limits set on the President's powers not to Congress, or to the Court, or to the Constitution, but to "the Court's majority."

Third. The Court, in its finding in the steel case, emphasized not only the unconstitutionality of the Presidential seizure but also stressed his failure to utilize and exhaust existing and available legal resources for dealing with the situation, including the Taft-Hartley law.

Fourth. The President's failure and refusal to utilize and exhaust existing and available legal resources for dealing with the emergency has persisted since the Court decision and in spite of clear and unmistakable evidence of the will and intent of Congress given in response to his latest request for special legislation authorizing seizure or other special procedures.

The discharge petition, No. 14, was not signed by a majority of the Members of the House and was therefore not eligible for consideration in the House under Rule XXVII clause 4, *House Rules and Manual* § 908 (1973).

Charges Against Judges Murrah, Chandler, and Bohanon

§ 14.13 A resolution authorizing an investigation in the 89th Congress into the conduct of three federal judges was referred to the Committee on Rules but not acted on.

On Feb. 22, 1966, Mr. H. R. Gross, of Iowa, introduced House Resolution 739, authorizing the Committee on the Judiciary to inquire into and investigate the conduct of Alfred Murrah, Chief Judge of the 10th Circuit, Stephen Chandler, District Judge, Western District of Oklahoma, and Luther Bohanon, District Judge, Eastern, Northern, and Western Districts of Oklahoma, in order to determine whether any of the three judges had been guilty of high crimes or misdemeanors. The resolution was referred to the Committee on Rules.(5)

Mr. Gross stated the purpose of the resolution as follows:

Mr. Segal, Judge John Biggs, Jr., the chairman of the judicial conference committee on court administration,

5. 112 CONG. REC. 3665, 89th Cong. 2d Sess.

and Mr. Joseph Borkin, Washington attorney and author of the book, "The Corrupt Judge," were in agreement that impeachment is the only remedy available today for action against judicial misconduct.

Both Mr. Borkin and the chairman of the subcommittee emphasized the serious problem that has arisen in Oklahoma where the Judicial Council of the 10th Judicial Circuit made an attempt to bar Judge Stephen S. Chandler from handling cases because it was stated he was "either unwilling or unable" to perform his judicial functions adequately.

Mr. Borkin, a man with an impressive background in the study of the problems of corruption and misconduct in the judiciary, pointed out that Judge Chandler, in return, has made serious charges of attempted bribery and other misconduct against two other judges—Alfred P. Murrah, chief judge, 10th Circuit, U.S. Court of Appeals, and Luther Bohanon, district judge, U.S. District Court for the Eastern, Northern, and Western Districts of Oklahoma.

Mr. Borkin stressed that this dispute in Oklahoma has been an upsetting factor in the Federal courts in Oklahoma since 1962, and he declared that these charges should not be permitted to stand. He emphasized that there can be no compromise short of a full investigation to clear the judges or to force their removal.

I agree with Mr. Borkin that great damage has been done because the courts, the executive branch, and the Congress have taken no effective steps to clear up this scandalous situation. I have waited patiently for months, and I have hoped that the Justice Department, the courts, or the Congress would initiate or suggest a proper legal investigation to clear the air and put an end to this outrageous situation in the judiciary in the 10th circuit.

There has been no effective action taken, or even started. Therefore, I am today instituting the only action available to try to get to the bottom of this.

I have introduced a House resolution authorizing and directing the House Committee on the Judiciary to investigate the conduct of the three Federal judges in Oklahoma involved in this controversy. Upon its finding of fact, the House Judiciary Committee would be empowered to institute impeachment proceedings or make any other recommendations it deems proper.

The committee would also be empowered to require the attendance of witnesses and the production of such books, papers, and documents—including financial statements, contracts, and bank accounts—as it deems necessary.

The resolution in no way establishes the guilt of the principals involved. It is necessary to the launching of an investigation for the purpose of determining the facts essential to an intelligent conclusion and eliminating the cloud now hanging over the Federal judiciary.[6]

The Committee on Rules took no action on the resolution.

Charges Against Associate Supreme Court Justice Douglas

§ 14.14 When the Minority Leader criticized the conduct

6. *Id.* at p. 3653.

of Associate Justice William O. Douglas of the U.S. Supreme Court during a special order speech in the 91st Congress and suggested the creation of a select committee to investigate such conduct to determine whether impeachment was warranted, another Member announced on the floor that he was introducing a resolution of impeachment; the resolution was referred to the Committee on the Judiciary.

On Apr. 15, 1970, Minority Leader Gerald R. Ford, of Michigan, took the floor for a special order speech in which he criticized the conduct of Associate Justice Douglas of the U.S. Supreme Court. Mr. Ford suggested that a select committee of the House be created to investigate such conduct in order to determine whether impeachment proceedings might be warranted.(7)

Mr. Louis C. Wyman, of New Hampshire, then took the floor under a special order speech to discuss the same subject. He yielded time to Mr. Andrew Jacobs, Jr., of Indiana, as follows:

MR. JACOBS: Mr. Speaker, will the gentleman yield for a three-sentence statement?

MR. WYMAN: I yield to the gentleman from Indiana.

MR. JACOBS: Mr. Speaker, the gentleman from Michigan has stated publicly that he favors impeachment of Justice Douglas.

He, therefore, has a duty to this House and this country to file a resolution of impeachment.

Since he refuses to do so and since he raises grave questions, the answers to which I do not know, but every American is entitled to know, I introduce at this time the resolution of impeachment in order that a proper and dignified inquiry into this matter might be held.

At this point Mr. Jacobs introduced the resolution by placing it in the hopper at the Clerk's desk.

THE SPEAKER PRO TEMPORE:(8) The gentleman from New Hampshire has the floor.

MR. WYMAN: I did not yield for that purpose.

THE SPEAKER PRO TEMPORE: The gentleman from Indiana has introduced a resolution.(9)

Mr. Jacobs' resolution, House Resolution 920, which was referred to the Committee on the Judiciary(10) declared:

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7. 116 CONG. REC. 11912–17, 91st Cong. 2d Sess. Mr. Ford discussed the standard for impeachable offenses and concluded in part that such an offense was "whatever a majority of the House of Representatives considers [it] to be at a given moment in history." *Id.* at p. 11913.

8. Charles M. Price (Ill.).

9. 116 CONG. REC. 11920, 91st Cong. 2d Sess.

10. *Id.* at p. 11942. For a similar resolution proposed in the 83d Congress,

Resolved, That William O. Douglas, Associate Justice of the Supreme Court of the United States be impeached [for] high crimes and misdemeanors and misbehavior in office.

Other resolutions, all of which called for the creation of a select committee to conduct an investigation and to determine whether impeachment proceedings were warranted, were referred to the Committee on Rules. For example, House Resolution 922, introduced by Mr. Wyman, with 24 cosponsors, read as follows:[11]

Whereas, the Constitution of the United States provides in Article III, Section 1, that Justices of the Supreme Court shall hold office only "during good behavior", and

Whereas, the Constitution also provides in Article II, Section 4, that Justices of the Supreme Court shall be removed from Office on Impeachment for High Crimes and Misdemeanors, and

Whereas the Constitution also provides in Article VI that Justices of the Supreme Court shall be bound by "Oath or Affirmation to support this Constitution" and the United States Code (5 U.S.C. 16) prescribes the following form of oath which was taken and sworn to by William Orville Douglas prior to his accession to incumbency on the United States Supreme Court:

I, William Orville Douglas, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

and

Whereas, integrity and objectivity in respect to issues and causes to be presented to the United States Supreme Court for final determination make it mandatory that Members thereof refrain from public advocacy of a position on any matter that may come before the High Court lest public confidence in this constitutionally co-equal judicial body be undermined, and

Whereas, the said William Orville Douglas has, on frequent occasions in published writings, speeches, lectures and statements, declared a personal position on issues to come before the United States Supreme Court indicative of a prejudiced and nonjudicial attitude incompatible with good behavior and contrary to the requirements of judicial decorum obligatory upon the Federal judiciary in general and members of the United States Supreme Court in particular, and

Whereas, by the aforementioned conduct and writings, the said William Orville Douglas has established himself before the public, including liti-

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but not acted upon, impeaching Justice Douglas, see H. Res. 290, introduced June 17, 1953, 99 CONG. REC. 6760, 83d Cong. 1st Sess.

11. H. Res. 922 was referred to the Committee on Rules. 116 CONG. REC. 12130, 12131, 91st Cong. 2d Sess., Apr. 16, 1970.

See also H. Res. 923, H. Res. 924, H. Res. 925, H. Res. 926, H. Res. 927, H. Res. 928, 91st Cong. 2d Sess.

gants whose lives, rights and future are seriously affected by decisions of the Court of which the said William Orville Douglas is a member, as a partisan advocate and not as a judge, and

Whereas, by indicating in advance of Supreme Court decisions, on the basis of declared, printed, or quoted convictions, how he would decide matters in controversy pending and to become pending before the Court of which he is a member, the said William Orville Douglas has committed the high misdemeanor of undermining the integrity of the highest constitutional Court in America, and has willfully and deliberately undermined public confidence in the said Court as an institution, and

Whereas, contrary to his Oath of Office as well as patently in conflict with the Canons of Ethics for the Judiciary of the American Bar Association, the said William Orville Douglas nevertheless on February 19, 1970, did publish and publicly distribute throughout the United States, statements encouraging, aggravating and inciting violence, anarchy and civil unrest in the form of a book entitled "Points of Rebellion" in which the said William Orville Douglas, all the while an incumbent on the Highest Court of last resort in the United States, stated, among other things, that:

> But where grievances pile high and most of the elected spokesmen represent the Establishment, violence may be the only effective response. (pp. 88–89, "Points of Rebellion," Random House, Inc., February 19, 1970, William O. Douglas.)
>
> The special interests that control government use its powers to favor themselves and to perpetuate regimes of oppression, exploitation, and discrimination against the many (ibid, p. 92).
>
> People march and protest but they are not heard (ibid, p. 88).
>
> Where there is a persistent sense of futility, there is violence; and that is where we are today (ibid, p. 56).
>
> The two parties have become almost indistinguishable; and each is controlled by the Establishment. The modern day dissenters and protesters are functioning as the loyal opposition functions in England. They are the mounting voice of political opposition to the status quo, calling for revolutionary changes in our institutions. Yet the powers-that-be faintly echo Adolph Hitler (ibid, p. 57).
>
> Yet American protesters need not be submissive. A speaker who resists arrest is acting as a free man (ibid, p. 6).
>
> We must realize that today's Establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is also revolution (ibid, p. 95).

and thus willfully and deliberately fanned the fires of unrest, rebellion, and revolution in the United States, and

Whereas, in the April 1970 issue of Evergreen Magazine, the said William Orville Douglas for pay did, while an incumbent on the United States Supreme Court, publish an article entitled Redress and Revolution, appearing on page 41 of said issue immediately following a malicious caricature of the President of the United States as George III, as well as photographs of nudes engaging in various acts of sexual intercourse, in which article the said William Orville Douglas again wrote for pay that:

> George III was the symbol against which our Founders made a revolution now considered bright and glorious. . . . We must realize that to-

> day's Establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is also Revolution.

and

Whereas, the said William Orville Douglas, prepared, authored, and received payment for an article which appeared in the March 1969 issue of the magazine, Avant Garde, published by Ralph Ginzburg, previously convicted of sending obscene literature through the United States Mails, (see 383 U.S. 463) at a time when the said Ralph Ginzburg was actively pursuing an appeal from his conviction upon a charge of malicious libel before the Supreme Court of the United States, yet nevertheless the said William Orville Douglas, as a sitting member of the Supreme Court of the United States, knowing full well his own financial relationship with this litigant before the Court, sat in judgment on the Ginzburg appeal, all in clear violation and conflict with his Oath of Office, the Canons of Judicial Ethics, and Federal law (396 U.S. 1049), and

Whereas, while an incumbent on the United States Supreme Court the said William Orville Douglas for hire has served and is reported to still serve as a Director and as Chairman of the Executive Committee of the Center for the Study of Democratic Institutions in Santa Barbara, California, a politically oriented action organization which, among other things, has organized national conferences designed to seek detente with the Soviet Union and openly encouraged student radicalism, and

Whereas, the said Center for the Study of Democratic Institutions, in violation of the Logan Act, sponsored and financed a "Pacem in Terris II Convocation" at Geneva, Switzerland, May 28–31, 1967, to discuss foreign affairs and U.S. foreign policy including the "Case of Vietnam" and the "Case of Germany", to which Ho Chi Minh was publicly invited, and all while the United States was in the midst of war in which Communists directed by the same Ho Chi Minh were killing American boys fighting to give South Vietnam the independence and freedom from aggression we had promised that Nation, and from this same Center there were paid to the said William Orville Douglas fees of $500 per day for Seminars and Articles, and

Whereas, paid activity of this type by a sitting Justice of the Supreme Court of the United States is contrary to his Oath of Office to uphold the United States Constitution, violative the Canons of Ethics of the American Bar Association and is believed to constitute misdemeanors of the most fundamental type in the context in which that term appears in the United States Constitution (Article II, Section 4) as well as failing to constitute "good behavior" as that term appears in the Constitution (Article III, Section 1), upon which the tenure of all Federal judges is expressly conditioned, and

Whereas, moneys paid to the said William Orville Douglas from and by the aforementioned Center are at least as follows: 1962, $900; 1963, $800; 1965, $1,000; 1966, $1,000; 1968, $1,100; 1969, $2,000; all during tenure on the United States Supreme Court, and all while a Director on a Board of Directors that meets (and met) biannually to determine the general policies of the Center, and

Whereas, the said William Orville Douglas, contrary to his sworn obligation to refrain therefrom and in violation of the Canons of Ethics, has repeatedly engaged in political activity while an incumbent of the High Court, evidenced in part by his authorization for the use of his name in a recent political fund-raising letter, has continued public advocacy of the recognition of Red China by the United States, has publicly criticized the military posture of the United States, has authored for pay several articles on subjects patently related to causes pending or to be pending before the United States Supreme Court in Playboy Magazine on such subjects as invasions of privacy and civil liberties, and most recently has expressed in Brazil public criticism of United States foreign policy while on a visit to Brazil in 1969, plainly designed to undermine public confidence in South and Latin American countries in the motives and objectives of the foreign policy of the United States in Latin America, and

Whereas, in addition to the foregoing, and while a sitting Justice on the Supreme Court of the United States, the said William Orville Douglas has charged, been paid and received $12,000 per annum as President and Director of the Parvin Foundation from 1960 to 1969, which Foundation received substantial income from gambling interests in the Freemont Casino at Las Vegas, Nevada, as well as the Flamingo at the same location, accompanied by innumerable conflicts of interest and overlapping financial maneuvers frequently involved in litigation the ultimate appeal from which could only be to the Supreme Court of which the said William Orville Douglas was and is a member, the tenure of the said William Orville Douglas with the Parvin Foundation being reported to have existed since 1960 in the capacity of President, and resulting in the receipt by the said William Orville Douglas from the Parvin Foundation of fees aggregating at least $85,000, all while a member of the United States Supreme Court, and all while referring to Internal Revenue Service investigation of the Parvin Foundation while a Justice of the United States Supreme Court as a "manufactured case" intended to force him to leave the bench all while he was still President and Director of the said Foundation and was earning a $12,000 annual salary in those posts, a patent conflict of interest, and

Whereas, it has been repeatedly alleged that the said William Orville Douglas in his position as President of the Parvin Foundation did in fact give the said Foundation tax advice, with particular reference to matters known by the said William Orville Douglas at the time to have been under investigation by the United States Internal Revenue Service, all contrary to the basic legal and judicial requirement that a Supreme Court Justice may not give legal advice, and particularly not for a fee, and

Whereas, the said William Orville Douglas has, from time to time over the past ten years, had dealings with, involved himself with, and may actually have received fees and travel expenses, either directly or indirectly, from known criminals, gamblers, and gangsters or their representatives and associates, for services, both within the United States and abroad, and

Whereas, the foregoing conduct on the part of the said William Orville

Douglas while a Justice of the Supreme Court is incompatible with his constitutional obligation to refrain from non-judicial activity of a patently unethical nature, and

Whereas, the foregoing conduct and other activities on the part of the said William Orville Douglas while a sitting Justice on the United States Supreme Court, establishes that the said William Orville Douglas in the conduct of his solemn judicial responsibilities has become a prejudiced advocate of predetermined position on matters in controversy or to become in controversy before the High Court to the demonstrated detriment of American jurisprudence, and

Whereas, from the foregoing, and without reference to whatever additional relevant information may be developed through investigation under oath, it appears that the said William Orville Douglas, among other things, has sat in judgment on a case involving a party from whom the said William Orville Douglas to his knowledge received financial gain, as well as that the said William Orville Douglas for personal financial gain, while a member of the United States Supreme Court, has encouraged violence to alter the present form of government of the United States of America, and has received and accepted substantial financial compensation from various sources for various duties incompatible with his judicial position and constitutional obligation, and has publicly and repeatedly, both orally and in writings, declared himself a partisan on issues pending or likely to become pending before the Court of which he is a member: Now, therefore, be it

Resolved, That—

(1) The Speaker of the House shall within fourteen days hereafter appoint a select committee of six Members of the House, equally divided between the majority and the minority parties and shall designate one member to serve as chairman, which select committee shall proceed to investigate and determine whether Associate Justice William Orville Douglas has committed high crimes and misdemeanors as that phrase appears in the Constitution, Article II, Section 4, or has, while an incumbent, failed to be of the good behavior upon which his Commission as said Justice is conditioned by the Constitution, Article III, Section 1. The select committee shall report to the House the results of its investigation, together with its recommendations on this resolution for impeachment of the said William Orville Douglas not later than ninety days following the designation of its full membership by the Speaker.

(2) For the purpose of carrying out this resolution the committee, or any subcommittee thereof, is authorized to sit and act during the present Congress at such times and places within the United States whether the House is sitting, has recessed, or has adjourned, to hold such hearings, and to require by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

Parliamentarian's Note: On Apr. 24, 1970, Chairman William M. Colmer, of Mississippi, of the Committee on Rules stated that pursuant to the statement of Emanuel Celler, of New York, Chairman of the Committee on the Judiciary, that the latter committee would hold hearings and take action on the impeachment within 60 days, he would not program for consideration by the Committee on Rules the resolutions creating a select committee to study the charges of impeachment.

§ 14.15 A subcommittee of the Committee on the Judiciary investigated charges of impeachable offenses against Associate Justice William O. Douglas and issued an interim report.

On June 20, 1970, the special subcommittee of the Committee on the Judiciary on House Resolution 920, impeaching Associate Justice Douglas, issued an interim report on the progress of its investigation of the charges.(12) The creation of the subcommittee and scope of its authority was set out on the first page of the report:

> I. AUTHORITY
>
> On April 21, 1970, the Committee on the Judiciary adopted a resolution to authorize the appointment of a Special Subcommittee on H. Res. 920, a resolution impeaching William O. Douglas, Associate Justice of the Supreme Court of the United States, of high crimes and misdemeanors in office. Pursuant to this resolution, the following members were appointed: Emanuel Celler (New York), Chairman; Byron G. Rogers (Colorado); Jack Brooks (Texas); William M. McCulloch (Ohio); and Edward Hutchinson (Michigan).
>
> The Special Subcommittee on H. Res. 920 is appointed and operates under the Rules of the House of Representatives. Rule XI, 13(f) empowers the Committee on the Judiciary to act on all proposed legislation, messages, petitions, memorials, or other matters relating to ". . . Federal courts and judges." In the 91st Congress, Rule XI has been implemented by H. Res. 93, February 5, 1969. H. Res. 93 authorizes the Committee on the Judiciary, acting as a whole or by subcommittee, to conduct full and complete investigations and studies on the matters coming within its jurisdiction, specifically ". . . (4) relating to judicial proceedings and the administration of Federal courts and personnel thereof, including local courts in territories and possessions".
>
> H. Res. 93 empowers the Committee to issue subpenas, over the signature of the Chairman of the Committee or any Member of the Committee designated by him. Subpenas issued by

12. First report by the special subcommittee on H. Res. 920 of the Committee on the Judiciary, committee print, 91st Cong; 2d Sess., June 20, 1970.

the Committee may be served by any person designated by the Chairman or such designated Member.

On April 28, 1970, the Special Subcommittee on H. Res. 920 held its organization meeting, appointed staff, and adopted procedures to be applied during the investigation. Although the power to issue subpenas is available, and the Subcommittee is prepared to use subpenas if necessary to carry out this investigation, thus far all potential witnesses have been cooperative and it has not been necessary to employ this investigatory tool. The Special Subcommittee operates under procedures established in paragraph 27, Rules of Committee Procedure, of Rule XI of the House of Representatives. These procedures will be followed until additional rules are adopted, which, on the basis of precedent in other impeachment proceedings, are determined by the Special Subcommittee to be appropriate.

The subcommittee held no hearings but gathered information on the various charges contained in House Resolution 922. As stated in the report, the subcommittee requested inspection of tax returns of Justice Douglas. Pursuant to advice by the Internal Revenue Service that a special resolution of the full committee would be required, as well as an executive order by the President, the committee adopted the following resolution on May 26, 1970:

RESOLUTION FOR SPECIAL SUBCOMMITTEE TO CONSIDER HOUSE RESOLUTION 920

Resolved, That the Special Subcommittee to consider H. Res. 920, a resolution impeaching William O. Douglas, Associate Justice of the Supreme Court of the United States, of high crimes and misdemeanors in office, hereby is authorized and directed to obtain and inspect from the Internal Revenue Service any and all materials and information relevant to its investigation in the files of the Internal Revenue Service, including tax returns, investigative reports, or other documents, that the Special Subcommittee to consider H. Res. 920 determines to be within the scope of H. Res. 920 and the various related resolutions that have been introduced into the House of Representatives.

The Special Subcommittee on H. Res. 920 is authorized to make such requests to the Internal Revenue Service as the Subcommittee determines to be appropriate, and the Subcommittee is authorized to amend its requests to designate such additional persons, taxpayers, tax returns, investigative reports, and other documents as the Subcommittee determines to be appropriate during the course of this investigation.

The Special Subcommittee on H. Res. 920 may designate agents to examine and receive information from the Internal Revenue Service.

This resolution specifically authorizes and directs the Special Subcommittee to obtain and inspect from the Internal Revenue Service the documents and other file materials described in the letter dated May 12, 1970, from Chairman Emanuel Celler to the Honorable Randolph Thrower. The tax returns for the following taxpayers, and the returns for such additional taxpayers as the Subcommittee subsequently may request, are included in this resolution:

Associate Justice William O. Douglas, Supreme Court of the United States, Washington, D. C. 20036.

Albert Parvin, 1900 Avenue of the Stars, Suite 1790, Century City, Calif. 90067.

Albert Parvin Foundation, c/o Arnold & Porter, 1229–19th Street, N. W., Washington, D.C. 20036.

The Center for the Study of Democratic Institutions, Box 4068, Santa Barbara, Calif. 93103.

Fund for the Republic, 136 East 57th Street, New York, N.Y. 10022.

Parvin-Dohrmann Corp., (Now Recrion Corp.), 120 N. Robertson Blvd., Los Angeles, Calif. 90048.[13]

The President subsequently issued the following executive order:

INSPECTION OF TAX RETURNS BY THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES

By virtue of the authority vested in me by sections 55(a) and 1604(c) of the Internal Revenue Code of 1939, as amended (26 U.S.C. (1952 ea.) 55(a), 1604(c)), and by sections 6103(a) and 6106 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6103(a), 6106), it is hereby ordered that any income, excess-profits, estate, gift, unemployment, or excise tax return, including all reports, documents, or other factual data relating thereto, shall, during the Ninety-first Congress, be open to inspection by the Committee on the Judiciary, House of Representatives, or any duly authorized subcommittee thereof, in connection with its consideration of House Resolution 920, a resolution impeaching William O. Douglas, Associate Justice of the Supreme Court of the United States. Whenever a return is open to inspection by such Committee or subcommittee, a copy thereof shall, upon request, be furnished to such Committee or subcommittee. Such inspection shall be in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury in Treasury Decisions 6132 and 6133, relating to the inspection of returns by committees of the Congress, approved by the President on May 3, 1955.[14]

The subcommittee recommended in its first report that the Committee on the Judiciary authorize an additional 60 days for the subcommittee to complete its investigation.[15]

§ 14.16 In its final report on its investigation into charges of impeachment against Associate Justice William O. Douglas, a subcommittee of the Committee on the Judiciary concluded that a federal judge could be impeached (1) for judicial conduct which is criminal or which is a serious dereliction from public duty, and (2) for nonjudicial conduct which is criminal; the subcommittee recommended that the evidence

13. Subcommittee report at pp. 18, 19.

14. Exec. Order No. 11535, issued June 12, 1970, subcommittee report at p. 19.

15. Subcommittee report at pp. 25, 26.

against Justice Douglas did not warrant impeachment.

On Sept. 17, 1970, the Special Subcommittee on House Resolution 920 of the Committee on the Judiciary, which subcommittee had been created by the committee to investigate and report on charges of impeachment against Associate Justice Douglas of the Supreme Court, submitted its final report to the committee.(16)

The report cited the 60-day extension granted the subcommittee by the Committee on the Judiciary on June 24, 1970, to complete its investigation. The report summarized the further investigation undertaken during the 60-day period and the additional requests for information from the Department of State, the Central Intelligence Agency, and various individuals.(17)

The report discussed concepts of impeachment and grounds for impeachment of federal civil officers and of federal judges in particular. The report concluded as follows on the grounds for impeachment of a federal judge:

> Reconciliation of the differences between the concept that a judge has a right to his office during "good behavior" and the concept that the legislature has a duty to remove him if his conduct constitutes a "misdemeanor" is facilitated by distinguishing conduct that occurs in connection with the exercise of his judicial office from conduct that is non-judicially connected. Such a distinction permits recognition that the content of the word "misdemeanor" for conduct that occurs in the course of exercise of the power of the judicial office includes a broader spectrum of action than is the case when nonjudicial activities are involved.
>
> When such a distinction is made, the two concepts on the necessity for judicial conduct to be criminal in nature to be subject to impeachment becomes defined and may be reconciled under the overriding requirement that to be a "misdemeanor," and hence impeachable, conduct must amount to a serious dereliction of an obligation owed to society.
>
> To facilitate exposition, the two concepts may be summarized as follows:
>
> > Both concepts must satisfy the requirements of Article II, Section 4, that the challenged activity must constitute ". . . Treason, Bribery or High Crimes and Misdemeanors."
> >
> > Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that

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16. Final report by the Special Subcommittee on H. Res. 920 of the Committee on the Judiciary, committee print, Committee on the Judiciary, 91st Cong. 2d Sess., Sept. 17, 1970.

17. The subcommittee issued on Aug. 11, 1970, a special subcommittee publication entitled "Legal Materials on Impeachment," containing briefs on the impeachment of Justice Douglas, information from the Library of Congress, and relevant extracts from Hinds' and Cannon's Precedents.

(1) involve criminal conduct in violation of law, or (2) that involve serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. . . . When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses [sic] against good morals and injurious to the social body.

Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve criminal acts in violation of law.

The two concepts differ only with respect to impeachability of judicial behavior not connected with the duties and responsibilities of the judicial office. Concept 2 would define "misdemeanor" to permit impeachment for serious derelictions of public duty but not necessarily violations of statutory or common law.

In summary, an outline of the two concepts would look this way:

A judge may be impeached for ". . . Treason, Bribery, or High Crimes or Misdemeanors."

A. Behavior, connected with judicial office or exercise of judicial power.

Concept I

1. Criminal conduct.
2. Serious dereliction from public duty.

Concept II

1. Criminal conduct.
2. Serious dereliction from public duty.

B. Behavior not connected with the duties and responsibilities of the judicial office.

Concept I

1. Criminal conduct.

Concept II

1. Criminal conduct.
2. Serious dereliction from public duty.

Chapter III, Disposition of Charges sets forth the Special Subcommittee's analysis of the charges that involve activities of Associate Justice William O. Douglas. Under this analysis it is not necessary for the members of the Judiciary Committee to choose between Concept I and II.[18]

The subcommittee's recommendation to the full committee read as follows:

IV. RECOMMENDATIONS OF SPECIAL SUBCOMMITTEE TO JUDICIARY COMMITTEE

1. It is not necessary for the members of the Judiciary Committee to take a position on either of the concepts of impeachment that are discussed in Chapter II.

2. Intensive investigation of the Special Subcommittee has not disclosed creditable evidence that would warrant preparation of charges on any acceptable concept of an impeachable offense.[19]

EMANUEL CELLER,
BYRON G. ROGERS,
JACK BROOKS.

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18. Special subcommittee report at pp. 37–39. For the entire portion of the subcommittee report entitled "Concepts of Impeachment", see § 3.13, supra.

19. Special subcommittee report at p. 349.

The report included minority views of Mr. Edward Hutchinson, of Michigan, stating (1) that the portion of the report on concepts of impeachment was mere dicta under the circumstances and (2) that the investigation was incomplete and should have been further pursued, not only as to impeachment for improper conduct but also as to other action such as censure or official rebuke:

> The report contains a chapter on the Concepts of Impeachment. At the same time, it takes the position that it is unnecessary to choose among the concepts mentioned because it finds no impeachable offense under any. It is evident, therefore, that while a discussion of the theory of impeachment is interesting, it is unnecessary to a resolution of the case as the Subcommittee views it. This chapter on Concepts is nothing more than dicta under the circumstances. Certainly the Subcommittee should not even indirectly narrow the power of the House to impeach through a recitation of two or three theories and a very apparent choice of one over the others, while at the same time asserting that no choice is necessary. The Subcommittee's report adopts the view that a Federal judge cannot be impeached unless he is found to have committed a crime, or a serious indiscretion in his judicially connected activities. Although it is purely dicta, inclusion of this chapter in the report may be mischievous since it might unjustifiably restrict the scope of further investigation.
>
> The Subcommittee's report, which is called a final report, addresses itself only to the question of impeachment. Admittedly no investigation has been undertaken to determine whether some of the Justice's activities, if not impeachable, seem so improper as to merit congressional censure or other official criticism by the House. There is considerable precedent for censure or other official rebuke even though a particular activity, while improper, was found not impeachable. This Subcommittee, however, did not investigate with the thoroughness requisite for judging questionable activities short of impeachment. The majority concludes that it finds no grounds for impeachment and stops there. In my opinion, it should have pursued the matter further. [20]

The Committee on the Judiciary discontinued further proceedings against Justice Douglas, and the matter was not further considered by the House.[1]

Charges Against Vice President Agnew

§ 14.17 The Speaker laid before the House in the 93d Con-

20. *Id.* at pp. 351, 352.

1. For remarks on the final subcommittee report and the Judiciary Committee's failure to act on the final report, see 116 CONG. REC. 43147, 43148, 91st Cong. 2d Sess., Dec. 21, 1970 (remarks of Mr. David W. Dennis [Ind.]). For the minority views on the report of Mr. Hutchinson, printed in the Record, see 116 CONG. REC. 43486, 91st Cong. 2d Sess., Dec. 22, 1970.

gress a communication from Vice President Spiro Agnew requesting the House to initiate an investigation of charges which might "assume the character of impeachable offenses," made against him during an investigation by a U.S. Attorney, and offering the House full cooperation in such a House investigation. No action was taken on the request.

On Sept. 25, 1973,[2] Speaker Carl Albert, of Oklahoma, laid before the House a communication from Vice President Agnew requesting that the House investigate certain charges brought against him by a U.S. Attorney:

> The Speaker laid before the House the following communication from the Vice President of the United States:
>
> THE VICE PRESIDENT,
> *Washington, September 25, 1973.*
>
> Hon. CARL ALBERT,
> *Speaker of the House of Representatives, the House of Representatives, Washington, D.C.*
>
> DEAR MR. SPEAKER: I respectfully request that the House of Representatives undertake a full inquiry into the charges which have apparently been made against me in the course of an investigation by the United States Attorney for the District of Maryland.
>
> This request is made in the dual interests of preserving the Constitutional stature of my Office and accomplishing my personal vindication.
>
> After the most careful study, my counsel have advised me that the Constitution bars a criminal proceeding of any kind—federal or state, county or town—against a President or Vice President while he holds office.
>
> Accordingly, I cannot acquiesce in any criminal proceeding being lodged against me in Maryland or elsewhere. And I cannot look to any such proceeding for vindication.
>
> In these circumstances, I believe, it is the right and duty of the Vice President to turn to the House. A closely parallel precedent so suggests.
>
> Almost a century and a half ago, Vice President Calhoun was beset with charges of improper participation in the profits of an Army contract made while he had been Secretary of War. On December 29, 1826, he addressed to your Body a communication whose eloquent language I can better quote than rival:
>
> "An imperious sense of duty, and a sacred regard to the honor of the station which I occupy, compel me to approach your body in its high character of grand inquest of the nation.
>
> "Charges have been made against me of the most serious nature, and which, if true ought to degrade me from the high station in which I have been placed by the choice of my fellow-citizens, and to consign my name to perpetual infamy.
>
> "In claiming the investigation of the House, I am sensible that, under our free and happy institutions, the conduct of public servants is a fair subject of the closest scrutiny and the freest remarks, and that a firm and faithful discharge of duty affords, ordinarily, ample protection against political attacks; but, when such attacks assume the character of impeachable offenses, and become, in some degree, official, by being placed among the public records, an officer thus assailed, however base the instrument used, if conscious of inno-

2. 119 CONG. REC. 31368, 93d Cong. 1st Sess.

cence, can look for refuge only to the Hall of the immediate Representatives of the People."

Vice President Calhoun concluded his communication with a "challenge" to "the freest investigation of the House, as the only means effectively to repel this premeditated attack." Your Body responded at once by establishing a select committee, which subpoenaed witnesses and documents, held exhaustive hearings, and submitted a Report on February 13, 1827. The Report, exonerating the Vice President of any wrongdoing, was laid on the table (together with minority views even more strongly in his favor) and the accusations were thereby put to rest.

Like my predecessor Calhoun I am the subject of public attacks that may "assume the character of impeachable offenses," and thus require investigation by the House as the repository of "the sole Power of Impeachment" and the "grand inquest of the nation." No investigation in any other forum could either substitute for the investigation by the House contemplated by Article I, Section 2, Clause 5 of the Constitution or lay to rest in a timely and definitive manner the unfounded charges whose currency unavoidably jeopardizes the functions of my Office.

The wisdom of the Framers of the Constitution in making the House the only proper agency to investigate the conduct of a President or Vice President has been borne out by recent events. Since the Maryland investigation became a matter of public knowledge some seven weeks ago, there has been a constant and ever-broadening stream of rumors, accusations and speculations aimed at me. I regret to say that the source, in many instances, can have been only the prosecutors themselves.

The result has been so to foul the atmosphere that no grand or petit jury could fairly consider this matter on the merits.

I therefore respectfully call upon the House to discharge its Constitutional obligation.

I shall, of course, cooperate fully. As I have said before, I have nothing to hide. I have directed my counsel to deliver forthwith to the Clerk of the House all of my original records of which copies have previously been furnished to the United States Attorney. If there is any other way in which I can be of aid, I am wholly at the disposal of the House.

I am confident that, like Vice President Calhoun, I shall be vindicated by the House.

Respectfully yours

SPIRO T. AGNEW.

On Sept. 26, 1973,[3] Majority Leader Thomas P. O'Neill, Jr., of Massachusetts, made an announcement in relation to Vice President Agnew's request for an investigation into possible impeachable offenses against him:

(Mr. O'Neill asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

MR. O'NEILL: Mr. Speaker, I rise at this time merely to make an announcement to the House that in the press conference the Speaker made the following statement:

> The Vice President's letter relates to matters before the courts. In view of that fact, I, as Speaker, will not take any action on the letter at this time.

The House took no action on the Vice President's request, although

3. *Id.* at p. 31453.

resolutions were introduced on Sept. 26, 1973, calling for investigation of the charges referred to by the Vice President, such charges to be investigated by the Committee on the Judiciary or by a select committee.[4]

Parliamentarian's Note: The request cited by the Vice President in his letter was made by Vice President John Calhoun in 1826 and is discussed at 3 Hinds' Precedents § 1736. On that occasion, the alleged charges related to the Vice President's former tenure as Secretary of War. The communication was referred on motion to a select committee which investigated the charges and subsequently reported to the House that no impropriety had been found in the Vice President's former conduct as a civil officer under the United States. The report of the select committee was ordered to lie on the table and the House took no further action thereon.

In 1873, however, the Committee on the Judiciary reported that a civil officer, in that case Vice President Schuyler Colfax, could not be impeached for offenses allegedly committed prior to his term of office as a civil officer under the United States. The committee had investigated whether Vice President Colfax had, during his prior term as Speaker of the House, been involved in bribes of Members. As reported in 3 Hinds' Precedents § 2510, the committee concluded as follows in its report to the House:

> But we are to consider, taking the harshest construction of the evidence, whether the receipt of a bribe by a person who afterwards becomes a civil officer of the United States, even while holding another official position, is an act upon which an impeachment can be grounded to subject him to removal from an office which he afterwards holds. To elucidate this we first turn to the precedents.
>
> Your committee find that in all cases of impeachment or attempted impeachment under our Constitution there is no instance where the accusation was not in regard to an act done or omitted to be done while the officer was in office. In every case it has been heretofore considered material that the articles of impeachment should allege in substance that, being such officer, and while in the exercise of the duties of his office, the accused committed the acts of alleged inculpation.

Vice President Agnew resigned his office as Vice President on Oct. 10, 1973. A resolution of inquiry (H. Res. 572), referred to the Committee on the Judiciary on Oct. 1, 1973, and directing the Attorney General to inform the

4. See H. Res. 566, H. Res. 567, H. Res. 569, H. Res. 570, referred to the Committee on Rules.

House of facts relating to Vice President Agnew's conduct, was discharged by unanimous consent on Oct. 10, 1973, and laid on the table.[5]

§ 15. Impeachment Proceedings Against President Nixon

Cross Reference

Portions of the final report of the Committee on the Judiciary, pursuant to its investigation into the conduct of the President, relating to grounds for Presidential impeachment and forms of articles of impeachment, see §§ 3.3, 3.7, 3.8, supra.

Collateral References

Debate on Articles of Impeachment, Hearings of the Committee on the Judiciary pursuant to House Resolution 803, 93d Cong. 2d Sess., July 24, 25, 26, 27, 29, and 30, 1974.

Impeachment of Richard M. Nixon, President of the United States, Report of the Committee on the Judiciary, H. REPT. No. 93-1305, 93d Cong. 2d Sess., Aug. 20, 1974, printed in full in the *Congressional Record*, 120 CONG. REC. 29219-361, 93d Cong. 2d Sess., Aug. 20, 1974.

Impeachment, Selected Materials, Committee on the Judiciary, H. Doc. No. 93-7, 93d Cong. 1st Sess., Oct. 1973.

Impeachment, Selected Materials on Procedure, Committee on the Judiciary, Committee Print, 93d Cong. 2d Sess., Jan. 1974.

Introduction of Impeachment Charges Against the President

§ 15.1 Various resolutions were introduced in the 93d Congress, first session, relating to the impeachment of President Richard M. Nixon, some directly calling for his censure or impeachment and some calling for an investigation by the Committee on the Judiciary or by a select committee; the former were referred to the Committee on the Judiciary and the latter were referred to the Committee on Rules.

On Oct. 23, 1973, resolutions calling for the impeachment of President Nixon or for investigations towards that end were introduced in the House by their being placed in the hopper pursuant to Rule XXII clause 4. The resolutions were referred as follows:

By Mr. Long of Maryland:

H. Con. Res. 365. Concurrent resolution of censureship without prejudice to impeachment; to the Committee on the Judiciary.

By Ms. Abzug:

H. Res. 625. Resolution impeaching Richard M. Nixon, President of the

5. 119 CONG. REC. 33687, 93d Cong. 1st Sess.

United States, for high crimes and misdemeanors; to the Committee on the Judiciary.

By Mr. Ashley:

H. Res. 626. Resolution directing the Committee on the Judiciary to investigate whether there are grounds for the impeachment of Richard M. Nixon; to the Committee on Rules.

By Mr. Bingham:

H. Res. 627. Resolution directing the Committee on the Judiciary to inquire into and investigate whether grounds exist for the impeachment of Richard M. Nixon; to the Committee on Rules.

By Mr. Burton (for himself, Ms. Abzug, Mr. Anderson of California, Mr. Aspin, Mr. Bergland, Mr. Bingham, Mr. Brasco, Mr. Brown of California, Mr. Boland, Mr. Brademas, Mrs. Chisholm, Mr. Culver, Mr. Conyers, Mr. Dellums, Mr. Drinan, Mr. Eckhardt, Mr. Edwards of California, Mr. Evans of Colorado, Mr. Fascell, Mr. Fauntroy, Mr. Foley, Mr. William D. Ford, Mr. Fraser, Mr. Giaimo, and Ms. Grasso):

H. Res. 628. Resolution directing the Committee on the Judiciary to inquire into and investigate whether grounds exist for the impeachment of Richard M. Nixon; to the Committee on Rules. . . .

By Mr. Hechler of West Virginia:

H. Res. 631. Resolution that Richard M. Nixon, President of the United States, is impeached of high crimes and misdemeanors; to the Committee on the Judiciary.

By Mrs. Heckler of Massachusetts:

H. Res. 632. Resolution to appoint a Special Prosecutor; to the Committee on the Judiciary. . . .

By Mr. McCloskey:

H. Res. 634. Resolution of inquiry; to the Committee on the Judiciary.

H. Res. 635. Resolution for the impeachment of Richard M. Nixon; to the Committee on the Judiciary.

By Mr. Mazzoli:

H. Res. 636. Resolution: an inquiry into the existence of grounds for the impeachment of Richard M. Nixon, President of the United States; to the Committee on Rules.

By Mr. Milford:

H. Res. 637. Resolution providing for the establishment of an Investigative Committee to investigate alleged Presidential misconduct; to the Committee on Rules.

By Mr. Mitchell of Maryland (for himself, Mr. Burton, and Mr. Fauntroy):

H. Res. 638. Resolution impeaching Richard M. Nixon, President of the United States, of high crimes and misdemeanors; to the Committee on the Judiciary.[6]

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6. 119 CONG. REC. 34873, 93d Cong. 1st Sess.

The first resolution in the 93d Congress calling for President Nixon's impeachment was introduced by Mr. Robert F. Drinan (Mass.), on July 31, 1973, H. Res. 513, 93d Cong. 1st Sess. (placed in hopper and referred to Committee on the Judiciary).

In the 92d Congress, second session, resolutions were introduced im-

Parliamentarian's Note: The resolutions were introduced following the President's dismissal of Special Prosecutor Cox, of the Watergate Special Prosecution Force investigating Presidential campaign activities, and the resignation of Attorney General Richardson.(7)

Authority for Judiciary Committee Investigation

§ 15.2 Although the House had adopted a resolution authorizing the Committee on the Judiciary, to which had been referred resolutions impeaching President Richard M. Nixon, to conduct investigations (with subpena power) within its jurisdiction as such jurisdiction was defined in Rule XI clause 13, and although the House had adopted a resolution intended to fund expenses of the impeachment inquiry by the committee, the committee reported and called up as privileged a subsequent resolution specifically mandating an impeachment investigation and continuing the availability of funds, in order to confirm the delegation of authority from the House to that committee to conduct the investigation.

On Feb. 6, 1974, Peter W. Rodino, Jr., of New Jersey, Chairman of the Committee on the Judiciary, called up for immediate consideration House Resolution 803, authorizing the committee to investigate the sufficiency of grounds for the impeachment of President Nixon, which resolution had been reported by the committee on Feb. 1, 1974.

The resolution read as follows:

H. RES. 803

Resolved, That the Committee on the Judiciary, acting as a whole or by any subcommittee thereof appointed by the chairman for the purposes hereof and in accordance with the rules of the committee, is authorized and directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America. The committee shall report to the House of Representatives such resolutions, articles of impeachment, or other recommendations as it deems proper.

Sec. 2. (a) For the purpose of making such investigation, the committee is authorized to require—

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peaching the President for his conduct of the Vietnam conflict. See H. Res. 976 and H. Res. 989, 92d Cong. 2d Sess.

7. Comments were delivered in the House on Oct. 23, 1973, on actions of the President. See, for example, the comments of Majority Leader Thomas P. O'Neill, Jr. (Mass.), at 119 CONG. REC. 34819, 93d Cong. 1st Sess.

(1) by subpena or otherwise—

(A) the attendance and testimony of any person (including at a taking of a deposition by counsel for the committee); and

(B) the production of such things; and

(2) by interrogatory, the furnishing of such information; as it deems necessary to such investigation.

(b) Such authority of the committee may be exercised—

(1) by the chairman and the ranking minority member acting jointly, or, if either declines to act, by the other acting alone, except that in the event either so declines, either shall have the right to refer to the committee for decision the question whether such authority shall be so exercised and the committee shall be convened promptly to render that decision; or

(2) by the committee acting as a whole or by subcommittee. Subpenas and interrogatories so authorized may be issued over the signature of the chairman, or ranking minority member, or any member designated by either of them, and may be served by any person designated by the chairman, or ranking minority member, or any member designated by either of them. The chairman, or ranking minority member, or any member designated by either of them (or, with respect to any deposition, answer to interrogatory, or affidavit, any person authorized by law to administer oaths) may administer oaths to any witness. For the purposes of this section, "things" includes, without limitation, books, records, correspondence, logs, journals, memorandums, papers, documents, writings, drawings, graphs, charts, photographs, reproductions, recordings, tapes, transcripts, printouts, data compilations from which information can be obtained (translated if necessary, through detection devices into reasonably usable form), tangible objects, and other things of any kind.

Sec. 3. For the purpose of making such investigation, the committee, and any subcommittee thereof, are authorized to sit and act, without regard to clause 31 of rule XI of the Rules of the House of Representatives, during the present Congress at such times and places within or without the United States, whether the House is meeting, has recessed, or has adjourned, and to hold such hearings, as it deems necessary.

Sec. 4. Any funds made available to the Committee on the Judiciary under House Resolution 702 of the Ninety-third Congress, adopted November 15, 1973, or made available for the purpose hereafter, may be expended for the purpose of carrying out the investigation authorized and directed by this resolution.

Mr. Rodino and Mr. Edward Hutchinson, of Michigan, the ranking minority member of the Committee on the Jucliciary, explained the purpose of the resolution, which had been adopted unanimously by the committee, as follows:

MR. RODINO: Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, the English statesman Edmund Burke said, in addressing an important constitutional question, more than 200 years ago:

> We stand in a situation very honorable to ourselves and very useful to our country, if we do not abuse or abandon the trust that is placed in us.

We stand in such a position now, and—whatever the result—we are going to be just, and honorable, and worthy of the public trust.

Our responsibility in this is clear. The Constitution says, in article I; section 2, clause 5:

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

A number of impeachment resolutions were introduced by Members of the House in the last session of the Congress. They were referred to the Judiciary Committee by the Speaker.

We have reached the point when it is important that the House explicitly confirm our responsibility under the Constitution.

We are asking the House of Representatives, by this resolution, to authorize and direct the Committee on the Judiciary to investigate the conduct of the President of the United States, to determine whether or not evidence exists that the President is responsible for any acts that in the contemplation of the Constitution are grounds for impeachment, and if such evidence exists, whether or not it is sufficient to require the House to exercise its constitutional powers.

As part of that resolution, we are asking the House to give the Judiciary Committee the power of subpena in its investigations.

Such a resolution has always been passed by the House. The committee has voted unanimously to recommend that the House of Representatives adopt this resolution. It is a necessary step if we are to meet our obligations. . . .

MR. HUTCHINSON: Mr. Speaker, the first section of this resolution authorizes and directs your Judiciary Committee to investigate fully whether sufficient grounds exist to impeach the President of the United States. This constitutes the first explicit and formal action in the whole House to authorize such an inquiry.

The last section of the resolution validates the use by the committee of that million dollars allotted to it last November for purposes of the impeachment inquiry. Members will recall that the million dollar resolution made no reference to the impeachment inquiry but merely allotted that sum of money to the committee to be expended on matters within its jurisdiction. All Members of the House understood its intended purpose.

But the rule of the House defining the jurisdiction of committees does not place jurisdiction over impeachment matters in the Judiciary Committee. In fact, it does not place such jurisdiction anywhere. So this resolution vests jurisdiction in the committee over this particular impeachment matter, and it ratifies the authority of the committee to expend for the purpose those funds allocated to it last November, as well as whatever additional funds may be hereafter authorized.[8]

Parliamentarian's Note: Until the adoption of House Resolution 803, the Committee on the Judici-

8. 120 CONG. REC. 2349–51, 93d Cong. 2d Sess.

ary had been conducting an investigation into the charges of impeachment against President Nixon under its general investigatory authority, granted by the House on Feb. 28, 1973 (H. Res. 74). The committee had hired special counsel for the impeachment inquiry on Dec. 20, 1973, and had authorized the chairman to issue subpenas in relation to the inquiry on Oct. 30, 1973. House Resolution 74 authorized the Committee on the Judiciary to conduct investigations, and to issue subpenas during such investigations, within its jurisdiction "as set forth in clause 13 of rule XI of the Rules of the House of Representatives."

That clause did not specifically include impeachments within the jurisdiction of the Committee on the Judiciary.

The House had provided for the payment, from the contingent fund, of further expenses of the Committee on the Judiciary, in conducting investigations, following the introduction and referral to the committee of various resolutions proposing the impeachment of President Nixon. Debate on one such resolution, House Resolution 702, indicated that the additional funds for the investigations of the Committee on the Judiciary were intended in part for use in conducting an impeachment inquiry in relation to the President.(9)

It was considered necessary for the House to specifically vest the Committee on the Judiciary with the investigatory and subpena power to conduct the impeachment investigation and to specifically provide for payment of resultant expenses from the contingent fund of the House.(10)

As discussed in section 6, supra, House Resolution 803 was privileged, since reported by the committee to which resolutions of impeachment had been referred and since incidental to consideration of the impeachment question, although resolutions providing for funding from the contingent fund of the House are normally only

9. See H. Res. 702, 93d Cong. 1st Sess., Nov. 15, 1973.

10. On Apr. 29, 1974, subsequent to the adoption of H. Res. 803, the House adopted H. Res. 1027, authorizing further funds from the contingent fund for the expenses of the impeachment inquiry and other investigations within the jurisdiction of the Committee on the Judiciary. The report on the resolution, from the Committee on House Administration (H. REPT. NO. 93–1009) included a statement by Mr. Rodino on the status of the impeachment inquiry and on the funds required for expenses and salaries of the impeachment inquiry staff.

privileged when called up by the Committee on House Administration, and resolutions authorizing investigations are normally only privileged when called up by the Committee on Rules.

Preserving Confidentiality of Inquiry Materials

§ 15.3 The Committee on the Judiciary adopted Procedures preserving the confidentiality of impeachment inquiry materials.

On Feb. 22, 1974, the Committee on the Judiciary unanimously adopted procedures governing the confidentiality of the materials gathered in the impeachment inquiry into the conduct of President Richard Nixon. The first set of procedures, entitled "Procedures for Handling Impeachment Inquiry Material," limited access to such materials to the chairman, ranking minority member, special counsel, and special counsel to the minority of the committee, until the actual presentation of evidence at hearings. Confidentiality was to be strictly preserved.

The second set of procedures, entitled "Rules for the Impeachment Inquiry Staff," provided for security and nondisclosure of impeachment inquiry materials and work product of the inquiry staff.(11)

Determining Grounds for Presidential Impeachment

§ 15.4 During the inquiry into charges against President Richard M. Nixon by the Committee on the Judiciary, the impeachment inquiry staff reported to the committee on the constitutional grounds for Presidential impeachment, as drawn from the historical origins of impeachment and the American impeachment cases.

On Feb. 22, 1974, Peter W. Rodino, Jr., of New Jersey, Chairman of the Committee on the Judiciary, made available a report by the inquiry staff on the conduct of President Nixon. The report, entitled "Constitutional Grounds for Presidential Impeachment," summarized the historical origins and constitutional bases for impeachment and chronicled the American impeachment cases.

The report, printed as a committee print, did not necessarily reflect the views of the committee or its members, but was entirely a staff report. The staff concluded, in reviewing the issue whether

11. For the text of the rules, see § 6.9, supra.

impeachable offenses were required to be criminal or indictable offenses, that such was not the case under the English and American impeachment precedents.(12)

Status Reports

§ 15.5 During the impeachment inquiry involving President Richard M. Nixon, the inquiry staff of the Committee on the Judiciary reported to the committee on the status of its investigation.

On Mar. 1, 1974, the staff for the impeachment inquiry reported to the Committee on the Judiciary on the status of its investigative work (summarized in the committee's final report) with respect to specified allegations:

A. Allegations concerning domestic surveillance activities conducted by or at the direction of the White House.

B. Allegations concerning intelligence activities conducted by or at the direction of the White House for the purpose of the Presidential election of 1972.

C. Allegations concerning the Watergate break-in and related activities, including alleged efforts by persons in the White House and others to "cover up" such activities and others.

D. Allegations concerning improprieties in connection with the personal finances of the President.

E. Allegations concerning efforts by the White House to use agencies of the executive branch for political purposes, and alleged White House involvement with election campaign contributions.

F. Allegations concerning other misconduct.(13)

Presenting Evidence and Examining Witnesses

§ 15.6 In the Nixon impeachment inquiry, the Committee

12. For the text of the report, see the appendix to this chapter, infra.

The conclusion of the staff report was included in the final report of the Committee on the Judiciary recommending impeachment of the President. (H. REPT. NO. 93–1305, by the Committee on the Judiciary.) See 120 CONG. REC. 29220, 29221, 93d Cong. 2d Sess., Aug. 20, 1974.

The minority views included in the committee report reached an opposite conclusion from that of the staff report and from that of the majority of the committee, which determined to impeach the President for both criminal and noncriminal conduct (see § 3.8, supra, for the minority views and § 3.7, supra, for the majority views on the issue).

13. H. REPT. NO. 93–1305, at p. 8, Committee on the Judiciary, 93d Cong. 2d Sess., reported Aug. 20, 1974.

On May 23, 1974, the House authorized by resolution the printing of 2,000 additional copies of a committee print containing the staff report. H. Res. 1074, 93d Cong. 2d Sess.

The House also adopted on May 23, H. Res. 1073, authorizing the printing of additional copies of a committee print on the work of the impeachment inquiry staff as of Feb. 5, 1974.

on the Judiciary adopted certain procedures to be followed in presenting evidence and hearing witnesses.

On May 2, 1974, the Committee on the Judiciary unanimously adopted special procedures for presenting the evidence compiled by the committee staff to the full committee in hearings. The procedures provided for a statement of information to be presented, with annotated evidentiary materials, to committee members and to the President's counsel.[14]

The procedures allowed for the compilation and presentation of additional evidence by committee members or on request of the President's counsel.

Procedures were also adopted for holding hearings to examine witnesses. Under the procedures, hearings were to be attended by the President's counsel, and he was permitted to examine witnesses.

The procedures followed in the presentation of evidence are reflected in the summary from the committee's final report:

> From May 9, 1974 through June 21, 1974, the Committee considered in executive session approximately six hundred fifty "statements of information" and more than 7,200 pages of supporting evidentiary material presented by the inquiry staff. The statements of information and supporting evidentiary material, furnished to each Member of the Committee in 36 notebooks, presented material on several subjects of the inquiry: the Watergate break-in and its aftermath, ITT, dairy price supports, domestic surveillance, abuse of the IRS, and the activities of the Special Prosecutor. The staff also presented to the Committee written reports on President Nixon's income taxes, presidential impoundment of funds appropriated by Congress and the bombing of Cambodia.
>
> In each notebook, a statement of information relating to a particular phase of the investigation was immediately followed by supporting evidentiary material, which included copies of documents and testimony (much of it already on public record), transcripts of presidential conversations, and affidavits. A deliberate and scrupulous abstention from conclusions, even by implication, was observed.
>
> The Committee heard recordings of nineteen presidential conversations and dictabelt recollections. The presidential conversations were neither paraphrased nor summarized by the inquiry staff. Thus, no inferences or conclusions were drawn for the Committee. During the course of the hearings, Members of the Committee listened to each recording and simultaneously followed transcripts prepared by the inquiry staff.
>
> On June 27 and 28, 1974, Mr. James St. Clair, Special Counsel to the President made a further presentation in a similar manner and form as the inquiry staff's initial presentation. The Committee voted to make public the initial presentation by the inquiry

14. See § 6.5, supra.

staff, including substantially all of the supporting materials presented at the hearings, as well as the President's response.

Between July 2, 1974, and July 17, 1974, after the initial presentation, the Committee heard testimony from nine witnesses, including all the witnesses proposed by the President's counsel. The witnesses were interrogated by counsel for the Committee, by Special counsel to the President pursuant to the rules of the Committee, and by Members of the Committee. The Committee then heard an oral summation by Mr. St. Clair and received a written brief in support of the President's position.

The Committee concluded its hearings on July 17, a week in advance of its public debate on whether or not to recommend to the House that it exercise its constitutional power of impeachment. In preparation for that debate the majority and minority members of the impeachment inquiry staff presented to the Committee "summaries of information." (15)

The Committee on the Judiciary had previously adopted a resolution which was called up in the House under a motion to suspend the rules, on July 1, 1974, to authorize the committee to proceed without regard to Rule XI clause 27(f)(4), *House Rules and Manual* § 735 (1973), requiring the application of the five-minute rule for interrogation of witnesses by committees. The House had rejected the motion to suspend the rules and thereby denied to the committee the authorization to dispense with the five-minute rule in the interrogation of witnesses.(16)

Committee Consideration of Resolution and Articles Impeaching the President

§ 15.7 Consideration by the Committee on the Judiciary of the resolution and articles of impeachment against President Richard M. Nixon was made in order by committee resolution.

On July 23, 1974, the Committee on the Judiciary adopted a resolution making in order its consideration of a motion to report a resolution and articles of impeachment to the House. The resolution provided:

> *Resolved,* That at a business meeting on July 24, 1974, the Committee shall commence general debate on a motion to report to the House a Resolution, together with articles of impeachment, impeaching Richard M. Nixon, President of the United States. Such general debate shall consume no more than ten hours, during which time no

15. H. REPT. NO. 93–1305 at p. 9, Committee on the Judiciary, 93d Cong. 2d Sess., reported Aug. 20, 1974, printed in the Record at 120 CONG. REC. 29221, 93d Cong. 2d Sess., Aug. 20, 1974.

16. 120 CONG. REC. 21849–55, 93d Cong. 2d Sess.

Member shall be recognized for a period to exceed 15 minutes. At the conclusion of general debate, the proposed articles shall be read for amendment and Members shall be recognized for a period of five minutes to speak on each proposed article and on any and all amendments thereto, unless by motion debate is terminated thereon. Each proposed article, and any additional article, shall be separately considered for amendment and immediately thereafter voted upon as amended for recommendation to the House. At the conclusion of consideration of the articles for amendment and recommendation to the House, if any article has been agreed to, the original motion shall be considered as adopted and the Chairman shall report to the House said Resolution of impeachment, together with such articles as have been agreed to, or if no article is agreed to, the Committee shall consider such resolutions or other recommendations as it deems proper.[17]

As stated in the committee's final report, consideration of the motion to report and of the articles of impeachment proceeded as follows on July 24 through July 30:

On July 24, at the commencement of general debate, a resolution was offered including two articles of impeachment. On July 26, an amendment in the nature of a substitute was offered to Article I. In the course of the debate on the substitute, it was contended that the proposed article of impeachment was not sufficiently specific. Proponents of the substitute argued that it met the requirements of specificity under modern pleading practice in both criminal and civil litigation, which provide for notice pleading. They further argued that the President had notice of the charge, that his counsel had participated in the Committee's deliberations, and that the factual details would be provided in the Committee's report.

On July 27, the Committee agreed to the amendment in the nature of a substitute for Article I by a vote of 27 to 11. The Committee then adopted Article I, as amended, by a vote of 27 to 11. Article I, as adopted by the Committee charged that President Nixon, using the power of his high office, engaged, personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of the unlawful entry into the headquarters of the Democratic National Committee in Washington, D.C., for the purpose of securing political intelligence; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

On July 29, an amendment in the nature of a substitute was offered for Article II of the proposed resolution. After debate, the substitute was agreed to by a vote of 28 to 10. The Committee then adopted Article II, as amended, by a vote of 28 to 10. Article II, as amended, charged that President Nixon, using the power of the office of President of the United States, repeatedly engaged in conduct which violated the constitutional rights of citizens;

17. H. REPT. No. 93–1305, at p. 10, Committee on the Judiciary, 93d Cong. 2d Sess., reported Aug. 20, 1974.

which impaired the due and proper administration of justice and the conduct of lawful inquiries, or which contravened the laws governing agencies of the executive branch and the purposes of these agencies.

On July 30, an additional article was offered as an amendment to the resolution. After debate, this amendment was adopted by a vote of 21 to 17 and became Article III. Article III charged that President Nixon, by failing, without lawful cause or excuse and in willful disobedience of the subpoenas of the House, to produce papers and things that the Committee had subpoenaed in the course of its impeachment inquiry, assumed to himself functions and judgments necessary to the exercise of the constitutional power of impeachment vested in the House. The subpoenaed papers and things had been deemed necessary by the Committee in order to resolve, by direct evidence, fundamental, factual questions related to presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment.

On July 30, the Committee considered an amendment to add a proposed Article, which charged that President Nixon authorized, ordered and ratified the concealment of information from the Congress and supplied to Congress false and misleading statements concerning the existence, scope and nature of American bombing operations in Cambodia. The proposed Article stated that these acts were in derogation of the powers of Congress to declare war, make appropriations, and raise and support armies. By a vote of 26 to 12, the amendment to add this Article was not agreed to.

Also on July 30, the Committee considered an amendment to add a proposed Article, charging that President Nixon knowingly and fraudulently failed to report income and claimed deductions that were not authorized by law on his Federal income tax returns for the years 1969 through 1972. In addition, the proposed Article charged that, in violation of Article II, Section 1 of the Constitution, President Nixon had unlawfully received emoluments, in excess of the compensation provided by law, in the form of government expenditures at his privately owned properties at San Clemente, California, and Key Biscayne, Florida. By a vote of 26 to 12, the amendment to add the article was not agreed to.

The Committee on the Judiciary based its decision to recommend that the House of Representatives exercise its constitutional power to impeach Richard M. Nixon, President of the United States, on evidence which is summarized in the following report. . . .[18]

The debate on the resolution and articles of impeachment were televised pursuant to House Resolution 1107, adopted by the House on July 22, 1974, amending Rule XI clause 34 of the rules of the House to permit committee meetings, as well as hearings, to be broadcast by live coverage.[19]

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18. H. REPT. NO. 93–1305, at pp. 10, 11, Committee on the Judiciary, 93d Cong. 2d Sess., reported Aug. 20, 1974, printed in the Record at 120 CONG. REC. 29221, 29222, 93d Cong. 2d Sess., Aug. 20, 1974.

19. 120 CONG. REC. 24436–48, 93d Cong. 2d Sess.

The transcript of the debate by the Committee on the Judiciary was printed in full as a public document.[20]

Senate Review of Impeachment Trial Rules

§ 15.8 After impeachment proceedings had been instituted in the House against President Richard M. Nixon, the Senate adopted a resolution for the study and review of Senate rules and precedents applicable to impeachment trials.

On July 29, l974,[1] during the pendency of an investigation in the House of alleged impeachable offenses committed by President Nixon, the Senate adopted a resolution related to its rules on impeachment:

> MR. [MICHAEL J.] MANSFIELD [of Montana]: Mr. President, I have at the desk a resolution, submitted on behalf of the distinguished Republican leader, the Senator from Pennsylvania (Mr. Hugh Scott), the assistant majority leader, the distinguished Senator from West Virginia (Mr. Robert C. Byrd), the assistant Republican leader, the distinguished Senator from Michigan (Mr. Griffin), and myself, and I ask that it be called up and given immediate consideration.
>
> THE PRESIDING OFFICER: The clerk will state the resolution.
>
> The legislative clerk read as follows:
>
> S. RES. 370
>
> *Resolved*, That the Committee on Rules and Administration is directed to review any and all existing rules and precedents that apply to impeachment trials with a view to recommending any revisions, if necessary, which may be required if the Senate is called upon to conduct such a trial.
>
> *Resolved further*, That the Committee on Rules and Administration is instructed to report back no later than 1 September 1974, or on such earlier date as the Majority and Minority Leaders may designate, and
>
> *Resolved further*, That such review by that Committee shall be held entirely in executive sessions.
>
> THE PRESIDING OFFICER: Without objection, the Senate will proceed to its immediate consideration.
>
> The question is on agreeing to the resolution.
>
> The resolution (S. Res. 370) was agreed to.[2]

The Committee on Rules and Administration reported out Senate Resolution 390, amending the

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20. See Debate on Articles of Impeachment, Hearings of the Committee on the Judiciary pursuant to H. Res. 803, 93d Cong. 2d Sess., July 24, 25, 26, 29, and 30, 1974.

1. 120 CONG. REC. 25468, 93d Cong. 2d Sess.

2. The Senate Parliamentarian prepared and published, at the request of Senator Robert C. Byrd (W. Va.) a study entitled "Procedure and Guidelines for Impeachment Trials in the United States Senate," S. Doc. No. 102, 93d Cong. 2d Sess., Aug. 8, 1974.

Rules and Procedure and Practice in the Senate when Sitting on Impeachment Trials, which was not acted on by the Senate. The amendments reported were clarifying and modernizing changes.[3]

Disclosure of Evidence of Presidential Activities

§ 15.9 Pending the investigation by the House Committee on the Judiciary into conduct of the President, the Senate adopted a resolution releasing records of a Senate select committee on Presidential activities to congressional committees and other agencies and persons with a legitimate need therefor.

On July 29, 1974,[4] Senator Samuel J. Ervin, Jr., of North Carolina, offered in the Senate Senate Resolution 369, relating to the records of a Senate select committee. The Senate adopted the resolution, following Senator Ervin's remarks thereon, in which he mentioned the needs and requests of the Committee on the Judiciary of the House:

> MR. ERVIN: Mr. President, under its present charter, the Senate Select Committee on Presidential Campaign Activities has 90 days after the 28th day of June of this year in which to wind up its affairs. This resolution is proposed with the consent of the committee, and its immediate consideration has been cleared by the leadership on both sides of the aisle.
>
> The purpose of this resolution is to facilitate the winding up of the affairs of the Senate Select Committee. The resolution provides that all of the records of the committee shall be transferred to the Library of Congress which shall hold them subject to the control of the Senate Committee on Rules and Administration.
>
> It provides that after these records are transferred to the Library of Congress the Senate Committee on Rules and Administration shall control the access to the records and either by special orders or by general regulations shall make the records available to courts, congressional committees, congressional subcommittees, Federal departments and agencies, and any other persons who may satisfy the Senate Committee on Rules and Administration that they have a legitimate need for the records.
>
> It provides that the records shall be maintained intact and that none of the original records shall be released to any agency or any person.
>
> It provides further that pending the transfer of the records to the Library of Congress and the assumption of such control by the Senate Committee on Rules and Administration, that the Select Committee, acting through its chairman or through its vice chairman, can make these records available to courts or to congressional committees

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3. See § 11.2, supra, for the committee amendments to the rules for impeachment trials.

4. 120 CONG. REC. 25392, 25393, 93d Cong. 2d Sess.

or subcommittees or to other persons showing a legitimate need for them.

I might state this is placed in here because of the fact that we have had many requests from congressional committees for the records. We have had requests from the Special Prosecutor and from the courts. . . .

I might state in the past the committee has made available some of the records to the House Judiciary Committee, at its request, and to the Special Prosecutor at his request. The resolution also provides that the action of the committee in doing so is ratified by the Senate.

Broadcasting Impeachment Proceedings

§ 15.10 The House adopted a resolution providing for the broadcast of the proceedings in the House in which it was to consider the resolution and articles of impeachment against President Richard M. Nixon.

On Aug. 7, 1974, the Committee on the Judiciary, having previously determined to report affirmatively to the House on the impeachment of the President, the House adopted House Resolution 802, called up by direction of the Committee on Rules, authorizing the broadcast of the anticipated impeachment proceedings in the House. Ray J. Madden, of Indiana, Chairman of the Committee on Rules, who called up the resolution (with committee amendments), cited the prior action of the House in changing the rules of the House to permit the deliberations of the Committee on the Judiciary to be televised.(5)

§ 15.11 After impeachment proceedings had been instituted in the House against President Richard M. Nixon, the Senate Committee on Rules and Administration reported a resolution for televising any resultant trial.

On Aug. 8, 1974,(6) Senator Howard W. Cannon, of Nevada, reported in the Senate, from the Committee on Rules and Administration, Senate Resolution 371, to permit television and radio coverage of any impeachment trial that might occur with respect to President Nixon. The resolution was subsequently laid on the table.

Procedures for Consideration by the House

§ 15.12 The House leadership considered a number of special procedures to be followed in the consideration of a resolution and articles im-

5. 120 CONG. REC. 27266–69, 93d Cong. 2d Sess.

6. 120 CONG. REC. 27325, 93d Cong. 2d Sess.

peaching President Richard M. Nixon.

On Aug. 2, 1974, Ray J. Madden, of Indiana, Chairman of the Committee on Rules, addressed the House on a recent meeting of the leadership as to the proposed hearings of the committee relative to the consideration by the House of the impeachment of President Nixon:

CONFERENCE OF HOUSE RULES COMMITTEE ON IMPEACHMENT DEBATE

(Mr. Madden asked and was given permission to address the House for 1 minute and to revise and extend his remarks, and include extraneous matter.)

MR. MADDEN: Mr. Speaker, the coming Presidential impeachment debate calls for the House to adopt certain special procedures which are not otherwise necessary when considering regular congressional business.

The members of the Rules Committee, Speaker Carl Albert, House Majority Leader Tip O'Neill, House Majority Whip John McFall, House Minority Leader John Rhodes, House Minority Whip Les Arends, Judiciary Committee Chairman Peter Rodino, and Representative Edward Hutchinson, the ranking minority member of the Judiciary Committee, met in an unofficial capacity Thursday afternoon, August 1. In the 2½ hour meeting thoughts were exchanged and recommendations made regarding the rules and procedures which would be most practical in allowing the entire House membership participation in this historical legislative event.

Although the bipartisan gathering reached no official decision, there was agreement that after the Judiciary Committee files its report on the impeachment proceedings next week, August 8, the Committee on Rules will then convene—on August 13 for the purpose of defining the rules and procedures for House debate. It was also agreed by the members of the Democratic and Republican leadership present that the impeachment debate will begin on the floor of the House on Monday, August 19.

Among the impeachment procedures to be given consideration by the Committee on Rules will be: The overall time of debate; division of debate time during the floor discussion; the control of the time; the question of whether the three articles of impeachment recommended by the Judiciary Committee should be amended; and whether or not the electronic media should be allowed to broadcast the proceedings of the House floor.[7]

Later on that day, Thomas P. O'Neill, Jr., of Massachusetts, the Majority Leader, and Peter W. Rodino, Jr., of New Jersey, the Chairman of the Committee on the Judiciary, discussed tentative scheduling of the resolution of impeachment and arrangements for Members of the House to listen to tape recordings containing evidence relating to the impeachment inquiry:

(Mr. [Leslie C.] Arends [of Illinois] asked and was given permission to address the House for 1 minute.)

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7. 120 CONG. REC. 26489, 93d Cong. 2d Sess.

MR. ARENDS: Mr. Speaker, I take this time to ask the majority leader if he will kindly advise us of the program for next week.

MR. O'NEILL: Mr. Speaker, will the gentleman yield to the gentleman from New Jersey (Mr. Rodino), chairman of the Committee on the Judiciary, so we may have some indication of his plans?

MR. ARENDS: I yield to the gentleman from New Jersey.

MR. RODINO: I thank the gentleman for yielding.

I would really like to announce that today I have circulated a letter that should be in the offices of each of the Members which sets up a schedule so that Members who are interested may listen to the tapes that are going to be available in the Congressional Building where the impeachment inquiry staff is located. There will be assistance provided to all of the Members, and this is spelled out in this letter—the schedule as to the time when the tapes will be available, together with the transcripts, and assistance will be provided by members of the impeachment inquiry staff.

In addition to that, there is also in the letter pertinent information which relates to the particular pieces of information or documents that are available. All of the documents that have been printed and the President's counsel's brief will be included. Members will have available to them all that the Committee on the Judiciary has presented and printed and published up to this particular time, which I am sure all Members will be interested in.

I thought that I would make this announcement so that this letter will come to the Members' attention and will not be somehow or other just laid aside. I think the Members are going to be interested in seeing it and knowing that there is a schedule for them, and we will allow them sufficient time within which to be briefed regarding these various materials that are available and the facilities that are available to them.

MR. O'NEILL: Mr. Speaker, will the gentleman yield?

MR. ARENDS: I yield to the distinguished majority leader.

MR. O'NEILL: I thank the gentleman for yielding.

I should like to address some remarks to the gentleman from New Jersey (Mr. Rodino), the chairman of the Committee on the Judiciary, in view of the fact that the leadership on both sides of the aisle met yesterday with members of the Committee on Rules trying to put together a schedule, which, of course, we understand is tentative.

It was my understanding from that meeting that the Judiciary Committee would be planning to report next Wednesday, and would be going to the Rules Committee on Tuesday, August 13, with the anticipation that the matter of impeachment would be on the floor on Monday, the 19th.

Would the gentleman want to comment on that?

MR. RODINO: If the gentleman will yield, that is correct. That is the schedule that we hope to follow. I have discussed this with the gentleman from Michigan, the ranking minority member, and we have agreed that the scheduling is the kind of scheduling dates that we can meet. On Tuesday, the 13th, we would go before the Rules Committee. I thank the gentleman.[8]

8. *Id.* at p. 26512.

Committee Report as to Impeachment; Resignation of the President

§ 15.13 After the Committee on the Judiciary had determined to report to the House a resolution and articles impeaching President Richard M. Nixon, the President resigned; the committee submitted its report recommending impeachment to the House, without an accompanying resolution of impeachment. The House then adopted a resolution under suspension of the rules accepting the committee's report, noting the committee's action and commending the chairman and members of the committee for their efforts.

On Aug. 9, 1974, President Nixon's written resignation was received in the office of the Secretary of State, pursuant to the provisions of the United States Code.(9)

On Aug. 20, 1974, Mr. Peter W. Rodino, Jr., of New Jersey, submitted as privileged the report of the Committee on the Judiciary (H. Rept. No. 93–1305) to the House. The report summarized the committee's investigation and included supplemental, additional, separate, dissenting, minority, individual, and concurring views. The committee's recommendation and adopted articles of impeachment read as follows:

> The Committee on the Judiciary, to whom was referred the consideration of recommendations concerning the exercise of the constitutional power to impeach Richard M. Nixon, President of the United States, having considered the same, reports thereon pursuant to H. Res. 803 as follows and recommends that the House exercise its constitutional power to impeach Richard M. Nixon, President of the United States, and that articles of impeachment be exhibited to the Senate as follows:
>
> RESOLUTION
>
> Impeaching Richard M. Nixon, President of the United States, of high crimes and misdemeanors.
>
> *Resolved,* That Richard M. Nixon, President of the United States, is impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:
>
> Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and of all of the people of the United States of America, against Richard M. Nixon, President of the United States of America, in maintenance and support of its impeachment

9. 3 USC § 20 provides that the resignation of the office of the President shall be an instrument in writing, subscribed by the person resigning, and delivered to the office of the Secretary of State.

against him for high crimes and misdemeanors.

ARTICLE I

In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, in that:

On June 17, 1972, and prior thereto, agents of the Committee for the Reelection of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

The means used to implement this course of conduct or plan included one or more of the following:

(1) making or causing to be made false or misleading statements to lawfully authorized investigative officers and employees of the United States;

(2) withholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States;

(3) approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements to lawfully authorized investigative officers and employees of the United States and false or misleading testimony in duly instituted judicial and congressional proceedings;

(4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force, and Congressional Committees;

(5) approving, condoning, and acquiescing in, the surreptitious payment of substantial sums of money for the purpose of obtaining the silence or influencing the testimony of witnesses, potential witnesses or individuals who participated in such unlawful entry and other illegal activities;

(6) endeavoring to misuse the Central Intelligence Agency, an agency of the United States;

(7) disseminating information received from officers of the Department of Justice of the United States to subjects of investigations conducted by lawfully authorized investigative officers and employees of the United States, for the purpose of aiding and assisting such subjects in their attempts to avoid criminal liability;

(8) making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and per-

sonnel of the Committee for the Reelection of the President, and that there was no involvement of such personnel in such misconduct; or

(9) endeavoring to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their silence or false testimony, or rewarding individuals for their silence or false testimony.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

ARTICLE II

Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.

This conduct has included one or more of the following:

(1) He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.

(2) He misused the Federal Bureau of Investigation, the Secret Service, and other executive personnel, in violation or disregard of the constitutional rights of citizens, by directing or authorizing such agencies or personnel to conduct or continue electronic surveillance or other investigations for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; he did direct, authorize, or permit the use of information obtained thereby for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; and he did direct the concealment of certain records made by the Federal Bureau of Investigation of electronic surveillance.

(3) He has, acting personally and through his subordinates and agents, in violation or disregard of the constitutional rights of citizens, authorized and permitted to be maintained a secret investigative unit within the office of the President, financed in part with money derived from campaign contributions, which unlawfully utilized the resources of the Central Intelligence Agency, engaged in covert and unlawful activities, and attempted to prejudice the constitutional right of an accused to a fair trial.

(4) He has failed to take care that the laws were faithfully executed by

failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial, and legislative entities concerning the unlawful entry into the headquarters of the Democratic National Committee, and the cover-up thereof, and concerning other unlawful activities, including those relating to the confirmation of Richard Kleindienst as Attorney General of the United States, the electronic surveillance of private citizens, the break-in into the offices of Dr. Lewis Fielding, and the campaign financing practices of the Committee to Reelect the President.

(5) In disregard of the rule of law, he knowingly misused the executive power by interfering with agencies of the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Offlce of Watergate Special Prosecution Force, of the Department of Justice, and the Central Intelligence Agency, in violation of his duty to take care that the laws be faithfully executed.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

ARTICLE III

In his conduct of the office of President of the United States, Richard M. Nixon, contrary to his oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives on April 11, 1974, May 15, 1974, May 30, 1974, and June 24, 1974, and willfully disobeyed such subpoenas. The subpoenaed papers and things were deemed necessary by the Committee in order to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President. In refusing to produce these papers and things, Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.[10]

10. H. REPT. NO. 93–1305, pp. 1–4, Committee on the Judiciary, printed in

The report was referred by the Speaker to the House Calendar and ordered printed.

The Committee did not report a separate resolution and articles of impeachment for action by the House, the President having resigned.

Thomas P. O'Neill, Jr., of Massachusetts, the Majority Leader, moved to suspend the rules and adopt House Resolution 1333, accepting the report of the Committee on the Judiciary and providing for its printing, and the House adopted the resolution without debate—yeas 412, nays 3, not voting 19:

H. RES. 1333

Resolved, That the House of Representatives:

(1) takes notice that

(a) the House of Representatives, by House Resolution 803, approved February 6, 1974, authorized and directed the Committee on the Judiciary to investigate fully and completely whether sufficient grounds existed for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America; and

(b) the Committee on the Judiciary, after conducting a full and complete investigation pursuant to House Resolution 803, voted on July 27, 29, and 30, 1974 to recommend Articles of impeachment against Richard M. Nixon, President of the United States of America; and

(c) Richard M. Nixon on August 9, 1974 resigned the Office of President of the United States of America;

(2) accepts the report submitted by the Committee on the Judiciary pursuant to House Resolution 803 (H. Rept. 93–1305) and authorizes and directs that the said report, together with supplemental, additional, separate, dissenting, minority, individual and concurring views, be printed in full in the Congressional Record and as a House Document; and

(3) commends the chairman and other members of the Committee on the Judiciary for their conscientious and capable efforts in carrying out the Committee's responsibilities under House Resolution 803.

Following the adoption of House Resolution 1333, Mr. O'Neill asked unanimous consent that all Members have five legislative days in which to revise and extend their remarks on House Resolution 1333, but Mr. Robert E. Bauman, of Maryland, objected to the request on the ground that no debate had been had on the report.(11)

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the Record at 120 CONG. REC. 29219, 29220, 93d Cong. 2d Sess., Aug. 20, 1974. For complete text of H. REPT. NO. 93–1305, see *id.* at pp. 29219–361.

Pursuant to H. Con. Res. 566, 93d Cong. 2d Sess., 10,000 additional copies of the report were printed for the use of the Committee on the Judiciary.

11. 120 CONG. REC. 29361, 29362, 93d Cong. 2d Sess. The Majority Leader

Neither the House nor the Committee on the Judiciary took any further action on the matter of the impeachment of former President Nixon in the 93d Congress.

Impeachment Inquiry Evidence Subpoenaed by Courts

§ 15.14 The Speaker laid before the House subpoenas duces tecum from a federal district court in a criminal case, addressed to the Chairman of the Committee on the Judiciary and to the chief counsel of its subcommittee on impeachment. The subpoenas sought evidence gathered by the committee in its impeachment inquiry into the conduct of President Richard M. Nixon. The House adopted a resolution granting such limited access as would not violate the privileges of the House or its sole power of impeachment under the U.S. Constitution.

On Aug. 22, 1974,(12) Speaker Carl Albert, of Oklahoma, laid before the House a communication and subpoena from the Chairman of the Committee on the Judiciary as follows:

COMMUNICATION FROM THE CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY

The Speaker laid before the House the following communication and subpoena from the chairman of the Committee on the Judiciary, which was read and ordered to be printed:

WASHINGTON, D.C.,
August 21, 1974.

Hon. CARL ALBERT,
Speaker, House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: On July 29, 1974 two subpoenas duces tecum issued by the United States District Court for the District of Columbia, one naming myself and one naming Mr. John Doar, an employee of the Committee, were served commanding appearance in the United States District Court on September 9, 1974 and the production of all tapes and other electronic and/or mechanical recordings or reproductions, and any memoranda, papers, transcripts, and other writings, relating to all nonpublic statements, testimony and interviews of witnesses relating to the matters being investigated pursuant to House Resolution No. 803.

The subpoenas were issued upon application of defendant H. R. Haldeman in the case of U. S. v John Mitchell, et al.

The subpoenas in question are forwarded herewith and the matter presented for such action as the House deems appropriate.

Sincerely,

PETER W. RODINO, Jr.,
Chairman.

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had announced on the previous day, Aug. 19, his intention to offer the resolution, and had read the text of the resolution on the floor of the House. 120 CONG. REC. 29005, 29006, 93d Cong. 2d Sess.

12. 120 CONG. REC. 30025, 30026, 93d Cong. 2d Sess.

[Subpoena]

[U.S. District Court for the District of Columbia, No. 74–110]

UNITED STATES OF AMERICA v. JOHN N. MITCHELL, ET AL., DEFENDANTS

To: Congressman Peter W. Rodino, United States House of Representatives, Washington, D.C.

You are hereby commanded to appear in the United States District Court for the District of Columbia at Constitution Avenue and John Marshall Place, N.W. in the city of Washington on the 9th day of September 1974 at 10 o'clock A.M. to testify in the case of United States v. John N. Mitchell, et al., and bring with you all tapes and other electronic and/or mechanical recordings or reproductions, and any memoranda, papers, transcripts, and other writings, relating to:

All non-public statements and testimony of witnesses relating to the matters being investigated pursuant to House Resolution No. 803.

This subpoena is issued upon application of the Defendant, H. R. Haldeman, 1974.

FRANK H. STRUTH,
Attorney for Defendant, H. R. Haldeman.
JAMES F. DAVEY,
Clerk.
By ROBERT L. LINE,
Deputy Clerk.

The following resolution, in response to such subpoenas, was offered by Mr. Thomas P. O'Neill, Jr., of Massachusetts:

CONCERNING SUBPOENAS ISSUED IN UNITED STATES VERSUS JOHN N. MITCHELL, ET AL.

MR. O'NEILL: Mr. Speaker, I call up House Resolution 1341 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. RES. 1341

Whereas in the case of United States of America against John N. Mitchell et al. (Criminal Case No. 74–110), pending in the United States District Court for the District of Columbia, subpoenas duces tecum were issued by the said court and addressed to Representative Peter W. Rodino, United States House of Representatives, and to John Doar, Chief Counsel, House Judicial Subcommittee on Impeachment, House of Representatives, directing them to appear as witnesses before said court at 10:00 antemeridian on the 9th day of September, 1974, and to bring with them certain and sundry papers in the possession and under the control of the House of Representatives: Therefore be it

Resolved, That by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission; be it further

Resolved, That the House of Representatives under Article I, Section 2 of the Constitution has the sole power of impeachment and has the sole power to investigate and gather evidence to determine whether the House of Representatives shall exercise its constitutional power of impeachment; be it further

Resolved, That when it appears by the order of the court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice, or before any judge or such legal officer, for the pro-

motion of justice, this House will take such action thereon as will promote the ends of justice consistently with the privileges and rights of this House; he it further

Resolved, That when said court determines upon the materiality and the relevancy of the papers and documents called for in the subpoenas duces tecum, then the said court, through any of its officers or agents, have full permission to attend with all proper parties to the proceeding and then always at any place under the orders and control of this House and take copies of all memoranda and notes, in the files of the Committee on the Judiciary, of interviews with those persons who subsequently appeared as witnesses in the proceedings before the full Committee pursuant to House Resolution 803, such limited access in this instance not being an interference with the Constitutional impeachment power of the House, and the Clerk of the House is authorized to supply certified copies of such documents and papers in possession or control of the House of Representatives that the court has found to be material and relevant (except that under no circumstances shall any minutes or transcripts of executive sessions, or any evidence of witnesses in respect thereto, be disclosed or copied) and which the court or other proper officer thereof shall desire, so as, however, the possession of said papers, documents, and records by the House of Representatives shall not be disturbed, or the same shall not be removed from their place of file or custody under any Members, officer, or employee of the House of Representatives, and be it further

Resolved, That a copy of these resolutions be transmitted to the said court as a respectful answer to the subpoenas aforementioned.

The House adopted the resolution.

Pardon of the Former President

§ 15.15 The House having discontinued impeachment proceedings against former President Richard M. Nixon following his resignation, President Gerald R. Ford granted a full pardon to the former President for all offenses against the United States committed by him during his terms in office.

On Sept. 8, 1974, President Ford issued Proclamation 4311, granting a pardon to Richard Nixon:

GRANTING PARDON TO RICHARD NIXON BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Richard Nixon became the thirty-seventh President of the United States on January 20, 1969 and was reelected in 1972 for a second term by the electors of forty-nine of the fifty states. His term in office continued until his resignation on August 9, 1974.

Pursuant to resolutions of the House of Representatives, its Committee on the Judiciary conducted an inquiry and investigation on the impeachment of the President extending over more than eight months. The hearings of the Committee and its deliberations, which received wide national publicity over television, radio, and in printed media, resulted in votes adverse to Richard

Nixon on recommended Articles of Impeachment.

As a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.

Now, therefore, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.

In witness whereof, I have hereunto set my hand this eighth day of September, in the year of our Lord nineteen hundred and seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth.[13]

Some Members of the House suggested in debate that impeachment proceedings be resumed, notwithstanding the resignation of the President; for example on Sept. 11, 1974, Mr. Ralph H. Metcalfe, of Illinois, declared:

On August 20, 1974, Mr. Speaker, the House adopted House Resolution 1033. This resolution took notice of the fact that on February 6, 1974, the House, by adoption of House Resolution 803, authorized and directed the Judiciary Committee "to investigate fully and completely whether sufficient grounds existed for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon"; further, House Resolution 1033 noted that the Committee on the Judiciary recommended articles of impeachment; that Richard M. Nixon resigned the office of President of the United States; and further, this resolution accepted the report submitted by the Committee on the Judiciary pursuant to House Resolution 803.

The articles of impeachment voted out by the full committee, Mr. Speaker, were never debated and voted upon by the full House. At that time there was the strong possibility that the former President would be indicted, and that

13. 39 FED. REG. 32601, 32602 (Sept. 10, 1974).

the President would be held accountable for his actions in a court of law. President Ford's action on September 8, 1974, has effectively nullified that course of action. . . .

Is there a precedent for the impeachment of a civil officer after his resignation? I think there is.

In Federalist Paper 65, Hamilton states:

> The Model from which the idea of this institution (Impeachment) has been borrowed pointed out that course to the convention.

The model that Hamilton refers to is clearly that of Great Britain. The course of action that Hamilton refers to is impeachment by the House of Commons and trial before the Lords. And, consequently, it is to the English precedent that we must first turn. Contemporaneous with the drafting and adopting of our own Constitution was the impeachment trial of Warren Hastings in Great Britain. Hastings resigned the governor-generalship of India before he left India in February 1785, 2 years before articles of impeachment were voted by the House of Commons for his conduct in India. The impeachment of Hastings was certainly a fact known to the drafters of the Constitution.

George Mason, in discussing the impeachment provision on September 8, 1787, in the Constitutional Convention, makes a clear reference to the trial of Hastings. Further, Prof. Arthur Bestor states that—

> American constitutional documents adopted prior to the Federal Convention of 1787 . . . refute the notion that officials no longer in office were supposed by the framers to be beyond the reach of impeachment.

Bestor specifically cites the constitutions of two States-Virginia and Delaware-which were adopted in 1776.

Bestor also cites a statement of John Quincy Adams, made in 1846 after he left the White House, made on the Floor of the House:

> I hold myself, so long as I have the breath of life in my body, amenable to impeachment by this House for everything I did during the time I held any public office.

Another historical precedent is that of William W. Belknap, Secretary of War in President Grant's cabinet. As Bestor summarizes it:

> Belknap resigned at 10:20 a.m. on the 2nd of March (1876), a few hours before the House of Representatives voted to impeach him, the latter decision being officially notified to the Senate at 12:55 p.m. on the 3rd . . . on May 27, 1876, in a roll-call vote of 37 to 29 (with seven not voting) the Senate ruled that Belknap was amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

Mr. Speaker, there is precedent for the impeachment of a civil officer after he has resigned.

Another point to make, Mr. Speaker, is that article I of section 3 of the Constitution states, inter alia:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.

There is a twofold penalty provided for in this article and removal from office is but one part of the penalty.

Mr. Speaker, the former President has not been held accountable for his

actions. He has avoided accountability through the impeachment process by resigning, and he has avoided trial on charges of alleged criminal misconduct as contained in the first article of impeachment through the Presidential pardon of his successor.

Mr. Speaker, history can conclude that the Congress of the United States was confronted with a series of actions by the Chief Executive, actions which constituted a serious danger to our political processes and that we did nothing. The proper forum, and now the only forum, for a debate and a vote on these most serious charges is here in the House. We have no other recourse but to proceed if we are to assure that all future Presidents will be held accountable for their actions whether such future Chief Executives resign or not.

Mr. Speaker, I urge that the impeachment report of the House Judiciary Committee be debated and that we proceed to vote on the articles of impeachment.[14]

On Sept. 12, 1974, Ms. Bella S. Abzug, of New York, introduced a resolution of inquiry related to the pardon:[15]

H. RES. 1363

Resolved, That the President of the United States is hereby requested to furnish the House, within ten days, with the following information:

1. What are the specific offenses against the United States for which a pardon was granted to Richard M. Nixon on September 8, 1974?

2. What are the certain acts or omissions occurring before his resignation from the office of President for which Richard Nixon had become liable to possible indictment and trial for offenses against the United States, as stated in your Proclamation of Pardon?

3. Did you or your representatives have specific knowledge of any formal criminal charges pending against Richard M. Nixon prior to issuance of the pardon? If so, what were these charges?

4. Did Alexander Haig refer to or discuss a pardon with Richard M. Nixon or representatives of Mr. Nixon at any time during the week of August 4, 1974 or at any subsequent time? If so, what promises were made or conditions set for a pardon, if any? If so, were tapes or transcriptions of any kind made of these conversations or were any notes taken? If so, please provide such tapes, transcriptions or notes.

5. When was a pardon for Richard M. Nixon first referred to or discussed with Mr. Nixon, or representatives of Mr. Nixon, by you or your representatives or aides, including the period when you were a member of Congress or Vice President?

6. Who participated in these and subsequent discussions or negotiations with Richard M. Nixon or his representatives regarding a pardon, and at what specific times and locations?

7. Did you consult with Attorney General William Saxbe or Special

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14. 120 CONG. REC. 30695, 30696, 93d Cong. 2d Sess. (footnotes omitted). For a memo inserted in the Record by Senate Majority Leader Michael J. Mansfield (Mont.) on the power of Congress to impeach and try a President after he has resigned, see 120 CONG. REC. 31346–48, 93d Cong. 2d Sess., Sept. 17, 1974.

15. 120 CONG. REC. 30964, 30965, 93d Cong. 2d Sess.

Prosecutor Leon Jaworski before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did they give to you?

8. Did you consult with the Vice Presidential nominee, Nelson Rockefeller, before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did he give to you?

9. Did you consult with any other attorneys or professors of law before making the decision to pardon Richard M. Nixon, and, if so, what facts or legal authorities did they give to you?

10. Did you or your representatives ask Richard M. Nixon to make a confession or statement of criminal guilt, and, if so, what language was suggested or requested by you, your representatives, Mr. Nixon, or his representatives? Was any statement of any kind requested from Mr. Nixon in exchange for the pardon, and, if so, please provide the suggested or requested language.

11. Was the statement issued by Richard M. Nixon immediately subsequent to announcement of the pardon made known to you or your representatives prior to its announcement, and was it approved by you or your representatives?

12. Did you receive any report from a psychiatrist or other physician stating that Richard M. Nixon was in other than good health? If so, please provide such reports

The resolution of inquiry was referred to the Committee on the Judiciary. A subcommittee thereof held hearings on the matter of the pardon of former President Nixon, and President Ford appeared in person and testified before such subcommittee on Oct. 17, 1974.

§ 16. Impeachment of Judge English

Committee Report on Resolution and Articles of Impeachment

§ 16.1 In the 69th Congress, the Committee on the Judiciary reported a resolution of impeachment accompanied with five articles of impeachment against Judge George English, which report was referred to the House Calendar, ordered printed, and printed in full in the Congressional Record.

On Mar. 25, 1926, Mr. George S. Graham, of Pennsylvania, offered a privileged report from the Committee on the Judiciary in the impeachment case against George English, U.S. District Judge for the Eastern District of Illinois. Speaker Nicholas Longworth, of Ohio, ordered the report printed and referred to the House Calendar.[16] By unanimous consent, the entire report (H. Rept. No. 653) was printed in the *Congressional Record*.[17]

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16. 67 CONG. REC. 6280, 69th Cong. 1st Sess.

17. *Id.* at pp. 6280–87.

The committee's recommendation and resolution read as follows:

RECOMMENDATION

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge George W. English, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said George W. English, United States district judge for the eastern district of Illinois.

RESOLUTION

Resolved, That George W. English, United States district judge for the eastern district of Illinois, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Joint Resolution 347, sustains five articles of impeachment, which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against George W. English, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States District Judge for the Eastern District of Illinois, on May 3, 1918 (18)

18. For a more comprehensive discussion of the impeachment proceedings against Judge English, see 6 Cannon's Precedents §§ 544–547.

House Consideration and Debate

§ 16.2 The resolution and articles of impeachment in the George English impeachment were considered in the House pursuant to unanimous-consent agreements fixing the control and distribution of debate.

On Mar. 30, 1926, Mr. George S. Graham, of Pennsylvania, called up for consideration in the House the resolution impeaching Judge English. By unanimous consent, the House agreed to procedures for the control and distribution of debate, thereby allowing every Member who wished to speak to do so:

THE SPEAKER: (19) The gentleman from Pennsylvania [Mr. Graham] asks unanimous consent that during today the debate be equally divided between the affirmative and the negative, and that he control one-half of the time and the other half be controlled by the gentleman from Alabama [Mr. Bowling]. (20)

On Mar. 31, the second day of debate on the resolution, debate proceeded under a unanimous-consent agreement that debate

19. Nicholas Longworth (Ohio).

20. 67 CONG. REC. 6585–90, 69th Cong. 1st Sess.

continue to be equally divided between Mr. Graham and Mr. William B. Bowling.[1] Mr. Graham obtained unanimous consent that debate be concluded in 7½ hours, such time to be equally divided as before.[2]

Voting; Motions

§ 16.3 The previous question having been ordered on the resolution of impeachment against Judge George English, a motion to recommit with instructions was offered and rejected, and a separate vote was demanded on the first article, followed by a vote on the resolution.

On Apr. 1, 1926, Mr. George S. Graham, of Pennsylvania, moved the previous question and it was ordered on the resolution impeaching Judge English. A motion to recommit the resolution with instructions was offered, the instructions directing the Committee on the Judiciary to take further testimony. The motion was rejected on a division vote-yeas 101, noes 260.[3]

Pending the motion to recommit, Mr. Tom T. Connally, of Texas, stated a parliamentary inquiry:

> Under the rules of the House, would not this resolution be subject to consideration under the five-minute rule for amendment?

Speaker Nicholas Longworth, of Ohio, responded, "The Chair thinks not."[4]

Following the rejection of the motion to recommit, the Speaker put the question on the resolution of impeachment and stated that it was agreed to. Mr. William B. Bowling, of Alabama, objected and stated that his attention had been diverted and that he had meant to ask for a separate vote on the first article of impeachment. The Speaker stated that the demand for a separate vote then came too late, since the demand was in order when the question recurred on the resolution. Because of the apparent confusion in the Chamber, the Speaker allowed Mr. Bowling to ask for a separate vote (thereby vacating, by unanimous consent, the proceedings whereby the resolution had been agreed to).

The Speaker put the question on Mr. Bowling's motion to strike out Article I, which motion was rejected. The vote then recurred on the resolution, which was

1. *Id.* at p. 6645.
2. *Id.* at pp. 6662, 6663.
3. 67 CONG. REC. 6733, 6734, 69th Cong. 1st Sess.
4. *Id.* at p. 6733.

adopted by the yeas and nays—yeas 306, nays 62.(5)

The Speaker had previously stated, in response to a parliamentary inquiry by Mr. Charles R. Crisp, of Georgia, that pursuant to Rule XVI clause 6, a separate vote could be demanded on any substantive proposition contained in the resolution of impeachment.(6)

Discontinuance of Proceedings

§ 16.4 Judge George English having resigned from the bench, the House adopted a resolution instructing the managers to advise the Senate that the House declined to further prosecute charges of impeachment.

On Dec. 11, 1926, the House adopted the following resolution in relation to the impeachment proceedings against Judge English:

> *Resolved,* That the managers on the part of the House of Representatives in the impeachment proceedings now pending in the Senate against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be instructed to appear before the Senate, sitting as a court of impeachment in said cause, and advise the Senate that in consideration of the fact that said George W. English is no longer a civil officer of the United States, having ceased to be a district judge of the United States for the eastern district of Illinois, the House of Representatives does not desire further to urge the articles of impeachment heretofore filed in the Senate against said George W. English.(7)

On Dec. 13, 1926, the Senate adjourned *sine die* as a court of impeachment after agreeing to the following order, which was messaged to the House:

> *Ordered,* That the impeachment proceedings against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be and the same are, duly dismissed.(8)

§ 17. Impeachment of Judge Louderback

Consideration of Committee Report

§ 17.1 The House considered the matter of the impeachment of U.S. District Judge Harold Louderback under a unanimous-consent agreement which allowed the minority of the Committee on

5. *Id.* at pp. 6734, 6735.

6. *Id.* at pp. 6589, 6590, see *House Rules and Manual* § 791 (1973).

7. 68 CONG. REC. 297, 69th Cong. 2d Sess.

8. *Id.* at p. 344.

the Judiciary to offer, to the reported resolution recommending abatement of proceedings, a substitute amendment impeaching Judge Louderback and setting forth articles of impeachment.

On Feb. 24, 1933, Speaker John N. Garner, of Texas, recognized Mr. Thomas D. McKeown, of Oklahoma, to call up a resolution, reported by the Committee on the Judiciary, recommending that charges against Harold Louderback, U.S. District Judge for the Northern District of California, did not merit impeachment (H. Res. 387; H. Rept. No. 2065). The minority report dissented from that recommendation and proposed a resolution and articles of impeachment.(9)

Mr. Earl C. Michener, of Michigan, commented on the fact that the report of the committee recommended censure of the judge, rather than impeachment:

> MR. MICHENER. Mr. Speaker, in answer to the gentleman from Alabama, let me make this observation. The purpose of referring a matter of this kind to the Committee on the Judiciary is to determine whether or not in the opinion of the Committee on the Judiciary there is sufficient evidence to warrant impeachment by the House. If the Committee on the Judiciary finds those facts exist, then the Committee on the Judiciary makes a report to the House recommending impeachment, and that undoubtedly is privileged. However, a custom has grown up recently in the Committee on the Judiciary of including in the report a censure. I do not believe that the constitutional power of impeachment includes censure. We have but one duty, and that is to impeach or not to impeach. Today we find a committee report censuring the judge. The resolution before the House presented by a majority of the committee is against impeachment. The minority members have filed a minority report, recommending impeachment. I am making this observation with the hope that we may get back to the constitutional power of impeachment.(10)

Discussion ensued as to controlling debate on the resolution so as to effectuate the understanding agreed on in committee that the previous question not be ordered until the minority had an opportunity to offer an amendment in the nature of a substitute for the resolution.

The House agreed to the following unanimous-consent request

9. 76 CONG. REC. 4913, 4914, 72d Cong. 2d Sess. See, generally, 6 Cannon's Precedents § 514.

10. *Id.* at p. 4914. The committee report stated "the committee censures the judge for conduct prejudicial to the dignity of the judiciary in appointing incompetent receivers . . . for allowing fees that seem excessive, and for a high degree of indifference to the interest of litigants in receiverships." H. REPT. NO. 2065, Committee on the Judiciary, 72d Cong. 2d Sess.

propounded by Mr. McKeown (and suggested by Speaker Garner):

THE SPEAKER: Under the rules of the House the gentleman from Oklahoma [Mr. McKeown] has one hour in which to discuss this resolution, unless some other arrangement is made.

MR. MCKEOWN: Mr. Speaker, I ask unanimous consent that two hours' time be granted on a side. One-half of mine I shall yield to the gentleman from Missouri [Mr. Dyer]. At the end of the two hours' time, that the previous question shall be considered as ordered.

MR. [FIORELLO H.] LAGUARDIA [of New York]: Mr. Speaker, will the gentleman yield?

MR. MCKEOWN: Yes.

MR. LAGUARDIA: The gentleman will remember that the committee unanimously voted that the previous question should not be considered as ordered until the majority had opportunity to offer the articles of impeachment.

MR. MCKEOWN: I yield now to the gentleman for that purpose.

THE SPEAKER: If gentlemen will permit, let the Chair make a suggestion. The Chair understands that the committee has something of an understanding that there would be an opportunity to vote upon the substitute for the majority resolution. Is that correct?

MR. MCKEOWN: Yes.

THE SPEAKER: Then the Chair suggests to the gentleman from Oklahoma that he ask unanimous consent that general debate be limited to two hours, one-half to be controlled by himself, and one-half to be controlled by the gentleman from New York.

MR. MCKEOWN: I want one-half of my time to be yielded to the gentleman from Missouri, and that the other hour shall be controlled by the gentleman from Texas.

THE SPEAKER: Then the Chair suggests that the gentleman from Oklahoma control all of the time.

MR. [HATTON W.] SUMNERS [of Texas]: Mr. Speaker, I am quite willing that the gentleman from Oklahoma may control the time, because I am sure that he will make a fair distribution of it.

MR. MCKEOWN: Mr. Speaker, I ask unanimous consent that the time for debate be limited to two hours to be controlled by myself, that during that time the gentleman from New York [Mr. La Guardia] be permitted to offer a substitute for the resolution and at the conclusion of the time for debate the previous question be considered as ordered.

THE SPEAKER: Then the Chair submits this: The gentleman from Oklahoma asks unanimous consent that debate be limited to two hours, to be controlled by the gentleman from Oklahoma, that at the end of that time the previous question shall be considered as ordered, with the privilege, however, of a substitute resolution being offered, to be included in the previous question. Is there objection?

MR. [WILLIAM B.] BANKHEAD [of Alabama]: Mr. Speaker, reserving the right to object for the purpose of getting the parliamentary situation clarified before we get to the merits, is there any question in the mind of the Speaker, if it is fair to submit such a suggestion, as to whether or not the substitute providing for absolute im-

peachment would be in order as a substitute for this report?

THE SPEAKER: That is the understanding of the Chair, that the unanimous-consent agreement is, that the gentleman from New York [Mr. LaGuardia] may offer a substitute, the previous question to be considered as ordered on the substitute and the original resolution at the expiration of the two hours. Is there objection?

There was no objection.[11]

Voting

§ 17.2 At the conclusion of debate on the resolution and substitute therefor, in the Harold Louderback impeachment proceedings, a yea and nay vote was taken on the substitute, which was agreed to.

On Feb. 24, 1933, the House had under consideration a resolution abating impeachment proceedings against Judge Louderback. A unanimous-consent agreement was adopted, as follows:

THE SPEAKER:[12] . . . The gentleman from Oklahoma (Mr. Thomas D. McKeown] asks unanimous consent that debate be limited to two hours . . . that at the end of that time the previous question shall be considered as ordered, with the privilege, however, of a substitute resolution being offered, to be included in the previous question. . . .

There was no objection.[13]

At the conclusion of the two hours' debate on the resolution abating the impeachment proceedings and on the amendment in the nature of a substitute, the Speaker put the question on the substitute and answered a parliamentary inquiry as to the effect of the vote:

THE SPEAKER: The question is on the substitute of the gentleman from New York [Mr. LaGuardia].

The question was taken, and the Chair announced that he was in doubt.

MR. [THOMAS D.] MCKEOWN of Oklahoma]: Mr. Speaker, a division.

MR. [CARL G.] BACHMANN [of West Virginia]: Mr. Speaker, I ask for the yeas and nays.

The yeas and nays were ordered.

MR. [EARL C.] MICHENER [of Michigan]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. MICHENER: As I understand, a vote of "aye" is a vote for impeachment and a vote of "no" is against impeachment; is that correct?

THE SPEAKER: An aye vote on the substitute of the gentleman from New York is a vote to impeach and a "no" vote is a vote against impeachment.

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11. *Id.* For more comprehensive treatment of impeachment proceedings against Judge Louderback, see 6 Cannon's Precedents §§ 513–524.

12. John N. Garner (Tex.).

13. 76 CONG. REC. 4914, 72d Cong. 2d Sess.

The Clerk will call the roll.

The question was taken; and there were—yeas 183, nays 142, answered "present" 4, not voting 97.[14]

Election of Managers; Continuation of Proceedings Into New Congress

§ 17.3 The House having adopted articles of impeachment against Judge Harold Louderback, the House adopted resolutions appointing managers and notifying the Senate of its actions, but did not resolve the question whether such managers could, without further authority, continue to represent the House in the succeeding Congress.

The House having adopted the articles of impeachment against Judge Louderback on Feb. 24, 1933, Chairman Hatton W. Sumners, of Texas, of the Committee on the Judiciary, called up on Feb. 27, 1933, resolutions appointing managers and notifying the Senate of the action of the House. Discussion ensued as to the power of the managers beyond the termination of the Congress (the Congress was to expire on Mar. 3):

IMPEACHMENT OF JUDGE HAROLD LOUDERBACK

MR. SUMNERS of Texas: Mr. Speaker, I offer the following privileged report from the Committee on the Judiciary, which I send to the desk and ask to have read, and ask its immediate adoption.

The Clerk read as follows:

HOUSE RESOLUTION 402

Resolved, That Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Harold Louderback, United States district judge for the northern district of California; and said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Harold Louderback of misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by the House; and that the said managers do demand the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and demand his impeachment, conviction, and removal from office.

THE SPEAKER PRO TEMPORE: The question is on agreeing to the resolution.

MR. [THOMAS L.] BLANTON [of Texas]: Mr. Speaker, will the gentleman yield?

MR. SUMNERS of Texas: Yes.

MR. BLANTON: Is it not usual in such cases to provide for the managers on the part of the House to interrogate witnesses?

14. *Id.* at p. 4925. The resolution, as amended by the substitute, was then agreed to. H. JOUR. 306, 72d Cong. 2d Sess., Feb. 24, 1933.

MR. SUMNERS of Texas: This is the usual resolution which is adopted.

MR. BLANTON: But this resolution does embrace that power and authority?

MR. SUMNERS of Texas: Yes. It is the usual resolution.

MR. [WILLIAM H.] STAFFORD [of Wisconsin]: Mr. Speaker, will the gentleman yield?

MR. SUMNERS of Texas: Yes.

MR. STAFFORD: This House, which is about to expire, has leveled impeachment articles against a sitting judge. It is impracticable to have the trial of that judge in the expiring days of the Congress. Has the gentleman considered what the procedure will be in respect to having the trial before the Senate in the next Congress?

MR. SUMNERS of Texas: The Committee on the Judiciary today gave full consideration to all of the angles that suggested themselves to the committee for consideration, and this arrangement seems to be more in line with the precedents and to be most definitely suggested by the situation in which we find ourselves.

MR. STAFFORD: Then, I assume, from the gentleman's statement, that it is the purpose that the gentlemen named in the resolution shall represent the House in the next Congress?

MR. SUMNERS of Texas: No; I believe not. I think it is pretty well agreed that the next Congress will probably have to appoint new managers before they may proceed. I think gentlemen on each side agree substantially with that statement as to what probably would be required.

MR. STAFFORD: There is nothing in the Constitution that would prevent Members of this Congress from serving as representatives of this House before the Senate in the next Congress, even though they be not Members of that Congress.

MR. SUMNERS of Texas: I hope my friend will excuse me for not taking the time of the House to discuss that feature of the matter.

MR. STAFFORD: It is quite an important subject.

MR. SUMNERS of Texas: It is an unsettled subject, and one we have tried to avoid.

THE SPEAKER PRO TEMPORE: The question is on agreeing to the resolution.

The resolution was agreed to.

A motion to reconsider the vote by which the resolution was agreed to was laid on the table.

MR. SUMNERS of Texas: Mr. Speaker, I desire to present a privileged resolution.

The Clerk read as follows:

HOUSE RESOLUTION 403

Resolved, That a message be sent to the Senate to inform them that this House has impeached Harold Louderback, United States district judge for the Northern District of California, for misdemeanors in office, and that the House has adopted articles of impeachment against said Harold Louderback, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of this House, have been appointed such managers.

The resolution was agreed to.

A motion to reconsider the vote by which the resolution was agreed to was laid on the table.(15)

Parliamentarian's Note: In the succeeding Congress, an issue arose as to the power of managers elected in one Congress to continue their functions in a new Congress. On Mar. 13, 1933, the 73d Congress having convened, the Senate convened as a Court of Impeachment and received the managers on the part of the House, who were those Members re-elected to the House who had been appointed as managers in the 72d Congress (two of the five managers were not reelected to the House). On Mar. 22, Mr. Sumners called up a resolution appointing two new Members, and reappointing the three re-elected Members, as managers on the part of the House to conduct the impeachment trial of Judge Louderback. Nevertheless, Mr. Sumners asserted that the managers elected in one Congress had the capacity to continue in that function in a new Congress without reappointment.(16)

In arguing that the impeachment managers elected by one House should retain their powers in a succeeding Congress, Chairman Sumners referred to the lengthy period of time that could occur between the appointment of managers, the adjournment of Congress, and the commencement of a trial.(17)

§ 17.4 The resolution of impeachment against Judge Louderback having been presented to the Senate on the last day of the 72d Congress, the Senate conducted the trial in the 73d Congress.

On Mar. 3, 1933, the last day of the 72d Congress under constitutional practice prior to the adoption of the 20th amendment, the managers on the part of the House in the Harold Louderback impeachment appeared before the Senate and read the resolution and articles of impeachment. The Senate adopted a special order that the Senate begin sitting for trial on the first day of the 73d Congress.(18)

President Franklin D. Roosevelt convened the 73d Congress on Mar. 9,1933, prior to the constitutional day of the first Monday in December, and the Senate organized for trial on that date, pursuant to its special order.(19)

15. 76 CONG. REC. 5177, 5178, 72d Cong. 2d Sess.

16. See 6 Cannon's Precedents §§ 516, 517.

17. See 6 Cannon's Precedents § 517.

18. 6 Cannon's Precedents § 515.

19. 6 Cannon's Precedents § 516. For the proclamation convening the 73d Con-

§ 18. Impeachment of Judge Ritter

Authorization of Investigation

§ 18.1 The Committee on the Judiciary reported in the 73d Congress a resolution authorizing an investigation into the conduct of Halsted Ritter, a U.S. District Court judge; the resolution was referred to the Union Calendar and considered and adopted in the House as in the Committee of the Whole by unanimous consent.

On May 29, 1933, Mr. J. Mark Wilcox, of Florida, placed in the hopper a resolution (H. Res. 163) authorizing the Committee on the Judiciary to investigate the conduct of Halsted Ritter, District Judge for the U.S. District Court for the Southern District of Florida, to determine whether in the opinion of the committee he had been guilty of any high crime or misdemeanor. The resolution was referred to the Committee on the Judiciary.(20)

On June 1, 1933, the Committee on the Judiciary reported House Resolution 163 (H. Rept. No. 191) with committee amendments; the resolution was referred to the Committee of the Whole House on the state of the Union, since the original resolution contained an appropriation.(21)

On the same day, Hatton W. Sumners, of Texas, Chairman of the Committee on the Judiciary, asked unanimous consent to consider House Resolution 163 in the House as in the Committee of the Whole. The resolution and committee amendments read as follows:

HOUSE RESOLUTION 163

Resolved, That the Committee on the Judiciary is authorized and directed, as a whole or by subcommittee, to inquire into and investigate the official conduct of Halsted L. Ritter, a district judge for the United States District Court for the Southern District of Florida, to determine whether in the opinion of said committee he has been guilty of any high crime or misdemeanor which in the contemplation of the Constitution requires the interposition of the Constitutional powers of the House. Said committee shall report its findings to the House, together with such resolution of impeachment or other recommendation as it deems proper.

Sec. 2. For the purpose of this resolution, the committee is authorized to

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gress, see H. JOUR. 3, 73d Cong. 1st Sess., Mar. 9, 1933.

On May 24, 1933, the Senate acquitted Judge Louderback on all articles. See 6 Cannon's Precedents § 524.

20. 77 CONG. REC. 4575, 73d Cong. 1st Sess.

21. *Id.* at p. 4796.

sit and act during the present Congress at such times and places in the District of Columbia and elsewhere, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearing, to employ such clerical, stenographic, and other assistance, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, to have such printing and binding done, and to make such expenditures not exceeding $5,000, as it deems necessary.

With the following committee amendments:

Page 2, line 5, strike out the words "to employ such clerical, stenographic, and other assistance"; and in line 9, on page 2, strike out "to have such printing and binding done, and to make such expenditures, not exceeding $5,000."

After brief debate, the House as in the Committee of the Whole adopted the resolution as amended by the committee amendments.(1)

The Committee on the Judiciary made no report to the House, prior to the expiration of the 73d Congress, in the matter of charges against Judge Ritter, but a subcommittee of the committee investigated the charges and gathered testimony and evidence pursuant to House Resolution 163.

The evidence gathered was the basis for House Resolution 422 in the 74th Congress, impeaching Judge Ritter, and both that resolution and the report of the Committee on the Judiciary in the 74th Congress (H. Rept. No. 2025) referred to the investigation conducted under House Resolution 163, 73d Congress.

The Chairman of the subcommittee, Malcolm C. Tarver, of Georgia, made a report recommending impeachment to the full committee; the report was printed in the Record in the 74th Congress.(2)

Presentation of Charges

§ 18.2 In the 74th Congress, a Member rose to a question of constitutional privilege and presented charges against Judge Ritter, which were referred to the Committee on the Judiciary.

On Jan. 14, 1936, Mr. Robert A. Green, of Florida, a member of the Committee on the Judiciary, rose to a question of constitutional

1. *Id.* at pp. 4784, 4785.

The House adopted a resolution, reported by the Committee on Accounts, authorizing payment out of the contingent fund for expenses of the Committee on the Judiciary in conducting its investigation under H. Res. 163; see H. Res. 172, 77 CONG. REC. 5429, 5430, 73d Cong. 1st Sess., June 9. 1933.

2. 80 CONG. REC. 408–10, 74th Cong. 2d Sess., Jan. 14, 1936.

privilege and on his own responsibility impeached Judge Halsted Ritter for high crimes and misdemeanors. Although he presented no resolution, he delivered lengthy and specific charges against the accused. He indicated his intention to read, as part of his speech, a report submitted to the Committee on the Judiciary by Malcolm C. Tarver, of Georgia, past Chairman of a subcommittee of the Committee on the Judiciary, which subcommittee had investigated the charges against Judge Ritter pursuant to House Resolution 163, adopted by the House in the 73d Congress.

In response to inquiries, Mr. Green summarized the status of the investigation and his reason for rising to a question of constitutional privilege:

MR. [JOHN J.] O'CONNOR [of New York]: Of course, ordinarily the matter would be referred to the Committee on the Judiciary. Does the gentleman think he must proceed longer in the matter at this time?

MR. GREEN: My understanding is, I may say to the chairman of the Rules Committee, that the articles of impeachment will be referred to the Committee on the Judiciary for its further consideration and action. I do not intend to consume any more time than is absolutely necessary.

MR. [THOMAS L.] BLANTON [of Texas]: Will the gentleman yield?

Mr. Green: I yield.

MR. BLANTON: What action was taken on the Tarver report? If this official is the kind of judge the Tarver report indicates, why was he not then impeached and tried by the Senate?

MR. GREEN: That is the question that is now foremost in my mind. Since Judge Tarver's service as chairman of the Judiciary Subcommittee he has been transferred from the House Judiciary Committee to the House Committee on Appropriations. He is not now a member of the Judiciary Committee.

I firmly believe that when our colleagues understand the situation thoroughly, there will be no hesitancy in bringing about Ritter's impeachment by a direct vote on the floor of the House. My purpose in this is to get it in concrete form, in compliance with the rules of the House, so that the direct impeachment will be handled by the Committee on the Judiciary. At present impeachment is not before the committee. This will give the Judiciary something to act upon.

MR. BLANTON: Was he not impeached in the House before when the Tarver investigation was made?

Mr. Green: No. He was never impeached. There was a resolution passed by the House directing an investigation to be made by the Judiciary Committee.

MR. BLANTON: Was that not a resolution that followed just such impeachment charges in the House as the gentleman from Florida is now making?

MR. GREEN: I understand that articles of impeachment have not been heretofore filed in this case.

MR. BLANTON: Was the Tarver report, to which the gentleman has re-

ferred, filed with the Judiciary Committee?

MR. GREEN: It is my understanding that it is now in their hands.(3)

Mr. Green inserted the text of the Tarver report, which recommended impeachment, in his remarks.(4)

At the conclusion of Mr. Green's remarks, Mr. O'Connor moved that "the proceedings be referred to the Committee on the Judiciary." The motion was agreed to.(5)

§ 18.3 The Committee on the Judiciary reported in the 74th Congress a resolution impeaching Judge Halsted Ritter on four articles of impeachment; the resolution referred to the investigation undertaken pursuant to authorizing resolution in the 73d Congress.

On Feb. 20, 1936, Mr. Hatton W. Sumners, of Texas, introduced House Resolution 422, impeaching Judge Ritter; the resolution was referred to the Committee on the Judiciary.(6) On the same day, Mr. Sumners, Chairman of the committee, submitted a privileged report on the charges of official misconduct against Judge Ritter (H. Rept. No. 2025). The report, which was referred to the House Calendar and ordered printed, read as follows:

> The Committee on the Judiciary, having had under consideration charges of official misconduct against Halsted L. Ritter, a district judge of the United States for the Southern District of Florida, and having taken testimony with regard to the official conduct of said judge under the authority of House Resolution 163 of the Seventy-third Congress, report the accompanying resolution of impeachment and articles of impeachment against Halsted L. Ritter to the House of Representatives with the recommendation that the same be adopted by the House and presented to the Senate.(7)

The resolving clause of the resolution recited that the evidence taken by a subcommittee of the Committee on the Judiciary under House Resolution 163 of the 73d Congress sustained impeachment.(8)

Consideration and Adoption of Articles of Impeachment

§ 18.4 The House considered and adopted a resolution and articles of impeachment against Judge Halsted Ritter,

3. 80 CONG. REC. 404, 405, 74th Cong. 2d Sess.

4. *Id. at pp. 408–410.*

5. *Id.* at p. 410.

6. 80 CONG. REC. 2534, 74th Cong. 2d Sess.

7. *Id.* at p. 2528.

8. For the text of the resolution and articles of impeachment, see § 18.7, infra.

pursuant to a unanimous-consent agreement fixing the time for and control of debate.

On Mar. 2, 1936, Mr. Hatton W. Sumners, of Texas, called up for immediate consideration a resolution (H. Res. 422), which the Clerk read at the direction of Speaker Joseph W. Byrns, of Tennessee. Mr. Sumners indicated his intention to conclude the proceedings and have a vote on the resolution before adjournment. The House agreed to his unanimous-consent request for consideration of the resolution:[9]

> THE SPEAKER: The gentleman from Texas asks unanimous consent that debate on this resolution be continued for 4½ hours, 2½ hours to be controlled by himself and 2 hours by the gentleman from New York [Mr. Hancock]; and at the expiration of the time the previous question shall be considered as ordered. Is there objection?
>
> There was no objection.

The resolving clause to the articles read as follows:

> RESOLUTION
>
> *Resolved*, That Halsted L. Ritter, who is a United States district judge for the southern district of Florida, be impeached for misbehavior, and for high crimes and misdemeanors; and that the evidence heretofore taken by the subcommittee of the Committee on the Judiciary of the House of Representatives under House Resolution 163 of the Seventy-third Congress sustains articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit: . . .[10]

The House then discussed the maintenance of order during debate on the resolution:

> MR. [WILLIAM B.] BANKHEAD [of Alabama]: Mr. Speaker, I realize that there is a full membership of the House here today, and properly so, because impeachment proceedings are a matter of grave importance.
>
> The proceedings are inquisitorial, and in order that we may arrive at a correct judgment with reference to the matter and form an intelligent opinion as to how we shall vote, it is absolutely necessary and essential that we have order in the Chamber during the proceedings.
>
> I know it is difficult at all times to get gentlemen to refrain from conversation, but I make a special appeal to the membership of the House on this occasion, in view of the serious importance of the proceedings, that they will be quiet and listen to the speakers so that we may vote intelligently on this matter. [Applause.]
>
> THE SPEAKER: The Chair wishes to emphasize what the gentleman from

9. 80 CONG. REC. 3066–69, 74th Cong. 2d Sess.

10. *Id.* at p. 3066. For the full text of the resolution and articles, see § 18.7, infra.

Alabama has said. There is but one way to maintain order, and that is for Members to cease conversation, because a little conversation here and a little there creates confusion that makes it difficult for speakers to be heard.(11)

Time for debate having expired, Speaker Byrns stated that pursuant to the order of the House the previous question was ordered. By the yeas and nays, the House agreed to the resolution of impeachment—yeas 181, nays 146, present 7, not voting 96.(12)

Election of Managers

§ 18.5 The House adopted resolutions appointing managers to conduct the impeachment trial, empowering the managers to employ staff and to prepare and conduct impeachment proceedings, and notifying the Senate that the House had adopted articles and appointed managers.

On Mar. 6, 1936,(13) following the adoption of articles of impeachment on Mar. 2, Mr. Hatton W. Sumners, of Texas, offered resolutions of a privileged nature related to impeachment proceedings against Judge Ritter:

IMPEACHMENT OF HALSTED L. RITTER

MR. SUMNERS of Texas: Mr. Speaker, I send to the desk the three resolutions which are the usual resolutions offered when an impeachment has been voted by the House, and I ask unanimous consent that they may be read and considered en bloc.

MR. [BERTRAND H.] SNELL [of New York]: Mr. Speaker, reserving the right to object, I do not know that I understand the situation we are in at the present time. Will the gentleman restate his request?

THE SPEAKER:(14) The request is to have read the three resolutions and have them considered en bloc.

MR. SUMNERS of Texas: I may say to the gentleman from New York, they are the three resolutions usually offered and they are in the language used when the House has voted an impeachment.

MR. SNELL: And the gentleman from Texas wants them considered at one time?

MR. SUMNERS of Texas: Yes.

There being no objection, the Clerk read the resolutions, as follows:

HOUSE RESOLUTION 439

Resolved, That Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida; that said managers are hereby instructed to ap-

11. *Id.* at p. 3069.

12. *Id.* at p. 3091.

13. 80 CONG. REC. 3393, 3394, 74th Cong. 2d Sess.

14. Joseph W. Byrns (Tenn.).

pear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Halsted L. Ritter of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Halsted L. Ritter to answer said impeachment, and demand his impeachment, conviction, and removal from office.

HOUSE RESOLUTION 440

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors Halsted L. Ritter, United States district judge for the southern district of Florida, and that the House adopted articles of impeachment against said Halsted L. Ritter, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, have been appointed such managers.

HOUSE RESOLUTION 441

Resolved, That the managers on the part of the House in the matter of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers, and the managers have power to send for persons and papers, and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary: *Provided,* That the total expenditures authorized by this resolution shall not exceed $2,500.

MR. SNELL: Mr. Speaker, may I ask the gentleman from Texas one further question? Is this exactly the procedure that has always been followed by the House under similar conditions?

MR. SUMNERS of Texas: Insofar as I know, it does not vary from the procedure that has been followed since the beginning of the Government.

The resolutions were agreed to.

House-Senate Communications

§ 18.6 The House having notified the Senate of its impeachment of Judge Halsted Ritter, the Senate communicated its readiness to receive the House managers and discussed the Senate rules for impeachment trials.

On Mar. 9, 1936, Vice President John N. Garner laid before the Senate a communication from the House of Representatives:

HOUSE RESOLUTION 440
IN THE HOUSE
OF REPRESENTATIVES,
United States, March 6, 1936.

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors Halsted L. Ritter, United States district judge for the southern district of Florida, and that

the House adopted articles of impeachment against said Halsted L. Ritter, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Hatton W. Sumners, Randolph Perkins, and Sam Hobbs, Members of this House, have been appointed such managers.

The Senate adopted the following order:

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Halsted L. Ritter, United States district judge for the southern district of Florida, agreeably to the notice communicated to the Senate, and that at the hour of 1 o'clock p.m. on Tuesday, March 10, 1936, the Senate will receive the honorable managers on the part of the House of Representatives, in order that they may present and exhibit the said articles of impeachment against the said Halsted L. Ritter, United States district judge for the southern district of Florida.

THE VICE PRESIDENT: The Secretary will carry out the order of the senate.[15]

Senator Elbert D. Thomas, of Utah, discussed the function of the Senate in sitting as a court of impeachment and inquired whether any review was being undertaken of the Senate rules for impeachment trials.

Senator Henry F. Ashurst, of Arizona, responded that the Senate Committee on the Judiciary had considered the rules and cited a change recently made in the rules for impeachment trials:

It will be remembered that in the trial of the Louderback case it was suggested that the trial was dreary, involved, and protracted, and that it was not according to public policy to have 96 Senators sit and take testimony. Subsequently, not a dozen, not 20, but at least 40 Senators urged that the Senate Committee on the Judiciary give its attention to the question whether or not a committee appointed by the Presiding Officer could take the testimony in impeachment trials, whereupon a resolution was introduced by the chairman of the Senate Committee on the Judiciary and was adopted. I ask that that resolution be incorporated in my remarks at this point.

THE PRESIDENT PRO TEMPORE:[16] Without objection, it is so ordered.

The resolution is as follows (Submitted by Mr. Ashurst):

Resolved, That in the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of 12 Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively,

15. 80 CONG. REC. 3423, 3424, 74th Cong. 2d Sess.

16. Key Pittman (Nev.).

under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

MR. ASHURST: The resolution was agreed to by the Senate. It does not provide for a trial by 12 Senators. It simply provides that a committee of 12, appointed by the Presiding Officer of the Senate, may take the testimony, the Senate declaring and determining in advance whether it desires that procedure, or otherwise, and that after such evidence is taken by this committee of 12, the Senate reviews the testimony in its printed form, and the Senate may take additional testimony or may then rehear the testimony of any of the witnesses heard by the committee. The Senate reserves to itself every power and every authority it has under the Constitution.

It could not be expected that I would draw, present, and urge the Senate to pass such resolution and then subsequently decline to defend it, but I am not defending it more than to say that, in my opinion, it is perfectly constitutional to do what the resolution provides. If the Senate so desired, it could appoint a committee to take the testimony, which would be reduced to writing, and be laid before the Senators the next morning in the Congressional Record. If a Senator were absent during one day of the trial, he could read the testimony as printed the next morning.[17]

Senator Warren R. Austin, of Vermont, of the Committee on the Judiciary, asked unanimous consent to have printed in the Record a ruling, cited in 3 Hinds' Precedents section 2006, that an impeachment trial could only proceed when Congress was in session.[18]

Initiation of Impeachment Trial

§ 18.7 The managers on the part of the House appeared in the Senate, read the articles, reserved their right to amend them, and demanded that Judge Halsted Ritter be put to answer the charges; the Senate organized for

17. 80 CONG. REC. 3424, 3425, 74th Cong. 2d Sess. For the adoption of the change referred to by Senator Ashurst, see 79 CONG. REC. 8309, 8310, 74th Cong. 1st Sess., May 28, 1935.

18. *Id.* at p. 3426.

trial as a Court of Impeachment.

On Mar. 10, 1936, pursuant to the Senate's order of Mar. 9, the managers on the part of the House appeared before the bar of the Senate and were announced by the Secretary to the majority, who escorted them to their assigned seats.

Vice President John N. Garner directed the Sergeant at Arms to make proclamation:

> The Sergeant at Arms, Chesley W. Jurney, made proclamation, as follows:
>
> Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Halsted L. Ritter, United States district judge in and for the southern district of Florida.[19]

Representative Hatton W. Sumners, of Texas, read the resolution adopted by the House (H. Res. 439) which directed the managers to appear before the bar of the Senate. Representative Sam Hobbs, of Alabama, read the articles of impeachment, the Vice President requesting that he stand at the desk in front of the Chair:[20]

> Mr. Manager Hobbs, from the place suggested by the Vice President, said:
>
> Mr. President and gentlemen of the Senate:
>
> ARTICLES OF IMPEACHMENT AGAINST HALSTED L. RITTER
>
> House Resolution 422, Seventy-fourth Congress, second session
>
> Congress of the United States of America
>
> IN THE HOUSE OF REPRESENTATIVES, UNITED STATES
>
> *March 2, 1936.*
>
> *Resolved,* That Halsted L. Ritter, who is a United States district judge for the southern district of Florida, be impeached for misbehavior and for high crimes and misdemeanors; and that the evidence heretofore taken by the subcommittee of the Committee on the Judiciary of the House of Representatives under House Resolution 163 of the Seventy-third Congress sustains articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:
>
> Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Halsted L. Ritter, who was appointed, duly qualified, and commissioned to serve, during good behavior in office, as United

19. 80 CONG. REC. 3485, 74th Cong. 2d Sess.

For the text of the proceedings in the Senate upon the appearance of the managers to present the articles of impeachment against Judge Ritter, see § 11.4, supra.

20. 80 CONG. REC. 3486–88, 74th Cong. 2d Sess.

States district judge for the southern district of Florida, on February 15, 1929.

ARTICLE I

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of a high crime and misdemeanor in office in manner and form as follows, to wit: On or about October 11, 1929, A. L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge), as solicitor for the plaintiff, filed in the court of the said Judge Ritter a certain foreclosure suit and receivership proceeding, the same being styled "Bert E. Holland and others against Whitehall Building and Operating Company and others" (No. 678–M–Eq.). On or about May 15, 1930, the said Judge Ritter allowed the said Rankin an advance of $2,500 on his fee for his services in said case. On or about July 2, 1930, the said Judge Ritter by letter requested another judge of the United States District Court for the Southern District of Florida, to wit, Hon. Alexander Akerman, to fix and determine the total allowance for the said Rankin for his services in said case for the reason as stated by Judge Ritter in said letter, that the said Rankin had formerly been the law partner of the said Judge Ritter, and he did not feel that he should pass upon the total allowance made said Rankin in that case, and that if Judge Akerman would fix the allowance it would relieve the writer, Judge Ritter, from any embarrassment if thereafter any question should arise as to his, Judge Ritter's favoring said Rankin with an exorbitant fee.

Thereafterward, notwithstanding the said Judge Akerman, in compliance with Judge Ritter's request, allowed the said Rankin a fee of $15,000 for his services in said case, from which sum the said $2,500 theretofore allowed the said Rankin by Judge Ritter as an advance on his fee was deducted, the said Judge Ritter, well knowing that at his request compensation had been fixed by Judge Akerman for the said Rankin's services in said case, and notwithstanding the restraint of propriety expressed in his said letter to Judge Akerman, and ignoring the danger of embarrassment mentioned in said letter, did fix an additional and exorbitant fee for the said Rankin in said case. On or about December 24, 1930, when the final decree in said case was signed, the said Judge Ritter allowed the said Rankin, additional to the total allowance of $15,000 theretofore allowed by Judge Akerman, a fee of $75,000 for his services in said case, out of which allowance the said Judge Ritter directly profited. On the same day, December 24, 1930, the receiver in said case paid the said Rankin, as part of his said additional fee, the sum of $25,000, and the said Rankin on the same day privately paid and delivered to the said Judge Ritter the sum of $2,500 in cash; $2,000 of said $2,500 was deposited in bank by Judge Ritter on, to wit, December 29, 1930, the remaining $500 being kept by Judge Ritter and not deposited in bank until, to wit, July 10, 1931. Between the time of such initial payment on said additional fee and April 6, 1931, the said receiver paid said Rankin thereon $5,000. On or about April 6, 1931, the said Rankin received the balance of the said additional fee allowed him by Judge Ritter, said balance amounting to $45,000. Shortly thereafter, on or about April 14, 1931, the said Rankin paid and delivered to the said Judge Ritter, privately, in cash,

an additional sum of $2,000. The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said A. L. Rankin the aforesaid sums of money, amounting to $4,500.

Wherefore the said Judge Halsted L. Ritter was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor.

ARTICLE II

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

On the 15th day of February 1929 the said Halsted L. Ritter, having been appointed as United States district judge for the southern district of Florida, was duly qualified and commissioned to serve as such during good behavior in office. Immediately prior thereto and for several years the said Halsted L. Ritter had practiced law in said district in partnership with one A. L. Rankin, which partnership was dissolved upon the appointment of said Ritter as said United States district judge.

On the 18th day of July 1928 one Walter S. Richardson was elected trustee in bankruptcy of the Whitehall Building & Operating Co., which company had been adjudicated in said district as a bankrupt, and as such trustee took charge of the assets of said Whitehall Building & Operating Co., which consisted of a hotel property located in Palm Beach in said district. That the said Richardson as such trustee operated said hotel property from the time of his said appointment until its sale on the 3d of January 1929, under the foreclosure of a third mortgage thereon. On the 1st of November and the 13th of December 1929, the said Judge Ritter made orders in said bankruptcy proceedings allowing the said Walter S. Richardson as trustee the sum of $16,500 as compensation for his services as trustee. That before the discharge of said Walter S. Richardson as such trustee, said Richardson, together with said A. L. Rankin, one Ernest Metcalf, one Martin Sweeney, and the said Halsted L. Ritter, entered into an arrangement to secure permission of the holder or holders of at least $50,000 of first-mortgage bonds on said hotel property for the purpose of filing a bill to foreclose the first mortgage on said premises in the court of said Halsted L. Ritter, by which means the said Richardson, Rankin, Metcalf, Sweeney, and Ritter were to continue said property in litigation before said Ritter. On the 30th day of August 1929, the said Walter S. Richardson, in furtherance of said arrangement and understanding, wrote a letter to the said Martin Sweeney, in New York, suggesting the desirability of contacting as many first mortgage bondholders as possible in order that their cooperation might be secured, directing special attention to Mr. Bert E. Holland, an attorney, whose address was in the Tremont Building in Boston, and who, as cotrustee, was the holder of $50,000 of first-mortgage bonds, the amount of bonds required to institute the contemplated proceedings in Judge Ritter's court.

On October 3, 1929, the said Bert E. Holland, being solicited by the said Sweeney, requested the said Rankin and Metcalf to prepare a complaint to file in said Judge Ritter's court for foreclosure of said first mortgage and the appointment of a receiver. At this time Judge Ritter was holding court in Brooklyn, N.Y.,

and the said Rankin and Richardson went from West Palm Beach, Fla., to Brooklyn, N.Y., and called upon said Judge Ritter a short time previous to filing the bill for foreclosure and appointment of a receiver of said hotel property.

On October 10, 1929, and before the filing of said bill for foreclosure and receiver, the said Holland withdrew his authority to said Rankin and Metcalf to file said bill and notified the said Rankin not to file the said bill. Notwithstanding the said instructions to said Rankin not to file said bill, said Rankin, on the 11th day of October, 1929, filed said bill with the clerk of the United States District Court for the Southern District of Florida, but with the specific request to said clerk to lock up the said bill as soon as it was filed and hold until Judge Ritter's return so that there would be no newspaper publicity before the matter was heard by Judge Ritter for the appointment of a receiver, which request on the part of the said Rankin was complied with by the said clerk.

On October 16, 1929, the said Holland telegraphed to the said Rankin, referring to his previous wire requesting him to refrain from filing the bill and insisting that the matter remain in its then status until further instruction was given; and on October 17, 1929, the said Rankin wired to Holland that he would not make an application on his behalf for the appointment of a receiver. On October 28, 1929, a hearing on the complaint and petition for receivership was heard before Judge Halsted L. Ritter at Miami, at which hearing the said Bert E. Holland appeared in person before said Judge Ritter and advised the judge that he wished to withdraw the suit and asked for dismissal of the bill of complaint on the ground that the bill was filed without his authority.

But the said Judge Ritter, fully advised of the facts and circumstances hereinbefore recited, wrongfully and oppressively exercised the powers of his office to carry into execution said plan and agreement theretofore arrived at, and refused to grant the request of the said Holland and made effective the champertous undertaking of the said Richardson and Rankin and appointed the said Richardson receiver of the said hotel property, notwithstanding that objection was made to Judge Ritter that said Richardson had been active in fomenting this litigation and was not a proper person to act as receiver.

On October 15, 1929, said Rankin made oath to each of the bills for intervenors which were filed the next day.

On October 16, 1929, bills for intervention in said foreclosure suit were filed by said Rankin and Metcalf in the names of holders of approximately $5,000 of said first-mortgage bonds, which intervenors did not possess the said requisite $50,000 in bonds required by said first mortgage to bring foreclosure proceedings on the part of the bondholders.

The said Rankin and Metcalf appeared as attorneys for complainants and intervenors, and in response to a suggestion of the said Judge Ritter, the said Metcalf withdrew as attorney for complainants and intervenors and said Judge Ritter thereupon appointed said Metcalf as attorney for the said Richardson, the receiver.

And in the further carrying out of said arrangement and understanding, the said Richardson employed the said Martin Sweeney and one Bemis, together with Ed Sweeney, as managers of said property, for which they were paid the sum of $60,000 for the management of said hotel for the two seasons the property remained in the custody of said Richardson as receiver.

On or about the 15th of May 1930 the said Judge Ritter allowed the

said Rankin an advance on his fee of $2,500 for his services in said case.

On or about July 2, 1930, the said Judge Ritter requested Judge Alexander Akerman, also a judge of the United States District Court for the Southern District of Florida, to fix the total allowance for the said Rankin for his services in said case, said request and the reasons therefor being set forth in a letter by the said Judge Ritter, in words and figures as follows, to wit:

JULY 2, 1930.

Hon. ALEXANDER AKERMAN,
United States District Judge,
Tampa, Fla.

MY DEAR JUDGE: In the case of *Holland et al.* v. *Whitehall Building & Operating Co.* (No. 678–M–Eq.), pending in my division, my former law partner, Judge A. L. Rankin, of West Palm Beach, has filed a petition for an order allowing compensation for his services on behalf of the plaintiff.

I do not feel that I should pass, under the circumstances, upon the total allowance to be made Judge Rankin in this matter. I did issue an order, which Judge Rankin will exhibit to you, approving an advance of $2,500 on his claim, which was approved by all attorneys.

You will appreciate my position in the matter, and I request you to pass upon the total allowance which should be made Judge Rankin in the premises as an accommodation to me. This will relieve me from any embarrassment hereafter if the question should arise as to my favoring Judge Rankin in this matter by an exorbitant allowance.

Appreciating very much your kindness in this matter, I am,

Yours sincerely,

HALSTED L. RITTER.

In compliance with said request the said Judge Akerman allowed the said Rankin $12,500 in addition to the $2,500 theretofore allowed by Judge Ritter, making a total of $15,000 as the fee of the said Rankin in the said case.

But notwithstanding the said request on the part of said Ritter and the compliance by the said Judge Akerman and the reasons for the making of said request by said Judge Ritter of Judge Akerman, the said Judge Ritter, on the 24th day of December 1930, allowed the said Rankin an additional fee of $75,000.

And on the same date when the receiver in said case paid to the said Rankin as a part of said additional fee the sum of $25,000, said Rankin privately paid and delivered to said Judge Ritter out of the said $25,000 the sum of $2,500 in cash, $2,000 of which the said Judge Ritter deposited in a bank and $500 of which was put in a tin box and not deposited until the 10th day of July 1931, when it was deposited in a bank with an additional sum of $600.

On or about the 6th day of April 1931, the said Rankin received as a part of the $75,000 additional fee the sum of $45,000, and shortly thereafter, on or before the 14th day of April 1931, the said Rankin paid and delivered to said Judge Ritter, privately and in cash, out of said $45,000 the sum of $2,000.

The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said Rankin the aforesaid sums of $2,500 in cash and $2,000 in cash, amounting in all to $4,500.

Of the total allowance made to said A. L. Rankin in said foreclosure suit, amounting in all to $90,000, the following sums were paid out by said Rankin with the knowledge and consent of said Judge Ritter, to wit, to said Walter S. Richardson, the sum of $5,000; to said Metcalf, the sum of $10,000; to Shutts and Bowen, also attorneys for the receiver, the sum of

$25,000; and to said Halsted L. Ritter, the sum of $4,500.

In addition to the said sum of $5,000 received by the said Richardson, as aforesaid, said Ritter by order in said proceedings allowed said Richardson a fee of $30,000 for services as such receiver.

The said fees allowed by said Judge Ritter to A. L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge) as solicitor for the plaintiff in said case were excessive and unwarranted, and said judge profited personally thereby in that out of the money so allowed said solicitor he received personally, privately, and in cash $4,500 for his own use and benefit.

While the Whitehall Hotel was being operated in receivership under said proceeding pending in said court (and in which proceeding the receiver in charge of said hotel by appointment of said judge was allowed large compensation by said judge) the said judge stayed at said hotel from time to time without cost to himself and received free rooms, free meals, and free valet service, and, with the knowledge and consent of said judge, members of his family, including his wife, his son, Thurston Ritter, his daughter, Mrs. M. R. Walker, his secretary, Mrs. Lloyd C. Hooks, and her husband, Lloyd C. Hooks, each likewise on various occasions stayed at said hotel without cost to themselves or to said judge, and received free rooms, and some or all of them received from said hotel free meals and free valet service; all of which expenses were borne by the said receivership to the loss and damage of the creditors whose interests were involved therein.

The said judge willfully failed and neglected to perform his duty to conserve the assets of the Whitehall Building & Operating Co. in receivership in his court, but to the contrary, permitted waste and dissipation of its assets, to the loss and damage of the creditors of said corporation, and was a party to the waste and dissipation of such assets while under the control of his said court, and personally profited thereby, in the manner and form hereinabove specifically set out.

Wherefore the said Judge Halsted L. Ritter was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor in office.

ARTICLE III

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C. Annotated, title 28, sec. 373), making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that after the employment of the law firm of Ritter & Rankin (which, at the time of the appointment of Halsted L. Ritter to be judge of the United States District Court for the Southern District of Florida, was composed of Halsted L. Ritter and A. L. Rankin) in the case of Trust Co. of Georgia and Robert G. Stephens, trustees, against Brazilian Court Building Corporation and others, No. 5704 in the Circuit Court of the Fifteenth Judicial Circuit of Florida, and after the final decree had been entered in said cause, and after the fee of $4,000 which had been agreed upon at the

outset of said employment had been fully paid to the firm of Ritter & Rankin, and after Halsted L. Ritter had on, to wit, February 15, 1929, become judge of the United States District Court for the Southern District of Florida, Judge Ritter on, to wit, March 11, 1929, wrote a letter to Charles A. Brodek, of counsel for Mulford Realty Corporation (the client which his former law firm had been representing in said litigation), stating that there had been much extra and unanticipated work in the case; that he was then a Federal judge; that his partner, A. L. Rankin, would carry through further proceedings in the case, but that he, Judge Ritter, would be consulted about the matter until the case was all closed up; and that "this matter is one among very few which I am assuming to continue my interest in until finally closed up"; and stating specifically in said letter:

"I do not know whether any appeal will be taken in the case or not; but if so, we hope to get Mr. Howard Paschal or some other person as receiver who will be amenable to our directions, and the hotel can be operated at a profit, of course, pending the appeal. We shall demand a very heavy supersedeas bond, which I doubt whether D'Esterre can give."

And further that he was "of course, primarily interested in getting some money in the case," and that he thought "$2,000 more by way of attorneys' fees should be allowed"; and asked that he be communicated with direct about the matter, giving his post-office box number. On, to wit, March 13, 1929, said Brodek replied favorably, and on March 30, 1929, a check of Brodek, Raphael & Eisner, a law firm of New York City, representing Mulford Realty Corporation, in which Charles A. Brodek, senior member of the firm of Brodek, Raphael & Eisner, was one of the directors, was drawn, payable to the order of "Hon. Halsted L. Ritter" for $2,000, and which was duly endorsed "Hon. Halsted L. Ritter. H. L. Ritter" and was paid on, to wit, April 4, 1929, and the proceeds thereof were received and appropriated by Judge Ritter to his own individual use and benefit, without advising his said former partner that said $2,000 had been received, without consulting with his said former partner thereabout, and without the knowledge or consent of his said former partner, appropriated the entire amount thus solicited and received to the use and benefit of himself, the said Judge Ritter.

At the time said letter was written by Judge Ritter and said $2,000 received by him, Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Fla., said holdings being within the territorial jurisdiction of the United States district court, of which Judge Ritter was a judge from February 15, 1929.

Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373), and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE IV

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a

United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

The said Judge Ritter by his actions and conduct, as an individual and as such judge, has brought his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice in his said court, and to the prejudice of public respect for and confidence in the Federal judiciary:

1. In that in the Florida Power Co. case (Florida Power & Light Co. against City of Miami and others, No. 1183–M–Eq.), which was a case wherein said judge had granted the complainant power company a temporary injunction restraining the enforcement of an ordinance of the city of Miami, which ordinance prescribed a reduction in the rates for electric current being charged in said city, said judge improperly appointed one Cary T. Hutchinson, who had long been associated with and employed by power and utility interests, special master in chancery in said suit, and refused to revoke his order so appointing said Hutchinson. Thereafter, when criticism of such action had become current in the city of Miami, and within 2 weeks after a resolution (H. Res. 163, 73d Cong.) had been agreed to in the House of Representatives of the Congress of the United States authorizing and directing the Judiciary Committee thereof to investigate the official conduct of said judge and to make a report concerning said conduct to said House of Representatives, an arrangement was entered into with the city commissioners of the city of Miami or with the city attorney of said city by which the said city commissioners were to pass a resolution expressing faith and confidence in the integrity of said judge, and the said judge recuse himself as judge [in] said power suit. The said agreement was carried out by the parties thereto, and said judge, after the passage of such resolution, recused himself from sitting as judge in said power suit, thereby bartering his judicial authority in said case for a vote of confidence. Nevertheless, the succeeding judge allowed said Hutchinson as special master in chancery in said case a fee of $5,000, although he performed little, if any, service as such, and in the order making such allowance recited: "And it appearing to the court that a minimum fee of $5,000 was approved by the court for the said Cary T. Hutchinson, special master in this cause."

2. In that in the Trust Co. of Florida cases (Illick against Trust Co. of Florida et al., No. 1043–M–Eq., and Edmunds Committee et al. against Marlon Mortgage Co. et al., No. 1124–M–Eq.) after the State banking department of Florida, through its comptroller, Honorable Ernest Amos, had closed the doors of the Trust Co. of Florida and appointed J. H. Therrell liquidator for said trust company, and had interviewed in the said Illick case, said Judge Ritter wrongfully and erroneously refused to recognize the right of said State authority to administer the affairs of the said trust company, and appointed Julian S. Eaton and Clark D. Stearns as receivers of the property of said trust company. On appeal, the United States Circuit Court of Appeals for the Fifth Circuit reversed the said order or decree of Judge Ritter, and ordered the said property surrendered to the State liquidator. Thereafter, on, to wit, September 12, 1932, there was filed in the United States District Court for the Southern District of Florida the Edmunds Committee case, supra. Marion Mortgage Co. was a subsidiary of the Trust Co. of Florida. Judge Ritter being absent from his district at the time of the filing of said case, an application for the appointment of receivers therein was

presented to another judge of said district, namely, Honorable Alexander Akerman. Judge Ritter, however, prior to the appointment of such receivers, telegraphed Judge Akerman, requesting him to appoint the aforesaid Eaton and Stearns as receivers in said case, which appointments were made by Judge Akerman. Thereafter the United States Circuit Court of Appeals for the Fifth Circuit reversed the order of Judge Akerman, appointing said Eaton and Stearns as receivers in said case. In November 1932 J. H. Therrell, as liquidator, filed a bill of complaint in the Circuit Court of Dade County, Fla.—a court of the State of Florida—alleging that the various trust properties of the Trust Co. of Florida were burdensome to the liquidator to keep, and asking that the court appoint a succeeding trustee. Upon petition for removal of said cause from said State court into the United States District Court for the Southern District of Florida, Judge Ritter took jurisdiction, notwithstanding the previous rulings of the United States Circuit Court of Appeals above referred to, and again appointed the said Eaton and Stearns as the receivers of the said trust properties. In December 1932 the said Therrell surrendered all of the trust properties to said Eaton and Stearns as receivers, together with all records of the Trust Co. of Florida pertaining thereto. During the time said Eaton and Stearns, as such receivers, were in control of said trust properties, Judge Ritter wrongfully and improperly approved their accounts without notice or opportunity for objection thereto to be heard. With the knowledge of Judge Ritter, said receivers appointed the sister-in-law of Judge Ritter, namely, Mrs. G. M. Wickard, who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building, one of said trust properties. On, to wit, January], 1933, Honorable J. M. Lee succeeded Honorable Ernest Amos as comptroller of the State of Florida and appointed M. A. Smith liquidator in said Trust Co. of Florida cases to succeed J. H. Therrell. An appeal was again taken to the United States Circuit Court of Appeals for the Fifth Circuit from the then latest order or decree of Judge Ritter, and again the order or decree of Judge Ritter appealed from was reversed by the said circuit court of appeals, which held that Judge Ritter, or the court in which he presided, had been without jurisdiction in the matter of the appointment of said Eaton and Stearns as receivers. Thereafter, and with the knowledge of the decision of the said circuit court of appeals, Judge Ritter wrongfully and improperly allowed said Eaton and Stearns and their attorneys some $26,000 as fees out of said trust-estate properties, and endeavored to require, as a condition precedent to releasing said trust properties from the control of his court, a promise from counsel for the said State liquidator not to appeal from his order allowing the said fees to said Eaton and Stearns and their attorneys.

3. In that the said Halsted L. Ritter, while such Federal judge, accepted, in addition to $4,500 from his former law partner as alleged in article I hereof, other large fees or gratuities, to wit, $7,500 from J. R. Francis, on or about April 19, 1929, J. R. Francis at this said time having large property interests within the territorial jurisdiction of the court of which Judge Ritter was a judge. On, to wit, the 4th day of April 1929 the said Judge Ritter accepted the sum of $2,000 from said Brodek, Raphael & Eisner, representing Mulford Realty Corporation, through his attorney, Charles A. Brodek, as a fee or gratuity, at which time the said Mulford Realty Corporation held and owned large

interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Fla., said holdings being within the territorial jurisdiction of the United States District Court of which Judge Ritter was a judge from February 15, 1929.

4. By his conduct as detailed in articles I and II hereof.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office.

Attest:

JOSEPH W. BYRNS,
Speaker of the House of Representatives.
SOUTH TRIMBLE,
Clerk.

Representative Sumners entered a reservation of the right of the House to amend or supplement the articles and demanded that the respondent be put to trial:

MR. MANAGER SUMNERS: Mr. President, the House of Representatives, by protestation, saving themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Halsted L. Ritter, district judge of the United States for the southern district of Florida, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Halsted L. Ritter may be put to answer the misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives by the adoption of the articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of the said Halsted L. Ritter to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

THE VICE PRESIDENT: The Senate wild take proper order and notify the House of Representatives.[1]

The most senior Member of the Senate, Senator William E. Borah, of Idaho, then administered the oath to Vice President Garner, who administered the oath to the other Senators present.

The Sergeant at Arms made proclamation that the Senate was then sitting as a Court of Impeachment. Orders were adopted notifying the House of the organization of the court and issuing a summons to the respondent.[2]

§ 18.8 In response to a summons, Judge Halsted Ritter

1. *Id.* at p. 3488.
2. *Id.* at pp. 3488, 3489. For the text of the proceedings whereby the Senate organized for the Ritter impeachment trial, see § 11.5, supra.

appeared before the Senate sitting as a Court of Impeachment.

On Mar. 12, 1936, respondent Halsted Ritter appeared before the Court of Impeachment pursuant to the summons previously issued, and filed an entry of appearance: (3)

THE VICE PRESIDENT: (4) . . . The Secretary will read the return of the Sergeant at Arms.

The Chief Clerk read as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons addressed to Halsted L. Ritter, and the foregoing precept, addressed to me, were duly served upon the said Halsted L. Ritter by me by delivering true and attested copies of the same to the said Halsted L. Ritter at the Carlton Hotel, Washington, D.C., on Thursday, the 12th day of March 1936, at 11 o'clock in the forenoon of that day.

CHESLEY W. JURNEY,
Sergeant at Arms,
United States Senate.

THE VICE PRESIDENT: The Secretary of the Senate will administer the oath to the Sergeant at Arms.

The Secretary of the Senate, Edwin A. Halsey, administered the oath to the Sergeant at Arms, as follows:

You, Chesley W. Jurney, do solemnly swear that the return made by you upon the process issued on the 10th day of March 1936 by the Senate of the United States against Halsted L. Ritter, United States district judge for the southern district of Florida, is truly made, and that you have performed such service as therein described. So help you God.

THE VICE PRESIDENT: The Sergeant at Arms will make proclamation.

The Sergeant at Arms made proclamation as follows:

Halsted L. Ritter! Halsted L. Ritter! Halsted L. Ritter! United States district judge for the southern district of Florida, appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The respondent, Halsted L. Ritter, and his counsel, Frank P. Walsh, Esq., of New York City, N.Y., and Carl T. Hoffman, Esq., of Miami, Fla., entered the Chamber and were conducted to the seats assigned them in the space in front of the Secretary's desk, on the right of the Chair.

THE VICE PRESIDENT: Counsel for the respondent are advised that the Senate is now sitting for the trial of articles of impeachment exhibited by the House of Representatives against Halsted L. Ritter, United States district judge for the southern district of Florida.

MR. WALSH (of counsel): May it please you, Mr. President, and honorable Members of the Senate, I beg to inform you that, in response to your summons, the respondent, Halsted L. Ritter, is now present with his counsel and asks leave to file a formal entry of appearance.

THE VICE PRESIDENT: Is there objection? The Chair hears none, and the appearance will be filed with the Secretary, and will be read.

The Chief Clerk read as follows:

3. 80 CONG. REC. 3646, 3647, 74th Cong. 2d Sess.

4. John N. Garner (Tex.).

IN THE SENATE OF THE UNITED STATES OF AMERICA SITTING AS A COURT OF IMPEACHMENT

MARCH 12, 1936.

The United States of America v. *Halsted L. Ritter*

The respondent, Halsted L. Ritter, having this day been served with a summons requiring him to appear before the Senate of the United States of America in the city of Washington, D.C., on March 12, 1936, at 1 o'clock afternoon to answer certain articles of impeachment presented against him by the House of Representatives of the United States of America, now appears in his proper person and also by his counsel, who are instructed by this respondent to inform the Senate that respondent stands ready to file his pleadings to such articles of impeachment within such reasonable period of time as may be fixed.

Dated March 12, 1936.

§ 18.9 The Senate, sitting as a Court of Impeachment, excused a Senator from service at his request, fixed a trial date, allowed respondent 18 days to file his answer, and adopted supplemental rules for trial.

On Mar. 12, 1936, the Senate convened as a Court of Impeachment in the Halsted Ritter case. Preceding the administration of the oath to members not theretofore sworn, the court granted the request of Senator Edward P. Costigan, of Colorado, that he be excused from service on the Court of Impeachment. Senator Costigan caused to be printed in the Record the reasons for his request, based on a long personal acquaintance with the respondent.(5)

The Senate ratified an agreement, between the managers and counsel for the respondent, as to the time permitted the respondent to file his answer with the Court of Impeachment:

MR. [JOSEPH T.] ROBINSON [of Arkansas]: Mr. President, I think there is not a clear understanding as to the arrangement which has been entered into between the managers and the counsel for the respondent. It is my understanding, and if I am in error someone who is better informed will please correct me, that the agreement is that counsel for the respondent will place their response in the possession of the managers on the part of the House not later than the 26th instant, and that the Court may reconvene again on the 30th when the response will be filed in the Senate.

THE VICE PRESIDENT:(6) Is there objection to that agreement?

There was no objection.(7)

The Court of Impeachment adopted a motion fixing the trial date at Apr. 6, 1936.(8)

The court adopted supplemental rules, which Senator Henry F.

5. 80 CONG. REC. 3646, 74th Cong. 2d Sess.

6. John N. Garner (Tex.).

7. 80 CONG. REC. 3647, 74th Cong. 2d Sess.

8. *Id.* at p. 3648.

Ashurst, of Arizona, stated to be the same as those adopted in the trial of Judge Harold Louderback:

Ordered, That in addition to the rules of procedure and practice in the Senate when sitting on impeachment trials, heretofore adopted, and supplementary to such rules, the following rules shall be applicable in the trial of the impeachment of Halsted L. Ritter, United States judge for the southern district of Florida:

1. In all matters relating to the procedure of the Senate, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

2. In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers on the part of the House or counsel representing the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.

3. It shall not be in order for any Senator, except as provided in the rules of procedure and practice in the Senate when sitting on impeachment trials, to engage in colloquy or to address questions either to the managers on the part of the House or to counsel for the respondent, nor shall it be in order for Senators to address each other; but they shall address their remarks directly to the Presiding Officer and not otherwise.

4. The parties may, by stipulation in writing filed with the Secretary of the Senate and by him laid before the Senate or presented at the trial, agree upon any facts involved in the trial; and such stipulation shall be received by the Senate for all intents and purposes as though the facts therein agreed upon had been established by legal evidence adduced at the trial.

5. The parties or their counsel may interpose objection to witnesses answering questions propounded at the request of any Senator, and the merits of any such objection may be argued by the parties or their counsel; and the Presiding Officer may rule on any such objection, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without debate and without a division, unless the ayes and nays be demanded by one-fifth of the Members present when the same shall be taken.[9]

Amendment of Articles of Impeachment

§ 18.10 The House adopted a resolution, reported as privileged by the managers on the part of the House in the Halsted Ritter impeachment, amending the articles previously voted by the House.

9. *Id.*

On Mar. 30, 1936,[10] Mr. Hatton W. Sumners, of Texas, called up the following privileged resolution (H. Res. 471) amending the articles of impeachment against Judge Ritter:

Resolved, That the articles of impeachment heretofore adopted by the House of Representatives in and by House Resolution 422, House Calendar No. 279, be, and they are hereby, amended as follows:

Article III is amended so as to read as follows:

ARTICLE II

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373), making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that after the employment of the law firm of Ritter & Rankin (which at the time of the appointment of Halsted L. Ritter to be judge of the United States District Court for the Southern District of Florida, was composed of Halsted L. Ritter and A. L. Rankin) in the case of *Trust Co. of Georgia and Robert G. Stephens, Trustee* v. *Brazilian Court Building Corporation et al.*, no. 5704, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, and after the fee of $4,000 which had been agreed upon at the outset of said employment had been fully paid to the firm of Ritter & Rankin, and after Halsted L. Ritter had, on, to wit, February 15, 1929, become judge of the United States District Court for the Southern District of Florida, Judge Ritter on, to wit, March 11, 1929, wrote a letter to Charles A. Brodek, of counsel for Mulford Realty Corporation (the client which his former law firm had been representing in said litigation), stating that there had been much extra and unanticipated work in the case, that he was then a Federal judge; that his partner, A. L. Rankin, would carry through further proceedings in the case, but that he, Judge Ritter, would be consulted about the matter until the case was all closed up; and that "this matter is one among very few which I am assuming to continue my interest in until finally closed up"; and stating specifically in said letter:

"I do not know whether any appeal will be taken in the case or not, but, if so, we hope to get Mr. Howard Paschal or some other person as receiver who will be amenable to our directions, and the hotel can be operated at a profit, of course, pending the appeal. We shall demand a very heavy supersedeas bond, which I doubt whether D'Esterre can give"; and further that he was "of course primarily interested in getting some money in the case", and that he thought "$2,000 more by way of attorney's fees should be allowed"; and asked that he be communicated with direct about the matter, giving his post-office box number. On, to wit, March 13, 1929, said Brodek replied favorably, and on March 30, 1929, a check of Brodek, Raphael & Eisner,

10. 80 CONG. REC. 4597–99. 74th Cong. 2d Sess.

a law firm of New York City, representing Mulford Realty Corporation, in which Charles A. Brodek, senior member of the firm of Brodek, Raphael & Eisner, was one of the directors, was drawn, payable to the order of "Hon. Halsted L. Ritter" for $2,000 and which was duly endorsed "Hon. Halsted L. Ritter. H. L. Ritter" and was paid on, to wit, April 4, 1929, and the proceeds thereof were received and appropriated by Judge Ritter to his own individual use and benefit, without advising his said former partner that said $2,000 had been received, without consulting with his former partner thereabout, and without the knowledge or consent of his said former partner, appropriated the entire amount thus solicited and received to the use and benefit of himself, the said Judge Ritter.

At the time said letter was written by Judge Ritter and said $2,000 received by him, Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Fla., said holdings being within the territorial jurisdiction of the United States district court, of which Judge Ritter was a judge from, to wit, February 15, 1929.

After writing said letter of March 11, 1929, Judge Ritter further exercised the profession or employment of counsel or attorney, or engaged in the practice of the law, with relation to said case.

Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373), and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

By adding the following articles immediately after article III as amended:

ARTICLE IV

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373), making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that Judge Ritter did exercise the profession or employment of counsel or attorney, or engaged in the practice of the law, representing J. R. Francis, with relation to the Boca Raton matter and the segregation and saving of the interest of J. R. Francis therein, or in obtaining a deed or deeds to J. R. Francis from the Spanish River Land Co. to certain pieces of realty, and in the Edgewater Ocean Beach Development Co. matter, for which services the said Judge Ritter received from the said J. R. Francis the sum of $7,500.

Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of the law above recited, and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE V

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146(b) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defeat the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1929 said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of some $12,000, yet paid no income tax thereon.

Among the fees included in said gross taxable income for 1929 were the extra fee of $2,000 solicited and received by Judge Ritter in the Brazilian Court case, as described in article III, and the fee of $7,500 received by Judge Ritter from J. R. Francis.

Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE VI

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146(b) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defeat the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1930 the said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of, to wit, $5,300, yet failed to report any part thereof in his income-tax return for the year 1930, and paid no income tax thereon.

Two thousand five hundred dollars of said gross taxable income for 1930 was that amount of cash paid Judge Ritter by A. L. Rankin on December 24, 1930, as described in article I.

Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

Original article IV is amended so as to read as follows:

"ARTICLE VII

"That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

"The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter, hereunder specified or indicated in this article, since he became judge of said court, as an individual or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the admin-

istration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge:

"1. In that in the Florida Power Co. case (*Florida Power & Light Co.* v. *City of Miami et al.*, no. 1183–M–Eq.), which was a case wherein said judge had granted the complainant power company a temporary injunction restraining the enforcement of an ordinance of the city of Miami, which ordinance prescribed a reduction in the rates for electric current being charged in said city, said judge improperly appointed one Cary T. Hutchinson, who had long been associated with and employed by power and utility interests, special master in chancery in said suit, and refused to revoke his order so appointing said Hutchinson. Thereafter, when criticism of such action had become current in the city of Miami, and within 2 weeks after a resolution (H. Res. 163, 73d Cong.) had been agreed to in the House of Representatives of the Congress of the United States, authorizing and directing the Judiciary Committee thereof to investigate the official conduct of said judge and to make a report concerning said conduct to said House of Representatives, an arrangement was entered into with the city commissioners of the city of Miami or with the city attorney of said city by which the said city commissioners were to pass a resolution expressing faith and confidence in the integrity of said judge, and the said judge recuse himself as judge in said power suit. The said agreement was carried out by the parties thereto, and said judge; after the passage of such resolution, recused himself from sitting as judge in said power suit, thereby bartering his judicial authority in said case for a vote of confidence. Nevertheless, the succeeding judge allowed said Hutchinson as special master in chancery in said case a fee of $5,000, although he performed little, if any, service as such, and in the order making such allowance recited: 'And it appearing to the court that a minimum fee of $5,000 was approved by the court for the said Cary T. Hutchinson, special master in this cause.'

"2. In that in the Trust Co. of Florida cases (*Illick* v. *Trust Co. of Florida et al.*, no. 1043–M–Eq., and *Edmunds Committee et al.* v. *Marion Mortgage Co. et al.*, no. 1124–M–Eq.), after the State Banking Department of Florida, through its comptroller, Hon. Ernest Amos, had closed the doors of the Trust Co. of Florida and appointed J. H. Therrell liquidator for said trust company, and had intervened in the said Illick case, said Judge Ritter wrongfully and erroneously refused to recognize the right of said State authority to administer the affairs of the said trust company and appointed Julian S. Eaton and Clark D. Stearns as receivers of the property of said trust company. On appeal the United States Circuit Court of Appeals for the Fifth Circuit reversed the said order or decree of Judge Ritter and ordered the said property surrendered to the State liquidator. Thereafter, on, to wit, September 12, 1932, there was filed in the United States District Court for the Southern District of Florida the Edmunds Committee case, supra. Marion Mortgage Co. was a subsidiary of the Trust Co. of Florida. Judge Ritter being absent from his district at the time of the filing of said case, an application for the appointment of receivers therein was presented to another judge of said district, namely, Hon. Alexander Akerman. Judge Ritter, however, prior to the appointment of such receivers, telegraphed Judge Akerman, requesting him to appoint the aforesaid Eaton and Stearns as receivers in said case, which appointments were made by Judge Akerman. Thereafter the United

States Circuit Court of Appeals for the Fifth Circuit reversed the order of Judge Akerman, appointing said Eaton and Stearns as receivers in said case. In November 1932 J. H. Therrell, as liquidator, filed a bill of complaint in the Circuit Court of Dade County, Fla.—a court of the State of Florida—alleging that the various trust properties of the Trust Co. of Florida were burdensome to the liquidator to keep, and asking that the court appoint a succeeding trustee. Upon petition for removal of said cause from said State court into the United States District Court for the Southern District of Florida, Judge Ritter took jurisdiction, notwithstanding the previous rulings of the United States Circuit Court of Appeals above referred to, and again appointed the said Eaton and Stearns as the receivers of the said trust properties. In December 1932 the said Therrell surrendered all of the trust properties to said Eaton and Stearns as receivers, together with all records of the Trust Co. of Florida pertaining thereto. During the time said Eaton and Stearns, as such receivers, were in control of said trust properties. Judge Ritter wrongfully and improperly approved their accounts without notice or opportunity for objection thereto to be heard. With the knowledge of Judge Ritter, said receivers appointed the sister-in-law of Judge Ritter, namely, Mrs. G. M. Wickard, who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building, one of said trust properties. On, to wit, January 1, 1933, Hon. J. M. Lee succeeded Hon. Ernest Amos as comptroller of the State of Florida and appointed M. A. Smith liquidator in said Trust Co. of Florida cases to succeed J. H. Therrell. An appeal was again taken to the United States Circuit Court of Appeals for the Fifth Circuit from the then latest order or decree of Judge Ritter, and again the order or decree of Judge Ritter appealed from was reversed by the said circuit court of appeals which held that the State officer was entitled to the custody of the property involved and that said Eaton and Stearns as receivers were not entitled to such custody. Thereafter, and with the knowledge of the decision of the-said circuit court of appeals, Judge Ritter wrongfully and improperly allowed said Eaton and Stearns and their attorneys some $26,000 as fees out of said trust-estate properties and endeavored to require, as a condition precedent to releasing said trust properties from the control of his court, a promise from counsel for the said State liquidator not to appeal from his order allowing the said fees to said Eaton and Stearns and their attorneys.

"3. In that the said Halsted L. Ritter, while such Federal judge, accepted, in addition to $4,500 from his former law partner, as alleged in article I hereof, other large fees or gratuities, to wit, $7,500 from J. R. Francis, on or about April 19, 1929, J. R. Francis at this said time having large property interests within the territorial jurisdiction of the court of which Judge Ritter was a judge; and on, to wit, the 4th day of April 1929 the said Judge Ritter accepted the sum of $2,000 from Brodek, Raphael & Eisner, representing Mulford Realty Corporation as its attorneys, through Charles A. Brodek, senior member of said firm and a director of said corporation, as a fee or gratuity, at which time the said Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District

Court of which Ritter was a judge from, to wit, February 15, 1929.

"4. By his conduct as detailed in articles I, II, III, and IV hereof, and by his income-tax evasions as set forth in articles V and VI hereof.

"Wherefore the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office."

The House adopted the resolution amending the articles after Mr. Sumners discussed its provisions and stated his opinion that the managers had the power to report amendments to the articles:

MR. SUMNERS of Texas: Mr. Speaker, the resolution which has just been read proposes three new articles. The change is not as important as that statement would indicate. Two of the new articles deal with income taxes, and one with practicing law by Judge Ritter, after he went on the bench. In the original resolution, the charge is made that Judge Ritter received certain fees or gratuities and had written a letter, and so forth. No change is proposed in articles 1 and 2. In article 3, as stated, Judge Ritter is charged with practicing law after he went on the bench. That same thing, in effect, was charged, as members of the committee will remember, in the original resolution, but the form of the charge, in the judgment of the managers, could be improved. These charges go further and charge that in the matter connected with J. R. Francis, the judge acted as counsel in two transactions after he went on the bench, and received $7,500 in compensation. Article 7 is amended to include a reference to these new charges. There is a change in the tense used with reference to the effect of the conduct alleged. It is charged, in the resolution pending at the desk, that the reasonable and probable consequence of the alleged conduct is to injure the confidence of the people in the courts—I am not attempting to quote the exact language—which is a matter of form, I think, more than a matter of substance.

MR. [BERTRAND H.] SNELL [of New York]: Mr. Speaker, will the gentleman yield?

MR. SUMNERS of Texas: Yes.

MR. SNELL: I may not be entirely familiar with all this procedure, but as I understand, what the gentleman is doing here today, is to amend the original articles of impeachment passed by the House.

MR. SUMNERS of Texas: That is correct.

MR. SNELL: The original articles of impeachment came to the House as a result of the evidence before the gentleman's committee. Has the gentleman's committee had anything to do with the change or amendment of these charges?

MR. SUMNERS of Texas: No; just the managers.

MR. SNELL: As a matter of procedure, would not that be the proper thing to do?

MR. SUMNERS of Texas: I do not think it is at all necessary, for this reason: The managers are now acting as the agents of the House, and not as the agents of the Committee on the Judiciary. Mr. Manager Perkins and Mr. Manager Hobbs have recently extended the investigation made by the committee.

MR. SNELL: Mr. Speaker, will the gentleman yield further?

MR. SUMNERS of Texas: Yes.

MR. SNELL: Do I understand that the amendments come because of new information that has come to you as managers that never was presented to the Committee on the Judiciary?

MR. SUMNERS of Texas: Perhaps it would not be true to answer that entirely in the affirmative, but the changes are made largely by reason of new evidence which has come to the attention of the committee, and some of these changes, more or less changes in form, have resulted from further examination of the question. This is somewhat as lawyers do in their pleadings. They often ask the privilege of making an amendment.

MR. SNELL: And the gentleman's position is that as agents of the House it is not necessary to have the approval of his committee, which made the original impeachment charges?

MR. SUMNERS of Texas: I have no doubt about that; I have no doubt about the accuracy of that statement.

§ 18.11 Following the amendment of the articles of impeachment against Judge Halsted Ritter, the House adopted a resolution to inform the Senate thereof.

On Mar. 30, 1936,[11] following the amendment by the House of the articles in the impeachment against Judge Ritter, the Senate was informed by resolution thereof:

MR. [HATTON W.] SUMNERS of Texas: Mr. Speaker, I offer the following privileged resolution.

The Clerk read as follows:

HOUSE RESOLUTION 472

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted an amendment to the articles of impeachment heretofore exhibited against Halsted L. Ritter, United States district judge for the southern district of Florida, and that the same will be presented to the Senate by the managers on the part of the House.

And also, that the managers have authority to file with the Secretary of the Senate, on the part of the House any subsequent pleadings they shall deem necessary.

The resolution was agreed to.

A motion to reconsider was laid on the table.

On Mar. 31, the amendments to the articles were presented to the Court of Impeachment and printed in the Record;[12] counsel for the respondent was granted 48 hours to file his response to the new articles.

Motions to Strike Articles

§ 18.12 During the impeachment trial of Judge Halsted Ritter, the respondent moved to strike Article I or, in the

11. 80 CONG. REC. 4601, 74th Cong. 2d Sess.

12. *Id.* at pp. 4654–56.

alternative, to require election as to Articles I and II, and moved to strike Article VII.

On Mar. 31, 1936,[13] the respondent, Judge Ritter, filed the following motion:

In the Senate of the United States of America sitting as a Court of Impeachment. *The United States of America v. Halsted L. Ritter, respondent*

MOTION TO STRIKE ARTICLE I, OR, IN THE ALTERNATIVE, TO REQUIRE ELECTION AS TO ARTICLES I AND II; AND MOTION TO STRIKE ARTICLE VII

The respondent, Halsted L. Ritter, moves the honorable Senate, sitting as a Court of Impeachment, for an order striking and dismissing article I of the articles of impeachment, or, in the alternative, to require the honorable managers on the part of the House of Representatives to elect as to whether they will proceed upon article I or upon article II, and for grounds of such motion respondent says:

1. Article II reiterates and embraces all the charges and allegations of article I, and the respondent is thus and thereby twice charged in separate articles with the same and identical offense, and twice required to defend against the charge presented in article I.

2. The presentation of the same and identical charge in the two articles in question tends to prejudice the respondent in his defense, and tends to oppress the respondent in that the articles are so framed as to collect, or accumulate upon the second article, the adverse votes, if any, upon the first article.

3. The Constitution of the United States contemplates but one vote of the Senate upon the charge contained in each article of impeachment, whereas articles I and II are constructed and arranged in such form and manner as to require and exact of the Senate a second vote upon the subject matter of article I.

MOTION TO STRIKE ARTICLE VII

And the respondent further moves the honorable Senate, sitting as a Court of Impeachment, for an order striking and dismissing article VII, and for grounds of such motion, respondent says:

1. Article VII includes and embraces all the charges set forth in articles I, II, III, IV, V, and VI.

2. Article VII constitutes an accumulation and massing of all charges in preceding articles upon which the Court is to pass judgment prior to the vote on article VII, and the prosecution should be required to abide by the judgment of the Senate rendered upon such prior articles and the Senate ought not to countenance the arrangement of pleading designed to procure a second vote and the collection or accumulation of adverse votes, if any, upon such matters.

3. The presentation in article VII of more than one subject and the charges arising out of a single subject is unjust and prejudicial to respondent.

4. In fairness and justice to respondent, the Court ought to require separa-

13. 80 CONG. REC. 4656, 4657, 74th Cong. 2d Sess.

tion and singleness of the subject matter of the charges in separate and distinct articles, upon which a single and final vote of the Senate upon each article and charge can be had.

(Signed) FRANK P. WALSH,
CARL T. HOFFMAN,
Of Counsel for Respondent.

Mr. Hoffman, counsel for respondent, argued that Article II duplicated charges set forth in Article I. He also contended that the rule of duplicity, or the principle of civil and criminal pleading that one count should contain no more than one charge or cause of action, was violated by Article VII.

Mr. Sumners argued in response that Article II was clearly not a duplication of Article I, two distinct charges being presented. As to Article VII, Mr. Sumners contended that impeachment was essentially an ouster proceeding as opposed to a criminal proceeding. He referred to the fact that the articles of impeachment against Judge Harold Louderback had contained a similar article charging that "by specifically alleged conduct" the respondent "has done those things the reasonable and probable consequences of which are to arouse a substantial doubt as to his judicial integrity.(14)

At the suggestion of the Chair, decision on the motions of respondent were reserved for investigation and deliberation:

MR. [HENRY F.] ASHURST [of Arizona]: Mr. President, I assume that the Presiding Officer will desire to take some time to examine all the pleadings and will not be prepared to announce a decision on this point until the next session of the Court?

THE PRESIDING OFFICER [NATHAN L. BACHMAN (Tenn.)]: It is the opinion of the present occupant of the chair that while the necessity for early decision is apparent, the importance of the matter would justify the occupant of the chair in saying that no decision should be made until the proceedings are printed and every member of the Court has an opportunity to investigate and consider them. Is there objection to that suggestion of the Chair? The Chair hears none.(15)

§ 18.13 On the respondent's motion to strike, the Chair overruled that part of the motion which sought to strike Article I or to require election between Articles I and II; the Chair submitted that part of the motion which sought to strike Article VII to the Court of Impeachment, which overruled that part of the motion.

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14. *Id.* at p. 4658.

For Article V, as amended, in the Louderback impeachment, charging such conduct as to destroy public confidence in the court, see 6 Cannon's Precedents § 520.

15. *Id.* at p. 4659.

On Apr. 3, 1936,[16] the following disposition was made of the motion of the respondent, Judge Halsted Ritter, to strike certain articles:

THE PRESIDING OFFICER [NATHAN L. BACHMAN (Tenn.)]: On the motion of the honorable counsel for the respondent to strike article I of the articles of impeachment or, in the alternative, to require the honorable managers on the part of the House to make an election as to whether they will stand upon article I or upon article II, the Chair is ready to rule.

The Chair is clearly of the opinion that the motion to strike article I or to require an election is not well taken and should be overruled.

His reason for such opinion is that articles I and II present entirely different bases for impeachment.

Article I alleges the illegal and corrupt receipt by the respondent of $4,500 from his former law partner, Mr. Rankin.

Article II sets out as a basis for impeachment an alleged conspiracy between Judge Ritter; his former partner, Mr. Rankin; one Richardson, Metcalf & Sweeny; and goes into detail as to the means and manner employed whereby the respondent is alleged to have corruptly received the $4,500 above mentioned.

The two allegations, one of corrupt and illegal receipt and the other of conspiracy to effectuate the purpose, are, in the judgment of the Chair, wholly distinct, and the respondent should be called to answer each of the articles.

What is the judgment of the Court with reference to that particular phase of the motion to strike?

MR. [WILLIAM H.] KING [of Utah]: Mr. President, if it be necessary, I move that the ruling of the honorable Presiding Officer be considered as and stand for the judgment of the Senate sitting as a Court of Impeachment.

THE PRESIDING OFFICER: Is there objection? The Chair hears none, and the ruling of the Chair is sustained, by the Senate.

With reference to article VII of the articles of impeachment, formerly article IV, the Chair desires to exercise his prerogative of calling on the Court for a determination of this question.

His reason for so doing is that an impeachment proceeding before the Senate sitting as a Court is sui generis, partaking neither of the harshness and rigidity of the criminal law nor of the civil proceedings requiring less particularity.

The question of duplicity in impeachment proceedings presented by the honorable counsel for the respondent is a controversial one, and the Chair feels that it is the right and duty of each Member of the Senate, sitting as a Court, to express his views thereon.

Precedents in proceedings of this character are rare and not binding upon this Court in any course that it might desire to pursue.

The question presented in the motion to strike article VII on account of duplicity has not, so far as the Chair is advised, been presented in any impeachment proceeding heretofore had before this body.

The Chair therefore submits the question to the Court.

16. 80 CONG. REC. 4898, 74th Cong. 2d Sess.

MR. [HENRY F.] ASHURST [of Arizona]: Mr. President, under the rules of the Senate, sitting as a Court of Impeachment, all such questions, when submitted by the Presiding Officer, shall be decided without debate and without division, unless the yeas and nays are demanded by one-fifth of the Members present, when the yeas and nays shall be taken.

THE PRESIDING OFFICER: The Chair therefore, will put the motion. All those in favor of the motion of counsel for the respondent to strike article VII will say "aye." Those opposed will say "no."

The noes have it, and the motion in its entirety is overruled.

§ 18.14 During the impeachment trial of Judge Halsted Ritter, the managers on the part of the House made and the Senate granted a motion to strike certain specifications from an article of impeachment.

On Apr. 3, 1936,[17] during the impeachment trial of Judge Ritter, the managers on the part of the House moved that two counts be stricken. The motion was granted by the Senate:

MR. MANAGER [HATTON W.] SUMNERS [of Texas] (speaking from the desk in front of the Vice President): Mr. President, the suggestion which the managers desire to make at this time has reference to specifications 1 and 2 of article VII. These two specifications have reference to what I assume counsel for respondent and the managers as well, recognize are rather involved matters, which would possibly require as much time to develop and to argue as would be required on the remainder of the case.

The managers respectfully move that those two counts be stricken. If that motion shall be sustained, the managers will stand upon the other specifications in article VII to establish article VII. The suggestion on the part of the managers is that those two specifications in article VII be stricken from the article.

THE PRESIDING OFFICER:[18] What is the response of counsel for the respondent?

MR. [CHARLES L.] MCNARY [of Oregon]: Mr. President, there was so much rumbling and noise in the Chamber that I did not hear the position taken by the managers on the part of the House.

THE PRESIDING OFFICER: The managers on the part of the House have suggested that specifications 1 and 2 of article VII be stricken on their motion. . . .

MR. HOFFMAN [of counsel]: Mr. President, the respondent is ready to file his answer to article I, to articles II and III as amended, and to articles IV, V, and VI. In view of the announcement just made asking that specifications 1 and 2 of article VII be stricken, it will be necessary for us to revise our answer to article VII and to eliminate paragraphs 1 and 2 thereof. That can be very speedily done with 15 or 20 minutes if it can be arranged for the

17. 80 CONG. REC. 4899, 74th Cong. 2d Sess.

18. Nathan L. Bachman (Tenn.).

Senate to indulge us for that length of time.

THE PRESIDING OFFICER: Is there objection to the motion submitted on the part of the managers?

MR. HOFFMAN: We have no objection.

THE PRESIDING OFFICER: The motion is made. Is there objection? The Chair hears none, and the motion to strike is granted.

MR. [JOSEPH T.] ROBINSON [of Arkansas]: Mr. President, it would seem that in the interest of the conservation of time and for the convenience of the Court, the motion should have been made prior to the decision on the question involved in the motion of counsel to strike certain articles. I merely make that observation for the consideration of the Court.

Answer and Replication

§ 18.15 In the Ritter impeachment trial, an answer to the charges was filed by the respondent, and a replication thereto was submitted by the managers.

On Apr. 3, 1936, the answer of the respondent in the Ritter impeachment was read in the Senate, ordered printed, and messaged to the House. The answer stated that the facts set forth therein did not constitute impeachable high crimes and misdemeanors and that the respondent was not guilty of the offenses charged.(19)

On Apr. 6, the respondent's answer was laid before the House and referred to the managers on the part of the House.(20) On the same day, the managers filed a replication in the Senate, sitting as a Court of Impeachment, to the answer of the respondent Judge Ritter. The replication was prepared and submitted by the managers on their own initiative, the House not having voted thereon:(1)

REPLICATION OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA TO THE ANSWER OF HALSTED L. RITTER, DISTRICT JUDGE OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, TO THE ARTICLES OF IMPEACHMENT, AS AMENDED, EXHIBITED AGAINST HIM BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA

The House of Representatives of the United States of America, having considered the several answers of Halsted L. Ritter, district judge of the United States for the southern district of Florida, to the several articles of impeachment, as amended, against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantages of exception to the insufficiency, irrelevancy, and impertinency of his answer to each and all of the several articles of impeachment, as amended, so exhibited against the said Halsted L. Ritter, judge as aforesaid, do say:

19. 80 CONG. REC. 4899–4906, 74th Cong. 2d Sess.

20. *Id.* at p. 5020.

1. *Id.* at pp. 4971, 4972.

(1) That the said articles, as amended do severally set forth impeachable offenses, misbehaviors, and misdemeanors as defined in the Constitution of the United States, and that the same are proper to be answered unto by the said Halsted L. Ritter, judge as aforesaid, and sufficient to be entertained and adjudicated by the Senate sitting as a Court of Impeachment.

(2) That the said House of Representatives of the United States of America do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, misbehaviors, or misdemeanors charged against the said Halsted L. Ritter in said articles of impeachment, as amended, or either of them, and for replication to said answers do say that Halsted L. Ritter, district judge of the United States for the southern district of Florida, is guilty of the impeachable offenses, misbehaviors, and misdemeanors charged in said articles, as amended, and that the House of Representatives are ready to prove the same.

HATTON W. SUMNERS,
On behalf of the Managers.

The Trial; Arguments

§ 18.16 Opening statements and closing arguments in an impeachment trial may consist of statements by the managers on the part of the House and statements by counsel for the accused.

On Apr. 6, 1936,[2] in the impeachment trial of Judge Halsted Ritter, opening statements were made in the Senate by the managers on the part of the House and by counsel for the accused.[3] The respondent himself testified before the Court of Impeachment.[4] Final arguments were made on Apr. 13 and 14 first by Mr. Sam Hobbs, of Alabama, for the managers, then by Mr. Walsh for the respondent, and finally by Mr. Hatton W. Sumners, of Texas, for the managers, the arguments being limited by an order adopted on Apr. 13:

> Ordered, That the time for final argument of the case of Halsted L. Ritter shall be limited to 4 hours, which said time shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, and the time thus assigned to each side shall be divided as each side for itself may determine.[5]

Mr. Hobbs argued three principles bearing on the weight of evidence and burden of proof in an impeachment trial:

> The statement of the law of the case, as we see it, will largely be left to the distinguished chairman of the Judici-

2. 80 CONG. REC. 4972–82, 74th Cong. 2d Sess.

3. For precedents during the trial as to the evidence, see §§ 12.7–12.9, supra.

4. 80 CONG. REC. 5370–86, 74th Cong. 2d Sess., Apr. 11 and Apr. 13, 1936.

5. *Id.* at p. 5401.
For final arguments on Apr. 13, 1936, *see id.* at pp. 5401–10; for Apr. 14, 1936, *see id.* at pp. 5464–73.

ary Committee of the House [Mr. Manager Sumners], the chairman of the managers on the part of the House in this case, and I will not attempt to go into that, save to observe these three points which, to my mind, should be in the minds of the Members of this high Court of Impeachment at all times in weighing this evidence:

First, that impeachment trials are not criminal trials in any sense of the word.

Second, that the burden of proof in this case is not "beyond a reasonable doubt", as it is in criminal cases.

Third, that the presumption of innocence, which attends a defendant in a criminal case, is not to be indulged in behalf of the respondent in an impeachment trial. Those three principles of law, I believe, are well recognized, and we respectfully ask the Members of this high Court of Impeachment to bear them in mind.

The present distinguished senior Senator from Nebraska [Mr. Norris], when acting as one of the managers on the part of the House in the impeachment trial of Judge Robert W. Archbald, made as clear and cogent a statement as has ever been made upon the subject of impeachable conduct. With his kind permission, I should like to take that as my text, so to speak, for the remarks that will follow:

> If judges can hold their offices only during good behavior, then it necessarily and logically follows that they cannot hold their offices when they have been convicted of any behavior that is not good. If good behavior is an essential of holding the office, then misbehavior is a sufficient reason for removal from office.[6]

6. *Id.* at p. 5401.

Mr. Walsh concluded his argument based on the lack of evidence of charges and on the good character and reputation of the respondent:

> Gentlemen, all I can say to you is that if this case were being tried in an ordinary court a demurrer to the evidence would be sustained. The law is that those bringing these charges must prove the receipt of income; they must prove the amount that was paid out against that income; they must prove what his exemptions were; they must prove what his allowances were; they must prove a tax liability. Those matters would all have been looked into, and as we look into them in this case there is no tax liability. When Judge Ritter swears he did not defraud the Government of a dollar, when he says that the $6.25 tax was not due because his exemptions exceeded that sum, the court would direct a verdict in his favor.
>
> In 1930 Judge Ritter had a loss which, added to his taxes and other expenditures, gave him a leeway of $4,600 over and above the income that he could be charged with having received. He testified to this, and you ought to believe that he testified to the truth, for a charge must be supported by something greater, I say, than the mere assertion of counsel, and nothing else has been introduced in this case in support of that charge. If Judge Ritter were found guilty upon that charge, which was filed in this Court on March 30, 1936—after he came here to defend himself against the other charges—that would be a monstrous thing. Those bringing the charge did not, nor

could they, make proof that Judge Ritter owed his Government a cent of income taxes or that Judge Ritter did anything improper in the filing of his return. It ought to be the pleasure of this body to acquit him of the charges with respect to income taxes, because the law protects him, because he is innocent of any offense in that regard.

Take this whole case in its entirety, gentlemen. I have tried to argue it on the facts. I have drawn no conclusions which I did not honestly believe came from these facts. My argument is backed up by the belief that you must recognize and accept his innocence as he stood here, a brave and manly man, testifying in opposition to these charges which have been made against him. It will not do to say that he undermined the dignity or the honor of the court. He did nothing in his whole career in Florida, according to the witnesses, which would belittle that dignity or besmirch his honor.

There is another thing I wish to call to your attention. I know and you know that a judge ought to have a good reputation. In this case, however, where a charge is made against his integrity, where a charge of corruption is made against him, he put his reputation in that community in evidence before this body.[7]

Mr. Sumners began and concluded his argument, the final argument in the case, as follows:

We do not assume the responsibility, Members of this distinguished Court, of proving that the respondent in this case is guilty of a crime as that term is known to criminal jurisprudence. We do assume the responsibility of bringing before you a case, proven facts, the reasonable and probable consequences of which are to cause the people to doubt the integrity of the respondent presiding as a judge among a free people.

We take the position, first, that justice must be done to the respondent. The respondent must be protected against those who would make him afraid. But we take the position also that when a judge on the bench, by his own conduct, does that which makes an ordinary person doubt his integrity, doubt whether his court is a fair place to go, doubt whether he, that ordinary person, will get a square deal there; doubt whether the judge will be influenced by something other than the sworn testimony, that judge must go.

This august body writes the code of judicial ethics. This Court fixes the standard of permissible judicial conduct. It will not be, it cannot be, that someone on the street corner will destroy the confidence of the American people in the courts of this country. That cannot happen if the courts are kept clean. If confidence in the courts of this country is destroyed it is going to be destroyed from within by the judges themselves. I declare to you, standing in my place of responsibility, that that is one thing which neither the House nor the Senate can permit to be tampered with or which they can be easy about. . . .

Now, let us look at this case. I do not know anything about what happened in Colorado, but when we see this respondent in this record he is down there in Florida as the secretary of a real-estate concern. After that he forms

7. *Id.* at p. 5468.

a copartnership with Mr. Rankin. Two years and three months after that time he occupies a position on the Federal bench, and when the Government put him there, when the people put him there, they said to him, "All we ask of you is to behave yourself." Good behavior! What does that mean? It means obey the law, keep yourself free from questionable conduct, free from embarrassing entanglements, free from acts which justify suspicion; hold in clean hands the scales of justice. That means that he shall not take chances that would tend to cause the people to question the integrity of the court, because where doubt enters confidence departs. Is not that sound? When a judge on the bench, by his own conduct, arouses a substantial doubt as to his judicial integrity he commits the highest crime that a judge can commit under the Constitution. It is not essential to prove guilt. There is nothing in the Constitution and nothing in the philosophy of a free government that holds that a man shall continue to occupy office until it can be established beyond a reasonable doubt that he is not fit for the office. It is the other way. When there is resulting from the judge's conduct a reasonable doubt as to his integrity he has no right to stay longer. He has forfeited his right. It is the high duty of this Court to write the judgment and make effective the terms of that contract. . . .[8]

MR. MANAGER SUMNERS: I do not want to be tedious, but this is very important, because these things go down to the depths of this man's character.

When he wrote this letter he referred to him as "A. L. Rankin, of Andalusia, Ala." Why did he do that? Because the job Rankin was trying to get was in Alabama. Just think of that, and weigh it.

In another letter he said:

> I want to say that Judge Rankin is a man of the highest character and integrity. He is one of the ablest common-law lawyers in the South.

That is a statement made by a judge upon his responsibility.

> We were partners in the practice of law in West Palm Beach before my appointment on the bench. I know of no man better qualified from the standpoint of experience, ability, and character for the position.

And so forth. Then he writes again in another letter that if he is appointed he will raise the bench to a high place.

I say a man who will not speak the truth above his signed name will not swear it, and a man who will not state the truth, and who does those things which arouse doubt as to his integrity must go from the bench.

I appreciate profoundly the attention which the Members of this honorable Court have given the case.

There ought to be a unanimous judgment in this case, and let it ring out from this Chamber all over the Nation that from now on men who hold positions in the Federal judiciary must be obedient to the high principles which in the nature of things it is essential for a judge to manifest.

A few Federal judges can reflect upon the great body of honorable men who hold these high positions.

There is another thing I was about to forget. Of course, the bondholders in Chicago did not protest the $90,000 fee to Rankin. The attorneys for the bond-

8. *Id.* at p. 5469.

holders and Mr. Holland were in the respondent's court at the same time. They came to represent 93 percent of the $2,500,000 of the first-mortgage bonds. They heard the respondent advised of the champertous conduct of Richardson, Rankin et al., and they saw the respondent approve. They were virtually kicked out of the court. They wanted the case out of that court and away from Rankin and the respondent just as quickly as they could get it out, and they would have stood not only for that fee of $90,000 but for more; and any of you practicing law would have done the same thing under the circumstances. You remember McPherson said respondent was positive, very positive, about Mr. Holland. Respondent was a great deal stronger with regard to the attorney for the bondholders. Remember the judge asked Holland, "Who bought you off?" of course they were glad to get out at almost any price.

Members of the Court, there is a great deal more which ought to be said, but you have the record and my time has about expired. I have a duty to perform and you have yours. Mine is finished.

The House has done all the House can do toward protecting the judiciary of the country. The people have trusted in you. Counsel for the respondent kept emphasizing the fact that this respondent stood and swore, stood and swore, stood and swore. I remember that I saw the Members of this honorable Court lift their hands to God Almighty, and, in that oath which they took, pledge themselves to rise above section and party entanglements and to be true to the people of the Nation in the exercise of this high power. I have no doubt you will do it.

I thank this honorable Court for the courtesy and consideration which have been shown to my colleagues and to me as we have tried to discharge our constitutional duty in this matter.[9]

Deliberation and Judgment

§ 18.17 Deliberation was followed by conviction on a general article of impeachment and by judgment of removal from office in the trial of Judge Halsted Ritter.

Final arguments in the Ritter trial having been concluded on Apr. 14, 1936, the Court of Impeachment adjourned until Apr. 15, when the doors of the Senate were closed for deliberation on motion of Senator Henry F. Ashurst, of Arizona. The Senate deliberated with closed doors for 4 hours and 37 minutes. A unanimous-consent agreement entered into while the Senate was deliberating with closed doors was printed in the Record; the order provided for a vote on the articles of impeachment on Friday, Apr. 17.[10]

Deliberation with closed doors was continued on Apr. 16, 1936, for 5 hours and 48 minutes. When the doors were opened, the Senate adopted orders to return evidence

9. *Id.* at pp. 5472, 5473.

10. 80 CONG. REC. 5505, 74th Cong. 2d Sess.

to proper persons, to allow each Senator to file written opinions within four days after the final vote, and to provide a method of vote. The latter order read as follows:

> Ordered, That upon the final vote in the pending impeachment of Halsted L. Ritter, the Secretary shall read the articles of impeachment separately and successively, and when the reading of each article shall have been concluded the Presiding Officer shall state the question thereon as follows:
>
> "Senators, how say you? Is the respondent, Halsted L. Ritter, guilty or not guilty?"
>
> Thereupon the roll of the Senate shall be called, and each Senator as his name is called, unless excused, shall arise in his place and answer "guilty" or "not guilty." (11)

On Apr. 17, 1936, the Senate convened as a Court of Impeachment to vote on the articles against Judge Ritter. Senator Joseph T. Robinson, of Arkansas, announced those Senators absent and excused and announced that pairs would not be recognized in the proceedings. Eighty-four Senators answered to their names on the quorum call.

President pro tempore Key Pittman, of Nevada, proceeded to put the vote on the articles of impeachment, a two-thirds vote being required to convict. The vote was insufficient to convict on the first six articles: Article I: 55 "guilty";—29 "not guilty"; Article II: 52 "guilty"—32 "not guilty"; Article III: 44 "guilty"—39 "not guilty"; Article IV: 36 "guilty"—48 "not guilty"; Article V: 36 "guilty"—48 "not guilty"; Article VI: 46 "guilty"—37 "not guilty." But on the final Article, Article VII, the vote was: 56 "guilty"—28 "not guilty." So the Senate convicted Judge Ritter on the seventh article of impeachment, charging general misbehavior and conduct that brought his court into scandal and disrepute.

Senator Warren R. Austin, of Vermont, made a point of order against the vote on the ground that two-thirds had not voted to convict, Article VII being an accumulation of facts and circumstances. The President pro tempore sustained a point of order that Senator Austin was indulging in argument rather than stating the grounds for his point of order, and overruled Senator Austin's point of order.(12)

Senator Ashurst submitted an order both removing Judge Ritter from office and disqualifying him from holding and enjoying any office of honor, trust, or profit under the United States. Senator Robert M. La Follette, Jr., of Wisconsin,

11. *Id.* at pp. 5558, 5559.

12. *Id.* at p. 5606.

asked for a division of the question, but Senator George W. Norris, of Nebraska, suggested that Senator Ashurst should submit two orders, since removal followed from conviction but disqualification did not. Senator Ashurst thereupon withdrew the original order and submitted an order removing Judge Ritter from office. The President pro tempore ruled that no vote was required on the order, removal automatically following conviction for high crimes and misdemeanors under section 4 of article II of the U.S. Constitution. The President pro tempore then pronounced judgment:

JUDGMENT

The Senate having tried Halsted L. Ritter, United States district judge for the southern district of Florida, upon seven several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of charges contained therein: It is therefore

Ordered and adjudged, That the said Halsted L. Ritter be, and he is hereby, removed from office.

Senator Ashurst submitted a second order disqualifying the respondent from holding an office of honor, trust, or profit under the United States. It was agreed, in reliance on the Robert Archbald proceedings, that only a majority vote was required for passage. The order for disqualification failed on a yea and nay vote—yeas 0, nays 76.

The Senate adopted an order communicating the order and judgment to the House, and the Senate adjourned *sine die* from the Court of Impeachment.(13)

Subsequent to his conviction and removal from office, the respondent brought an action in the U.S. Court of Claims for back salary, claiming that the Senate had exceeded its jurisdiction in trying him for nonimpeachable charges. The Court of Claims dismissed the claim for want of jurisdiction on the ground that the impeachment power was vested in Congress and was not subject to judicial review.(14)

§ 18.18 The order and judgment of the Senate in the Ritter impeachment trial were messaged to the House.

On Apr. 20, 1936,(15) the order and judgment in the Halsted Rit-

13. *Id.* at pp. 5606, 5607.

14. *Ritter* v *United States,* 84 Ct. Cl 293 (1936), cert. denied, 300 U.S. 668 (1937). The opinion of the Court of Claims cited dicta in the case of *Mississippi* v *Johnson*, 71 U.S. 475 (1866), to support the conclusion that the impeachment power was political in nature and not subject to judicial review.

15. 80 CONG. REC. 5703, 5704, 74th Cong. 2d Sess.

ter impeachment trial were received in the House:

MESSAGE FROM THE SENATE

A message from the Senate, by Mr. Home, its enrolling clerk, announced that the Senate had ordered that the Secretary be directed to communicate to the President of the United States and the House of Representatives the order and judgment of the Senate in the case of Halsted L. Ritter, and transmit a certified copy of same to each, as follows:

I, Edwin A. Halsey, Secretary of the Senate of the United States of America, do hereby certify that the hereto attached document is a true and correct copy of the order and judgment of the Senate, sitting for the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida, entered in the said trial on April 17, 1936.

In testimony whereof, I hereunto subscribe my name and affix the seal of the Senate of the United States of America, this the 18th day of April, A.D. 1936.

EDWIN A. HALSEY,
Secretary of the Senate
of the United States.

In the Senate of the United States of America, sitting for the trial of the impeachment of Halsted L. Ritter, United States district judge for the southern district of Florida

JUDGMENT

APRIL 17, 1936.

The Senate having tried Halsted L. Ritter, United States district judge for the southern district of Florida, upon seven several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of charges contained therein: It is therefore

Ordered and adjudged, That the said Halsted L. Ritter be, and he is hereby, removed from office.

Attest:

EDWIN A. HALSEY
Secretary.

APPENDIX

Report by the Staff of the Impeachment Inquiry on the Constitutional Grounds for Presidential Impeachment, Committee Print, Committee on the Judiciary, 93d Cong. 2d Sess., Feb. 1974

I. Introduction

The Constitution deals with the subject of impeachment and conviction at six places. The scope of the power is set out in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Other provisions deal with procedures and consequences. Article I, Section 2 states:

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

Similarly, Article I, Section 3, describes the Senate's role:

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

The same section limits the consequences of judgment in cases of impeachment:

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

Of lesser significance, although mentioning the subject, are: Article II, Section 2:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article III, Section 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

Before November 15, 1973 a number of Resolutions calling for the impeachment of President Richard M. Nixon had been introduced in the House of Representatives, and had been referred by the Speaker of the House, Hon. Carl Albert, to the Committee on the Judiciary for consideration, investigation and report. On November 15, anticipating the magnitude of the Committee's task, the House voted funds to enable the Committee to carry out its assignment and in that regard to select an inquiry staff to assist the Committee.

On February 6, 1974, the House of Representatives by a vote of 410 to 4

"authorized and directed" the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America."

To implement the authorization (H. Res. 803) the House also provided that "For the purpose of making such investigation, the committee is authorized to require . . . by subpoena or otherwise . . . the attendance and testimony of any person . . . and . . . the production of such things; and . . . by interrogatory, the furnishing of such information, as it deems necessary to such investigation."

This was but the second time in the history of the United States that the House of Representatives resolved to investigate the possibility of impeachment of a President. Some 107 years earlier the House had investigated whether President Andrew Johnson should be impeached. Understandably, little attention or thought has been given the subject of the presidential impeachment process during the intervening years. The Inquiry Staff, at the request of the Judiciary Committee, has prepared this memorandum on constitutional grounds for presidential impeachment. As the factual investigation progresses, it will become possible to state more specifically the constitutional, legal and conceptual framework within which the staff and the Committee work.

Delicate issues of basic constitutional law are involved. Those issues cannot be defined in detail in advance of full investigation of the facts. The Supreme Court of the United States does not reach out, in the abstract, to rule on the constitutionality of statutes or of conduct. Cases must be brought and adjudicated on particular facts in terms of the Constitution. Similarly, the House does not engage in abstract, advisory or hypothetical debates about the precise nature of conduct that calls for the exercise of its constitutional powers; rather, it must await full development of the facts and understanding of the events to which those facts relate.

What is said here does not reflect any prejudgment of the facts or any opinion or inference respecting the allegations being investigated. This memorandum is written before completion of the full and fair factual investigation the House directed be undertaken. It is intended to be a review of the precedents and available interpretive materials, seeking general principles to guide the Committee.

This memorandum offers no fixed standards for determining whether grounds for impeachment exist. The framers did not write a fixed standard. Instead they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.

The House has set in motion an unusual constitutional process, conferred solely upon it by the Constitution, by directing the Judiciary Committee to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach." This action was not partisan. It was supported by the overwhelming majority of both political parties. Nor was it intended to obstruct or weaken the presidency. It was supported by Members firmly committed to the need for a strong presidency and a healthy executive branch of our government. The House of Representatives acted out of a clear sense of constitu-

tional duty to resolve issues of a kind that more familiar constitutional processes are unable to resolve.

To assist the Committee in working toward that resolution, this memorandum reports upon the history, purpose and meaning of the constitutional phrase, "Treason, Bribery, or other high Crimes and Misdemeanors."

II. The Historical Origins of Impeachment

The Constitution provides that the President ". . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The framers could have written simply "or other crimes"—as indeed they did in the provision for extradition of criminal offenders from one state to another. They did not do that. If they had meant simply to denote seriousness, they could have done so directly. They did not do that either. They adopted instead a unique phrase used for centuries in English parliamentary impeachments, for the meaning of which one must look to history.

The origins and use of impeachment in England, the circumstances under which impeachment became a part of the American constitutional system, and the American experience with impeachment are the best available sources for developing an understanding of the function of impeachment and the circumstances in which it may become appropriate in relation to the presidency.

A. The English Parliamentary Practice

Alexander Hamilton wrote, in No. 65 of *The Federalist*, that Great Britain had served as "the model from which [impeachment] has been borrowed." Accordingly, its history in England is useful to an understanding of the purpose and scope of impeachment in the United States.

Parliament developed the impeachment process as a means to exercise some measure of control over the power of the King. An impeachment proceeding in England was a direct method of bringing to account the King's ministers and favorites—men who might otherwise have been beyond reach. Impeachment, at least in its early history, has been called "the most powerful weapon in the political armoury, short of civil war."[1] It played a continuing role in the struggles between King and Parliament that resulted in the formation of the unwritten English constitution. In this respect impeachment was one of the tools used by the English Parliament to create more responsive and responsible government and to redress imbalances when they occurred.[2]

The long struggle by Parliament to assert legal restraints over the unbridled will of the King ultimately reached a climax with the execution of Charles I in 1649 and the establishment of the Commonwealth under Oliver Cromwell. In the course of that struggle, Parliament sought to exert restraints over the King by removing those of his ministers who most effectively advanced the King's absolutist purposes. Chief among them was

1. Plucknett, "Presidential Address" reproduced in 3 *Transactions, Royal Historical Society,* 5th Series, 145 (1952).
2. See generally C. Roberts, *The Growth of Responsible Government in Stuart England* (Cambridge 1966).

Thomas Wentworth, Earl of Strafford. The House of Commons impeached him in 1640. As with earlier impeachments, the thrust of the charge was damage to the state.[3] The first article of impeachment alleged.[4]

> That he . . . hath traiterously endeavored to subvert the Fundamental Laws and Government of the Realms . . . and in stead thereof, to introduce Arbitrary and Tyrannical Government against Law. . . .

The other articles against Strafford included charges ranging from the allegation that he had assumed regal power and exercised it tyrannically to the charge that he had subverted the rights of Parliament.[5]

Characteristically, impeachment was used in individual cases to reach offenses, as perceived by Parliament, against the system of government. The charges, variously denominated "treason," "high treason," "misdemeanors," "malversations," and "high Crimes and Misdemeanors," thus included allegations of misconduct as various as the kings (or their ministers) were ingenious in devising means of expanding royal power.

At the time of the Constitutional (Convention the phrase "high Crimes and Misdemeanors" had been in use for over 400 years in impeachment proceedings in Parliament.[6] It first appears in 1386 in the impeachment of the King's Chancellor, Michael de la Pole, Earl of Suffolk.[7] Some of the charges may have involved common law offenses.[8] Others

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3. Strafford was charged with treason, a term defined in 1352 by the Statute of Treasons. 25 Edw. 3, stat. 5, c. 2 (1352). The particular charges against him presumably would have been within the compass of the general, or "salvo," clause of that statute, but did not fall within any of the enumerated acts of treason. Strafford rested his defense in part on that failure; his eloquence on the question of retrospective treasons ("Beware you do not awake these sleeping lions, by the searching out some neglected moth-eaten records, they may one day tear you and your posterity in pieces: it was your ancestors' care to chain them up within the barricadoes of statutes; be not you ambitious to be more skillful and curious than your forefathers in the art of killing." *Celebrated Trials* 518 [Phila. 1837]) may have dissuaded the Commons from bringing the trial to a vote in the House of Lords: instead they caused his execution by bill of attainder.

4. J. Rushworth, *The Tryal of Thomas Earl of Strafford*, in 8 Historical Collections 8 (1686).

5. Rushworth, *supra* n. 4, at 8–9. R. Berger, *Impeachment: The Constitutional Problems* 30 (1973), states that the impeachment of Strafford ". . . constitutes a great watershed in English constitutional history of which the Founders were aware."

6. See generally A. Simpson, *A Treatise on Federal Impeachments* 81–190 (Philadelphia, 1916) (Appendix of English Impeachment Trials); M. V. Clarke, "The Origin of Impeachment" in *Oxford Essays in Medieval History* 164 (Oxford, 1934). Reading and analyzing the early history of English impeachments is complicated by the paucity and ambiguity of the records. The analysis that follows in this section has been drawn largely from the scholarship of others, checked against the original records where possible.

The basis for what became the impeachment procedure apparently originated in 1341, when the King and Parliament alike accepted the principle that the King's ministers were to answer in Parliament for their misdeeds. C. Roberts, *supra* n. 2, at 7. Offenses against Magna Carta, for example, were failing for technicalities in the ordinary courts, and therefore Parliament provided that offenders against Magna Carta be declared in Parliament and judged by their peers. Clarke, *supra*, at 173.

7. Simpson, *supra* n. 6, at 86; Berger, *supra* n. 5, at 61, Adams and Stevens, *Select Documents of English Constitutional History* 148 (London, 1927).

8. For example, de la Pole was charged with purchasing property of great value from the King while using his position as Chancellor to have the lands appraised at less than they were

plainly did not: de la Pole was charged with breaking a promise he made to the full Parliament to execute in connection with a parliamentary ordinance the advice of a committee of nine lords regarding the improvement of the estate of the King and the realm; "this was not done, and it was the fault of himself as he was then chief officer." He was also charged with failing to expend a sum that Parliament had directed be used to ransom the town of Ghent, because of which "the said town was lost."[9]

The phrase does not reappear in impeachment proceedings until 1450. In that year articles of impeachment against William de la Pole, Duke of Suffolk (a descendant of Michael), charged him with several acts of high treason, but also with "high Crimes and Misdemeanors,"[10] including such various offenses as "advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws" "procuring offices for persons who were unfit, and unworthy of them" and "squandering away the public treasure."[11]

Impeachment was used frequently during the reigns of James I (1603–1625) and Charles I (1628–1649). During the period from 1620 to 1649 over 100 impeachments were voted by the House of Commons.[12] Some of these impeachments charged high treason, as in the case of Strafford; others charged high crimes and misdemeanors. The latter included both statutory offenses, particularly with respect to the Crown monopolies, and nonstatutory offenses. For example, Sir Henry Yelverton, the King's Attorney General, was impeached in 1621 of high crimes and misdemeanors in that he failed to prosecute after commencing suits, and exercised authority before it was properly vested in him.[13]

There were no impeachments during the Commonwealth (1649–1660). Following the end of the Commonwealth and the Restoration of Charles II (1660–1685) a more powerful Parliament expanded somewhat the scope of "high Crimes and Misdemeanors" by impeaching officers of the Crown for such things as negligent discharge of duties[14] and improprieties in office.[15]

The phrase "high Crimes and Misdemeanors" appears in nearly all of the comparatively few impeachments that occurred in the eighteenth century. Many of the charges involved abuse of official power or trust. For example, Edward, Earl of Oxford, was charged in 1701 with "violation of his duty and trust" in that,

worth, all in violation of his oath, in deceit of the King and in neglect of the need of the realm. Adams and Stevens, *supra* n. 7, at 148.

9. Adams and Stevens, *supra* n. 7, at 148–150.

10. 4 Hatsell 67 (Shannon, Ireland, 1971, reprint of London 1796, 1818).

11. 4 Hatsell, *supra* n. 10, at 67, charges 2, 6 and 12.

12. The Long Parliament (1640–48) alone impeached 98 persons. Roberts *supra* n. 2, at 133.

13. 2 Howell *State Trials* 1135, 1136–37 *(charges 1, 2 and 6). See generally* Simpson, *supra* n. 6, at 91–127; Berger, *supra* n. 5, at 67–73.

14. Peter Pett, Commissioner of the Navy, was charged in 1668 with negligent preparation for an invasion by the Dutch, and negligent loss of a ship. The latter charge was predicated on alleged willful neglect in failing to insure that the ship was brought to a mooring. 6 Howell *State Trials* 865, 866–67 *(charges 1, 5).*

15. Chief Justice Scroggs was charged in 1680, among other things, with browbeating witnesses and commenting on their credibility, and with cursing and drinking to excess, thereby bringing "the highest scandal on the public justice of the kingdom." 8 Howell *State Trials* 197, 200 *(charges 7, 8).*

while a member of the King's privy council, he took advantage of the ready access he had to the King to secure various royal rents and revenues for his own use, thereby greatly diminishing the revenues of the crown and subjecting the people of England to "grievous taxes."[16], Oxford was also charged with procuring a naval commission for William Kidd, "known to be a person of ill fame and reputation," and ordering him "to pursue the intended voyage, in which Kidd did commit diverse piracies . . . being thereto encouraged through hopes of being protected by the high station and interest of Oxford, in violation of the law of nations, and the interruption and discouragement of the trade of England."[17]

The impeachment of Warren Hastings, first attempted in 1786 and concluded in 1795,[18] is particularly important because contemporaneous with the American Convention debates. Hastings was the first Governor-General of India. The articles indicate that Hastings was being charged with high crimes and misdemeanors in the form of gross maladministration, corruption in office, and cruelty toward the people of India.[19]

Two points emerge from the 400 years of English parliamentary experience with the phrase "high Crimes and Misdemeanors." First, the particular allegations of misconduct alleged damage to the state in such forms as misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and betrayal of trust.[20] Second, the phrase "high Crimes and Misdemeanors" was confined to parliamentary impeachments; it had no roots in the ordinary criminal law,[21] and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes.

B. The Intention of the Framers

The debates on impeachment at the Constitutional Convention in Philadelphia focus principally on its applicability to the President. The framers sought to create a responsible though strong executive; they hoped, in the words of Elbridge Gerry of Massachusetts, that "the maxim would never be adopted here that the chief Magistrate could do [no] wrong."[22] Impeachment was to be one of the central elements of executive responsibility

16. Simpson, *supra* n. 6, at 144.

17. Simpson, *supra* n. 6, at 144.

18. *See generally* Marshall, *The Impeachment of Warren Hastings* (Oxford, 1965).

19. Of the original resolutions proposed by Edmund Burke in 1786 and accepted by the House as articles of impeachment in 1787, both criminal and non-criminal offenses appear. The fourth article, for example, charging that Hastings had confiscated the landed income of the Begums of Oudh, was described by Pitt as that of all others that bore the strongest marks of criminality, Marshall, *supra*, n. 19, at 53.

The third article, on the other hand, known as the Benares charge, claimed that circumstances imposed upon the Governor-General duty to conduct himself "on the most distinguished principles of good faith, equity, moderation and mildness." Instead, continued the charge, Hastings provoked a revolt in Benares, resulting in "the arrest of the rajah, three revolutions in the country and great loss, whereby the said Hastings is guilty of a high crime and misdemeanor in the destruction of the country aforesaid." The Commons accepted this article, voting 119–79 that these were grounds for impeachment. Simpson, *supra* n. 6, at 168–170; Marshall, supra n. 19, at xv, 46.

20. *See, e.g.*, Berger, *supra* n. 5, at 70–71.

21. Berger, *supra* n. 5, at 62.

22. *The Records of the Federal Convention* 66 (M. Farrand ed. 1911) (brackets in original). Hereafter cited as Farrand.

in the framework of the new government as they conceived it.

The constitutional grounds for impeachment of the President received little direct attention in the Convention; the phrase "other high Crimes and Misdemeanors" was ultimately added to "Treason" and "Bribery" with virtually no debate. There is evidence, however, that the framers were aware of the technical meaning the phrase had acquired in English impeachments.

Ratification by nine states was required to convert the Constitution from a proposed plan of government to the supreme law of the land. The public debates in the state ratifying conventions offer evidence of the contemporaneous understanding of the Constitution equally as compelling as the secret deliberations of the delegates in Philadelphia. That evidence, together with the evidence found in the debates during the First Congress on the power of the President to discharge an executive officer appointed with the advice and consent of the Senate, shows that the framers intended impeachment to be a constitutional safeguard of the public trust, the powers of government conferred upon the President and other civil officers, and the division of powers among the legislative, judicial and executive departments.

1. THE PURPOSE OF THE IMPEACHMENT REMEDY

Among the weaknesses of the Articles of Confederation apparent to the delegates to the Constitutional Convention was that they provided for a purely legislative form of government whose ministers were subservient to Congress. One of the first decisions of the delegates was that their new plan should include a separate executive judiciary, and legislature.[23] However, the framers sought to avoid the creation of a too-powerful executive. The Revolution had been fought against the tyranny of a king and his council, and the framers sought to build in safeguards against executive abuse and usurpation of power. They explicitly rejected a plural executive, despite arguments that they were creating "the foetus of monarchy,"[24] because a single person would give the most responsibility to the office.[25] For the same reason, they rejected proposals for a council of advice or privy council to the executive (footnote omitted).

The provision for a single executive was vigorously defended at the time of the state ratifying conventions as a protection against executive tyranny and wrongdoing. Alexander Hamilton made the most carefully reasoned argument in Federalist No. 70, one of the series of *Federalist Papers* prepared to advocate the ratification of the Constitution by the State of New York. Hamilton criticized both a plural executive and a council because they tend "to conceal faults and destroy responsibility." A plural executive, he wrote, deprives the people of "the two greatest securities they can have for the faithful exercise of any delegated power"—"[r]esponsibility . . . to censure and to punishment." When censure is divided and responsibility uncertain, "the restraints of public opinion . . . lose their efficacy" and "the opportunity of discovering with facility and clearness

23. 1 Farrand 322.

24. 1 Farrand 66.

25. This argument was made by James Wilson of Pennsylvania, who also said that he preferred a single executive as "giving most energy dispatch and responsibility to the office." 1 Farrand 65.

the misconduct of the persons [the public] trust, in order either to their removal from office, or to their actual punishment. in cases which admit of it" is lost.[26] A council, too, "would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the (Chief Magistrate himself."[27] It is, Hamilton concluded, "far more safe [that] there should be a single object for the jealousy and watchfulness of the people; . . . all multiplication of the Executive is rather dangerous than friendly to liberty."[28]

James Iredell, who played a leading role in the North Carolina ratifying convention and later became a justice of the Supreme Court, said that under the proposed Constitution the President "is of a very different nature from a monarch. He is to be . . . personally responsible for any abuse of the great trust reposed in him."[29] In the same convention, William R. Davie, who had been a delegate in Philadelphia, explained that the "predominant principle" on which the Convention had provided for a single executive was "the more obvious responsibility of one person." When there was but one man, said Davie, "the public were never at a loss" to fix the blame.[30]

James Wilson, in the Pennsylvania convention, described the security furnished by a single executive as one of its "very important advantages":

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes. . . . Add to all this, that officer is placed high, and is possessed of power far from being contemptible, yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment.*[31]

As Wilson's statement suggests, the impeachability of the President was considered to be an important element of his responsibility. Impeachment had been in-

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26. *The Federalist* No. 70, at 459–61 (Modern Library ea.) (A. Hamilton) (hereinafter cited as *Federalist*). The "multiplication of the Executive," Hamilton wrote, "adds to the difficulty of detection":

> The circumstances which may have led to any national miscarriage of misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

If there should be "collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?" Id. at 460.

27. *Federalist* No. 70 at 461. Hamilton stated:

> A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad, and are almost always a cloak to his faults. Id. at 462–63.

28. *Federalist* No. 70 at 462.

29. 4 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 74 (reprint of 2d ea.) (hereinafter cited as Elliot.)

30. Elliot 104.

31. 2 Elliot 480 (emphasis in original).

cluded in the proposals before the Constitutional Convention from its beginning.[32] A specific provision, making the executive removable from office on impeachment and conviction for "mal-practice or neglect of duty," was unanimously adopted even before it was decided that the executive would be a single person.[33]

The only major debate on the desirability of impeachment occurred when it was moved that the provision for impeachment be dropped, a motion that was defeated by a vote of eight states to two.[34]

One of the arguments made against the impeachability of the executive was that he "would periodically be tried for his behavior by his electors" and "ought to be subject to no intermediate trial, by impeachment."[35] Another was that the executive could "do no criminal act without Coadjutors [assistants] who may be punished."[36] Without his subordinates, it was asserted, the executive "can do nothing of consequence," and they would "be amenable by impeachment to the public Justice."[37]

This latter argument was made by Gouverneur Morris of Pennsylvania, who abandoned it during the course of the debate, concluding that the executive should be impeachable.[38] Before Morris changed his position, however, George Mason had replied to his earlier argument:

> Shall any man be above justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.[39]

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32. The Virginia Plan, fifteen resolutions proposed by Edmund Randolph at the beginning of the Convention, served as the basis of its early deliberations. The ninth resolution gave the national judiciary jurisdiction over "impeachments of any National officers." 1 Farrand 22.

33. 1 Farrand 88. Just before the adoption of this provision, a proposal to make the executive removable from office by the legislature upon request of a majority of the state legislatures had been overwhelmingly rejected. *Id.* 87. In the course of debate on this proposal, it was suggested that the legislature "should have power to remove the Executive at pleasure"—a suggestion that was promptly criticized as making him "the mere creature of the Legislature" in violation of "the fundamental principle of good Government," and was never formally proposed to the Convention. *Id.* 85–86.

34. 2 Farrand 64, 69.

35. 2 Farrand 67 (Rufus King). Similarly, Gouverneur Morris contended that if an executive charged with a criminal act were reelected, "that will be sufficient proof of his innocence." *Id.* 64.

It was also argued in opposition to the impeachment provision, that the executive should not be impeachable "whilst in office"—an apparent allusion to the constitutions of Virginia and Delaware, which then provided that the governor (unlike other officers) could be impeached only after he left office. *Id.* See 7 Thorpe, *The Federal and State Constitutions* 3818 (1909) and 1 *Id.* 566. In response to this position, it was argued that corrupt elections would result, as an incumbent sought to keep his office in order to maintain his immunity from impeachment. He will "spare no efforts or no means whatever to get himself reelected," contended William R. Davie of North Carolina. 2 Farrand 64. George Mason asserted that the danger of corrupting electors "furnished a peculiar reason in favor of impeachments whilst in office": "Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?" *Id.* 65.

36. 2 Farrand 64.

37. 2 Farrand 54.

38. "This Magistrate is not the King but the prime-Minister. The people are the King." 2 Farrand 69.

39. 2 Farrand 65.

James Madison of Virginia argued in favor of impeachment stating that some provision was "indispensable" to defend the community against "the incapacity, negligence or perfidy of the chief Magistrate." With a single executive, Madison argued, unlike a legislature whose collective nature provided security, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic." (40) Benjamin Franklin supported impeachment as "favorable to the executive"; where it was not available and the chief magistrate had "rendered himself obnoxious," recourse was had to assassination. The Constitution should provide for the "regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.(41) Edmund Randolph also defended "the propriety of impeachments":

> The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided it will be irregularly inflicted by tumults & insurrections.(42)

The one argument made by the opponents of impeachment to which no direct response was made during the debate was that the executive would be too dependent on the legislature—that, as Charles Pinckney put it, the legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence." (43) That issue, which involved the forum for trying impeachments and the mode of electing the executive, troubled the Convention until its closing days. Throughout its deliberations on ways to avoid executive subservience to the legislature, however, the Convention never reconsidered its early decision to make the executive removable through the process of impeachment (footnote omitted).

2. ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

Briefly, and late in the Convention, the framers addressed the question how to describe the grounds for impeachment consistent with its intended function. They did so only after the mode of the President's election was settled in a way that did not make him (in the words of James Wilson) "the Minion of the Senate." (45)

The draft of the Constitution then before the Convention provided for his removal upon impeachment and conviction for "treason or bribery." George Mason objected that these grounds were too limited:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.(46)

Mason then moved to add the word "maladministration" to the other two grounds.

40. 2 Farrand 65–66.
41. 2 Farrand 65.
42. 2 Farrand 67.
43. 2 Farrand 66.
45. 2 Farrand 523.
46. 2 Farrand 550.

Maladministration was a term in use in six of the thirteen state constitutions as a ground for impeachment, including Mason's home state of Virginia.(47)

When James Madison objected that "so vague a term will be equivalent to a tenure during pleasure of the Senate," Mason withdrew "maladministration" and substituted "high crimes and misdemeanors agst. the State," which was adopted eight states to three, apparently with no further debate.(48)

That the framers were familiar with English parliamentary impeachment proceedings is clear. The impeachment of Warren Hastings, Governor-General of India, for high crimes and misdemeanors was voted just a few weeks before the beginning of the Constitutional Convention and George Mason referred to it in the debates.(49) Hamilton, in the *Federalist* No. 65, referred to Great Britain as "the model from which [impeachment] has been borrowed." Furthermore, the framers were well-educated men. Many were also lawyers. Of these, at least nine had studied law in England.(50)

The Convention had earlier demonstrated its familiarity with the term "high misdemeanor."(51) A draft constitution had used "high misdemeanor" in its provision for the extradition of offenders from one state to another.(52) The Convention, apparently unanimously struck "high misdemeanor" and inserted "other crime," "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited.(53)

The "technical meaning" referred to is the parliamentary use of the term "high misdemeanor." Blackstone's *Commentaries on the Laws of England*—a work cited by delegates in other portions of the Convention's deliberations and which Madison later described (in the Virginia ratifying convention) as "a book which is in every man's hand"(54)—included "high misdemeanors" as one term

47. The grounds for impeachment of the Governor of Virginia were "mal-administration, corruption, or other means, by which the safety of the State may be endangered." 7 Thorpe, *The Federal and State Constitution* 3818 (1909).

48. 2 Farrand 550. Mason's wording was unanimously changed later the same day from "agst. the State" to "against the United States" in order to avoid ambiguity. This phrase was later dropped in the final draft of the Constitution prepared by the Committee on Style and Revision, which was charged with arranging and improving the language of the articles adopted by the Convention without altering its substance.

49. *Id.*

50. R. Berger, *Impeachment: The Constitutional Problems* 87, 89 and accompanying notes (1973).

51. As a technical term, a "high" crime signified a crime against the system of government, not merely a serious crime. "This element of injury to the commonwealth—that is, to the state itself and to its constitution—was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one. The distinction goes back to the ancient law of treason, which differentiated 'high' from 'petit' treason." Bestor, Book Review, 49 Wash. L Rev. 255, 263–64 (1973). *See* 4 W. Blackstone, Commentaries 75.

52. The provision (article XV of Committee draft of the Committee on Detail) originally read: "Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence." 2 Farrand 187–88.

This clause was virtually identical with the extradition clause contained in article IV of the Articles of Confederation, which referred to "any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state. . . ."

53. 2 Farrand 443.

54. 3 Elliott 501.

for positive offenses "against the king and government." The "first and principal" high misdemeanor, according to Blackstone, was "mal-administration of such high officers, as are in public trust and employment," usually punished by the method of parliamentary impeachment.(55)

"High Crimes and Misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due process." The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the framers meant when they adopted them.(56) Chief Justice Marshall wrote of another such phrase:

> It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.(57)

3. GROUNDS FOR IMPEACHMENT

Mason's suggestion to add "maladministration," Madison's objection to it as "vague," and Mason's substitution of "high crimes and misdemeanors agst the State" are the only comments in the Philadelphia convention specifically directed to the constitutional language describing the grounds for impeachment of the President. Mason's objection to limiting the grounds to treason and bribery was that treason would "not reach many great and dangerous offences" including "[a]ttempts to subvert the Constitution."(58) His willingness to substitute "high Crimes and Misdemeanors," especially given his apparent familiarity with the English use of the term as evidenced by his reference to the Warren Hastings impeachment, suggests that he believed "high crimes and Misdemeanors" would cover the offenses about which he was concerned.

Contemporaneous comments on the scope of impeachment are persuasive as to the intention of the framers. In *Federalist* No. 65, Alexander Hamilton described the subject of impeachment as:

> those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.(59)

Comments in the state ratifying conventions also suggest that those who adopted the Constitution viewed impeachment as a remedy for usurpation or abuse of power or serious breach of trust. Thus, Charles Cotesworth Pinckney of South Carolina stated that the impeachment power of the House reaches "those who behave amiss, or betray their public trust."(60) Edmund Randolph said in the Virginia convention that the President may be impeached if he "misbehaves."(61)

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55. 4 Blackstone's Commentaries 121 (emphasis omitted).

56. *See* Murray v. Hoboken Land Co., 52 U.S. (18 How.) 272 (1856), Davidson v. New Orleans, 96 U.S. 97 (1878); Smith v. Alabama, 124 U.S. 465 (1888).

57. *United States* v. *Burr,* 25 Fed. Cas. 1, 159 (No. 14, 693) (C.C.D. Va. 1807).

58. 2 Farrand 550.

59. *The Federalist* No. 65 at 423–24 (Modern Library ed.) (A. Hamilton) (emphasis in original).

60. 4 Elliot 281.

61. 3 Elliot 201.

He later cited the example of the President's receipt of presents or emoluments from a foreign power in violation of the constitutional prohibition of Article I, section 9.[62] In the same convention George Mason argued that the President might use his pardoning power to "pardon crimes which were advised by himself" or, before indictment or conviction, "to stop inquiry and prevent detection." James Madison responded:

> [I]f the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty. . . .[63]

In reply to the suggestion that the President could summon the Senators of only a few states to ratify a treaty, Madison said,

> Were the President to commit any thing so atrocious . . . he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor.[64]

Edmund Randolph referred to the checks upon the President:

> It has too often happened that powers delegated for the purpose of promoting the happiness of a community have been perverted to the advancement of the personal emoluments of the agents of the people; but the powers of the President are too well guarded and checked to warrant this illiberal aspersion.[65]

Randolph also asserted, however, that impeachment would not reach errors of judgment: "No man ever thought of impeaching a man for an opinion. It would be impossible to discover whether the error in opinion resulted from a willful mistake of the heart, or an involuntary fault of the head."[66]

James Iredell made a similar distinction in the North Carolina convention, and on the basis of this principle said, "I suppose the only instances, in which the President would be liable to impeachment, would be where he has received a bribe, or had acted from some corrupt motive or other."[67] But he went on to argue that the President must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them—in this case, I ask whether, upon an impeachment for a misdemeanor upon such

62. 3 Elliot 486.

63. 3 Elliot 497–98. Madison went on to say, contrary to his position in the Philadelphia convention, that the President could be suspended when suspected, and his powers would devolve on the Vice President, who could likewise be suspended until impeached and convicted, if he were also suspected. *Id*. 498.

64. 3 Elliot 500. John Rutledge of South Carolina made the same point, asking "whether gentlemen seriously could suppose that a President, who has a character at stake, would be such a fool and knave as to join with ten others [two-thirds of a minimal quorum of the Senate] to tear up liberty by the roots, when a full Senate were competent to impeach him." 4 Elliot 268.

65. 3 Elliot 117.

66. 3 Elliot 401.

67. 4 Elliot 126.

an account, the Senate would probably favor him.[68]

In short, the framers who discussed impeachment in the state ratifying conventions, as well as other delegates who favored the Constitution,[69] implied that it reached offenses against the government, and especially abuses of constitutional duties. The opponents did not argue that the grounds for impeachment had been limited to criminal offenses.

An extensive discussion of the scope of the impeachment power occurred in the House of Representatives in the First Session of the First Congress. The House was debating the power of the President to remove the head of an executive department appointed by him with the advice and consent of the Senate, an issue on which it ultimately adopted the position, urged primarily by James Madison, that the Constitution vested the power exclusively in the President. The discussion in the House lends support to the view that the framers intended the impeachment power to reach failure of the President to discharge the responsibilities of his office.[70]

Madison argued during the debate that the President would be subject to impeachment for "the wanton removal of meritorious officers."[71] He also contended that the power of the President unilaterally to remove subordinates was "absolutely necessary" because "it will make him in a peculiar manner, responsible for [the] conduct" of executive officers. It would, Madison said,

> subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.[72]

Elbridge Gerry of Massachusetts, who had also been a framer though he had opposed the ratification of the Constitution, disagreed with Madison's contentions about the impeachability of the President. He could not be impeached for dismissing a good officer, Gerry said, because he would be "doing an act which the Legislature has submitted to his discretion.[73] And he should not be held responsible for the acts of subordinate officers, who were themselves subject to impeachment and should bear their own responsibility.[74]

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68. 4 Elliot 127.

69. For example, Wilson Nicholas in the Virginia convention asserted that the President "is personally amenable for his mal-administration" through impeachment, 3 Elliot 17; George Nicholas in the same convention referred to the President's impeachability if he "deviates from his duty," *id.* 240. Archibald MacLaine in the South Carolina convention also referred to the President's impeachability for "any maladministration in his office," 4 Elliot 47; and Reverend Samuel Stillman of Massachusetts referred to his impeachability for "malconduct," asking, "With such a prospect, who will dare to abuse the powers vested in him by the people?" 2 Elliot 169.

70. Chief Justice Taft wrote with reference to the removal power debate in the opinion for the Court in *Myers* v. *United States,* that constitutional decisions of the First Congress "have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." 272 U.S. 52, 174–75 (1926).

71. 1 Annals of Cong. 498 (1789).

72. *Id.* 372–73.

73. *Id.* 502.

74. *Id.* 535–36. Gerry also implied, perhaps rhetorically, that a violation of the Constitution was grounds for impeachment. If, he said, the Constitution failed to include provision for removal of executive officers, an attempt by the legislature to cure the omission would be an attempt to amend the Constitution. But the Con-

Another framer, Abraham Baldwin of Georgia, who supported Madison's position on the power to remove subordinates, spoke of the President's impeachability for failure to perform the duties of the executive. If, said Baldwin, the President "in a fit of passion" removed "all the good officers of the Government" and the Senate were unable to choose qualified successors, the consequence would be that the President "would be obliged to do the duties himself; or, if he did not, we would impeach him, and turn him out of office, as he had done others."[75]

Those who asserted that the President has exclusive removal power suggested that it was necessary because impeachment, as Elias Boudinot of New Jersey contended, is "intended as a punishment for a crime, and not intended as the ordinary means of re-arranging the Departments."[76] Boudinot suggested that disability resulting from sickness or accident "would not furnish any good ground for impeachment; it could not be laid as treason or bribery, nor perhaps as a high crime or misdemeanor."[77] Fisher Ames of Massachusetts argued for the President's removal power because "mere intention [to do a mischief] would not be cause of impeachment" and "there may be numerous causes for removal which do not amount to a crime."[78] Later in the same speech Ames suggested that impeachment was available if an officer "misbehaves"[79] and for "mal-conduct."[80]

One further piece of contemporary evidence is provided by the *Lectures on Law* delivered by James Wilson of Pennsylvania in 1790 and 1791. Wilson described impeachments in the United States as "confined to political characters, to political crimes and misdemeanors, and to political punishment."[81] And, he said:

> The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the constitution and the laws: every one should be secure while he observes them.[82]

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stitution provided procedures for its amendment, and "an attempt to amend it in any other way may be a high crime or misdemeanor, or perhaps something worse." *Id.* 503.

75. *Id.* John Vining of Delaware commented: "The President. What are his duties? To see the laws faithfully executed; if he does not do this effectually, he is responsible. To whom? To the people. Have they the means of calling him to account, and punishing him for neglect? They have secured it in the Constitution, by impeachment, to be presented by their immediate representatives; if they fail here, they have another check when the time of election comes round." *Id.* 572.

76. *Id.* 375.

77. *Id.*

78. *Id.* 474.

79. *Id.* 475.

80. *Id.* 477. The proponents of the President's removal power were careful to preserve impeachment as a supplementary method of removing executive officials. Madison said impeachment will reach a subordinate "whose bad actions may be connived at or overlooked by the President." *Id.* 372. Abraham Baldwin said:

"The Constitution provides for—what? That no bad man should come into office. . . . But suppose that one such could be got in, he can be got out again in despite of the President. We can impeach him, and drag him from his place . . . ." *Id.* 558.

81. Wilson, *Lectures on Law*, in 1 *The Works of James Wilson* 426 (R. McCloskey ed. 1967).

82. *Id.* 425.

From the comments of the framers and their contemporaries, the remarks of the delegates to the state ratifying conventions, and the removal power debate in the First Congress, it is apparent that the scope of impeachment was not viewed narrowly. It was intended to provide a check on the President through impeachment, but not to make him dependent on the unbridled will of the Congress.

Impeachment, as Justice Joseph Story wrote in his *Commentaries on the Constitution* in 1833, applies to offenses of "a political character":

> Not but that crimes of a strictly legal character fall within the scope of the power . . . but that it has a more enlarged operation, and reaches, what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations of foreign as well as domestic political movements; and in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.(83)

C. THE AMERICAN IMPEACHMENT CASES

Thirteen officers have been impeached by the House since 1787: one President, one cabinet officer, one United States Senator, and ten Federal judges.(84) In addition there have been numerous resolutions and investigations in the House not resulting in impeachment. However, the action of the House in declining to impeach an officer is not particularly illuminating. The reasons for failing to impeach are generally not stated, and may have rested upon a failure of proof, legal insufficiency of the grounds, political judgment, the press of legislative business, or the closeness of the expiration of the session of Congress. On the other hand, when the House has voted to impeach an officer, a majority of the Members necessarily have concluded that the conduct alleged constituted grounds for impeachment.(85)

Does Article III, Section 1 of the Constitution, which states that judges "shall

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83. 1 *J. Story Commentaries on the Constitution of the United States*, § 764, at 559 (5th ed. 1905).

84. Eleven of these officers were tried in the Senate. Articles of impeachment were presented to the Senate against a twelfth (Judge English), but he resigned shortly before the trial. The thirteenth (Judge Delahay) resigned before articles could be drawn.

85. Only four of the thirteen impeachments—all involving judges—have resulted in conviction in the Senate and removal from office. While conviction and removal show that the Senate agreed with the House that the charges on which conviction occurred stated legally sufficient grounds for impeachment, acquittals offer no guidance on this question, as they may have resulted from a failure of proof, other factors, or a determination by more than one third of the Senators (as in the Blount and Belknap impeachments) that trial or conviction was inappropriate for want of jurisdiction.

hold their Offices during good Behavior," limit the relevance of the ten impeachments of judges with respect to presidential impeachment standards as has been argued by some? It does not. The argument is that "good behavior" implies an additional ground for impeachment of judges not applicable to other civil officers. However, the only impeachment provision discussed in the Convention and included in the Constitution is Article II, Section 4, which by its expressed terms, applies to all civil officers, including judges, and defines impeachment offenses as "Treason, Bribery, and other high Crimes and Misdemeanors."

In any event, the interpretation of the "good behavior" clause adopted by the House has not been made clear in any of the judicial impeachment cases. Whichever view is taken, the judicial impeachments have involved an assessment of the conduct of the officer in terms of the constitutional duties of his office. In this respect, the impeachments of judges are consistent with the three impeachments of nonjudicial officers.

Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder. This conduct falls into three broad categories: (1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or for personal gain.[86]

1. EXCEEDING THE POWERS OF THE OFFICE IN DEROGATION OF THOSE OF ANOTHER BRANCH OF GOVERNMENT

The first American impeachment, of Senator William Blount in 1797, was based on allegations that Blount attempted to incite the Creek and Cherokee Indians to attack the Spanish settlers of Florida and Louisiana, in order to capture the territory for the British. Blount was charged with engaging in a conspiracy to compromise the neutrality of the United States, in disregard of the constitutional provisions for conduct of foreign affairs. He was also charged, in effect, with attempting to oust the President's lawful appointee as principal agent for Indian affairs and replace him with a rival, thereby intruding upon the President's supervision of the executive branch.[87]

The impeachment of President Andrew Johnson in 1868 also rested on allegations that he had exceeded the power of his office and had failed to respect the prerogatives of Congress. The Johnson impeachment grew out of a bitter partisan struggle over the implementation of Reconstruction in the South following the Civil War, Johnson was charged with violation of the Tenure of Office Act, which purported to take away the President's authority to remove members of his own cabinet and specifically provided that violation would be a "high misdemeanor," as well as a crime. Believing the Act unconstitutional, Johnson re-

86. A procedural note may be useful. The House votes both a resolution of impeachment against an officer and articles of impeachment containing the specific charges that will be brought to trial in the Senate. Except for the impeachment of Judge Delahay, the discussion of grounds here is based on the formal articles.

87. After Blount had been impeached by the House, but before trial of the impeachment, the Senate expelled him for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator."

moved Secretary of War Edwin M. Stanton and was impeached three days later.

Nine articles of impeachment were originally voted against Johnson, all dealing with his removal of Stanton and the appointment of a successor without the advice and consent of the Senate. The first article, for example, charged that President Johnson,

> unmindful of the high duties of this office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, order in writing the removal of Edwin M. Stanton from the office of Secretary for the Department of War.(88)

Two more articles were adopted by the House the following day. Article Ten charged that Johnson, "unmindful of the high duties of his office, and the dignity and proprieties thereof," had made inflammatory speeches that attempted to ridicule and disgrace the Congress.[89] Article Eleven charged him with attempts to prevent the execution of the Tenure of Office Act, an Army appropriations act, and a Reconstruction act designed by Congress "for the more efficient government of the rebel States." On its face, this article involved statutory violations, but it also reflected the underlying challenge to all of Johnson's post-war policies.

The removal of Stanton was more a catalyst for the impeachment than a fundamental cause.[90] The issue between the President and Congress was which of them should have the constitutional—and ultimately even the military—power to make and enforce Reconstruction policy in the South. The Johnson impeachment, like the British impeachments of great ministers, involved issues of state going to the heart of the constitutional division of executive and legislative power.

2. BEHAVING IN A MANNER GROSSLY INCOMPATIBLE WITH THE PROPER FUNCTION AND PURPOSE OF THE OFFICE

Judge John Pickering was impeached in 1803, largely for intoxication on the bench.(91) Three of the articles alleged errors in a trial in violation of his trust and duty as a judge; the fourth charged that Pickering, "being a man of loose morals and intemperate habits," had appeared on the bench during the trial in a state of total intoxication and had used profane language. Seventy-three years later another judge, Mark Delahay, was impeached for intoxication both on and

88. Article one further alleged that Johnson's removal of Stanton was unlawful because the Senate had earlier rejected Johnson's previous suspension of him.

89. Quoting from speeches which Johnson had made in Washington, D.C., Cleveland, Ohio and St. Louis, Missouri, article ten pronounced these speeches "censurable in any, [and] peculiarly indecent and unbecoming in the Chief Magistrate of the United States." By means of these speeches, the article concluded, Johnson had brought the high office of the presidency "into contempt, ridicule, and disgrace. to the great scandal of all good citizens."

90. The Judiciary Committee had reported a resolution of impeachment three months earlier charging President Johnson in its report with omissions of duty, usurpations of power and violations of his oath of office, the laws and the Constitution in his conflict of Reconstruction. The House voted down the resolution.

91. The issue of Pickering's insanity was raised at trial in the Senate, but was not discussed by the House when it voted to impeach or to adopt articles of impeachment.

off the bench but resigned before articles of impeachment were adopted.

A similar concern with conduct incompatible with the proper exercise of judicial office appears in the decision of the House to impeach Associate Supreme Court Justice Samuel Chase in 1804. The House alleged that Justice Chase had permitted his partisan views to influence his conduct of two trials held while he was conducting circuit court several years earlier. The first involved a Pennsylvania farmer who had led a rebellion against a Federal tax collector in 1789 and was later charged with treason. The articles of impeachment alleged that "unmindful of the solemn duties of his office, and contrary to the sacred obligation" of his oath, Chase "did conduct himself in a manner highly arbitrary, oppressive, and unjust," citing procedural rulings against the defense.

Similar language appeared in articles relating to the trial of a Virginia printer indicted under the Sedition Act of 1798. Specific examples of Chase's bias were alleged, and his conduct was characterized as "an indecent solicitude . . . for the conviction of the accused, unbecoming even a public prosecutor but highly disgraceful to the character of a judge, as it was subversive of justice." The eighth article charged that Chase, "disregarding the duties . . . of his judicial character. . . . did . . . prevert his official right and duty to address the grand jury" by delivering "an intemperate and inflammatory political harangue." His conduct was alleged to be a serious breach of his duty to judge impartially and to reflect on his competence to continue to exercise the office.

Judge West H. Humphreys was impeached in 1862 on charges that he joined the Confederacy without resigning his federal judgeship.(92) Judicial prejudice against Union supporters was also alleged.

Judicial favoritism and failure to give impartial consideration to cases before him were also among the allegations in the impeachment of Judge George W. English in 1926. The final article charged that his favoritism had created distrust of the disinterestedness of his official actions and destroyed public confidence in his court.(93)

3. EMPLOYING THE POWER OF THE OFFICE FOR AN IMPROPER PURPOSE OR PERSONAL GAIN

Two types of official conduct for improper purposes have been alleged in past impeachments. The first type involves vindictive use of their office by federal judges; the second, the use of office for personal gain.

Judge James H. Peck was impeached in 1826 for charging with contempt a lawyer who had publicly criticized one of his decisions, imprisoning him, and ordering his disbarment for 18 months. The House debated whether this single instance of vindictive abuse of power was sufficient to impeach, and decided that it was, alleging that the conduct was unjust, arbitrary, and beyond the scope of Peck's duty.

Vindictive use of power also constituted an element of the charges in two other impeachments. Judge George W.

92. Although some of the language in the articles suggested treason, only high crimes and misdemeanors were alleged, and Humphrey's offenses were characterized as a failure to discharge his judicial duties.

93. Some of the allegations against Judges Harold Louderback (1932) and Halsted Ritter (1936) also involved judicial favoritism affecting public confidence in their courts.

English was charged in 1926, among other things, with threatening to jail a local newspaper editor for printing a critical editorial and with summoning local officials into court in a non-existent case to harangue them. Some of the articles in the impeachment of Judge Charles Swayne (1903) alleged that he maliciously and unlawfully imprisoned two lawyers and a litigant for contempt.

Six impeachments have alleged the use of office for personal gain or the appearance of financial impropriety while in office. Secretary of War William W. Belknap was impeached in 1876 of high crimes and misdemeanors for conduct that probably constituted bribery and certainly involved the use of his office for highly improper purposes-receiving substantial annual payments through an intermediary in return for his appointing a particular post trader at a frontier military post in Indian territory.

The impeachments of Judges Charles Swayne (1903), Robert W. Archbald (1912), George W. English (1926), Harold Louderback (1932) and Halsted L. Ritter (1936) each involved charges of the use of office for direct or indirect personal monetary gain.(94) In the Archbald and Ritter cases, a number of allegations of improper conduct were combined in a single, final article, as well as being charged separately.

In drawing up articles of impeachment, the House has placed little emphasis on criminal conduct. Less than one-third of the eighty-three articles the House has adopted have explicitly charged the violation of a criminal statute or used the word "criminal" or "crime" to describe the conduct alleged, and ten of the articles that do were those involving the Tenure of Office Act in the impeachment of President Andrew Johnson. The House has not always used the technical language of the criminal law even when the conduct alleged fairly clearly constituted a criminal offense, as in the Humphreys and Belknap impeachments. Moreover, a number of articles, even though they may have alleged that the conduct was unlawful, do not seem to state criminal conduct-including Article Ten against President Andrew Johnson (charging inflammatory speeches), and some of the charges against all of the judges except Humphreys.

Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions. Recitals that a judge has brought his court or the judicial system into disrepute are commonplace. In the impeachment of President Johnson, nine of the articles allege that he acted "unmindful of the high duties of his office and of his oath of office," and several specifically refer to his constitutional duty to take care that the laws be faithfully executed.

The formal language of an article of impeachment, however, is less significant than the nature of the allegations that it contains. All have involved charges of conduct incompatible with continued performance of the office; some have explicitly rested upon a "course of conduct" or have combined disparate charges in a single, final article. Some of the indi-

94. Judge Swayne was charged with falsifying expense accounts and using a railroad car in the possession of a receiver he had appointed. Judge Archbald was charged with using his office to secure business favors from litigants and potential litigants before his court. Judges English, Louderback, and Ritter were charged with misusing their power to appoint and set the fees of bankruptcy receivers for personal profit.

vidual articles seem to have alleged conduct that, taken alone, would not have been considered serious, such as two articles in the impeachment of Justice Chase that merely alleged procedural errors at trial. In the early impeachments, the articles were not prepared until after impeachment had been voted by the House, and it seems probable that the decision to impeach was made on the basis of all the allegations viewed as a whole, rather than each separate charge. Unlike the Senate, which votes separately on each article after trial, and where conviction on but one article is required for removal from office, the House appears to have considered the individual offenses less significant than what they said together about the conduct of the official in the performance of his duties.

Two tendencies should be avoided in interpreting the American impeachments. The first is to dismiss them too readily because most have involved judges. The second is to make too much of them. They do not all fit neatly and logically into categories. That, however, is in keeping with the nature of the remedy. It is intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office.

Past impeachments are not precedents to be read with an eye for an article of impeachment identical to allegations that may be currently under consideration. The American impeachment cases demonstrate a common theme useful in determining whether grounds for impeachment exist-that the grounds are derived from understanding the nature, functions and duties of the office.

III. The Criminality Issue

The phrase "high Crimes and Misdemeanors" may connote "criminality" to some. This likely is the predicate for some of the contentions that only an indictable crime can constitute impeachable conduct. Other advocates of an indictable-offense requirement would establish a criminal standard of impeachable conduct because that standard is definite, can be known in advance and reflects a contemporary legal view of what conduct should be punished. A requirement of criminality would require resort to familiar criminal laws and concepts to serve as standards in the impeachment process. Furthermore, this would pose problems concerning the applicability of standards of proof and the like pertaining to the trial of crimes.(1)

The central issue raised by these concerns is whether requiring an indictable offense as an essential element of impeachable conduct is consistent with the purposes and intent of the framers in establishing the impeachment power and in setting a constitutional standard for the exercise of that power. This issue must be considered in light of the historical evidence of the framers' intent.(2) It

1. See A. Simpson, A *Treatise on Federal Impeachments* 28–29 (1916). It has also been argued that because Treason and Bribery are crimes, "other high Crimes and Misdemeanors" must refer to crimes under the *ejusdem generis* rule of construction. But *ejusdem generis* merely requires a unifying principle. The question here is whether that principle is criminality or rather conduct subversive of our constitutional institutions and form of government.

2. The rule of construction against redundancy indicates an intent not to require criminality. If criminality is required, the word "Misdemeanors" would add nothing to "high Crimes."

is also useful to consider whether the purposes of impeachment and criminal law are such that indictable offenses can, consistent with the Constitution, be an essential element of grounds for impeachment. The impeachment of a President must occur only for reasons at least as pressing as those needs of government that give rise to the creation of criminal offenses. But this does not mean that the various elements of proof, defenses, and other substantive concepts surrounding an indictable offense control the impeachment process. Nor does it mean that state or federal criminal codes are necessarily the place to turn to provide a standard under the United States Constitution. Impeachment is a constitutional remedy. The framers intended that the impeachment language they employed should reflect the grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify impeachment.

This view is supported by the historical evidence of the constitutional meaning of the words "high Crimes and Misdemeanors." That evidence is set out above.[3] It establishes that the phrase "high Clrimes and Misdemeanors"—which over a period of centuries evolved into the English standard of impeachable conduct—has a special historical meaning different from the ordinary meaning of the terms "crimes" and "misdemeanors.[4] High misdemeanors" referred to a category of offenses that subverted the system of government. Since the fourteenth century the phrase "high Crimes and Misdemeanors" had been used in English impeachment cases to charge officials with a wide range of criminal and non-criminal offenses against the institutions and fundamental principles of English government.[5]

There is evidence that the framers were aware of this special, non-criminal meaning of the phrase "high Crimes and Misdemeanors" in the English law of impeachment.[6] Not only did Hamilton acknowledge Great Britain as "the model from which [impeachment] has been borrowed," but George Mason referred in the debates to the impeachment of Warren Hastings, then pending before Parliament. Indeed, Mason, who proposed the phase "high Crimes and Misdemeanors," expressly stated his intent to encompass "[a]ttempts to subvert the Constitution."[7]

The published records of the state ratifying conventions do not reveal an intention to limit the grounds of impeachment to criminal offenses[8] James Iredell said in the North Carolina debates on ratification:

> . . . the person convicted is further liable to a trial at common law, and may receive such common-law punishment as belongs to a description of such offences if it be punishable by that law.[9]

Likewise, George Nicholas of Virginia distinguished disqualification to hold office from conviction for criminal conduct:

> If [the President] deviates from his duty, he is responsible to his constituents. . . . He will be absolutely disqualified to hold any place of profit, honor, or trust, and liable to further

3. See part II B. *supra.*

4. See part II B.2. *supra.*

5. See part II.A. *supra.*

6. See part II.B.2. *supra.*

7. See *Id.*

8. See part II.B.3. *supra.*

9. 4 Elliot 114.

punishment if he has committed such high crimes as are punishable at common law.[10]

The post-convention statements and writings of Alexander Hamilton, James Wilson, and James Madison—each a participant in the Constitutional Convention—show that they regarded impeachment as an appropriate device to deal with offenses against constitutional government by those who hold civil office, and not a device limited to criminal offenses.[11] Hamilton, in discussing the advantages of a single rather than a plural executive, explained that a single executive gave the people "the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.[12] Hamilton further wrote: "Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment.[13]

The American experience with impeachment, which is summarized above, reflects the principle that impeachable conduct need not be criminal. Of the thirteen impeachments voted by the House since 1789, at least ten involved one or more allegations that did not charge a violation of criminal law.[14]

Impeachment and the criminal law serve fundamentally different purposes. Impeachment is the first step in a remedial process—removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment;[15] its function is primarily to maintain constitutional government. Furthermore, the Constitution itself provides that impeachment is no substitute for the ordinary process of criminal law since it specifies that impeachment does not immunize the officer from criminal liability for his wrongdoing.[16]

The general applicability of the criminal law also makes it inappropriate as the standard for a process applicable to a highly specific situation such as removal of a President. The criminal law sets a general standard of conduct that all must follow. It does not address itself to the

10. 3 Elliot 240.

11. See part II.B 1. *supra*; part II.B.3. *supra.*

12. Federalist No. 70, at 461.

13. *Id.* at 459.

14. See part II.C. *supra.*

15. It has been argued that "[i]mpeachment is a special form of punishment for crime," but that gross and willful neglect of duty would be a violation of the oath of office and "[s]uch violation, by criminal acts of commission or omission, is the only nonindictable offense for which the President, Vice President, judges or other civil officers can be impeached." I. Brant, *Impeachment, Trials and Errors* 13, 20, 23 (1972). While this approach might in particular instances lead to the same results as the approach to impeachment as a constitutional remedy for action incompatible with constitutional government and the duties of constitutional office, it is, for the reasons stated in this memorandum, the latter approach that best reflects the intent of the framers and the constitutional function of impeachment. At the time the Constitution was adopted, "crime" and "punishment for crime" were terms used far more broadly than today. The seventh edition of Samuel Johnson's dictionary, published in 1785, defines "crime" as "an act contrary to right, an offense; a great fault; an act of wickedness." To the extent that the debates on the Constitution and its ratification refer to impeachment as a form of "punishment" it is punishment in the sense that today would be thought a noncriminal sanction, such as removal of a corporate officer for misconduct breaching his duties to the corporation.

abuses of presidential power. In an impeachment proceeding a President is called to account for abusing powers that only a President possesses.

Other characteristics of the criminal law make criminality inappropriate as an essential element of impeachable conduct. While the failure to act may be a crime, the traditional focus of criminal law is prohibitory. Impeachable conduct, on the other hand, may include the serious failure to discharge the affirmative duties imposed on the President by the Constitution. Unlike a criminal case, the cause for the removal of a President may be based on his entire course of conduct in office. In particular situations, it may be a course of conduct more than individual acts that has a tendency to subvert constitutional government.

To confine impeachable conduct to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government. Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law.

If criminality is to be the basic element of impeachment conduct, what is the standard of criminal conduct to be? Is it to be criminality as known to the common law, or as divined from the Federal Criminal Code, or from an amalgam of State criminal statutes? If one is to turn to State statutes, then which of those of the States is to obtain? If the present Federal Criminal Code is to be the standard, then which of its provisions are to apply? If there is to be new Federal legislation to define the criminal standard, then presumably both the Senate and the President will take part in fixing that standard. How is this to be accomplished without encroachment upon the constitutional provision that "the sole power" of impeachment is vested in the House of Representatives?

A requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government. Impeachment is a constitutional safety valve; to fulfill this function, it must be flexible enough to cope with exigencies not now foreseeable. Congress has never undertaken to define impeachable offenses in the criminal code. Even respecting bribery, which is specifically identified in the Constitution as grounds for impeachment, the federal statute establishing the criminal offense for civil officers generally was enacted over seventy-five years after the Constitutional Convention.[17]

In sum, to limit impeachable conduct to criminal offenses would be incompatible with the evidence concerning the constitutional meaning of the phrase "high Crimes and Misdemeanors" and would frustrate the purpose that the framers intended for impeachment. State

16. It is sometimes suggested that various provisions in the Constitution exempting cases of impeachment from certain provisions relating to the trial and punishment of crimes indicate an intention to require an indictable offense as an essential element of impeachable conduct. In addition to the provision referred to in the text (Article I, Section 3), cases of impeachment are exempted from the power of pardon and the right to trial by jury in Article II, Section 2 and Article III, Section 2 respectively. These provisions were placed in the Constitution in recognition that impeachable conduct may entail criminal conduct and to make it clear that even when criminal conduct is involved, the trial of an impeachment was not intended to be a criminal proceeding. The sources quoted at notes 8–13, supra, show the understanding that impeachable conduct may, but need not, involve criminal conduct.

and federal criminal laws are not written in order to preserve the nation against serious abuse of the presidential office. But this is the purpose of the constitutional provision for the impeachment of a President and that purpose gives meaning to "high Orimes and Misdemeanors."

IV. Conclusion

Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high" offenses in the sense that word was used in English impeachments.

The framers of our Constitution consciously adopted a particular phrase from the English practice to help define the constitutional grounds for removal. The content of the phrase "high Crimes and Misdemeanors" for the framers is to be related to what the framers knew, on the whole, about the English practice—the broad sweep of English constitutional history and the vital role impeachment had played in the limitation of royal prerogative and the control of abuses of ministerial and judicial power.

Impeachment was not a remote subject for the framers. Even as they labored in Philadelphia, the impeachment trial of Warren Hastings, Governor-General of India, was pending in London, a fact to which George Mason made explicit reference in the Convention. Whatever may be said of the merits of Hastings, conduct, the charges against him exemplified the central aspect of impeachment—the parliamentary effort to reach grave abuses of governmental power.

The framers understood quite clearly that the constitutional system they were creating must include some ultimate check on the conduct of the executive, particularly as they came to reject the suggested plural executive. While insistent that balance between the executive and legislative branches be maintained so that the executive would not become the creature of the legislature, dismissable at its will, the framers also recognized that some means would be needed to deal with excesses by the executive. Impeachment was familiar to them. They understood its essential constitutional functions and perceived its adaptability to the American contest.

While it may be argued that some articles of impeachment have charged conduct that constituted crime and thus that criminality is an essential ingredient, or that some have charged conduct that was not criminal and thus that criminality is not essential, the fact remains that in the English practice and in several of the American impeachments the criminality issue was not raised at all. The emphasis has been on the significant effects of the conduct—undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of govern-

ment. Clearly, these effects can be brought about in ways not anticipated by the criminal law. Criminal standards and criminal courts were established to control individual conduct. Impeachment was evolved by Parliament to cope with both the inadequacy of criminal standards and the impotence of courts to deal with the conduct of great public figures. It would be anomalous if the framers, having barred criminal sanctions from the impeachment remedy and limited it to removal and possible disqualification from office, intended to restrict the grounds for impeachment to conduct that was criminal.

The longing for precise criteria is understandable; advance, precise definition of objective limits would seemingly serve both to direct future conduct and to inhibit arbitrary reaction to past conduct. In private affairs the objective is the control of personal behavior, in part through the punishment of misbehavior. In general, advance definition of standards respecting private conduct works reasonably well. However, where the issue is presidential compliance with the constitutional requirements and limitations on the presidency, the crucial factor is not the intrinsic quality of behavior but the significance of its effect upon our constitutional system or the functioning of our government.

It is useful to note three major presidential duties of broad scope that are explicitly recited in the Constitution: "to take Care that the Laws be faithfully executed," to "faithfully execute the Office of President of the United States" and to "preserve, protect, and defend the Constitution of the United States" to the best of his ability. The first is directly imposed by the Constitution; the second and third are included in the constitutionally prescribed oath that the President is required to take before he enters upon the execution of his office and are, therefore, also expressly imposed by the Constitution.

The duty to take care is affirmative. So is the duty faithfully to execute the office. A President must carry out the obligations of his office diligently and in good faith. The elective character and political role of a President make it difficult to define faithful exercise of his powers in the abstract. A President must make policy and exercise discretion. This discretion necessarily is broad, especially in emergency situations, but the constitutional duties of a President impose limitations on its exercise.

The "take care" duty emphasizes the responsibility of a President for the overall conduct of the executive branch, which the Constitution vests in him alone. He must take care that the executive is so organized and operated that this duty is performed.

The duty of a President to "preserve, protect, and defend the Constitution" to the best of his ability includes the duty not to abuse his powers or transgress their limits—not to violate the rights of citizens, such as those guaranteed by the Bill of Rights, and not to act in derogration of powers vested elsewhere by the Constitution.

Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only

upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.

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CHAPTER 15

Investigations and Inquiries

Commentary and editing by Thomas J. Nicola, J.D.

D. Authority in Cases of Contempt

INDEX TO PRECEDENTS

Investigations and Inquiries

A. BASIS OF AUTHORITY TO INVESTIGATE; CREATING COMMITTEES

§ 1. In General; Subjects of Authorizing Resolutions

Although the congressional power of investigation is not explicitly granted by the Constitution, it has been exercised by the House since 1792.(1) It is well established that the power to investigate is implied from the power to legislate granted in article I, section 1 of the Constitution. Thus, the Supreme Court has stated that the power of inquiry, with process to enforce it, is an essential and appropriate auxiliary to the legislative function.(2) The Court has further stated:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.(3)

The scope of the power of inquiry is as broad as the power to enact and appropriate under the Constitution.(4) Subjects of inves-

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1. The House in that year rejected a resolution requesting the President to investigate the defeat of General St. Clair's army and instead asserted its own right to investigate by requesting the President to cause proper executive officers to deliver to the House documents pertinent to the matter. See 3 Hinds' Precedents § 1725.

For earlier coverage of the subject matter of this chapter generally, see, for example, 3 Hinds' Precedents §§ 1666–1724 (punishment of witnesses for contempt); §§ 1725–1826 (powers of investigation and conduct of investigations); §§ 1856–1910 (inquiries of the executive); 6 Cannon's Precedents §§ 335–353 (punishment of witnesses for contempt); §§ 354–393 (power of investigation and conduct of investigations); and §§ 404–437 (inquiries of the executive).

See also Leading Cases on Congressional Investigatory Power (Committee Print, Joint Committee on Congressional Operations, 94th Cong. 2d Sess.).

2. *McGrain* v *Daugherty,* 273 U.S. 135, 174.

3. *Watkins* v *United States,* 354 U.S. 178, 187 (1957).

4. *Barenblatt* v *United States,* 360 U.S. 109, 111 (1959). See also The Con-

tigation that have specifically been approved by the courts include the existence of subversive activities in education,[5] labor and industry,[6] the extent of corruption in labor unions,[7] and the denial of civil rights by particular organizations.[8]

Although the power of investigation is broad, it is not unlimited. It may be exercised only "in aid of the legislative function."[9] Accordingly, it has been stated that, generally, there is no congressional power "to expose for the sake of exposure,"[10] and that, in any event, Congress cannot inquire into matters which are within the exclusive province of one of the other branches of government,[11] or which are reserved

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stitution of the United States of America, Analysis and Interpretation, S. Doc. No. 92–82, 92d Cong. 2d Sess., p. 80 (1972).

5. *Barenblatt* v *United States,* 360 U.S. 109 (1959); *Deutch* v *United States,* 367 U.S. 456 (1961).

6. *Watkins* v *United States,* 354 U.S. 178 (1957); *Flaxer* v *United States,* 358 U.S. 147 (1958); *Wilkinson* v *United States,* 365 U.S. 399 (1961).

7. *Hutcheson* v *United States,* 369 U.S. 599 (1962). See also The Constitution of the United States of America, Analysis and Interpretation, S. Doc. No. 92–82, 92d Cong. 2d Sess., pp. 84, 85 (1972).

8. *Shelton* v *United States,* 404 F2d 1292 (D.C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969).

9. *Kilbourn* v *Thompson,* 103 U.S. 168 (1881). Beginning with *In re Chapman,* 166 U.S. 661 (1897) and *McGrain* v *Daugherty,* 273 U.S. 135 (1927) and until prior to *United States* v *Rumely,* 345 U.S. 543 (1952), courts presumed existence of a legislative purpose. After that period, as investigations began to arouse criticism for infringing individual liberties, however, courts began to construe narrowly the resolutions describing authority of committees (see *Rumely*) and went so far as to impose a specific burden on the government in contempt prosecutions to show affirmatively the source of authority for each investigation. See *United States* v *Lamont,* 236 F2d 312 (2d Cir. 1956) and Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189, 230–236 (1967) for a discussion of legislative purpose. See also §6, infra, for discussion of a closely related topic, the pertinence of the inquiry.

10. *Watkins* v *United States,* 354 U.S. 178, 200 (1957). In making this statement, however, Chief Justice Warren pointed out that this view did not apply to Congress' function to inquire into and publicize corruption, maladministration or inefficiency in agencies of government. *Id.,* 211 n. 33.

11. *Barenblatt* v *United States,* 360 U.S. 109, 111, 112 (1959). See also §3, infra, for a discussion of executive branch refusals to provide information.

to the states.[12] In imposing such limitations upon the power to investigate, the courts have, as in other areas, traditionally refused to inquire into the motives of legislators.[13]

A further requirement for the validity of an investigation is that it must have been expressly or impliedly authorized in accordance with congressional procedures. As an example, the House, may authorize a select or standing committee to investigate a particular subject, or a committee may authorize a subcommittee to investigate a subject.[14] In the usual practice, resolutions authorizing the Speaker to appoint Members to select or special committees to investigate designated subjects are assigned to and reported by the Committee on Rules,[15] which calls them up as privileged.[16] In addition, congressional investigations may be initiated pursuant to statute,[17] motion to recommit,[18] joint[19] or

12. See *United States* v *DiCarlo,* 102 F Supp 597 (N.D. Ohio 1952) for rejection of an allegation that the Senate encroached state powers by creating a special committee to investigate organized crime in interstate commerce.

13. *Tenney* v *Brandhove,* 341 U.S. 367 (1951) and *United States* v *O'Brien,* 391 U.S. 367 (1968).

14. See § 1.1, infra, for the full text of an authorizing resolution and *House Rules and Manual* § 976 (1973), for the form of an authorizing resolution. Mr. Justice Frankfurter characterized such a resolution, one to investigate lobbying activities (see § 1.5, infra, for a discussion of this resolution), as the committee's "controlling charter" which delimits its "right to exact testimony." *United States* v *Rumely,* 345 U.S. 41, 44 (1953).

Parliamentarian's Note: Recent changes in procedures relating to authorization of standing committees will be discussed in supplements to this edition as they appear.

15. *House Rules and Manual* § 717 (1973).

16. See Rule XI clauses 22, 23, and 24, *House Rules and Manual* §§ 726, 729, and 732 in the edition published at the commencement of 1973; at the end of the 93d Congress first session these clauses were numbered 23, 24, and 25, respectively.

17. See, for example, 26 USC §§ 8001, 8022, which establish the Joint Committee on Internal Revenue Taxation, and confer investigatory duties, respectively.

18. See, for example, 112 CONG. REC. 1762, 1763, 89th Cong. 2d Sess., Feb. 2, 1966, for a motion to recommit a resolution directing the Speaker to certify to a U.S. Attorney a contempt citation against Robert M. Shelton allegedly of the Ku Klux Klan, to a select committee of seven members appointed by the Speaker to examine the sufficiency of these citations in light of relevant judicial decisions.

19. See, for example, 114 CONG. REC. 21012–31, 90th Cong. 2d Sess., July 12, 1968, for House approval of H.J.

concurrent resolution,[20] or rule of the House.[1]

The determination of whether a particular investigation is within the scope of the congressional power, or whether procedural requirements of the investigation have been met, may be important when such questions as the alleged contempt of witnesses arise. Thus, courts have held that persons may not be convicted of contumacy arising out of an investigation which the House lacked authority to conduct. Subjects that have, in this context, been held not to be proper matters for legislative action have included the withdrawal of congressional consent to establish a bi-state compact, the port of New York authority.[2] Similarly, courts have refused to convict a witness for contumacy arising out of a subcommittee investigation of Communist activities in the field of labor, where such investigation had not been approved by a majority of the parent Committee on UnAmerican Activities as was required by the committee rule.[3] In another instance, the authorizing resolution was construed not to sanction the investigation of ac-

Res. 1, establishing a joint committee to investigate crime. The final action in the Senate was referral to the Committee on the Judiciary.

20. See, for example, 91 CONG. REC. 346–350, 79th Cong. 1st Sess., Jan. 18, 1945, for House approval of H. Con. Res. 18, establishing the Joint Committee on the Organization of the Congress. This measure was amended by the Senate at 91 CONG. REC. 1010, 79th Cong. 1st Sess., Feb. 12, 1945; the House concurred in the Senate amendments at 91 CONG. REC. 1272–74, 79th Cong. 1st Sess., Feb. 19, 1945.

1. See Rule XI clauses 2(b), 11(b), and 19 (c), *House Rules and Manual* §§ 679, 703A, and 720 (1973), authorizing the Committees on Appropriations, Internal Security, and Standards of Official Conduct, respectively, to conduct investigations and studies.

Note: Recent changes in Rule XI and in the procedure for authorizing investigations by rule will be discussed in supplements to this edition as they appear. Meanwhile, see Rules X and XI, *House Rules and Manual* (1975 and 1977) for discussion of changes in investigating, oversight, and subpena authorities of standing committees since the 93d Congress.

2. See *Tobin* v *United States*, 306 F2d 270 (D.C. cir. 1962); cert. denied, 371 U.S. 902 (1962) which held that the express reservation of Congress' right "to alter, amend or repeal" its initial consent granted in 1921 could not be implied from art. I, § 10 clause 3 of the Constitution which provides that no state shall without the consent of Congress enter into any agreement or compact with another state.

3. *Gojack* v *United States*, 384 U.S. 702 (1966).

tivities of a lobbyist that were related to his efforts to influence public opinion by the distribution of literature, and that were unrelated to any representations made by him to Congress.[4]

Discussed in ensuing sections are particular subjects on which Congress may legislate and appropriate and which are therefore proper matters for investigation;[5] inquiries directed to the executive branch;[6] procedures for investigative hearings;[7] and things incidental to the authority to investigate, such as the power to punish witnesses for contempt.[8]

Principles affecting the investigation of certain specific subjects have been treated in other chapters. These subjects include impeachment;[9] election contests;[10] conduct of Members;[11] and qualification and disqualification of Members.[12] In addition, the broad subject of committee structure and procedures is treated elsewhere.[13]

4. *United States* v *Rumely*, 345 U.S. 543 (1952). See § 1.5, infra, for the resolution establishing a select committee to investigate lobbying activities.

5. See § § 1.1–1.46, infra.

6. See § § 2–5, infra.

7. See § § 6–16, infra.

8. See § § 17–22, infra.

9. See Ch. 14, supra.

10. See Ch. 9, supra.

11. See Ch. 12, supra.

12. See Ch. 7, supra.

13. See Ch. 17. infra.

Collateral References

Barth, Alan, *Government by Investigation*, Viking Press, New York (1955).

The Constitution of the United States of America, Analysis and Interpretation, S. Doc. No. 92–82, 92d Cong. 2d Sess., pp. 79–81, 83–86 (1972).

De Grazia, Alfred, ed., Congress: *The First Branch of Government*, American Enterprise Institute for Public Policy Research, Washington, D.C. (1966).

Dimock, Marshall Edward, *Congressional Investigating Committees*, AMS Press, New York, 1971 (reprint of a 1928 work).

Frantz, Laurent, *Wilkinson, Braden, and Deutch: The Legislative Investigation Case*, 21 Law in Transition (continuation of National Lawyer's Guild Rev.) 219 (1962).

Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926).

Levi, Edward H., et al., Congressional Investigations, A Symposium, 18 U. of Chic. L. Rev. 421 (1951).

McGreary, M. Nelson, *The Development of Congressional Investigative Power*, Octagon Books, Inc. (1966).

McKay, R. B., Congressional Investigations and the Supreme Court, 51 Cal. L. Rev. 276 (1963).

Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189 (1967).

Newman, Frank C., Supreme Court, Congressional Investigations and Influence

Peddling, N. Y. U. L. Rev. 796 June (1958).
Senate Committee on the Judiciary, Congressional Power of Investigation, S. Doc. No. 99, 82d Cong. 2d Sess. (1954).
Shapiro, M., Judicial Review: Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations, 15 Vand. L. Rev. 535 (1962).
Taylor, Telford, *Grand Inquest: The Story of Congressional Investigations*, Simon and Schuster, New York (1955).
Warren, W. C., Congressional Investigations: Some Observations, 21 Food, Drug, Cosm. L. Jour. 40 (1966)

Privacy, Human Values, and Democratic Institutions

§ 1.1 Form of resolution establishing select committee. The House rejected a resolution establishing a select committee to investigate privacy, human values, and democratic institutions.

On Feb. 8, 1972,[14] the House rejected a resolution (called up as privileged by direction of the Committee on Rules) establishing a select committee. The proceedings were as follows:

MR. [RAY J.] MADDEN [of Indiana]: Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 164 and ask for its immediate consideration.

The Clerk read the resolution as follows:

H. RES. 164

Whereas the development of technology is advancing at an unparalleled rate of speed and is rapidly coming to affect every level of American life; and

Whereas the operations of industry and Government are coming more and more to rely on highly sophisticated computer technology to assist them in their operations; and

Whereas the full significance and the effects of technology on society and on the operations of industry and Government are largely unknown; and

Whereas computers and other technological innovations aid in the gathering and centralization of massive information of all kinds of individuals and, consequently, call into question the effect of technology on the right of privacy; and

Whereas Congress needs a committee ready and able to evaluate the effects of technology on the operations of Government, on the democratic institutions and processes basic to the United States, and on the basic human and civil rights of our citizens: Now, therefore, be it

Resolved, That there is hereby created a select committee to be known as the Select Committee on Privacy, Human Values, and Democratic Institutions to be composed of nine Members of the House of Representatives to be appointed by the Speaker, one of whom he shall designate as chairman. Any vacancy occurring in the membership of the committee shall be filled in the same manner in which the original appointment was made.

The committee is authorized and directed to conduct a full and com-

14. 118 CONG. REC. 3181–3200, 92d Cong. 2d Sess. The resolution was reported on May 19, 1971 (H. Rept. No. 218).

plete investigation and study of the development and proliferation of technology in American society, including the role and effectiveness of computer technology in the operations of industry and Government, the consequences of using computers to solve social questions which traditionally have been addressed without the assistance of computers and other machines, and the effects of technology and machines on democratic institutions and processes. The committee shall also study the use of computers and other technical instruments in gathering and centralizing information on individuals and the effect of such activity on the human and civil rights.

For the purpose of carrying out this resolution the committee, or any subcommittee thereof authorized by the committee to hold hearings, is authorized to sit and act during the present Congress at such times and places and within the United States, including any Commonwealth or possession thereof, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee nor any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpoenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

The committee shall report to the House as soon as practicable during the present Congress the results of its investigation and study, together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

With the following committee amendment:

On page 3, line 5: Strike the words "act during the" and insert "act, subject to clause 31 of Rule XI of the Rules of the House of Representatives, during the".

The committee amendment was agreed to. . . .

MR. MADDEN: Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

THE SPEAKER:[15] The question is on the resolution.

MR. [FLETCHER] THOMPSON of Georgia: Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered. . . .

The question was taken; and there were—yeas 168, nays 216, not voting 47 . . . .

So the resolution was rejected.

Congressional Operations and Practices

§ 1.2 The House established a select committee to investigate House Rules X and XI, which relate to the structure, jurisdiction, and procedure of committees.

On Jan. 31, 1973,[16] the House by a vote of yeas 282 to nays 91

15. Carl Albert (Okla.).

16. 119 CONG. REC. 2812–16, 93d Cong. 1st Sess. The resolution was re-

agreed to House Resolution 132, reported from the Committee on Rules, creating a select committee to study the operation and implementation of Rules X and XI, focusing on committee structure, number and optimum size of committees, their jurisdiction, number of subcommittees, committee rules and procedures, media coverage of meetings, staffing, space, equipment, and other committee facilities.

Parliamentarian's Note: Consideration of House Resolution 132 was provided for by the adoption of House Resolution 176 [119 CONG. REC. 2804, 93d Cong. 1st Sess.], called up by direction of the Committee on Rules. Since House Resolution 132 would not have been privileged (because it contained provisions affecting contingent funds), House Resolution 176 provided for the immediate consideration of House Resolution 132, debate to be controlled by the Committee on Rules and the previous question considered as ordered.

§ 1.3 The House agreed to a resolution creating a special committee to investigate and report on campaign expenditures and practices by candidates for the House.

On Aug. 4, 1970,[17] the House by voice vote approved House Resolution 1062, authorizing the Speaker to appoint a special committee to investigate and report to the House on candidate expenditures and donations of services and funds received as well as violations of election laws. The resolution was called up by Mr. Thomas P. O'Neill, Jr., of Massachusetts, who referred to it as authorizing the biennial special committee to investigate campaign expenditure."[18]

ported on Jan. 30, 1973 (H. Rept. No. 2).

17. 116 CONG. REC. 27125, 27126, 91st Cong. 2d Sess. The resolution was reported on June 11, 1970 (H. Rept. No. 1187) from the Committee on Rules.

18. See also 112 CONG. REC. 19079–81, 89th Cong. 2d Sess., Aug. 11, 1966; and 90 CONG. REC. 6392, 6393–98, 78th Cong. 2d Sess., June 21, 1944, for other examples of voice vote approvals of H. Res. 929 and 551, respectively, creating special committees to investigate campaign expenditures.

Parliamentarian's Note: Since the 93d Congress, the special committee has not been reconstituted. On Aug. 21, 1974, the House agreed to H. Res. 737, a privileged resolution reported from the Committee on Rules, authorizing the Committee on House Administration to conduct investigations within its jurisdiction (including elections of Members) and authorizing that committee to issue subpenas. 120 CONG. REC. 29653, 29654, 93d Cong. 2d Sess.

§ 1.4 The House established a select committee to study and investigate the welfare and education of congressional pages.

On Sept. 30, 1964,[19] the House by voice vote approved House Resolution 847 (called up as privileged by direction of the Committee on Rules), to create a select committee to investigate the welfare and education of congressional pages including dining, recreational, educational, and physical training facilities and opportunities as well as rates of pay, hours of work, and other working conditions.

§ 1.5 The House established a select committee to investigate lobbying activities.

On Aug. 12, 1949,[20], the House by voice vote approved House Resolution 298 (called up as privileged by direction of the Committee on Rules), creating a select committee of seven members to investigate all lobbying activities and all activities of federal agencies intended to influence, encourage, promote, or retard legislation.

Structure and Operation of the Executive Branch

§ 1.6 The House established a select committee to study executive agencies.

On Apr. 29, 1936,[1] the House by a roll call vote of yeas 269 to nays 44 approved House Resolution 460 (called up as privileged by direction of the Committee on Rules), authorizing the Speaker to appoint a select committee of five members to study activities of executive departments, bureaus, boards, commissions, and agencies to determine whether any of these agencies should be abolished or coordinated with other agencies in the interest of simplification, efficiency, and economy.

This resolution, called up by Mr. John J. O'Connor, of New York, had been requested by President Franklin D. Roosevelt, in a Mar. 20, 1936, letter to Speaker Joseph W. Byrns, of Tennessee, seeking cooperation of the House in incorporating agencies created during the depression into the regular executive organization.[2]

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19. 110 CONG. REC. 23187, 23188, 88th Cong. 2d Sess. The resolution was reported on Sept. 16, 1964 (H. Rept. No. 1887).

20. 95 CONG. REC. 11385–89, 81st Cong. 1st Sess. The resolution was reported on Aug. 3, 1949 (H. Rept. No. 1185).

1. 80 CONG. REC. 6375, 6376, 6385, 6386, 74th Cong. 2d Sess. The resolution was reported on Apr. 28, 1936 (H. Rept. No. 2504).

2. See 80 CONG. REC. 6376, 74th Cong. 2d Sess., for the text of this letter.

§ 1.7 The House established a special committee to investigate acts of executive agencies.

On Feb. 11, 1943,[3] the House by a roll call vote of yeas 294 to nays 50, approved House Resolution 102 (called up as privileged by direction of the Committee on Rules), establishing a special committee of five members to investigate any action, rule, procedure, regulation, order, or directive taken or promulgated by any department or independent agency of the federal government where complaint is made that any action or rule (1) is beyond the scope of the department or agency, (2) invades constitutional rights, privileges, or immunities of citizens, or (3) inflicts penalties for noncompliance without an opportunity to present a defense.[4]

§ 1.8 The House rejected a resolution establishing a select committee to investigate the transfer of certain government agencies and bureaus from the District of Columbia.

On July 15, 1941,[5] the House by a vote of yeas 72 to nays 204, rejected House Resolution 257 (called up as privileged by direction of the Committee on Rules), creating a select committee of five members to investigate the feasibility and desirability of transferring any government agencies and bureaus to locations outside the District of Columbia and to investigate the location, extent, and cost of office space and other facilities rented by the various federal departments, bureaus, and agencies within and without the District of Columbia.

Specific Agencies

§ 1.9 The House approved a resolution establishing a select committee to investigate the organization, personnel, and activities of the Federal Communications Commission.

On Jan. 19, 1943,[6] the House by voice vote approved House Res-

3. 89 CONG REC. 872, 883, 884, 78th Cong. 1st Sess. The resolution was reported on Feb. 8, 1943 (H. Rept. No. 104).

4. Authority to continue this subcommittee was granted by a roll call vote of yeas 254 to nays 55 on H. Res. 88, on Jan. 18, 1945. 91 CONG. REC. 344–346, 79th Cong. 1st Sess.

5. 87 CONG. REC. 6073, 6082, 6083, 77th Cong. 1st Sess. The resolution was reported on July 10, 1941 (H. Rept. No. 932).

6. 89 CONG. REC. 233, 235, 78th Cong. 1st Sess. The resolution was reported on Jan. 18, 1943 (H. Rept. No. 8).

olution 21 (called up as privileged by direction of the Committee on Rules), establishing a select committee of five members to determine whether the Federal Communications Commission acted in accordance with law and the public interest in its organization, selection of personnel, and conduct of its activities.

§ 1.10 The House established a select committee to investigate activities of the Farm Security Administration.

On Mar. 18, 1943,[7] the House by voice vote approved House Resolution 119 (called up as privileged by direction of the Committee on Rules), creating a select committee to investigate activities of the Farm Security Administration to determine whether congressional policies were being followed.[8]

§ 1.11 The House established a select committee to investigate the financial position of the White County Bridge Commission.

On May 25, 1955,[9] the House by a roll call vote of yeas 205 to nays 166, approved House Resolution 244 (called up as privileged by direction of the Committee on Rules), creating a select committee of three members to investigate and study the White County Bridge Commission, established by Public Law 37 of the 77th Congress, to ascertain whether that bridge, located near New Harmony, Ind., should be toll free, and to study receipts and expenditures of the commission since it was established in 1941.

§ 1.12 The House approved a resolution establishing a select committee to investigate the National Labor Relations Board.

On July 20, 1939,[10] the House on a roll call vote of 254 yeas to 134 nays approved House Resolution 258 (called up as privileged by direction of the Committee on Rules), establishing a select committee of five members to investigate the fairness of the National Labor Relations Board in its dealings with labor organizations and employers; the effect of the National Labor Relations Act on disputes between employers and em-

7. 89 CONG. REC. 2194, 78th Cong. 1st Sess. The resolution was reported on Mar. 11, 1945 (H. Rept. No. 241).

8. See 89 CONG. REC. 1859, 78th Cong. 1st Sess., for text of the resolution.

9. 101 CONG. REC. 7036, 7043, 7044, 84th Cong. 1st Sess. The resolution was reported on May 24, 1955 (H. Rept. No. 614).

10. 84 CONG. REC. 9582, 9592, 9593, 76th Cong. 1st Sess. The resolution was reported on July 18, 1939 (H. Rept. No. 1215).

ployees, on employment, and on general economic conditions; the desirability of amendments to the National Labor Relations Act; whether the Board has attempted to write into the National Labor Relations Act intents and purposes not justified by the act; and the need for legislation further to define and clarify the meaning of the term "interstate commerce" and the relationship between employers and employees.

Economics

§ 1.13 The House rejected a resolution creating a special committee to study prices paid for the necessities of life.

On June 27, 1941,[11] the House by a roll call vote of yeas 100 to nays 200, rejected House Resolution 212 (called up as privileged by direction of the Committee on Rules), to establish a select committee of five members to study prices paid for the necessities of life, and various problems facing purchasers of goods in the markets of the country.

§ 1.14 The House established a special committee known as the Committee on Post-War Economic Policy and Planning.

On Jan. 26, 1944,[12] the House by voice vote approved House Resolution 408 (called up as privileged by direction of the Committee on Rules), creating a special committee of 18 members to investigate all matters relating to post-war economic policy and programs; to gather and study information, plans, and suggestions; and to report to the House periodically.

§ 1.15 The House established a select committee to investigate supplies and shortages of food, particularly meat.

On Mar. 27, 1945,[13] the House on a roll call vote of 292 yeas to 7 nays approved House Resolution 195 (called up as privileged by direction of the Committee on Rules), creating a select committee to investigate shortages of food, particularly civilian meat supplies; factors relating to production and distribution of essential foodstuffs, particularly meat;

11. 87 CONG. REC. 5624, 5634, 77th Cong. 1st Sess. The resolution was reported on June 24, 1941 (H. Rept. No. 848).

12. 90 CONG. REC. 753, 762, 763, 78th Cong. 2d Sess. The resolution was reported on Jan. 25, 1944 (H. Rept. No. 1021).

13. 91 CONG. REC. 2862, 2863, 79th Cong. 1st Sess. The resolution was reported on Mar. 21, 1945 (H. Rept. No. 356).

the presence of black markets in all kinds of meat; and the diversion of meat from normal, legitimate commercial channels of trade.(14)

§ 1.16 The House established a select committee to investigate newsprint supplies.

On Feb. 26, 1947,(15) the House by a roll call vote of yeas 269 to nays 100, approved House Resolution 58 (called up as privileged by direction of the Committee on Rules), creating a select committee to study and investigate the need for adequate American supplies of newsprint, printing and wrapping paper, paper products, paper pulp and pulpwood; possible means of increasing these supplies by domestic production or import; and the assistance that could be rendered by American agencies or officers to increase supplies.

§ 1.17 The House established a select committee to investigate transactions on commodity exchanges.

On Dec. 18, 1947,(16) the House by voice vote approved House Resolution 403 (called up as privileged by direction of the Committee on Rules), creating a select committee to investigate purchases and sales of commodities, including any activities of federal departments and agencies which have affected or may affect food prices as well as private acts and official activities of federal authorities in connection with the purchase or sale of other commodities.

§ 1.18 The House established a select committee to investigate the disposition of surplus property.

On May 9, 1946,(17) the House by voice vote approved House Resolution 385 (called up as privileged by direction of the Committee on Rules),(18) creating a se-

14. See 91 CONG. REC. 2784, 79th Cong. 1st Sess., Mar. 26, 1945, for text of this resolution.

15. 93 CONG. REC. 1457, 1458, 1465, 80th Cong. 1st Sess. The resolution was reported on Feb. 18, 1947 (H. Rept. No. 41).

16. 93 CONG. REC. 11640, 11648, 80th Cong. 1st Sess. The resolution was reported on Dec. 17, 1947 (H. Rept. No. 1221).

17. 92 CONG. REC. 4750, 79th Cong. 2d Sess. The resolution was reported on Apr. 9, 1946 (H. Rept. No. 1889).

18. See 92 CONG. REC. 4568, 79th Cong. 2d Sess., May 7, 1946, for the text of this resolution, and for discussion of the division of time for debate. In this instance, the Chairman of the Committee on Rules obtained unanimous consent to provide an additional hour for debate. Since the chairman was opposed to the resolution and had made the request in the absence of the Member in charge of the resolution, some discussion en-

lect committee to study and investigate contracts entered into between the United States and purchasers and lessees of surplus real and personal property; methods by which such contracts were awarded and opportunities to bid on the contracts; the effects of this program of disposition; the disposition of surplus outside the United States; the advisability of governmental operation of facilities and the effect of governmental competition with private business in such operations; the adequacy or inadequacy of present statutes; and other matters deemed appropriate by the committee.

Small Business

§ 1.19 The House established a select committee to investigate and study war-time problems of small business.

On Jan. 18, 1945,[19] the House by voice vote approved House Resolution 64 (called up as privileged by direction of the Committee on Rules), creating a select committee of nine members to investigate and study the problems of small business arising because of World War II, with particular reference to (1) whether the potentialities of small business were being adequately developed and utilized and, if not, what factors hindered development; (2) whether adequate consideration was being given to small business needs; (3) whether small business was being treated fairly; and (4) the need for a sound program for the solution of post-war problems of small business.[20]

§ 1.20 The House established a select committee to investigate problems of small business.

On Feb. 5, 1969,[1] the House by voice vote approved House Resolution 66 (called up as privileged by direction of the Committee on Rules), creating a select committee of 15 members to investigate problems affecting small business, including impediments to normal operations, growth, and development; administration of federal laws; and adequacy of gov-

sued as to the effect of the request in the circumstances.

19. 91 CONG. REC. 337, 341, 79th Cong. 1st Sess. The resolution was reported on Jan. 16, 1945 (H. Rept. No. 21).

20. The nine-member Select Committee on Small Business with the same jurisdiction was created on Jan. 22, 1943, by voice vote approval of H. Res. 18. 89 CONG. REC. 309, 310, 317, 78th Cong. 1st Sess.

1. 115 CONG. REC. 2778, 91st Cong. 1st Sess. The resolution was reported on Jan. 23, 1969 (H. Rept. No. 7).

ernment service to the needs of small business.(2)

Parliamentarian's Note: After adopting the rules for the 92d Congress on Jan. 22, 1971,(3) establishing the permanent Select Committee on Small Business (Rule X clause 3) the House by voice vote approved House Resolution 19 (called up as privileged by direction of the Committee on Rules), which dealt with the size of the committee, conferred subpena power, and authorized domestic travel.(4) Beginning in the 94th Congress, the Committee on Small Business became a standing committee of the House (see Rule X clause 1(s), *House Rules and Manual,* 1975).

Taxation

§ 1.21 The House established a special committee to investigate tax-exempt foundations.

On July 27, 1953,(5) the House by a roll call vote of yeas 209 to nays 163, approved House Resolution 217 (called up as privileged by direction of the Committee on Rules), creating a special committee to investigate and study tax-exempt educational and philanthropic foundations to determine whether their funds were being used for the purposes for which they were established, or for un-American and subversive activities, propaganda, attempts to influence legislation, or other political purposes.

§ 1.22 The House substituted the Committee on Ways and Means for a select committee to investigate duplication and overlapping of taxes.

On Sept. 27, 1951,(6) the House, after voice vote adoption of a Committee on Rules amendment substituting the Committee on Ways and Means for a select com-

2. See also, for example, 113 CONG. REC. 2148–50, 90th Cong. 1st Sess., Feb. 1, 1967, in which the House by voice vote approved H. Res. 53, establishing a select committee to investigate problems of small business and providing the same jurisdiction as would H. Res. 66, of the 91st Congress. Authority for a select committee on small business had been granted biennially since 1941 (H. Res. 294, 77th Congress).

3. 117 CONG. REC. 143, 144, 92d Cong. 1st Sess. See 117 CONG. REC. 14, 92d Cong. 1st Sess., Jan. 21, 1971, for the text of H. Res. 5, relating to adoption of the rules.

4. See 117 CONG. REC. 4593–95, 92d Cong. 1st Sess., Mar. 2, 1971, for the text of and vote on H. Res. 19.

5. 99 CONG. REC. 10015, 10030, 83d Cong. 1st Sess. The resolution was reported on July 13, 1953 (H. Rept. No. 773).

6. 97 CONG. REC. 12263, 12265, 82d Cong. 1st Sess. H. Res. 414 was reported from the Committee on Rules on Sept. 26, 1951 (H. Rept. No. 1056), and subsequently called up as privileged.

mittee of five members to investigate means and methods of eliminating overlapping between and duplication of sources of federal, state, and local taxes, approved House Resolution 414 authorizing such investigation by voice vote.

Domestic Military Activities

§ 1.23 The House established the select committee to investigate the seizure of property of Montgomery Ward & Co.

On May 5, 1944,[7] the House by a roll call vote of yeas 300 to nays 60, approved House Resolution 521 (called up as privileged by direction of the Committee on Rules), creating a select committee of seven members to investigate the seizure by the Army of property of Montgomery Ward & Co., on Apr. 26, 1944, pursuant to Executive Order No. 9438.[8]

Military Preparedness

§ 1.24 The House established a select committee known as the Committee on Post-War Military Policy.

On Mar. 28, 1944,[9] the House by voice vote created a select committee of 23 members to investigate all matters relating to post-war military requirements of the United States, to gather and study information, plans, and suggestions, and to report findings and conclusions to the House.

§ 1.25 After defeating the motion for the previous question, the House laid on the table a resolution reported by the Committee on Rules to create a special committee to investigate national defense.

On Mar. 11, 1941,[10] after defeating the motion for the previous question, the House by voice vote laid on the table House Resolution 120 (called up as privileged by direction of the Committee on Rules), creating a select committee to investigate all federal activities relating to the national

7. 90 CONG. REC. 4047, 4069, 4070, 78th Cong. 2d Sess. The resolution was reported on May 2, 1944 (H. Rept. No. 1410).

8. See *Public Papers and Addresses of Franklin D. Roosevelt*, 1944, 1945, Harper and Brothers Publishers (N.Y.), note p. 453, for a discussion of this and other executive orders to seize property of Montgomery Ward & Co.

9. 90 CONG. REC. 3199, 3207, 78th Cong. 2d Sess. See H. Res. 465 (called up as privileged by the Committee on Rules. The resolution was reported on Mar. 24, 1944 (H. Rept. No. 1286).

10. 87 CONG. REC. 2182, 2189, 2190, 77th Cong. 1st Sess. The resolution was reported on Mar. 10, 1941 (H. Rept. No. 222).

defense and to prepare, compile, and analyze data pertinent thereto to enable Congress to determine the need for appropriations or further legislation facilitating or abolishing any such activities.

Foreign Military Operations and Foreign Affairs

§ 1.26 The House agreed to a resolution establishing a select committee to travel to Southeast Asia, investigate all aspects of American military involvement there, and report back to the House within 45 days.

On June 8, 1970,(11) the House by a vote of 224 yeas to 101 nays approved House Resolution 976 (called up as privileged by direction of the Committee on Rules), directing the Speaker to appoint a select committee of 12 members, including two from the Committee on Armed Services, two from the Committee on Foreign Affairs, and eight from the House at large, to travel to Southeast Asia to investigate all aspects of American military involvement and report to the House within 45 days.

§ 1.27 The House established a select committee to investigate the Katyn Forest massacre.

On Sept. 18, 1951,(12) the House by voice vote approved House Resolution 390 (called up as privileged by direction of the Committee on Rules), creating a select committee of seven members to study and investigate the facts, evidence, and extenuating circumstances relating to the massacre of thousands of Polish officers buried in a mass grave in the Katyn Forest on the banks of the Dnieper, near Smolensk, when it was a Nazi-occupied territory formerly controlled by the Union of Soviet Socialist Republics.

§ 1.28 The House established a select committee to investigate the seizure of Lithuania, Latvia, and Estonia by the Union of Soviet Socialist Republics.

On July 27, 1953,(13) the House by voice vote approved House Resolution 346 (called up as privileged by direction of the Committee on Rules), creating a select committee to study and inves-

11. 116 CONG. REC. 18656–71, 91st Cong. 2d Sess. The resolution was reported on June 4, 1970 (H. Rept. No. 1160).

12. 97 CONG. REC. 11545, 11554, 82d Cong. 1st Sess. The resolution was reported on Aug. 16, 1951 (H. Rept. No. 885).

13. 99 CONG. REC. 10031, 10037, 83d Cong. 1st Sess. The resolution was reported on July 23, 1953 (H. Rept No. 903).

tigate the seizure and forced incorporation of Lithuania, Latvia, and Estonia by the Union of Soviet Socialist Republics and the treatment of the people in such areas during and following the seizure and incorporation.

Veterans' Benefits

§ 1.29 The House established a select committee to investigate alleged abuses in the education and training program for World War II veterans.

On Aug. 28, 1950,[14] the House by voice vote approved House Resolution 474 (called up as privileged by direction of the Committee on Rules), creating a select committee of nine members to investigate and study alleged abuses in the education and training program for World War II veterans, and action taken or not taken by the Veterans' Administration and state authorities to prevent abuses under the Servicemen's Readjustment Act, as amended.

§ 1.30 The House established a select committee to investigate education, training, and loan guaranty programs for veterans.

On Feb. 2, 1951,[15] the House by voice vote approved House Resolution 93 (called up as privileged by direction of the Committee on Rules), creating a select committee of nine members to investigate, study, and evaluate alleged abuses in education, training, and loan guaranty programs for World War II veterans, and the action taken or not taken by the Veterans' Administration and state agencies to prevent abuses arising under the national service life insurance program (38 USC § 701).

§ 1.31 The House established a select committee to investigate and study the benefits under federal law for the survivors of deceased members of the armed forces.

On Feb. 2, 1955,[16] the House by voice vote approved House Resolution 35 (called up as privileged by direction of the Committee on Rules), creating a select committee of five members to investigate federal benefits for sur-

14. 96 CONG. REC. 13629, 13632, 81st Cong. 2d Sess. The resolution was reported on Aug. 16, 1950 (H. Rept. No. 2927).

15. 97 CONG. REC. 876, 82d Cong. 1st Sess. The resolution was reported on Jan. 29, 1951 (H. Rept. No. 19).

16. 101 CONG. REC. 1079–81, 84th Cong. 1st Sess. The resolution was reported on Jan. 31, 1955 (H. Rept. No. 13).

vivors of members and former members of the armed forces.

Un-American Activities

§ 1.32 The House established a special committee to investigate un-American propaganda activities.

On May 26, 1938,[17] the House by voice vote approved House Resolution 282 (called up as privileged by direction of the Committee on Rules), authorizing the Speaker to appoint a special committee of seven members to investigate un-American propaganda activities in the United States, domestic diffusion of such propaganda, and all other questions relating thereto.[18]

17. 83 CONG. REC. 7568, 7586, 75th Cong. 3d Sess. The resolution was reported on May 10, 1938 (H. Rept. No. 2319).

18. Authority for the select committee to investigate un-American propaganda with the same jurisdiction as the above resolution was continued, by subsequent privileged resolutions reported from the Committee on Rules, as follows: by roll call vote of 302 yeas to 94 nays, on H. Res. 65 on Feb. 10, 1943 (89 CONG. REC. 795, 809, 810, 78th Cong. 1st Sess.); 331 yeas to 46 nays, on H. Res. 420 on Mar. 11, 1942 (88 CONG. REC. 2282, 2297, 77th Cong. 2d Sess.); 354 yeas to 6 nays, on H. Res. 90 on Feb. 11, 1941 (87 CONG. REC. 886–899, 77th Cong. 1st Sess.); 344 yeas to 21 nays, on H. Res. 321 on Jan. 23, 1940 (86 CONG. REC. 572, 604, 605, 76th Cong. 3d Sess.); and 344 yeas to 35 nays, on H. Res. 26 on Feb. 3, 1939 (84 CONG. REC. 1098, 1127, 1128, 76th Cong. 1st Sess.). An amendment to the rules, contained in H. Res. 5, established the standing Committee on Un-American Activities on Jan. 3, 1945 (91 CONG. REC. 10–15, 79th Cong. 1st Sess.). The Committee on Internal Security, established on Feb. 18, 1969 (115 CONG. REC. 3723, 3746, 91st Cong. 1st Sess.) by approval on a vote of 306 yeas to 80 nays, of H. Res. 89, reported as privileged from the Committee on Rules, assumed the jurisdiction of the Committee on Un-American Activities. Commencing with the 94th Congress, the Committee on Internal Security was abolished and its jurisdiction, files and staff transferred to the Committee on the Judiciary (see Rule X clause 1(m), *House Rules and Manual*, 1975).

19. 81 CONG. REC. 3283, 3290, 75th Cong. 1st Sess. The resolution was reported on Apr. 1, 1937 (H. Rept. No. 534).

§ 1.33 The House tabled a resolution to create a special committee to investigate un-American activities.

On Apr. 8, 1937,[19] the House on a division vote of yeas 184 to nays 38, laid on the table House Resolution 88 (called up as privileged by direction of the Committee on Rules), creating a special committee of seven members

to investigate organizations or groups of individuals operating within the United States which diffuse slanderous or libelous un-American propaganda of a religious, racial, or subversive nature tending to incite to the use of force and violence; and to investigate the extent and use of United States mail and postal services for the diffusion of these materials.

Parliamentarian's Note: The House had previously created the Special Committee to Investigate Communist Activities, chaired by Hamilton Fish, Jr., of New York, and the Special Committee on Un-American Activities, chaired by John W. McCormack, of Massachusetts, in 1930 and 1934, respectively. Authority for each of these special committees had expired at the time House Resolution 88 was introduced.[20]

Scientific Activities

§ 1.34 The House established the Select Committee on Astronautics and Space Exploration.

On Mar. 5, 1958,[1] the House by voice vote approved House Resolution 496, which had been submitted by Majority Leader John W. McCormack, of Massachusetts, by unanimous consent. The resolution was for purposes of creating the Select Committee on Astronautics and Space Exploration of 13 members to investigate all aspects of and problems relating to the exploration of outer space and the control, development, and use of astronautical resources, personnel, and facilities.

On July 21, 1958,[2] the standing Committee on Science and Astronautics was established by voice vote approval of House Resolution 580 (called up as privileged by direction of the Committee on Rules), amending Rule X clause 1 by adding subclause (q).[3]

§ 1.35 The House established a select committee to investigate research programs.

On Sept. 11, 1963,[4] the House by a roll call vote of 336 yeas to 0

20. See the remarks of Mr. Lindsay C. Warren (N.C.), at 81 CONG. REC. 3287, 76th Cong. 1st Sess., Apr. 8, 1937.

1. 104 CONG. REC. 3443, 85th Cong. 2d Sess.

2. 104 CONG. REC. 14513, 14514, 85th Cong. 2d Sess.

3. The resolution was reported on May 29, 1958 (H. Rept. No. 1837). See § 1.44, infra, for a discussion of Senate establishment of the Special Committee on Astronautical and Space Exploration and a successor standing committee, the Committee on Astronautical and Space Sciences.

4. 109 CONG. REC. 16744, 16753, 16754, 88th Cong. 1st Sess. The res-

nays approved House Resolution 504 (called up as privileged by direction of the Committee on Rules), creating a select committee of nine members to investigate expenditures for research programs, government departments and agencies which conduct research and amounts expended thereby, and facilities for coordinating research programs, including grants to colleges and universities.

Chemicals in Food Production

§ 1.36 The House established a select committee to investigate the use of chemicals in the production of food products.

On June 20, 1950,[5] the House by voice vote approved House Resolution 323 (called up as privileged by direction of the Committee on Rules), creating a select committee of seven members to investigate and study the use of chemicals, pesticides, and insecticides in the production of food products and fertilizers and their effects on the health and welfare of the nation, stability of the agricultural economy, soil, health of animals, and vegetation.

Airplane Crashes

§ 1.37 The House established a select committee to investigate crashes of commercial airplanes in 1940 and 1941.

On Mar. 6, 1941,[6] the House by voice vote approved House Resolution 125 (called up as privileged by direction of the Committee on Rules), creating a select committee of five members to investigate air crashes and other accidents in the United States in 1940 and 1941 occurring on commercial airlines; to ascertain pertinent facts relating to the construction of flying and ground equipment and the management and operation of airlines; to examine laws and regulations relating to operation and inspection of airplanes and safety equipment, and the liability of airlines for loss of life or injury to persons or property; and to investigate other matters as deemed necessary by the committee.

Migration of Destitute Citizens

§ 1.38 The House established a select committee to inves-

olution was reported on Aug. 28, 1963 (H. Rept. No. 718).

5. 96 CONG. REC. 8933–36, 81st Cong. 2d Sess. The resolution was reported on June 12, 1950 (H. Rept. No. 2214).

6. 87 CONG. REC. 1930, 1931, 1940, 77th Cong. 1st Sess. The resolution was reported on Mar. 4, 1941 (H. Rept. No. 183).

tigate the interstate migration of destitute citizens.

On Apr. 22, 1940,[7] the House by voice vote approved House Resolution 63 (called up as privileged by direction of the Committee on Rules), creating a select committee of five members to investigate the social and economic needs and interstate migration of destitute persons.[8]

Pensions

§ 1.39 The House established a select committee to investigate old-age pension plans.

On Mar. 10, 1936,[9] the House by voice vote approved House Resolution 443, authorizing the Speaker to appoint eight members to a select committee to inquire into old-age pension plans with respect to which legislation had been submitted to the House, particularly the plan embodied in a House bill (H.R. 7154), providing for retirement annuities; and to examine the conduct, history, and records of persons or groups promoting such plans. The resolution was, by unanimous consent, submitted by Mr. C. Jasper Bell, of Missouri, and was intended as a modification and clarification of House Resolution 418, which had previously been reported from the Committee on Rules (H. Rept. No. 2005), and adopted.

Offensive Literature

§ 1.40 The House established a select committee to investigate current literature.

On May 12, 1952,[10] the House by voice vote approved House Resolution 596 (called up as privileged by direction of the Committee on Rules), creating a select committee of nine members to investigate and study the extent to which current literature, books, and magazines containing im-

7. 86 CONG. REC. 4880, 4884, 76th Cong. 3d Sess. The resolution was reported on Apr. 19, 1940 (H. Rept. No. 1998).

8. Authority for this select committee was continued by voice vote approval of H. Res. 113, on Mar. 31, 1941. 87 CONG. REC. 2730, 2736, 77th Cong. 1st Sess. The resolution which was privileged, was reported on Mar. 31 from the Committee on Rules (H. Rept. No. 350). It was called up that same day, by direction of the Committee on Rules, by Mr. Lawrence Lewis [Colo.], who asked unanimous consent for its consideration.

9. 80 CONG. REC. 3506, 3507, 74th Cong. 2d Sess. See *Id.* at p. 2360 (Feb. 19, 1936), for adoption of the related resolution H. Res. 418.

10. 98 CONG. REC. 5061, 5062, 5069, 82d Cong. 2d Sess. The resolution was reported on Apr. 30, 1952 (H. Rept. No. 1837).

moral, obscene, or otherwise offensive matter, or placing an improper emphasis on crime, violence, and corruption, were being made available to Americans through the mail and otherwise, and to determine the adequacy of existing law to prevent the publication and distribution of this literature.

Crime

§ 1.41 The House established a select committee to study crime in the United States.

On May 1, 1969,(11) the House by a roll call vote of yeas 345 to nays 18, approved House Resolution 17, reported as privileged from the Committee on Rules, establishing a select committee of seven members to investigate all aspects of crime in the United States including causes and effects; preparation of statistics; exchange of information among federal, state, local, and foreign law enforcement agencies; treatment and rehabilitation of offenders; and prevention and control.(12)

Energy

§ 1.42 The House rejected a resolution establishing a select committee to investigate energy resources.

On May 26, 1971,(13) the House by a roll call vote of yeas 128 and nays 218, rejected House Resolution 155 (called up as privileged by direction of the Committee on Rules), creating a select committee of seven members to investigate availability and ownership of oil, gas, coal, and nuclear energy reserves; reasons and possible solutions for delay in new starts of fossil fueled power plants; effects of pricing practices; effects of import of low sulfur fuels; measures to increase transportation of fuel materials and close the gap between supply and demand of electric energy; and the environmental effects of the electricity industry

Sit-down Strikes

§ 1.43 The House laid on the table a resolution to create a special committee to investigate sit-down strikes.

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11. 115 CONG. REC. 11087, 11100, 11101, 91st Cong. 1st Sess. The resolution was reported on Apr. 22, 1969 (H. Rept. No. 150).

12. The House by voice vote approved H. Res. 115, which authorized an investigation of the same issues on Mar. 9, 1971. 117 CONG. REC. 5587, 5588, 5610, 92d Cong. 1st Sess.

13. 117 CONG. REC. 16984, 17002, 17003, 92d Cong. 1st Sess. The resolution was reported on May 19, 1971 (H. Rept. No. 217).

On Apr. 8, 1937,[14] the House by voice vote agreed to a motion to table House Resolution 162 (called up as privileged by direction of the Committee on Rules), to authorize the Speaker to appoint a special committee to investigate the causes and management of sit-down strikes and state and local efforts to prevent them, as well as persons instigating such strikes.

Senate Precedents

§ 1.44 The Senate established the Special Committee on Astronautical and Space Exploration.

On Feb. 6, 1958,[15] the Senate on a roll call vote of 78 yeas to 1 nay approved Senate Resolution 256, establishing a special committee of 13 Senators to investigate all aspects and problems relating to the exploration of outer space and control, development, and use of astronautical resources, personnel, equipment, and facilities.[16]

§ 1.45 The Senate established a special committee to investigate contracts under the national defense program.

On Mar. 1, 1941,[17] the Senate by voice vote approved Senate Resolution 71, establishing a special committee of seven Senators to investigate the operation of the program for procurement and construction of supplies, materials, munitions, vehicles, aircraft, vessels, plants, camps, and other articles and facilities in connection with the national defense. Areas of inquiry included (1) types and terms of contracts awarded on behalf of the United States; (2) methods by which contracts are awarded and contractors selected; (3) utilization of small business facilities; (4) geographic distribution of contracts and location of plants and facilities; (5) effect of the program with respect to labor and migration of labor; (6) perform-

14. 81 CONG. REC. 3291, 3301, 75th Cong. 1st Sess. The resolution was reported on Apr. 2, 1937 (H. Rept. No. 555)

15. 104 CONG. REC. 1804, 1806, 85th Cong. 2d Sess.

16. The Senate established the standing Committee on Astronautical and Space Sciences which assumed the functions of the select committee on July 24, 1958. See 104 CONG. REC. 14857, 14858, 85th Cong. 2d Sess., for voice vote approval of S. Res. 327. See also § 1.34, supra, for House establishment of the Select Committee on Astronautics and Space Exploration and the successor standing committee, the Committee on Science and Astronautics.

17. 87 CONG. REC. 1615, 77th Cong. 1st Sess.

ance of contracts and accountings required of contractors; (7) benefits accruing to contractors with respect to amortization for taxation and other purposes; and (8) practices of management or labor, and prices, fees, and charges which interfere with the defense program or unduly increase its cost.

§ 1.46 The Senate established the Select Committee on Presidential Campaign Activities to investigate the extent, if any, of illegal, improper, or unethical activities engaged in by persons involved in the Presidential election of 1972.

On Feb. 7, 1973,[18] the Senate by a roll call vote of 77 yeas to 0 nays approved Senate Resolution 60, establishing the Select Committee on Presidential Campaign Activities to investigate the extent, if any, of involvement in illegal, improper, or unethical conduct by persons in the Presidential campaign of 1972. Areas of inquiry included (1) breaking, entering, and bugging of headquarters or offices of the Democratic National Committee in the Watergate Building; (2) electronic surveillance of the Democratic National Committee; (3) surreptitious removal of documents; (4) preparation, transmission, or receipt of reports on the aforementioned activities; (5) whether any person alone or with others planned the aforementioned activities; (6) whether participants in the aforementioned activities were induced by bribery, coercion, or threats to plead guilty or conceal or fail to reveal such activities; (7) efforts to disrupt, hinder, impede, or sabotage campaign activities; (8) whether any person alone or with others induced activities mentioned in (7) above or paid participants; (9) fabrication, dissemination, or publication of false charges or information to discredit Presidential aspirants; (10) planning of activities mentioned in (7), (8), or (9); (11) financial transactions and storage; (12) compliance or noncompliance with congressional acts which require reporting of receipt or disbursement of money; (13) whether secret funds were kept; (14) whether documents or other physical evidence were concealed, suppressed, or destroyed; and (15) any other activities having a tendency to prove or disprove that persons acting alone or with others engaged in illegal, improper, or unethical activities in connection with the Presidential election of 1972.

18. 119 CONG. REC. 3849–51, 93d Cong. 1st Sess.

B. INQUIRIES AND THE EXECUTIVE BRANCH

§ 2. Resolutions of Inquiry and Responses

Resolutions of inquiry are usually simple resolutions used to obtain information from the executive branch. Such resolutions, if addressed to the President or head of an executive department, are given privileged status in the House, provided they seek information of a factual nature, rather than request opinions or require an investigation on the subject.[19]

The effectiveness of such a resolution derives from comity between the branches of government rather than from any elements of compulsion.[20]

Certain conventions have arisen with regard to the wording of resolutions of inquiry. Thus, the House traditionally "requests" the President and "directs" the heads of executive departments to furnish information.[21] Moreover, such resolutions often include the qualifying phrase, "if not incompatible with the public interest," particularly where the request is for information relating to foreign affairs.[1]

The ensuing precedents are illustrative of resolutions of inquiry directed to the President,[2] Secretary of State,[3] Secretary of Defense,[4] Attorney General,[5] Acting Attorney General,[6] Secretary of Commerce,[7] Secretary of the Interior,[8] Secretary of Health, Education, and Welfare,[9] and Postmaster General.[10] The emphasis in these precedents is upon the nature of the information requested in each case, and the response if any to the resolution of inquiry.[11] Actual floor procedures

19. See *House Rules and Manual* §§ 856 and 857 (1973).

20. See § 4, infra, for a discussion of legal proceedings initiated by a Senate select committee to enforce a subpena issued to the President. Other methods to obtain information include committee or subcommittee oral or written requests for documents or testimony from the President or cabinet officers.

21. 3 Hinds' Precedents §§ 1856, 1895; and Rule XXII clause 5, *House Rules and Manual* § 856 (1973).

1. See 3 Hinds' Precedents § 1899, "directing" the President, and §§ 2.1, 2.2, and 2.7, infra, "directing" the President and other officers, and §§ 2.15, and 2.21–2.23, infra, "requesting" certain department heads.

2. See §§ 2.1, 2.2, 2.7, and 2.16, infra.

3. See §§ 2.1–2.5, 2.9–2.11, 2.13–2.1.5, 2.21, and 2.26, infra.

4. See §§ 2.1, 2.6–2.8, 2.12, and 2.15 infra.

5. See §§ 2.18 and 2.19, infra.

6. See § 2.17, infra.

7. See §§ 2.20, 2.22, infra.

8. See § 2.23, infra.

9. See § 2.24, infra.

10. See § 2.25, infra.

11. See 2 Hinds' Precedents § 1596, 3 Hinds' Precedents §§ 1856–1910, and

relating to the use of resolutions of inquiry, and prerequisites for privileged status, are treated in detail elsewhere.[12] Generally, formal responses to resolutions of inquiry are laid before the House, referred to the committee having jurisdiction, and ordered printed but more informal responses to resolutions of inquiry are sometimes forwarded directly to the interested committee or Members, even where the resolution itself has been tabled or not otherwise disposed of. (See, *e.g.* § 2.11, infra.)

Foreign Affairs—American Military Involvement in South Vietnam

§ 2.1 A resolution of inquiry directing the President, Secretary of State, Secretary of Defense, and Director of the Central Intelligence Agency to furnish information relating to the history and rationale for American involvement in South Vietnam, nature and capacity of the South Vietnamese government, and plans for elections in the Republic of South Vietnam was held not privileged in response to a point of order.

On July 7, 1971,[13] Speaker Carl Albert, of Oklahoma, sustained a point of order against a resolution of inquiry, House Resolution 491, directing the President, Secretary of State, Secretary of Defense, and Director of the Central Intelligence Agency to furnish, within 15 days after adoption of the resolution, full and complete information on the following: (1) the history and rationale of American involvement in South Vietnam since completion of the study "United States-Vietnam Relationships, 1945–1967," (the Pentagon Papers) prepared by the Vietnam Task Force, Office of the Secretary of Defense; (2) the known existing plans for a residual force of American armed forces in South Vietnam; (3) the nature and capacity of the South Vietnamese government, including but not limited to their past and present military capabilities; the capacity for self-sufficiency including but not limited to the political base of the Republic, the scope if any, of governmental malfunction and corruption; the depth of popular support and procedures for dealing with nonsupport including

6 Cannon's Precedents §§ 404–437, for earlier precedents.

12. See Ch. 24, infra.

13. 117 CONG. REC. 23810, 23811, 92d Cong. 1st Sess.

but not limited to known existing studies of the economy and internal workings of the government of the Republic of South Vietnam; and (4) American and South Vietnamese plans and procedures for Nov. 1971 elections in the Republic of South Vietnam, including but not limited to United States covert or non-covert involvement in those elections.

The Speaker sustained the point of order raised by F. Edward Hebert, of Louisiana, Chairman of the Committee on Armed Services, on the ground that the resolution sought opinions rather than facts. The ruling was made when Ms. Bella S. Abzug, of New York, moved to discharge the Committee on Armed Services from further consideration of the resolution under Rule XXII clause 5.

Parliamentarian's Note: Although the issue was not raised in this instance, the reference to the Director of Central Intelligence would have destroyed the privilege if a point of order had been raised on that ground. 6 Cannon's Precedents § 406 indicates that the term "heads of executive departments" in Rule XXII clause 5,[14] refers exclusively to members of the President's cabinet and only resolutions of inquiry addressed to these heads of executive departments are privileged. (The resolution at issue in § 406 to which Cannon referred was addressed to the Federal Reserve Board.) See also 3 Hinds' Precedents §§ 1861–1863, and 5 Hinds' Precedents § 7283, for other relevant precedents.

§ 2.2 The House laid on the table resolutions of inquiry directing the President and Secretary of State to furnish the report entitled "United States-Vietnam Relationships, 1945–1967," also known as the Pentagon Papers.

On June 30, 1971,[15] the House, by a roll call vote of yeas 272 to nays 113, tabled a privileged resolution of inquiry reported adversely by the Committee on Armed Services, House Resolution 489, directing the President to furnish the House, within 15 days after adoption of the resolution, the full and complete text of the study entitled "United States-Vietnam Relationships, 1945–1967," also known as the Pentagon Papers, prepared by the Vietnam Task Force, Office of the Secretary of Defense.

On the same date,[16] the House by voice vote tabled an identical

14. *House Rules and Manual* §§ 855, 856 (1973).

15. 117 CONG. REC. 23030, 23031, 92d Cong. 1st Sess.

16. *Id.* at p. 23031.

resolution, House Resolution 490, and on July 7, 1971,[17] by voice vote tabled House Resolution 494, directing the Secretary of State to furnish this study.

South Vietnamese Presidential Election

§ 2.3 The House laid on the table a privileged resolution of inquiry directing the Secretary of State to furnish communications between the Department of State, the United States Embassy in Saigon, and certain Vietnamese presidential candidates which might relate to the Vietnamese presidential elections.

On Sept. 30, 1971,[18] the House by voice vote tabled a privileged resolution of inquiry reported adversely by the Committee on Foreign Affairs, House Resolution 595, directing the Secretary of State to furnish to the House, within one week after adoption of the resolution, the complete text of all communications, as described above, taking place since Jan. 1, 1971, pertaining to the 1971 Vietnamese presidential election.

Following this action the House by unanimous consent tabled House Resolution 619, which was identical to House Resolution 595 and had also been adversely reported by the Committee on Foreign Affairs.

§ 2.4 The House laid on the table two privileged resolutions of inquiry directing the Secretary of State to furnish information relating to an election in South Vietnam.

On Oct. 20, 1971,[19] the House laid on the table two identically worded resolutions of inquiry, House Resolution 632 and House Resolution 638, directing the Secretary of State to furnish to the Committee on Foreign Affairs,[20] not later than 15 days after adoption of the resolution, materials relating to the Oct. 3, 1971, Vietnamese election, including: (1) all documents and other pertinent information relating to public opinion surveys financed by the United States in Vietnam; (2) all documents and other information relating to use by South Vietnamese authorities of radio and television facilities financed by the United States; (3) all press re-

17. *Id.* at p. 23808.

18. 117 CONG. REC. 34266, 92d Cong. 1st Sess.

19. 117 CONG. REC. 37055, 37057, 92d Cong. 1st Sess.

20. See § 2.26, infra, for a discussion of this precedent as it relates to requesting a head of an executive department to respond directly to a committee rather than to the House.

leases by American officials in Saigon; (4) all communications between American and South Vietnamese officials; and (5) all representations made to the participants in that election by American officials concerning the desire that the election be free and contested.

These resolutions, reported adversely by the Committee on Foreign Affairs, were laid on the table by voice votes.

Phoenix Program

§ 2.5 The House laid on the table a privileged resolution of inquiry directing the Secretary of State to furnish the House certain information regarding the Phoenix Program.

On July 7, 1971,[1] the House by voice vote tabled a privileged resolution reported adversely from the Committee on Foreign Affairs, House Resolution 493, directing the Secretary of State, to the extent not incompatible with the public interest, to furnish the House, not later than 15 days following adoption of the resolution, all documents in the English language with respect to (1) the Phoenix Program, a counterintelligence operation conducted in South Vietnam, and (2) the extent of U.S. involvement in that program.

Bombardment of North Vietnam

§ 2.6 The House laid on the table a resolution of inquiry directing the Secretary of Defense to furnish information relating to American air and naval bombardment of North Vietnam.

On Aug. 16, 1972,[2] the House by voice vote tabled a privileged resolution of inquiry reported adversely by the Committee on Armed Services, House Resolution 1078, directing the Secretary of Defense, to the extent not incompatible with the public interest, to furnish, not later than seven days after adoption of the resolution, information relating to American air and naval bombardment of North Vietnam since Mar. 1, 1972, including (1) the number of sorties flown and types of ordnance used each month; (2) post-action reports and bomb damage assessments, both written and photographic; and (3) specific descriptions and photographic evidence of all damage to dikes, cit-

1. 117 CONG. REC. 23808, 92d Cong. 1st Sess.

2. 118 CONG. REC. 28365, 92d Cong. 2d Sess.

ies, and villages of North Vietnam.

§ 2.7 The House laid on the table a resolution of inquiry directing the President and Secretary of Defense to furnish information relating to American bombing of North Vietnam in 1972 and 1973.

On Mar. 6, 1973,[3] the House by voice vote tabled a resolution of inquiry reported adversely by the Committee on Armed Services, House Resolution 26, directing the President[4] and Secretary of Defense within 10 days after adoption of the resolution to furnish the House information relating to American bombing of North Vietnam from Dec. 17, 1972, through Jan. 3, 1973, including: (1) the number of sorties flown; (2) tonnage of bombs and shells fired or dropped; (3) the number and nomenclature of American airplanes lost; (4) the number of Americans killed, wounded, captured, and missing in action; (5) best available estimates of North Vietnamese casualties; (6) the cost of all bombing and shelling; and (7) the extent of damage to any and all facilities struck by bombs.

Parliamentarian's Note: House Resolution 26 was technically not privileged because the request for information on the "extent of damage" to facilities struck by bombs required an opinion or investigation.[5]

On the same date,[6] the House also tabled House Resolutions 114, 115, and 143, which were identical to House Resolution 26, except that they did not mention the President or "extent of damage" to facilities struck by bombs.

§ 2.8 The House laid on the table a privileged resolution of inquiry directing the Secretary of Defense to furnish certain information relating to prisoner of war camps in North Vietnam and American bombing in North Vietnam.

On Aug. 16, 1972,[7] the House by voice vote tabled a privileged resolution of inquiry, House Resolution 1079, reported adversely by

3. 119 CONG. REC. 6383, 6384, 93d Cong. 1st Sess.

4. To "direct" the President to furnish information contravenes standard practice. Although the House "directs" a head of an executive department, it usually "requests" the President to furnish information. See 3 Hinds Precedents §§ 1856, 1895.

5. See Rule XXII clause 5, *House Rules and Manual* § 857 (1973) and Ch. 24, infra, for discussions of the requirements for privileged status.

6. 119 CONG. REC. 6384, 6385, 93d Cong. 1st Sess., Mar. 6, 1973.

7. 118 CONG. REC. 28365, 92d Cong. 2d Sess.

the Committee on Armed Services, directing the Secretary of Defense, to the extent not incompatible with the public interest, to furnish to the House not later than seven days after the adoption of the resolution: (1) maps showing all known or suspected prisoner of war camps in North Vietnam; (2) maps showing all bombing strikes and naval bombardments from Mar. 1, 1972, to date; and (3) rules of engagement promulgated for the bombing of North Vietnam for the same period, and a description of procedures, policies, and actions taken by American Armed Forces to prevent danger to American prisoners of war.

Laotian Operations

§ 2.9 The House laid on the table a privileged resolution of inquiry directing the Secretary of State to furnish the House certain information respecting bombing operations in northern Laos.

On July 7, 1971,[8] the House by voice vote agreed to table a privileged resolution of inquiry reported adversely by the Committee on Foreign Affairs, House Resolution 495, directing the Secretary of State, to the extent not incompatible with the public interest, to furnish, within 15 days after adoption of the resolution, any documents respecting the rules of engagement and targeting, and procedures followed by the U.S. Ambassador in Laos with respect to the direction and control of American bombing operations in northern Laos during the period from Jan. 1, 1965, through June 21, 1971, together with the most recent aerial photographs of 196 Laotian villages which were identified in the resolution.

§ 2.10 The House laid on the table a privileged resolution of inquiry directing the Secretary of State to furnish information regarding American, Thai, and other foreign nation military and diplomatic operations in Laos.

On July 7, 1971,[9] the House by a roll call vote of yeas 261 to nays 118, tabled a privileged resolution of inquiry reported adversely by the Committee on Foreign Affairs, House Resolution 492, directing the Secretary of State, to the extent not incompatible with the public interest, to furnish to the House, not later than 15 days

8. 117 CONG. REC. 23808–10, 92d Cong. 1st Sess.

9. 117 CONG. REC. 23800, 23807, 23808, 92d Cong. 1st Sess.

after adoption of the resolution, any documents containing policy instructions or guidelines given to the American Ambassador in Laos for the purpose of his administration of certain operations in Laos, between Jan. 1, 1964, and June 21, 1971. Information was sought particularly with regard to: (1) covert Central Intelligence Agency operations in Laos; (2) Thai and other foreign armed forces operations in Laos; (3) American bombing operations other than along the Ho Chi Minh Trail; (4) American Armed Forces operations in Laos; and (5) United States Agency for International Development operations which have served to assist, directly or indirectly, military or Central Intelligence Agency operations in Laos, and details of such assistance.

American Bombing of Cambodia and Laos

§ 2.11 The House laid on the table a privileged resolution of inquiry directing the Secretary of State to furnish information relating to American bombing of Cambodia and Laos in 1973.

On May 9, 1973,[10] the House by voice vote tabled a privileged resolution of inquiry reported adversely by the Committee on Armed Services, House Resolution 379, directing the Secretary of State to furnish within 10 days after adoption of the resolution information relating to American bombing of Cambodia and Laos from Jan. 27, 1973, through Apr. 30, 1973, including: (1) the number of sorties flown; (2) tonnage of bombs and shells fired and dropped; (3) number and nomenclature of American airplanes lost; (4) number of Americans killed, wounded, captured, or missing in action; (5) cost of all American bombing and shelling; (6) number of sorties flown by American military airplanes for purposes other than bombing; (7) cost of all actions other than bombing; (8) number, rank, location, and nature of activity of American ground personnel in Cambodia and Laos; (9) the order of battle of all forces, both combat and noncombat, in Cambodia and Laos, including North Vietnamese, ARVN (Army of the Republic of [South] Vietnam), Viet Cong, American, and indigenous; and, for the period from Oct. 30, 1972, through Jan. 27, 1973, certain related information, including the tonnage of bombs dropped and sorties flown by American airplanes emanating from Thailand.

10. 119 CONG. REC. 14990, 14991, 14994, 93d Cong. 1st Sess.

The resolution also inquired as to the legal authority for American military activity in Cambodia and Laos since Jan. 27, 1973; and the extent of involvement of American Embassy personnel in military operations in or over Cambodia and Laos between Jan. 27, 1973, through Apr. 30, 1973.

Answers to questions in this resolution of inquiry were provided by witnesses from the Department of Defense at a hearing of the Committee on Armed Services held on May 8, 1973. Following this hearing, committee members voted 36 yeas to 0 nays to report the resolution adversely.(11)

The motion to table was offered immediately after the resolution. was reported because the Chairman of the Committee on Armed Services, F. Edward Hébert, of Louisiana, requested and obtained unanimous consent for immediate consideration of the resolution, thereby waiving the three-day availability requirement of Rule XI clause 27(d)(4).

11. See 119 CONG. REC. 14991–93, 93d Cong. 1st Sess., for a transcript of answers and remarks of F. Edward Hébert (La.), Chairman of the Committee on Armed Services, explaining the hearing on May 8, 1973.

Military Aid to Forward-defense and Mediterranean Nations

§ 2.12 The House laid on the table a privileged resolution of inquiry directing the Secretary of Defense to furnish information regarding the extent of military assistance to forward-defense and Mediterranean nations.

On Aug. 3, 1971,(12) the House by voice vote tabled a privileged resolution of inquiry reported adversely by the Committee on Armed Services, House Resolution 557, directing the Secretary of Defense, to the extent not incompatible with the public interest, to furnish to the House, not later than 15 days after adoption of the resolution, any documents regarding all forms of American military aid extended to the forward-defense nations of Greece, Turkey, Nationalist China, and South Korea as well as to Israel, Jordan, Morocco, Libya, Tunisia, Lebanon, Syria, and Saudi Arabia, between Jan. 1, 1969, and July 21, 1971.(13)

12. 117 CONG. REC. 29063, 29064, 92d Cong. 1st Sess.

13. See Ch. 24, infra, for a discussion of the proper time to call up a resolution of inquiry.

Presidential Agreements With British Prime Minister

§ 2.13 The House agreed to a privileged resolution of inquiry directing the Secretary of State to transmit information regarding any agreements made by the President and the Prime Minister of Great Britain during conversations held in Jan. 1952, after rejecting a motion to lay the resolution on the table.

On Feb. 20, 1952,(14) after rejecting the motion to table by a roll call vote of yeas 150 to nays 184, the House by a roll call vote of yeas 189 to nays 143, approved a privileged resolution of inquiry reported adversely by the Committee on Foreign Affairs, House Resolution 514, directing the Secretary of State, at the earliest practicable date, to transmit to the House information with respect to any agreements, commitments, or understandings entered into by the President and Prime Minister of Great Britain in the course of their conversations during Jan. 1952, which might require the shipment of additional members of the armed forces beyond the continental limits of the United States or involve American forces in armed conflict on foreign soil.(15)

The adverse report of the Committee on Foreign Affairs, the letter from the Assistant Secretary of State for the Secretary stating the position of the Department of State that sufficient information had been supplied, and communiques relating to the subject matter of the resolution were included in the Record.(16) On Mar. 5, 1952,(17) a letter, dated Mar. 4, 1952, from the Secretary of State, Dean Acheson, citing the President's negative response to a question about such agreements at a press conference on Feb. 20, 1952, was laid before the House, referred to the Committee on Foreign Affairs, and ordered printed.

Mexican-American Relations

§ 2.14 The House laid on the table a privileged resolution of inquiry directing the Secretary of State to furnish information relating to Mexican-American relations.

On Feb. 7, 1937,(18) the House by voice vote tabled a privileged

14. 98 CONG. REC. 1205, 1207, 1208, 1215, 1216, 82d Cong. 2d Sess.

15. See Ch. 24. infra, for a discussion of the time to report a resolution of inquiry.

16. See 98 CONG. REC. 1205, 1206, 82d Cong. 2d Sess., for these materials.

17. 98 CONG. REC. 1892, 82d Cong. 2d Sess.

18. 84 CONG. REC. 1181, 1182, 76th Cong. 1st Sess.

resolution of inquiry reported adversely by the Committee on Foreign Affairs, House Resolution 78, directing the Secretary of State to transmit, within 15 days from receipt of the resolution answers to questions relating to whether: (1) Mexico bartered oil from expropriated American and British properties for German, Italian, and Japanese products; (2) American investments in Mexico were eliminated; (3) reported loss of American investments led to reductions in American-Mexican trade; (4) Mexico appointed a Minister to Berlin and Japanese experts participated in Mexican projects; (5) State Department officials sought to obtain adequate compensation for holders of American bonds in Mexican national railroads expropriated in 1937; (6) the State Department has evidence that Germany, Italy, and Japan had an agreement to absorb Mexican oil prior to expropriation of American and British properties; (7) Mexican real wages fell since 1937; (8) the Ambassador informed the State Department that railroads and oil properties would be expropriated or whether news of that development was a surprise; (9) the State Department possessed a full record of speeches and public remarks as well as reports to the Secretary of State relating to Mexican expropriation of American properties and Mexico's relations with Germany, Italy, and Japan (the resolution sought the full text of these documents); (10) the Department of State was satisfied that the American Ambassador in Mexico City took steps to protect remaining American investments; and (11) the Department of State agreed to expropriation of American-owned property in Mexico.

Speaker William B. Bankhead, of Alabama, ruled out of order a question of consideration raised after the motion to table was made but prior to the vote.

Removal of German Industrial Plants

§ 2.15 The House agreed to a privileged resolution requesting the Secretary of State and Secretary of Defense to transmit information relating to the dismantlement and removal of industrial plants from post-war Germany. The Under Secretary of State responded for the Department of State and Department of Defense.

On Dec. 18, 1947,[19] the House by voice vote approved a privi-

19. 93 CONG. REC. 11636, 11640, 80th Cong. 1st Sess.

leged resolution of inquiry reported favorably from the Committee on Foreign Affairs, House Resolution 365, requesting the Secretary of State and the Secretary of Defense to transmit information relating to: (1) the number of plants in Germany which were dismantled and removed from that country; (2) the character and capacity of plants removed and remaining to be dismantled; (3) the number of remaining plants which could be converted to peacetime production and were capable of contributing to German export trade; (4) the basis for the determination that a particular plant was surplus; (5) the amount of material and goods, and their cost needed to be sent from the United States to compensate for production of plants removed and scheduled for dismantling; (6) whether plants were removed from any of the German zones beyond the limits prescribed or contemplated in the Yalta agreement; (7) whether essential agricultural produce was removed from any zone for delivery outside Germany; (8) the extent of removal of harbor facilities and transportation equipment; and (9) whether the U.S. government had taken appropriate steps to delay temporarily further dismantling of plants in western Germany, in order to permit further congressional study to determine whether transfers prejudice a general recovery program for western Europe.

A preamble was added by committee amendment, following voice vote approval of the resolution as amended.

On Jan. 26, 1948,[20] a letter, dated Jan. 24, 1948, from the Under Secretary of State, Robert A. Lovett, responding for the Department of State and Department of Defense to the resolution of inquiry was laid before the House and referred to the Committee on Foreign Affairs.

American Policy on Formosa

§ 2.16 The House tabled a privileged resolution of inquiry requesting the President to furnish information about American policy on Formosa.

On Feb. 9, 1950,[1] the House by voice vote agreed to table a privileged resolution of inquiry reported adversely by the Committee on Foreign Affairs, House Resolution 452, requesting the President, if not incompatible with the public interest, to furnish

20. 94 CONG. REC. 541, 542, 80th Cong. 2d Sess.

1. 96 CONG. REC. 175.3—55, 81st Cong. 2d Sess.

within 15 days after adoption of the resolution, full and complete answers to questions relating to the President's statement of Jan. 5, 1950, on policy toward Formosa and the current situation in China and the Far East.[2]

Domestic Affairs—Evidence of Criminal Activity

§ 2.17 The House discharged a committee from further consideration and laid on the table a privileged resolution of inquiry directing the Acting Attorney General to furnish all documents and items of evidence in the custody of the Watergate Special Prosecutor as of Oct. 20, 1973.

On Nov. 1, 1973,[3] the House discharged the Committee on the Judiciary from further consideration and tabled House Resolution 634, directing the Acting Attorney General, to the extent not incompatible with the public interest, to furnish, not later than 15 days after adoption of the resolution, true copies of all papers, documents, recordings, memoranda, and items of evidence in the custody of the Special Prosecutor and Director of the Special Prosecution Force, as of noon, Saturday, Oct. 20, 1973.[4]

Parliamentarian's Note: President Richard M. Nixon dismissed the Special Prosecutor, Archibald Cox, on the evening of Oct. 20, 1973.

When the Acting Attorney General subsequently turned the documents over to a federal court, thus assuring their preservation, the Member who introduced this resolution of inquiry, Mr. Paul M. McCloskey, of California, decided not to proceed further with it and sought and obtained unanimous consent to discharge the committee from further consideration and to table the resolution.

§ 2.18 The House discharged a committee from further consideration and laid on the table a privileged resolution

2. See Ch. 24, infra, for a discussion of the time to report back a resolution of inquiry.

3. 119 CONG. REC. 35644, 93d Cong. 1st Sess.

4. H. Res. 634 read as follows:

Resolved, That the Acting Attorney General of the United States, to the extent not incompatible with the public interest, is directed to furnish to the House of Representatives not later than fifteen days following the adoption of this resolution, true copies of all papers, documents, recordings, memorandums, and items of evidence in the custody of the Special Prosecutor and Director, Watergate Special Prosecution Force, Archibald Cox as of noon, Saturday, October 20, 1973.

of inquiry directing the Attorney General to furnish all factual information as to whether the Vice President may have accepted bribes.

On Oct. 10, 1973,[5] the House, pursuant to the unanimous-consent request of Mr. Paul Findley, of Illinois, discharged the Committee on the Judiciary from further consideration and tabled House Resolution 572, a privileged resolution of inquiry directing the Attorney General to inform the House of all facts within the knowledge of the Department of Justice relating to whether the Vice President, Spiro T. Agnew, accepted bribes or received consideration for services rendered or promised in the performance of his official responsibilities as a public official in Maryland or as Vice President or failed to declare his income for tax purposes.[6]

Parliamentarian's Note: Vice President Agnew resigned his office, and entered a plea of nolo contendere to a count of failure to report certain income, on Oct. 10, 1973.

§ 2.19 The House laid on the table a privileged resolution of inquiry directing the Attorney General to transmit information relating to the kidnapping of David Levinson and Robert Minor.

On May 16, 1935,[7] the House by a vote of yeas 276, to nays 40, tabled a privileged resolution of inquiry reported by the Committee on the Judiciary, House Resolution 219, directing the Attorney General to transmit to the House at the earliest practical moment: (1) copies of all official information on file in the Department of Justice or in possession of its agents concerning the kidnapping of David Levinson and Robert Minor, in Gallup, New Mexico, on May 2, 1935; (2) information as to whether a person or persons had been apprehended or taken into custody and charged with kidnapping and, if not, whether

5. 119 CONG. REC. 33687, 93d Cong. 1st Sess.

6. H. Res. 572 read as follows:

Resolved, That the Attorney General of the United States be, and he is hereby directed to inform the House of all the facts within the knowledge of the Department of Justice that the Vice President of the United States, Spiro T. Agnew, accepted bribes or received consideration for services rendered or promised in the performance of his official responsibilities as a public official in the State of Maryland or Vice President of the United States, or failed to declare his income for tax purposes.

7. 79 CONG. REC. 7687, 7688, 74th Cong. 1st Sess.

the Department of Justice had instituted and prosecuted an investigation with a view to bringing to justice those guilty of violating 18 USC § 408a, as amended by Public Law No. 232 of the 73d Congress (May 18, 1934); (3) name or names of all persons questioned in connection with this investigation and statements made by them; (4) information as to whether the crime was completed within Navajo Indian Reservation, western New Mexico; and (5) whether the reservation was under the jurisdiction of the U.S. government and whether the Attorney General had authority to prosecute crimes committed within the reservation.

Speaker Joseph W. Byrns, of Tennessee, overruled a point of order raised against the resolution because it sought information (testimony of witnesses given to New Mexico law enforcement officials) that was not in the possession of the Attorney General.

Security Files on Government Officials

§ 2.20 The House agreed to a resolution of inquiry directing the Secretary of Commerce to transmit a letter from the Director of the Federal Bureau of Investigation to the Secretary regarding the Director of the National Bureau of Standards.

On Apr. 22, 1948,[8] the House by a roll call vote of yeas 302 to nays 29, approved a privileged resolution of inquiry, House Resolution 522, reported favorably by the Committee on Interstate and Foreign Commerce, directing the Secretary of Commerce to transmit forthwith the full text of a letter dated May 15, 1947, written by the Director of the Federal Bureau of Investigation and addressed to the Secretary, relating to Dr. Edward U. Condon, Director of the National Bureau of Standards, about whom allegations of disloyal conduct had been made.[9]

On Apr. 26, 1948,[10] a communication dated Apr. 23, 1948, from the Acting Secretary of Commerce, William C. Foster, refusing to transmit the 1947 letter and citing a directive of President Harry S. Truman dated Mar. 13, 1948, ordering all executive

8. 94 CONG. REC. 4777, 4786, 80th Cong. 2d Sess.

9. See 94 CONG. REC. A2458–A2461, 80th Cong. 2d Sess., Apr. 22, 1948, for letters from former Attorney General Robert H. Jackson and Special Assistant to the Attorney General Peyton Ford and a legal memorandum relating to this incident and the broader issue of executive privilege.

10. 94 CONG. REC. 4879, 80th Cong. 2d Sess.

branch officials to decline to disclose Loyalty Board files to any person or agency was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.(11)

Fish Imports

§ 2.21 The House agreed to a resolution requesting the Secretary of State to study the effect of increased imports on the domestic fishing industry. The Assistant Secretary responded for the Secretary.

On Apr. 4, 1949,(12) the House by voice vote approved a resolution reported favorably by the Committee on Merchant Marine and Fisheries and called from the Consent Calendar.(13) House Resolution 147 requested the Secretary of State to make an immediate study on the effect on the domestic fishing industry of increasing imports of fresh and frozen fish, especially ground fish fillets, into the United States; and, with the advice of and in coordination with appropriate executive departments and independent agencies of government, to recommend means by which the American fishing industry may survive; and to report not later than May 15, 1949.

The resolution contained a preamble.

On May 17, 1949,(14) a letter and report of findings from the Assistant Secretary of State, Ernest A. Gross, responding for the Secretary and Department to the resolution of inquiry, was laid before the House, referred to the Committee on Merchant Marine

11. See § 5.3, infra, for a discussion of House approval, and the text, of H.J. Res. 342, directing officers and employees of the executive branch to provide information to Congress. See also the minority report to H. REPT. NO. 1595, pp. 8–10 which accompanies the joint resolution and contains a Mar. 15, 1948, memorandum from President Truman stating precedents of Presidential refusals to respond to requests for information.

12. 95 CONG. REC. 3820–22, 81st Cong. 1st Sess.

13. *Parliamentarian's Note:* This measure would have been subject to points of order that it was not privileged if the committee chairman had sought to call it up as privileged business because it required an investigation (see 3 Hinds' Precedents §§ 1872–74 and 6 Cannon's Precedents §§ 422, 427, 429, and 432) and contained a preamble (see 3 Hinds' Precedents §§ 1877, 1878 and 6 Cannon's Precedents §§ 422, 427). See also Rule XXII clause 5, *House Rules and Manual* § 857 (1973).

14. 95 CONG. REC. 6372, 81st Cong. 1st Sess.

and Fisheries, and ordered printed.

Foreign Sales of Short Supply Goods

§ 2.22 The House agreed to a privileged resolution of inquiry requesting the Secretary of Commerce to furnish information regarding sales to foreign countries of supplies, shortages of which might endanger national defense and security.

On Dec. 5, 1947,[15] the House by voice vote approved a privileged resolution of inquiry, House Resolution 366, reported favorably and unanimously by the Committee on Interstate and Foreign Commerce, with a committee amendment requesting[16] the Secretary of Commerce to furnish the House with information concerning shipments of heavy machinery, farm and railroad equipment, motor vehicles, metals and metal products, coal, petroleum and petroleum products, building materials, meats and grains, and all other supplies shortages of which might endanger national defense or security, which were made to each foreign country since Jan. 1, 1947, including the most recent date for which figures were obtainable; names of firms or individuals making these sales, dates orders were received and supplies were delivered, and the nature of payments made in return for supplies; and information revealing the extent of unfilled orders for the above-listed supplies which each foreign country has on record with firms or individuals in the United States as of the date of adoption of the resolution.

On Jan. 8, 1948,[17] a letter in response dated Jan. 7, 1948, accompanied by reports of study findings from the Acting Secretary of Commerce, William C. Foster, were laid before the House and referred to the Committee on Interstate and Foreign Commerce.

Domestic Energy Sources

§ 2.23 The House agreed to a resolution of inquiry requesting the Secretary of the Interior to furnish information

15. 93 CONG. REC. 11075, 11076, 80th Cong. 1st Sess.

16. *Parliamentarian's Note:* To "request" the Secretary of Commerce to furnish information deviates from the standard practice which is to "request" the President and "direct" a head of an executive department to furnish information. See 3 Hinds' Precedents §§ 1856, 1895 and Rule XXII clause 5, *House Rules and Manual* § 856 (1973).

17. 94 CONG. REC. 39, 80th Cong. 2d Sess.

relating to domestic availability of petroleum and coal. The Secretary responded by providing reports.

On Feb. 16, 1948,[18] the House by voice vote approved a resolution of inquiry (H. Res. 385) reported favorably by the Committee on Public Lands and called from the Consent Calendar requesting the Secretary of the Interior to furnish the House full information in his possession concerning domestic availability of fuel oil, gasoline, petroleum products, and coal, as well as information on the steps the government should take to make the proper and necessary supply available.

On Apr. 30, 1948,[19] a letter dated Apr. 30, 1948, and reports from Secretary of the Interior J. A. Krug, responding to the resolution of inquiry, were laid before the House and referred to the Committee on Public Lands.

Busing

§ 2.24 After discharging a committee from further consideration of the measure, the House agreed to a resolution of inquiry directing the Secretary of Health, Education, and Welfare to furnish a list of public school systems which receive federal funds and engage in busing of schoolchildren to achieve racial balance, and any departmental rules and regulations regarding busing. The Secretary responded that he was unable to provide the information.

On Aug. 2, 1971,[20] the House by a roll call vote of yeas 252 to nays 129 discharged the Committee on Education and Labor from further consideration and then by a roll call vote of yeas 351 to nays 36, agreed to House Resolution 539, directing the Secretary of Health, Education, and Welfare, to the extent not incompatible with the public interest, to furnish to the House, not later than 60 days after adoption of the resolution, any documents containing a list of public school systems which, during the period between Aug. 1, 1971 through June 30, 1972, would be receiving federal funds and busing schoolchildren to achieve racial balance; and any documents respecting departmental rules and regulations regarding use of federal funds ad-

18. 94 CONG. REC. 1328, 1329, 80th Cong. 2d Sess.

19. *Id.* at p. 5163.

20. 117 CONG. REC. 28863, 28869, 92d Cong. 1st Sess.

ministered by the department for busing.

On Aug. 3, 1971,[1] the Secretary of Health, Education, and Welfare, Elliot L. Richardson, in a letter of the same date stated that because the department did not administer busing programs, it did not have a reason either to compile a list of school districts which bus schoolchildren or to draft rules or regulations respecting busing. He enclosed a memorandum from the Associate Commissioner, Equal Educational Opportunity, Office of Education, regarding the policy on funding transportation costs for the Emergency School Assistance Program, and a proposed amendment to a pending bill, H.R. 2266, the Emergency School Aid Act.

The letter, memorandum, and proposed amendment were laid before the House and referred to the Committee on Education and Labor.

Postal Temporaries

§ 2.25 The House laid on the table a privileged resolution of inquiry directing the Postmaster General to furnish the names of persons employed temporarily during the summer of 1965.

On Sept. 16, 1965,[2] the House by a roll call vote of yeas 185 to nays 181, tabled a privileged resolution of inquiry reported adversely by the Committee on Post Office and Civil Service, House Resolution 574, directing the Postmaster General to furnish to the House the names of all persons employed by the Post Office Department as temporary employees at any time during the period beginning on May 23, 1965, and ending on Sept. 6, 1965.[3]

Information Furnished to Committee

§ 2.26 Two resolutions of inquiry directing the Secretary of State to furnish information to a committee rather than to the House were called up and considered as privileged business.

On Oct. 20, 1971,[4] two identically worded resolutions of inquiry, House Resolution 632 and House Resolution 638, directing the Secretary of State to furnish information to a committee relating to the South Vietnamese elec-

1. 117 CONG. REC. 29137, 92d Cong. 1st Sess.

2. 111 CONG. REC. 24030, 24034, 89th Cong. 1st Sess.

3. See Ch. 24, infra, for a discussion of the privileged status of resolutions of inquiry.

4. 117 CONG. REC. 37055, 37057, 92d Cong. 1st Sess.

tion of Oct. 3, 1971,[5] were called up and considered as privileged business. The privileged status was not questioned when these resolutions were called up.[6]

Parliamentarian's Note: The privileged status of these resolutions could have been questioned because they directed the Secretary to furnish information to the committee rather than directly to the House. The only precedent on this point is 3 Hinds' Precedents § 1860, in which Speaker Joseph G. Cannon, of Illinois, ruled that a resolution authorizing a committee to request information from the Postmaster General and requesting him to send certain papers to the committee was privileged as a resolution of inquiry.

§ 3. Executive Branch Refusals to Provide Information

The authority of Congress to obtain information needed to legislate effectively and oversee other branches has often been challenged by the efforts of the executive branch to withhold material which that branch considers confidential, including information relating to military affairs and foreign policy. During the period prior to the "Watergate" investigations of 1973 and 1974, case law on these two potentially conflicting prerogatives developed independently.[7] Generally, such a conflict was averted, not because the executive branch complied with all requests and subpenas[8] but because the Congress

5. See § 2.4, supra, for the content of these resolutions.

6. See § 2.4, supra, for the disposition of the resolutions.

7. See, for example, *Kilbourn* v *Thompson*, 103 U.S. 168 (1881), *McGrain* v *Daugherty*, 273 U.S. 135 (1927), *Sinclair* v *United States*, 279 U.S. 263 (1929), *Watkins* v *United States*, 354 U.S. 178 (1957), *Barenblatt* v *United States*, 360 U.S. 109 (1959), for judicial recognition of legislative authority to obtain information; and *United States* v *Burr*, 25 F Cas. 187 (No. 14, 694) (cc Va. 1807); *United States* v *Reynolds*, 345 U.S. 1 (1953); and *McPhaul* v *United States*, 364 U.S. 372, 382–383 (1960), for judicial recognition of executive authority to withhold information.

8. Commenting on a survey conducted by the Senate Subcommittee on Separation of Powers for the period 1964 to 1973, Chairman Sam J. Ervin, Jr., of North Carolina, stated that the executive branch on 284 occasions refused to provide testimony or documents requested by House or Senate committees or subcommittees. These refusals were in response to oral or written requests, as distinguished from subpenas. See Senate Committee on the Judiciary, Sub-

when rebuffed did not exhaust all procedures to enforce its requests. The Watergate crisis, of course, brought the law on the subject into sharper focus.[9]

Refusals of the executive branch to provide information to the Congress, while representing only a small portion of executive responses to requests for information, have frequently occurred. Such refusals have generally been in response to informal requests for information as distinguished from a subpena. Such refusals to provide information to the Congress have been based on the following grounds:[10] (1) executive privilege, (2) alleged prerogative of office, (3) law or pretext of law, (4) classified information, (5) prejudice to litigation or investigation, (6) "inappropriateness," and, (7) other reasons, including previous submission of information, personal inconvenience, possible "adverse reaction," and claims that compliance would "hamper the agency and create adverse publicity," "create public concern," or "set a precedent."

The following are examples of instances in which the President or executive officers have refused to provide information to the Congress.

Examples of refusals by the President or executive branch officers during the administration of President Franklin D. Roosevelt include the following:[11]

—Federal Bureau of Investigation records and reports were refused to

committee on Separation of Powers, Refusals by the Executive Branch to Provide Information to the Congress 1964–1973, 93d Cong. 2d Sess. (1974), Foreword.

The only constitutional requirement relating the President's duty to provide information to Congress is article II, § 3, which provides, "He [the President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their consideration such Measures as he shall judge necessary and expedient. . . ."

9. See § 4, infra, for a discussion of a suit against the President to enforce a Senate subpena.

10. These categories appear in a document of the Senate Committee on the Judiciary, Subcommittee on Separation of Powers, Refusals by the Executive Branch to Provide Information to the Congress 1964–1973, 93d Cong. 2d Sess. (1974) pp. 4–9.

11. This list, which is not exhaustive but merely illustrative, is taken from a memorandum from Attorney General Herbert Brownell to President Eisenhower and reprinted in Senate Committee on Government Operations, Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr, 83d Cong. 2d Sess., hearing of May 17, 1954, pp. 1269–1275.

congressional committees, in the public interest (40 Opinions of the Attorney General [hereinafter cited as Op. A.G.] No. 8, Apr. 30, 1941).

—The Director of the Federal Bureau of Investigation refused to give testimony or to exhibit a copy of the President's directive requiring him, in the interests of national security, to refrain from testifying or from disclosing the contents of the Bureau's reports and activities (Hearings, Vol. 2, House, 78th Cong. Select Committee to Investigate the Federal Communications Commission [1944] p. 2337).

—Communications between the President and the heads of departments were held to be confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress (Letter dated Jan. 22, 1944, signed Francis Biddle, Attorney General, to Select Committee, etc.).

—The Director of the Bureau of the Budget refused to testify and to produce the bureau's files, pursuant to subpoena which had been served upon him, because the President had instructed him not to make public the records of the bureau due to their confidential nature. Public interest was again invoked to prevent disclosure (Reliance placed on Attorney General's Opinion in 40 Op. A.G. No. 8, Apr. 30, 1941).

—The Secretaries of War and Navy were directed not to deliver documents which the committee had requested, on grounds of public interest. The Secretaries, in their own judgment, refused permission to Army and Navy officers to appear and testify because they felt that it would be contrary to the public interests (Hearings, Select Committee to Investigate the Federal Communications Commission, Vol. 1, pp. 46, 48–68).

The following examples arose during the administration of President Harry S. Truman:[12]

—An FBI letter-report on Dr. Edward U. Condon, Director of National Bureau of Standards, was refused by Secretary of Commerce (Mar. 4, 1948).

—The President issued a directive forbidding all Executive departments and agencies to furnish information or reports concerning the loyalty of their employees to any court or committee of Congress, unless the President approves (Mar. 15, 1948).

—Dr. John R. Steelman, Confidential Adviser to the President, refused to appear before the Committee on Education and Labor of the House, following the service of two subpoenas upon him. The President directed him not to appear (March 1948).

—The Attorney General wrote Senator Ferguson, Chairman of the Senate Investigations Subcommittee, that he would not furnish letters, memoranda, and other notices which the Justice Department had furnished to other government agencies concerning W. W. Remington (Aug. 5, 1948).

—Senate Resolution 231 having directed a Senate subcommittee to procure State Department loyalty files, President Truman refused to permit such files to be furnished, following vigorous opposition by J. Edgar Hoover to the request (Feb. 22, 1950).

—The Attorney General and the Director of the FBI appeared before a

12. *Id.*

Senate subcommittee. Mr. Hoover's historic statement of his reasons for refusing to furnish raw files was approved by the Attorney General (Mar. 27, 1950).

—General Bradley refused to divulge conversations between the President and his advisers to the combined Senate Foreign Relations and Armed Services Committees (May 16, 1951).

—President Truman directed the Secretary of State to refuse to the Senate Internal Security Subcommittee the reports and views of foreign service officers (Jan. 31, 1952).

—Acting Attorney General Perlman laid down a procedure for complying with requests for inspection of Department of Justice files by the Committee on the Judiciary. Requests on open cases would not be honored. As to closed cases, files would be made available. All FBI reports and confidential information would not be made available. As to personnel files, they are never disclosed (Apr. 22, 1952).

—President Truman instructed the Secretary of State to withhold from a Senate Appropriations Subcommittee files on loyalty and security investigations of employees—such policy to apply to all Executive agencies. The names of individuals determined to be security risks would not be divulged. The voting record of members of an agency loyalty board would not be divulged (Apr. 3, 1952).

During the administration of President Dwight D. Eisenhower, the following instances arose:[13]

—In a letter dated May 17, 1954, President Eisenhower ordered Secretary of Defense Wilson to instruct Department of Defense employees not to testify or produce documents about any executive branch communications or conversations at the Army-McCarthy hearings before the Senate Subcommittee on Permanent Investigations.

—On July 18, 1955, the General Manager of the Atomic Energy Commission refused to provide the Senate Subcommittee on Antitrust and Monopoly with papers relating to the contract between the Commission and the Mississippi Valley Generating Company (the Dixon-Yates contract) for construction of an electrical powerplant and sale of the generated power to the United States.

—In letters dated July 21, and July 26, 1955, Presidential Assistant Sherman Adams declined an invitation to appear before the Senate Subcommittee on Antitrust and Monopoly

13. This list, which is merely illustrative, was compiled from instances cited in Kramer, Robert and Marcuse, Herman, Executive Privilege—A Study of the Period 1953–1960, which contained responses to an Apr. 2, 1957, letter from the Chairman of the Senate Subcommittee on Constitutional Rights requesting agencies and departments to report instances of refusals to provide information since May 17, 1954. See also House Subcommittee on Government Information of Committee on Government Operations, Availability of Information from Federal Agencies (the First Five Years and Progress of a Study, Aug. 1959–July 1960), H. REPT. NO. 2084, 86th Cong. 2d Sess., 5–35 (1960), for a chart listing refusals.

to testify about his request for a postponement of the June 13, 1955, Securities and Exchange Commission hearing on a contract between the Atomic Energy Commission and the Mississippi Valley Generating Company (the Dixon-Yates contract) for construction of an electrical powerplant and sale of the generated power to the United States.

—On Dec. 5, 1955, before the Senate Subcommittee on Antitrust and Monopoly, the Chairman of the Atomic Energy Commission refused to answer questions relating to executive branch discussions about the contract between the Commission and the Mississippi Valley Generating Company (the Dixon-Yates contract) for construction of an electrical powerplant and sale of the generated power to the United States.

—The Administrator of the Small Business Administration, who had received a subpena duces tecum, refused to provide a subcommittee of the Senate Committee on Post Office and Civil Service with security files about a named individual on the ground that President Eisenhower's Executive Order 10450 required confidential preservation of employee security files.

—The International Cooperation Administration refused to provide the General Accounting Office with evaluation reports on American foreign assistance programs to the following countries: Taiwan and Pakistan, 1957; India, Sept. 1959; Guatemala, Mar. 1960; Bolivia, May 1960; Brazil, May 1960; Laos, Aug. 1959; Vietnam, 1959.

—On Apr. 13, 1957, the Department of Defense refused to provide the Chairman of the House Subcommittee on Public Information with investigative memoranda and a report of conversations between the Department and newsmen.

—On Jan. 12, 1957, the Department of the Army refused to provide the Chairman of the House Subcommittee on Public Information with an investigative file compiled in connection with charges of disloyalty and subversion at the Signal Corps Intelligence Agency.

—In 1956, the Chairman of the Civil Service Commission, who had received a subpena duces tecum, refused to provide the Senate Committee on Post Office and Civil Service with some but not all Federal Employees' Security Program files, documents, and records about three named individuals.

—On Nov. 12, 1956, the Department of Defense refused to provide the Chairman of the House Subcommittee on Public Information with a memorandum of the Under Secretary of the Navy relating to a discussion with an Assistant Secretary of Defense about the Department's responsibility to safeguard intradepartmental communications of an advisory and preliminary nature.

—On July 27 and Dec. 26, 1956, the Office of Defense Mobilization refused to provide the House Subcommittee on Military Operations with copies of command post exercise proclamations issued during Operation Alert 1956.

—In July 1956, the Department of the Army refused to provide the Chairman of the House Armed Services Committee with intradepartmental communications pertaining to an officer's status. A complete statement of the basis for the final decision in the matter was submitted.

—On Feb. 20, 1956, the Secretaries of Defense, State, Commerce, and the Director of the International Cooperation Administration refused to provide the Senate Permanent Investigations Subcommittee with information relating to East-West trade controls and instructed employees who might be called to testify on this matter to refuse to testify.

—On Feb. 3, 1956, the Department of the Interior refused to provide the House Subcommittee on Antitrust and Monopoly with portions of files of the National Petroleum Council which had not been made available to the legislative branch under a long established executive branch policy, as well as documents which had been received by the Council only on the condition that they be kept confidential.

—On Sept. 2–6, 1955, the Department of the Army denied requests of the Committee on House Appropriations for Inspector General's reports and Auditor General's reports. Requested summaries of all actions taken in connection with the contracts under investigation were provided.

—On Sept. 16, 1955, the Department of the Air Force refused to provide the Chairman of the Senate Preparedness Investigating Subcommittee with material derived from an Inspector General's report.

—On Feb. 2, 1956, the Department of the Air Force refused to provide the House Committee on Appropriations with Inspector General's reports and Auditor General's reports.

—On Jan. 25, 1957, the Department of the Air Force refused to provide the Chairman of the House Committee on Post Office and Civil Service with a report of the Inspector General concerning employment conditions in Okinawa. A summary of the findings of the report was submitted.

—On Jan. 17, 1956, the Department of the Air Force refused to provide the Chairman of the Senate Committee on Interstate and Foreign Commerce with information concerning the discharge of a serviceman.

—On Oct. 13, 1955, the Civil Service Commission denied a request from the Clerk of the House Committee on Un-American Activities to review the Commission's files personally.

—In June of 1955, the Department of State refused to disclose to a subcommittee of the Senate Committee on Post Office and Civil Service the personnel and security file of the Federal Employees' Security Program of a named individual.

—In May of 1955, the Atomic Energy Commission refused to provide the Joint Committee on Atomic Energy with copies of certain National Security Council documents which had been mentioned in a memorandum from the commission to the committee regarding a nuclear-powered merchant ship. A statement as to relevant presidentially approved policies contained in those documents was supplied.

—On May 12, 1955, the Department of the Interior refused to provide the House Subcommittee on Public Works and Resources with exchanges of correspondence between departmental officials regarding a departmental order which was submitted.

—On May 5, 1955, the Department of the Interior refused to provide the Subcommittee on Public Works and Resources with surnamed (initialed)

file copies of an amendment to 43 C.F.R. Part 244.

—On Feb. 8, 1955, the Department of the Army refused to provide the Chairman of the Senate Permanent Investigations Subcommittee with the Inspector General's report on Irving Peress, but did provide a detailed summary of all actions taken by the Army in the Peress case.

—On Sept. 6, 1954, the Department of the Army denied a request of the Chairman of the Senate Internal Security Subcommittee for a document entitled "Research Material for Political Intelligence Problem."

—On July 13, 1954, and Mar. 3, 1955, the Bureau of the Budget [14] denied requests for information made by the Senate Internal Security Subcommittee.

—In 1956, the Department of State refused to provide the Senate Permanent Subcommittee on Investigations with material relating to East-West trade policy. Refusals during the administration of President John F. Kennedy include the following: [15]

—On or about June 21, 1962, the Food and Drug Administration refused to provide the House Interstate and Foreign Commerce Committee with requested files on the drug MEA–29.

—On or about June 27, 1962, the State Department refused to provide the Senate Foreign Relations Committee a copy of a working paper on the "mellowing" of the Soviet Union.

—On or about Feb. 7–8, 1963, General Maxwell D. Taylor, during testimony before the House Department of Defense Appropriations Subcommittee, refused to discuss the Bay of Pigs invasion as "it would result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned.

The following refusals occurred during the administration of President Lyndon B. Johnson: [16]

—On Apr. 4, 1968, the Department of Defense refused to provide the Senate Foreign Relations Committee a copy of the Command Control Study of the Gulf of Tonkin incident (U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *Executive Privilege: The Withholding of Information by the Executive Branch*. Hearings, 92d Cong., 1st sess. Washington: U.S. Govt. Print. Off., 1971, p. 39 [hereinafter cited as Executive Privilege]).

—On or about Sept. 18, 1968, Treasury Under Secretary Joseph W. Barr and presidential Associate Special Counsel W. DeVier Pierson refused to

14. This name has been changed to the Office of Management and Budget.

15. This list is taken from a study compiled by Harold C. Relyea, Analyst, American National Government, Government and General Research Division, Library of Congress, completed on Mar. 26, 1973, and reprinted in House Committee on Government Operations, [Unnamed] Subcommittee Hearings on Availability of Information to Congress, 93d Cong. 1st Sess. (1973), 264, 271–274. This list with refusals by White House aides excised is reprinted at 119 CONG. REC 10081, 10082, 93d Cong. 1st Sess., Mar. 28, 1973.

16. See 119 CONG. REC. 10081, 93d Cong. 1st Sess., Mar. 28, 1973.

testify before the Senate Judiciary Committee during hearings on the nomination of Associate Justice Abe Fortas to be Chief Justice.

Refusals during the administration of President Richard M. Nixon include the following:[17]

—On July 26, 1969, the Department of Defense refused to provide the five-year plan for military assistance programs to the Senate Foreign Relations Committee (Executive Privilege, p. 40).

—On or about Aug. 9, 1969, the Department of Defense refused to provide the Senate Foreign Relations Committee a copy of a defense agreement between the United States and Thailand.

—On Dec. 20, 1969, the Department of Defense refused to supply the Senate Foreign Relations Committee the "Pentagon Papers" (Executive Privilege, pp. 37–38).

—On or about Mar. 19, 1970, Secretary of Defense Melvin Laird declined an invitation to appear before the Senate Foreign Relations Committee's Disarmament Subcommittee.

—On Nov. 21, 1970, Attorney General John Mitchell refused to supply certain Federal Bureau of Investigation files to the House Intergovernmental Relations Subcommittee (*executive privilege formally invoked*).

—On Mar. 2, 1971, Department of Defense General Counsel J. Fred Buzhardt refused to release an Army investigation report on the 113th Intelligence Group to the Senate Constitutional Rights Subcommittee (Executive Privilege, pp. 402–405).

—On Apr. 10, 1971, the Department of Defense refused to supply continuous monthly reports on military operations in Southeast Asia to the Senate Foreign Relations Committee (Executive Privilege, p. 47).

—On Apr. 19, 1971, the Department of Defense refused to allow three generals to appear before the Senate Constitutional Rights Subcommittee (Id. p. 402).

—On June 9, 1971, the Department of Defense refused to release computerized surveillance records to the Senate Constitutional Rights Subcommittee and refused to agree to a subcommittee report on such records (Executive Privilege, p. 398–399).

—On Aug. 31, 1971, the Department of Defense refused to supply certain foreign military assistance plans to the Senate Foreign Relations Committee (*executive privilege formally invoked*).

—On Sept. 21, 1971, White House Director of Communications Herbert G. Klein declined to appear before the Senate Constitutional Rights Subcommittee (U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. *Freedom of the Press. Hearings*, 92d Cong., 1st and 2d sess. Washington: U.S. Govt. Print. Off., p. 1299).

—In Dec., 1971, White House Counsel John W. Dean III indicated neither Frederick Malek nor Charles Colson, both of the White House, would appear before the Senate Constitutional Rights Subcommittee during hearings regarding an F.B.I. investigation of C.B.S. reporter Daniel Schorr (Executive Privilege, p. 425).

—On Feb. 28, 1972, White House Counsel John W. Dean III indicated

17. See 119 CONG. REC. 10081, 10082, 93d Cong. 1st Sess., Mar. 28, 1973.

the unwillingness of presidential aide Henry Kissinger to appear before the Senate Foreign Relations Committee.

—On Mar. 15, 1972, the White House refused to allow the House Foreign Operations and Government Information Subcommittee to obtain country field submissions for Cambodian foreign assistance for the fiscal years 1972 and 1973 while simultaneously denying the Senate Foreign Relations Committee access to U.S.I.A. program planning papers (*executive privilege formally invoked*).

—On Mar. 20, 1972, Frank Shakespeare, Director of the United States Information Agency, refused during testimony before the Senate Foreign Relations Committee to provide copies of U.S.I.A. program planning papers withheld by a formal invocation of executive privilege on March 15.

—On or about Mar. 20, 1972, the State Department refused to supply the Senate Foreign Relations Committee a copy of "Negotiations, 1964–1968: The Half-Hearted Search for Peace in Vietnam."

—On Apr. 27, 1972, Treasury Secretary John Connally refused to testify before the Joint Economic Committee on the matter of the Emergency Loan Guarantee Board refusing to supply requested records on the Lockheed loan to the General Accounting Office.

—On Apr. 29, 1972, White House Counsel John W. Dean III indicated the unwillingness of David Young, Special Assistant to the National Security Council, to appear before the House Foreign Operations and Government Information Subcommittee (U.S. Congress. House. Committee on Government Operations. Foreign Operations and Government Information Subcommittee. *U.S. Government Information Policies and Practices—Security Classification Problems Involving Section (b)(1) of the Freedom of Information Act.* Hearings, 92d Cong., 2d sess. Washington: U.S. Govt. Print. Off., 1972, p. 2453).

—On or about June 8, 1972, Henry Ramirez, Chairman of the Cabinet Committee on Opportunities for the Spanish Speaking, refused to testify before the House Judiciary Subcommittee on Civil Rights.

—On July 26, 1972, Department of Defense Assistant General Counsel Benjamin Forman testified before the Senate Foreign Relations Committee before refusal to discuss weather modification activities in Southeast Asia.

—On Aug. 2, 1972, Henry Ramirez, Chairman of the Cabinet Committee on Opportunities for the Spanish Speaking again refused to testify before the House Judiciary Subcommittee on Civil Rights.

—On Oct. 6, 1972, Securities and Exchange Commission Chairman William J. Casey refused to turn over the Commission's investigative files on I.T.T. to the House Interstate and Foreign Commerce Committee and disclosed that the files were then in the possession of the Justice Department.

—On Oct. 12, 1972, presidential campaign manager Clark MacGregor, former Attorney General John Mitchell, White House Counsel John W. Dean III, and former Commerce Secretary Maurice Stans declined to appear before the House Banking and Currency Committee to discuss matters relating to the Watergate bugging case.

—On or about Nov. 29, 1972, White House Counsel John Wesley Dean III, presidential assistant John Ehrlichman, presidential special consultant Leonard Garment, and Bradley H. Patterson, Garment's assistant, refused to testify before the House Interior and Insular Affairs Committee during hearings on the takeover of the Bureau of Indian Affairs building in Washington.

—On Dec. 5, 1972, Housing and Urban Development Secretary George Romney declined to testify before the Joint Economic Committee on the matter of housing subsidies, saying his appearance was inappropriate in view of his announced resignation from office.

—On or about Dec. 19, 1972, the Department of Defense refused to provide the House Armed Services Committee with documents pertaining to unauthorized bombing raids of interest to the committee as part of their hearings on the firing of Gen. John D. Lavelle.

—On or about Dec. 23, 1972, presidential assistant Peter Flanigan refused to appear before the House Conservation and Natural Resources Subcommittee to discuss an anti-pollution court case against Armco Steel Company.

—On or about Jan. 1, 1973, presidential assistant Henry Kissinger and Secretary of State William Rogers declined invitations to appear before both the House Foreign Affairs and Senate Foreign Relations Committees to discuss resumed Vietnam bombings and the Paris peace talks.

—On Jan. 9, 1973, Admiral Isaac Kidd declined to testify before the Joint Economic Committee regarding his role in action involving the demotion of Gordon Rule, a Navy procurement official who testified earlier before the Committee on Litton Industries' contracts with the Defense Department and the suitability of Roy Ash, a former Litton official, as Director of the Office of Management and Budget.

Collateral References

Availability of Information to Congress, Hearings before the House Committee on Government Operations, [Unnamed] Subcommittee, 93d Cong. 1st Sess. (1973).

Berger, Raoul, *Executive Privilege: A Constitutional Myth*, Harvard University Press, Cambridge, Mass. (1974).

Berger, Raoul, Executive Privilege v Congressional Inquiry, 12 U.C.L.A. L. Rev. 1043–1120, 1286–1364 (1965).

Berger, Raoul, The President, Congress, and the Courts, 83 Yale L.J. 1111 (1974).

Bibby, John F., Committee Characteristics and Legislative Oversight of Administration, 10 Midwest Journal of Political Science, p. 78 (Feb. 1966).

Bishop, The Executive's Right to Privacy: An Unresolved Constitutional Question, 66 Yale L.J. 477 (1957).

Cappalletti, Mauro, and Golden, C. J., Crown Privilege and Executive Privilege: A British Response to an American Controversy, 2.5 Stanford L.J. 836 (1973).

Cooper, Joseph, and Cooper, Ann, The Legislative Veto and the Constitution, 31 Geo. Wash. L. Rev. 467 (1962).

Cox, Archibald, Executive Privilege, 132 U. Pa. L. Rev. 1383 (1974).

Directive on the Need for Maintaining the Confidential Status of Employee Loyalty Records to All Officers and

Employees of the Executive Branch of Government, Public Papers of the Presidents, Harry S. Truman, p. 181 (Mar. 15, 1948); reprinted at 13 Code of Federal Regulations 1359 (Mar. 16, 1948) and 94 CONG. REC. 2929 80th Cong. 2d Sess., Mar. 16, 1948.

Dorsen and Shattuck, Executive Privilege, the Congress, and the Courts, 35 Ohio St. L.J. 1 (1974).

Essays on Executive Privilege, Samuel Poole Weaver Constitutional Law Series, No. 1, American Bar Foundation, Chicago (1974).

Executive Privilege, Secrecy in Government, Freedom of Information, Hearings before the Senate Government Operations Committee, Subcommittee on Intergovernmental Operations, 93d Cong. 1st Sess. (1973).

Executive Privilege: The Withholding of Information by the Executive, Hearings before the Senate Judiciary Committee, Subcommittee on Separation of Powers, 92d Cong. 1st Sess. (1971).

Freund, Paul A., The Supreme Court, 1973 Term—Foreword: On Presidential Privilege, 88 Harv. L. Rev. 13 (1974).

Hardin, Executive Privilege in the Federal Courts, 71 Yale L.J. 879 (1959).

Harris, Joseph P., *Congressional Control of Administration*, The Brookings Institution, Washington, D.C. (1964).

Henderson, Thomas A., *Congressional Oversight of Executive Agencies*, University of Florida Press, Gainesville (1970).

Kramer, Robert, and Marcuse, Herman, Executive Privilege—A Study of the Period 1953–1960, 29 George Washington Law Rev. 623–717 and 827–916 (1961).

Letter of the President to the Secretary of Defense Directing Him to Withhold Certain information from the Senate Committee on Government Operations, Public Papers of the Presidents: Dwight D. Eisenhower, 483 (Mar. 17, 1954).

Memorandum of Attorney General Tom C. Clark to President Truman regarding executive privilege (1948). The original of this memorandum is now kept at the Harry S. Truman Library in Independence, Missouri. A portion appears in the concurring and dissenting opinion of Judge Mackinnon, *Nixon* v *Sirica*, 487 F2d 700, 734–736, No. 9 (D.C. Cir., 1973).

Nathanson, From Watergate to Marbury v Madison: Some Reflections on Presidential Privilege in Current and Historical Perspectives, 16 Ariz. L. Rev. 59 (1974).

Opinion of Attorney General Robert H. Jackson to President Roosevelt regarding refusal to transmit Federal Bureau of Investigation Records to Congressional Committees, 40 Opinions of the Attorney General No. 8, Apr. 30, 1941. This opinion is reprinted at 94 CONG. REC. A2459, A2460, 80th Cong. 2d Sess., Apr. 22, 1948.

Refusals by the Executive Branch to Provide Information to the Congress l964–1973, Survey of the Senate Committee on the Judiciary, Subcommittee on Separation of Powers, 93d Cong. 2d Sess. (1974).

Rodino, Peter, Congressional Review of Executive Action, 5 Seton Hall L. Rev. 489 Spring (1974).

Rogers, William P., Constitutional Law: The Papers of the Executive Branch, 44 A.B.A.J. 941 (1958).

Schwartz, Executive Privilege and Congressional Investigatory Power, 47 California L. Rev. 3 (1959).

Taylor, Telford, *Grand Inquest,* Simon Schuster, Inc., New York, 1955.

The Power of the President to Withhold Information from the Congress, Memorandum of the Attorney General [William P. Rogers], Committee Print of the Senate Judiciary Committee, Subcommittee on Constitutional rights, 85th Cong. 2d Sess. (1958).

Wolkinson, Herman, Demands of Congressional Committees for Executive Papers, 10 Fed. B. J. 103 (1949).

Younger, Irving, Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers, 20 Pitt. L. Rev. 755 1959).

Refusals by Former Executive Branch Officials

§ 3.1 A former President and two former cabinet officers refused to appear in response to subpenas ad testificandum issued by the Committee on Un-American Activities in its investigation of their knowledge of a Federal Bureau of Investigation memorandum they had received while serving in the executive branch.

On Nov. 12 and 13, 1953,[8] a former President and two former cabinet officers refused to testify about their knowledge of a 1946 memorandum from the Director of the Federal Bureau of Investigation, J. Edgar Hoover, concerning alleged Communist Party affiliations of the late Harry Dexter White, who in 1946 served as Assistant Secretary of the Treasury and had been appointed by the President to the United States Mission to the International Monetary Fund.

In a Nov. 12, 1953, letter to the Chairman of the Committee on Un-American Activities, Harold H. Velde, of Illinois, former President Harry S. Truman stated that he declined to comply with the subpena to appear on Nov. 13, 1953, because he assumed that the committee sought to examine him with respect to matters which occurred during his tenure as President. He asserted that if the constitutional doctrine of separation of powers and independence of the Presidency is to have validity, it must also apply to a President after expiration of his term of office. He expressed the view that the doctrine would be destroyed and the President would become a mere arm of the legislative branch if he felt during his term that every act would be a subject of official inquiry and possible distortion for political purposes. Mr.

18. See Beck, Carl, Contempt of Congress, A Study of the Prosecutions Initiated by the Committee on Un-American Activities, 1945–1967, The Hauser Press, New Orleans, 1959, pp. 101–102.

Truman also stated that he would be happy to appear and respond to questions relating to his acts as a private citizen either before or after leaving office and unrelated to his activities as President. The committee took no further action.

Similarly, Supreme Court Associate Justice Tom C. Clark, Attorney General in 1946, refused to appear on Nov. 13, 1953, as ordered by subpena. In a letter to the Chairman of the Committee on Un-American Activities, Mr. Justice Clark cited the importance of judicial branch independence and freedom from the strife of public controversy as reasons for his refusal to appear. He offered to consider responding to any written questions, subject only to his constitutional duties.

The Governor of South Carolina, James F. Byrnes, Secretary of State in 1946, refused to appear before the committee on Nov. 13, 1953, in response to a subpena. In a telegram to the chairman, Governor Byrnes stated that he could not by appearing admit the committee's right to command a Governor to leave his state and remain in Washington until granted leave to return. Such authority, he said, would enable the legislative branch to paralyze the administration of affairs of the sovereign states. He offered to respond to written questions and invited the committee or a subcommittee to meet with him at the State House in Columbia, S.C. The committee sent a subcommittee to South Carolina.

§ 4. Litigation to Enforce a Subpena; Senate Select Committee v Nixon

A review of recent litigation to enforce congressional subpenas may help reveal the issues involved in reconciling the congressional authority to seek information with the Chief Executive's claim of right to deny access to information in some circumstances.

The stage for a historic confrontation was set when the Senate Select Committee on Presidential Campaign Activities, created on Feb. 7, 1973, by unanimous approval of Senate Resolution 60,[19] with authority to investigate and study illegal, improper, or unethical activities in connection with the 1972 Presidential campaign and to issue subpenas,[20] discovered that

19. See § 1.46, supra, and 119 CONG. REC. 3830–51, 93d Cong. 1st Sess. for a discussion of this resolution.

20. Authority to issue subpenas, originally granted by S. Res. 60, was buttressed and clarified by S. Res. 194,

President Nixon had tape recorded conversations at the White House. After failing to obtain certain information by informal means, the select committee issued two subpenas duces tecum, one for tape recordings of five meetings between the President and White House Counsel John W. Dean III, and another for documents and materials relating to alleged criminal acts by a list of 25 persons. When the President failed to disclose the recordings and other materials, the select committee filed a civil action[1] for declaratory judgment, mandatory injunction, mandamus, and summary judgment in the District Court of the District of Columbia to enforce its subpenas and compel the President to transmit these materials to the select committee.[2]

In an order dated Oct. 17, 1973, the trial court dismissed the select committee's prayer for enforcement of its subpena after deciding only one of the several issues raised, that existing statutes did not grant jurisdiction to decide

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which expressed the sense of the Senate that issuance of a subpena to the President was authorized by S. Res. 60, and ratified that issuance. Furthermore, S. Res. 194 expressed the sense of the Senate that the select committee's initiation and pursuit of the lawsuit to compel disclosure of the subpenaed materials did not require prior approval of the Senate, and that in seeking this information which was of vital importance the select committee furthered a valid legislative purpose. See 119 CONG. REC. 36094, 36095, 93d Cong. 1st Sess., Nov. 7, 1973.

1. This case, captioned as Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, et al. v Richard M. Nixon, individually and as President of the United States, was the subject of three judicial pronouncements discussed here, two in the District Court of the District of Columbia, an opinion entered by Chief Judge John J. Sirica and reported at 366 F Supp 51 (Oct. 17, 1973), and an order and memorandum entered by Judge Gerhard A. Gesell and reported at 370 F Supp 521 (Feb. 8, 1974); and one in the Court of Appeals for the District of Columbia Circuit, an opinion written by Chief Judge David L. Bazelon for the court sitting en banc and reported at 498 F2d 725 (May 23 1974).

2. In seeking these civil remedies, the select committee rejected as "unseemly and inappropriate" two traditional procedures to enforce subpenas, a contempt proceeding under 2 USC §192 and common law powers permitting the Sergeant at Arms forcibly to secure attendance of a subpenaed person. See *Senate Select Committee on Presidential Campaign Activities, et al.* v *Nixon,* 366 F Supp 51, 54 (D.D.C., Oct. 17, 1973), John J. Sirica, Chief Judge.

such a controversy.[3] To remedy this inhibition, Congress, at the instance of the select committee, expressly conferred special jurisdiction on the District Court of the District of Columbia to consider civil actions brought by the select committee to enforce its subpenas.[4]

After rehearing the case and considering the contentions of the parties, the district court[5] made several findings: first, a controversy between two branches of government in which one sought information from the other was justiciable (appropriate for resolution by the courts) and was not, as suggested by the President's counsel, a nonjusticiable political question; second, that in a controversy of this kind, the court, after determining justiciability, had a "duty to weigh the public interest protected by the President's claim of privilege against the public interest that would be served by disclosure to the Committee in this particular instance";[6] third, that the select committee failed to demonstrate either a pressing need for the subpenaed tapes or that further public hearings concerning the tapes would serve the public interest; fourth, the President's claim that the public interest was best served by a blanket unreviewable claim of confidentiality over all communications was rejected; and fifth, that the pending criminal prosecutions had to be safeguarded from the prejudicial effect which might arise if the select committee subpenaed the materials. On the basis of these holdings, the court declined to issue an injunction directing the President to comply with the subpena requiring information about the 25 listed individuals, and instead directed the President to submit a particularized statement as to selected portions of the subpenaed tape recordings.

The President refused to submit such a statement and reasserted

3. *Senate Select Committee on Presidential Campaign Activities, et al.* v *Nixon,* 366 F Supp 51, 61 (D.D.C.) John J. Sirica Chief Judge.

4. This jurisdictional statute, Pub. L. No. 93–190 (Dec. 19, 1973), appears in Senate Select Committee on Presidential Campaign Activities, Presidential Campaign Activities of 1972, S. Res. 60, appendix to the hearings, 93d Cong. 2d Sess. (1974).

5. See *Senate Select Committee on Presidential Campaign Activities, et al.* v *Nixon,* 370 F Supp 521 (D.D.C., Feb. 8, 1974), Gerhard A. Gesell, District Judge.

6. 370 F Supp 521, 522 (D.D.C. 1974); the quoted language was taken from *Nixon* v *Sirica,* 487 F2d 700, 716–718 (D.C. Cir., 1973), the suit brought by the Special Prosecutor to obtain certain evidence from the President.

his generalized claim of privilege on the grounds of confidentiality and his duty to prevent the possibly prejudicial effects on criminal prosecutions which might result from disclosure of the materials to the select committee. The trial court dismissed the select committee's suit to compel disclosure of the tapes.[7]

The select committee did not contest the decision to quash the subpena for materials relating to the 25 named individuals, but appealed the dismissal of the action to compel disclosure of the tapes. The United States Court of Appeals for the District of Columbia Circuit applying the reasoning it had used in *Nixon* v *Sirica*,[8] in which the Special Prosecutor was granted access to certain Presidential tapes for use in grand jury investigations, rejected the select committee's argument that a district court, once it had determined that a generalized claim of privilege failed, lacked authority to balance public interests. The court of appeals also rejected the district court's rulings that the President's generalized claim of privilege failed and that the Chief Executive must submit subpenaed materials to the court accompanied by particularized claims to be weighed against the public interest.

Restating its belief expressed in *Nixon* v *Sirica,* that Presidential communications are "presumptively privileged,"[9] and that the privilege is analogous to the privilege "between a congressman and his aides under the speech and debate clause; to that among judges and their law clerks; and . . . to that contained in the fifth exemption to the Freedom of Information Act,"[10] the court held that, ". . . the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government, a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations. . . ."[11] Such a showing "turns not on the nature of the Presidential conduct the subpenaed materials might reveal, but

7. 370 F Supp 521, 524 (D.D.C. 1974).

8. *Nixon* v *Sirica,* 487 F2d 700 (D.C. Cir. 1973) [hereinafter cited as *Nixon*].

9. *Senate Select Committee on Presidential Campaign Activities, et al.* v *Nixon,* 498 F2d 725, 730 (D.C. Cir. 1974) [hereinafter cited as Select Committee]; see also *Nixon,* at 705, 717, and 718.

10. Select Committee, at 729; see also *Nixon,* at 717.

11. Select Committee, at 730; see also *Nixon,* at 722.

rather on the nature and appropriateness of the function in the performance of which the material was sought and the degree to which the material was necessary to its fulfillment."[12]

The court applied these tests to the select committee's functions and asserted needs. The select committee maintained that it needed subpenaed materials to resolve conflicts in the voluminous testimony it had received so that it could responsibly exercise its duty to oversee activities and ascertain malfeasance in the executive department. Without denying the congressional role to exercise a general oversight power or defining the limits of that power, the court found that the select committee's oversight authority was subordinate to the constitutionally prescribed method of ascertaining malfeasance by executive officials, impeachment. Because the House Committee on the Judiciary had commenced an impeachment inquiry, the Select Committee's immediate need for the subpenaed materials was "merely cumulative" from a congressional perspective. The need for the subpenaed materials to fulfill its legislative responsibility, to determine whether Congress should enact laws to regulate political activities, also failed because the court believed that legislative judgments, unlike grand jury determinations of probable cause, depend more on predicted consequences of proposed legislative actions and their political acceptability than on precise reconstruction of past events.[13]

The court indicated that the President's obligation to respond to a subpena would not require him to submit particularized claims of privilege to the court to be weighed against the public interest in disclosure unless the select committee made a "showing of the order made by the grand jury" in *Nixon* v *Sirica*.[14] Applying this standard, the court concluded that the need demonstrated by the select committee in the circumstances of this case and in light of the impeachment investigation by the House Committee on the Judiciary, was "too attenuated and too tangential" to permit a judicial judgment that the President was required to comply with the committee's subpena.[15]

The court of appeals affirmed the order dismissing the select

12. Select Committee, at 731; see also *Nixon*, at 717, 718.

13. Select Committee, at 732.

14. Select Committee, at 729, 730; in *Nixon*, at 715, the Special Prosecutor was found to have made a "uniquely powerful showing" of need for subpenaed materials.

15. Select Committee, at 733.

committee's suit without prejudice, although on grounds different from those announced by the district court.[16]

A review of the Chief Executive's refusal to disclose information on the basis of privilege would not be complete without a discussion of certain aspects of the 8–0 Supreme Court decision in *United States* v *Nixon*,[17] in which the President was ordered to respond to a subpena issued by the Special Prosecutor for tape recordings by submitting them to the district court for judicial inspection. Because the opinion expressly stated that the court was "not here concerned with the balance . . . between the confidentiality interest of the executive and congressional demands for information,"[18] its holding would not control a future suit brought to enforce a congressional subpena. Nonetheless, an analysis of the court's reasoning and approach demonstrates the limits and foundation of executive privilege, factors which would be involved in such an action. Reaffirming that "it is emphatically the province and duty of the Supreme Court to 'say what the law is'",[19] the court rejected the President's claim of absolute discretion exclusively to determine what information may be withheld under the shield of executive privilege. However, in one of the most significant holdings of the opinion, the court at three points alluded to a constitutional foundation for a claim of executive privilege based on confidentiality of Presidential communications:

> Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. III powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers;[20] the protection

16. *Id.*

17. 418 U.S. 683 (1974) [hereinafter cited as *U.S.* v *Nixon*]; Mr. Justice Rehnquist took no part in the consideration or decision of this case. See Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92–82, 92 Cong. 2d Sess., 1975 Supplement, p. S 20–22, for a discussion of this decision.

18. *U.S.* v *Nixon,* at 712 n. 19.

19. *U.S.* v *Nixon,* at 705; the internal quotes were taken from *Marbury* v *Madison,* 1 Cranch 137 (1803).

20. In a footnote at this point the court dealt with the Special Prosecutor's contention that no constitutional provision authorized the Executive to assert privilege by stating that silence of the Constitution is not dispositive. To support this position, the following passage from *Marshall* v *Gordon,* 243 U.S. 521, 537 (1937), was cited: "The rule of constitutional

of the confidentiality of presidential communications has similar constitutional underpinnings.(1)

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.(2)

Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.(3)

The court's willingness to balance competing interests depends on the nature of the claim of executive privilege. Although it found that a generalized claim of privilege based on confidentiality must yield to a need of the Special Prosecutor to obtain information for use in a pending criminal trial, the court indicated that it would not be as willing to balance interests or reject a claim of executive privilege based on the President's need to protect military, diplomatic or sensitive national security secrets. "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities." (4)

Another factor in the authority of courts to review claims of executive privilege is the nature of the asserted need for information. Because claims of executive privilege either on grounds of confidentiality or diplomatic, military, or national security secrets are constitutionally based, the claim of need based on the Constitution is more likely to be reviewed than

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interpretation announced in *McCulloch* v *Maryland,* 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was considered as accompanying the grant, has been so universally applied that it suffices merely to state it." See *U.S.* v *Nixon,* at 705, n. 16.

1. *U.S.* v *Nixon,* at 705, 706.

2. Here the Court cited *Carl Zeiss Stiftung* v *V.E.B.* Carl Zeiss, Jena, 40 F.R.D. 318, 325 (DDC 1966), [aff'd. 384 F2d 979, cert. denied 389 U.S. 952 (1967)]; *Nixon* v *Sirica,* 487 F2d 700, 713 (D.C. Cir. 1973); *Kaiser Aluminum and Chem. Corp.* v *U.S.,* 157 F Supp 939 (Ct. Cl. 1958); and The Federalist No. 64 (S.F. Mittel ed. 1938). *U.S.* v *Nixon,* at 708, n. 17.

3. *U.S.* v *Nixon,* at 711.

4. *U.S.* v *Nixon,* at 710; the court cited *C. & S. Air Lines* v *Waterman,* 333 U.S. 103, 111 (1948) and *U.S.* v *Reynolds,* 345 U.S. 1 (1952), two cases where the Supreme Court deferred to Presidential claims of secrecy in foreign policy and military affairs, respectively.

one which is not. The fact that the Special Prosecutor's claim of need for information needed in a pending criminal trial was based on the fifth amendment guarantee of due process of law and the sixth amendment right to be confronted with witnesses against him and have compulsory process (subpenas) for obtaining witnesses in his favor was accorded great weight by the court in balancing the need for evidence against the requirement of confidentiality. Linking these constitutional bases to the responsibilities of the judicial branch tipped the balance in favor of requiring the President to submit subpenaed materials for a judicial inspection.

> The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty on the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. . . .
>
> To read the Art. II powers of the President as providing [such] privilege [on the basis merely of] a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.(5)

Additional factors in the decision were the court's unwillingness to conclude that advisors would temper the candor of their remarks because of the possibility of occasional disclosure;(6) and its belief that a judge in chambers could protect the confidentiality of Presidential communications consistent with the fair administration of justice.(7)

§ 5. Legislation to Obtain Information

Some statutes require agencies to provide information to selected committees. An executive agency, on the request of the Committee on Government Operations of the House, or any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, is required to submit any information requested of it relating to any matter within the jurisdiction of the committee.(8)

The Atomic Energy Commission is required to keep the Joint Committee on Atomic Energy fully and currently informed with respect to all commission activities.(9) The

5. *U.S.* v. *Nixon,* at 707.

6. *U.S.* v. *Nixon,* at 712.

7. *U.S.* v. *Nixon,* at 714.

8. 5 USC § 2954; Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 413.

9. 42 USC § 2252; Aug. 1, 1946, c. 724, § 202, as added Aug. 30, 1954, c.

Department of Defense is required to keep the joint committee fully and currently informed with respect to all matters within the department relating to the development, utilization, or application of atomic energy. Any government agency is required to furnish any information requested by the joint committee with respect to the activities or responsibilities of that agency in the field of atomic energy.(10)

Other statutes encourage government personnel, as distinguished from departments and agencies to supply information to Congress. The right of federal employees, individually or collectively, to furnish information to either House of Congress or to a committee or member thereof, may not be interfered with or denied.(11) Upon the request of a congressional committee, joint committee, or member of such committee, an officer or employee of the Department of State, the U.S. Information Agency, the Agency for International Development, the U.S. Arms Control and Disarmament Agency, or any other department, agency, or independent establishment of the U.S. government primarily concerned with matters relating to foreign countries or multilateral organizations, may express views and opinions and make recommendations if the request of the committee or member of the committee relates to a subject within the jurisdiction of that committee.(12)

1073 § 1, 68 Stat. 956, and amended Sept. 6, 1961, Pub. L. 87–206, § 17, 75 Stat. 479; Mar. 26, 1964, Pub. L. 88–294, 78 Stat. 172. By Pub. L. 93–438, the AEC was abolished and its functions transferred to the Nuclear Regulatory Commission and the Energy Research and Development Administration. The jurisdiction of the joint committee was eliminated in the 95th Congress.

10. *Id.*

11. 5 USC § 7102; Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 523.

12. 2 USC § 194a; Pub. L. 92–352, title V, § 502, July 13, 1972, 86 Stat. 496, amended Pub. L. 93–126, § 17, Oct. 18, 1973, 87 Stat. 455.

Concurrent Resolution

§ 5.1 The Senate approved a concurrent resolution to establish a procedure assuring Congress the full and prompt production of information requested from federal officers and employees but the procedures therein never became effective since not approved by the House.

On Dec. 18, 1973,[13] the Senate by voice vote approved Senate Concurrent Resolution 30:

Whereas the withholding from either House of Congress, or from the committees of Congress and subcommittees thereof by officers or employees of the United States of any information, including testimony, records, or documents, or other material requested by the Congress in order to enable it to exercise a legislative function under the Constitution erodes the system of checks and balances prescribed by the Constitution, unless such withholding is justified by the President to the Congress and, if necessary, determined by the Judiciary to be proper: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), (a) That, when an officer or employee of the United States is summoned to testify or to produce information, records, documents, or other material before either House of Congress or a committee of the Congress or subcommittee thereof, that officer or employee shall appear at the time and place specified and shall answer all questions propounded to him, or produce all information, including records, documents, and other material sought, unless, in the case of an officer or employee of a Federal agency in the executive branch, either within twenty days of the date of the summons, or, in the case of any such information which was first requested at an appearance, within ten days after that appearance, the President formally and expressly instructs the officer or employee in writing to withhold the information requested, including answers to specific questions, or specific records, documents, or other material, in which event such Presidential instruction shall set forth the grounds on which it is based.

(b) Each written Presidential instruction pursuant to subsection (a) shall be transmitted to the House of Congress or committee of the Congress or subcommittee thereof requesting the information, proposing the questions, or seeking the records, documents, or other material.

Sec. 2. (a) If a House of Congress or a committee of Congress—

(1) determines that an officer or employee of the United States has failed to comply with the provisions of section 1(a); or

(2) upon consideration of the Presidential instruction transmitted pursuant to section 1(b), determines that the information requested is needed to enable it to exercise a legislative function under the Constitution, it shall prepare a written report setting forth such determination. In the case of a committee, the chairman is authorized, subject to the approval of the committee, to issue a subpena requiring such officer or employee to appear before the committee at a time specified and to provide the information requested by answering the question or questions propounded and to produce any information, including records, documents, or other material requested. In the case of a House of Congress, the majority or minority leader shall introduce a resolution citing such determination and authorizing the ma-

13. 119 CONG. REC. 42105, 42106, 93d Cong. 1st Sess., see also S. REPT. NO. 93–613.

jority or minority leader of that House to issue a subpena requiring such officer or employee to appear before such House and to provide the information requested by answering the question or questions propounded and to produce any information, including records, documents, or other material requested.

(b) If a committee of the Congress, or the majority or minority leader of a House of Congress determines that an officer or employee of the United States has failed to comply with a subpena issued pursuant to subsection (a) within fifteen days after such officer or employee receives such subpena, the chairman of such committee or the majority or minority leader of such House shall file—

(1) in the case of a House of Congress, a resolution with such House;

(2) in the case of a joint committee, a concurrent resolution with both Houses of Congress; and

(3) in the case of a committee, a resolution with its House of Congress; with a report and record of the proceedings relating to such subpena. Congress, in the case of any such concurrent resolution, and the House of Congress with which any such resolution is filed, shall take such action as it deems proper with respect to the disposition of such concurrent resolution or resolution.

(c)(1) A resolution introduced pursuant to subsections (a) or (b) shall not be referred to a committee and shall be privileged business for immediate consideration. It shall at any time be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) If the motion to proceed to the consideration of the resolution is agreed to, debate thereon shall be limited to two hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

Sec. 3. (a) Each House of Congress and each committee or subcommittee of the Congress shall take appropriate measures to insure the confidentiality of any information made available to it which, in the judgment of the Federal agency providing it and the House of Congress or committee or subcommittee of the Congress receiving it, requires protection against disclosure which would endanger (1) personal privacy, (2) trade secrets or confidential commercial or financial information, or

(3) the conduct of the national defense, foreign policy, or law enforcement activities.

(b) The Select Committee on Standards and Conduct of the Senate shall investigate any breach of confidentiality of information made available under this part by a Member or employee of the Senate, and the Committee on Standards of Official Conduct of the House of Representatives shall investigate any breach of confidentiality of information made available under this part by a Member or employee of the House of Representatives. Such committee shall recommend appropriate action such as censure or removal from office or position.

Sec. 4. For purposes of this resolution:

(1) The term "committee of the Congress" means any joint committee of the Congress or any standing committee, special committee, or select committee of either House of Congress.

(2) The term "Federal agency" has the same meaning given that term under section 207 of the Legislative Reorganization Act of 1970 and includes the Executive Office of the President.

Sec. 5. (a) Nothing in this resolution shall be construed to require the furnishing or production of any information, records, documents, or other material to either House of Congress if such furnishing or production is prohibited by an Act of Congress.

(b) Nothing in this resolution shall be construed as in any way impairing the effectiveness or availability of any other procedure whereby Congress may obtain information needed to enable it to exercise a legislative function under the Constitution.

The final disposition of this resolution (S. Con. Res. 30) in the House was referral to the Committee on Rules by the Speaker.

Bill

§ 5.2 The Senate approved a bill, not acted upon by the House, known as the Congressional Right to Information Act to establish a procedure assuring full and complete disclosure of information requested from federal officers and employees.

On Dec. 18, 1973,[14] the Senate approved S. 2432:[15]

That this Act may be cited as the "Congressional Right to Information Act".

Sec. 2. (a) Title III of the Legislative Reorganization Act of 1970 is amended by adding at the end thereof the following new part:

PART 4—KEEPING THE CONGRESS INFORMED

INFORMING CONGRESSIONAL COMMITTEES

Sec. 341. (a) The head of every Federal agency shall keep each committee of the Congress and the subcommittees thereof fully and cur-

14. 119 CONG. REC. 42101–05, 93d Cong. 1st Sess.

15. See S. Rept. No. 93–612 for the report on the bill.

rently informed with respect to all matters relating to that agency which are within the jurisdiction of such committee or subcommittee.

(b) The head of a Federal agency, on request of a committee of the Congress or a subcommittee thereof or on request of two-fifths of the members thereof, shall submit any information requested of such agency head relating to any matter within the jurisdiction of the committee or subcommittee.

PRODUCTION OF INFORMATION

Sec. 342. (a) When an officer or employee of the United States is summoned to testify or to produce information, records, documents, or other material before either House of Congress or a committee of the Congress or subcommittee thereof, that officer or employee shall appear at the time and place specified and shall answer all questions propounded to him, or produce all information, including records, documents, and other material sought, unless, in the case of an officer or employee of a Federal agency in the executive branch, either within twenty days of the date of the summons, or, in the case of any such information which was first requested at an appearance, within ten days after that appearance, the President formally and expressly instructs the officer or employee in writing to withhold the information requested, including answers to specific questions, or specific records, documents, or other material, in which event such Presidential instruction shall set forth the grounds on which it is based.

(b) Each written Presidential instruction pursuant to subsection (a) shall be transmitted to the House of Congress or committee of the Congress or subcommittee thereof requesting the information, proposing the questions, or seeking the records, documents, or other material.

SUBPENA OF INFORMATION

Sec. 343. (a) If a House of Congress or a committee of Congress—

(1) determines that an officer or employee of the United States has failed to comply with the provisions of section 342(a); or

(2) upon consideration of the Presidential instruction transmitted pursuant to section 342 (b), determines that the information requested is needed to enable it to exercise a legislative function under the Constitution it shall prepare a written report setting forth such determination. In the case of a committee, the chairman is authorized, subject to the approval of the committee, to issue a subpena requiring such officer or employee to appear before the committee at a time specified and to provide the information requested by answering the question or questions propounded and to produce any information, including records, documents, or other material requested. In the case of a House of Congress, the majority leader shall introduce a resolution citing such determination and authorizing the majority leader of that House to issue a subpena requiring such officer or employee to appear before such House and to provide the information requested by answering the question or questions propounded and to produce any information, including records, documents, or other material requested.

(b)(1) If a committee of the Congress determines that an officer or employee of the United States has failed to comply with a subpena issued pursuant to subsection (a) within fifteen days after such officer or employee receives such subpena, the chairman of such committee is authorized, subject to the provisions of paragraph (2), to bring a civil action in the United States District Court for the District of Columbia to enforce such subpena.

(2) If a committee of the Congress referred to in paragraph (1) deter-

mines that the chairman of such committee should institute a civil action in the United States District Court for the District of Columbia to enforce the subpena issued by it pursuant to subsection (a), the chairman shall introduce a resolution in the House or Houses of Congress concerned citing the failure to comply with the subpena of the committee and authorizing the chairman to bring a civil action in such purpose. If such resolution is agreed to by the House or Houses of Congress concerned, the chairman shall institute a civil action in the United States Court for the District of Columbia to enforce the subpena.

(c) If a House of Congress determines that an officer or employee of the United States has failed to comply with a subpena issued pursuant to subsection (a) within fifteen days after such officer or employee receives such subpena, the majority or minority leader of that House shall introduce a resolution citing such failure to comply and authorizing the majority or minority leader of that House to bring a civil action in the United States District Court for the District of Columbia to enforce such subpena.

(d)(1) A resolution introduced pursuant to subsections (a), (b) (2), or (c) shall not be referred to a committee and shall be privileged business for immediate consideration. It shall at any time be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) If the motion to proceed to the consideration of the resolution is agreed to, debate thereon shall be limited to two hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(e) The provisions of subsection (d) of this section are enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively; and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

JUDICIAL REVIEW

Sec. 344. (a) The United States District Court for the District of Columbia shall have original jurisdiction of actions brought pursuant to section 343 of this Act without regard to the sum or value of the matter in controversy. The court shall have power to issue a mandatory injunction or other order as may be ap-

propriate, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the subpena issued pursuant to section 343 of this Act.

(b) Any congressional party commencing or prosecuting an action pursuant to this section may be represented in such action by such attorneys as it may designate.

(c) Appeal of the judgment and orders of the court in such actions shall be had in the same manner as actions brought against the United States under section 1346 of title 28, United States Code.

(d) The courts shall give precedence over all other civil actions to actions brought under this part.

PROTECTION OF INFORMATION

Sec. 345. (a) Each House of Congress and each committee or subcommittee of the Congress shall take appropriate measures to insure the confidentiality of any information made available to it under this part which, in the judgment of the Federal agency providing it and the House of Congress or committee or subcommittee of the Congress receiving it, requires protection against disclosure which would endanger (1) personal privacy, (2) trade secrets or confidential commercial or financial information, or (3) the conduct of the national defense, foreign policy, or law enforcement activities.

(b) The Select Committee on Standards and Conduct of the Senate shall investigate any breach of confidentiality of information made available under this part by a Member or employee of the Senate, and the Committee on Standards of Official Conduct of the House of Representatives shall investigate any breach of confidentiality of information made available under this part by a Member or employee of the House of Representatives. Such committee shall recommend appropriate action such as censure or removal from office or position.

DEFINITIONS

Sec. 346. For purposes of this part:

(1) The term "committee of the Congress" means any joint committee of the Congress or any standing committee, special committee, or select committee of either House of Congress.

(2) The term "Federal agency" has the same meaning given that term under section 207 of this Act, and includes the Executive Office of the President.

SAVINGS PROVISIONS

Sec. 347. (a) Nothing in this part shall be construed to require the furnishing or production of any information, records, documents, or other material to either House of Congress if such furnishing or production is prohibited by an Act of Congress.

(b) Nothing in this part shall be construed as in any way impairing the effectiveness or availability of any other procedure whereby Congress may obtain information needed to enable it to exercise a legislative function under the Constitution.

(b) Title III of the table of contents of the Legislative Reorganization Act of 1970 is amended by adding at the end thereof the following:

PART 4—KEEPING THE CONGRESS INFORMED

The final disposition of this measure (Senate Bill 2432) in the House was referral to the Committee on Rules by the Speaker.

Joint Resolution

§5.3 The House approved a joint resolution, not passed by the Senate, directing all executive departments and agencies of the federal government to make available to committees and subcommittees of the House and Senate information which may be deemed necessary to enable them properly to perform duties delegated to them by the Congress.

On May 13, 1948,[16] the House, after rejecting a motion to recommit on a roll call vote of 145 yeas to 217 nays, approved House Joint Resolution 342 by a roll call vote of 219 yeas to 142 nays. The text of the joint resolution follows:[17]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all executive departments and agencies of the Federal Government created by the Congress, and the Secretaries thereof, and all individuals acting under or by virtue of authority granted said departments and agencies, are, and each of them hereby is, authorized and directed to make available and to furnish to any and all of the standing, special, or select committees of the House of Representatives and the Senate, acting under the authority of any Federal statute, Senate or House resolution, joint or concurrent resolution, such information, books, records, and memoranda in the possession of or under the control of any of said departments, agencies, Secretaries, or individuals as may, by any of said committees, be deemed to be necessary to enable it to carry on the investigations, perform the duties, falling within its jurisdiction, when requested to do so: *Provided,* That said request shall be made only by a majority vote of all the members of the committee voting therefor at a formal meeting of the committee: *And provided further,* That if the committee be a committee created by the Senate, upon approval of the President or President pro tempore of the Senate: *And provided further,* That if the committee making such request be a committee created by or acting under the authority of the House of Representatives, upon approval of the Speaker or Acting Speaker of the House of Representatives, such major-

16. 94 CONG. REC. 5822, 80th Cong. 2d Sess.; debate on this joint resolution appears on pp. 5700–43 and 5807–22, on May 12 and 13, 1948, respectively. The report on this measure is H. REPT. NO. 1595.

17. This copy of the joint resolution is the final form which was sent to the Senate, read twice, and referred to the Committee on Expenditures in the Executive Departments. Referral to the committee was the final Senate disposition. The text that appears in the *Congressional Record* is not given here because it was amended several times.

ity vote of the committee to be shown by a certificate of the chairman of the committee, countersigned by the clerk; the approval of the President or President pro tempore of the Senate or the Speaker or Acting Speaker of the House of Representatives to be shown by letter over his signature. Any officer or employee in any such executive department or agency who fails or refuses to comply with a request of any committee of the Congress made in accordance with the foregoing provisions of this section shall, upon conviction thereof, be punished by a fine not exceeding $1,000 or by imprisonment for not exceeding 1 year, or both, at the discretion of the court.

Sec. 2. When, by virtue of section 1, any committee of the Congress shall have received information, books, records or memoranda from any of the departments, agencies, Secretaries, or individuals in pursuance of a request made under the authority of said section, it shall forthwith, by majority vote of the membership of said committee, determine what, if any, part of such information shall be made public and what part shall be deemed to be confidential, and it shall thereafter be unlawful for any member of said committee or any employee thereof to divulge or to make known in any manner whatever not provided by law to any person any part of the information so disclosed to said committee and which has by said committee been declared to be confidential; and any offense against the foregoing provision shall be a misdemeanor and shall be punished by fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and, if the offender be an employee of the United States, he shall be dismissed from office or discharged from employment.

Sec. 3. It shall be unlawful for any individual, while or after holding any office or employment under the United States Government, to appropriate or take custody of, for his own unofficial use or the unofficial use of any other person, any papers, documents, or records (other than those which are of a character strictly personal to him) to which he has or had access solely by reason of holding or having held such office or employment. Any individual who willfully violates this section shall, upon conviction thereof, be punished by a fine not exceeding $1,000, or by imprisonment for not exceeding one year, or both, at the discretion of the court.

Sec. 4. If any provision of this joint resolution, or the application of such provision to any person or circumstance, is held invalid, the remainder of the joint resolution, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 5. Nothing contained herein shall alter the procedure for inspection of tax returns by committees of Congress prescribed by section 55d of the Internal Revenue Code: *Provided,* That nothing herein contained shall alter any provision of law which expressly protects from disclosure specified categories of information obtained by executive departments and agencies.

Sec. 6. This joint resolution shall become effective on the tenth day after the date of its enactment.

This joint resolution was passed subsequent to President Truman's

refusal to permit the Secretary of Commerce to respond to a resolution of inquiry requesting a letter from the Director of the Federal Bureau of Investigation to the Secretary regarding the loyalty file on Dr. Edward U. Condon, Director of the National Bureau of Standards.[18]

C. PROCEDURE; HEARINGS

§ 6. Limitations on Authority to Investigate—Pertinence of Inquiry

Limitations on the authority to investigate are expressed in the Constitution and statutes, and judicial interpretation thereof, as well as in congressional and committee rules as interpreted and applied by presiding officers and the courts.

The authority of Congress to investigate has been interpreted to derive from article I, section 1, stating that, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Consequently, the authority to investigate is necessarily limited by the authority to legislate.[19]

A review of criminal contempt proceedings provides a comprehensive overview of limits of authority to investigate including legislative purpose,[20] pertinence of investigation thereto, procedural regularity of hearings,[1] and rights of witnesses.[2]

The statute which makes failure to testify a crime, 2 USC § 192, provides that the question must be "pertinent to the subject under inquiry." Pertinence is a matter of law[3] and does not depend upon

18. See § 2.20, supra, for a discussion of the resolution of inquiry.

19. See, for example, *Barenblatt* v *U.S.*, 360 U.S. 109, 111 (1959) in which Mr. Justice Harlan stated, "The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." See also Lovell, G. B., Scope of the Legislative Investigational Power and Redress for Its Abuse, 9 Hastings L. J. 276 (1957).

20. See § 1, supra, for a discussion of authority to investigate and legislative purpose.

1. See § 8, infra.

2. See §§ 9 through 14, infra.

3. *Braden* v *United States*, 365 U.S. 431 (1961); and *Sinclair* v *United States*, 279 U.S. 263 (1929).

the probative value of the evidence.[4] It means pertinent to the subject under inquiry, rather than pertinent to the person under interrogation,[5] and relates to the particular question asked, not to unasked possibilities.[6]

Because a legislative inquiry, unlike a judicial inquiry, must anticipate all possible cases which may arise rather than determine facts in a single case, the concept of pertinence in a congressional investigation is broader than that of relevance in the law of evidence.[7] The elements of pertinence are: (1) the material sought or answers requested must relate to a legislative purpose which Congress may constitutionally entertain, and (2) such material or answers must fall within the grant of authority actually made by Congress to the investigating committee. The question must be pertinent; if it is pertinent, an innocent true answer does not destroy such pertinence. Although the statute mentions pertinence only in relation to answers to questions, it applies equally to demands to produce papers.[8]

Because a witness at an investigative hearing exposes himself to criminal prosecution for contempt under 2 USO § 192 by refusing to answer questions, he is entitled to knowledge of the subject to which the interrogation is deemed pertinent with the same degree of explicitness that the due process clause requires in the expression of any element of a criminal offense.[9] An indictment which fails to identify the subject under inquiry at the time the witness was interrogated is fatally defective because the subject is central to prosecution under the statute.[10]

Rule XI clause 28(h)[11] imposes a duty on the chairman at an in-

4. *Sinclair* v *United States*, 279 U.S. 263 (1929). See 6 Cannon's Precedents § § 336-338, for a discussion of this case.

5. *Rumely* v *United States*, 197 F2d 166, 177 (D. C. Cir. 1953); aff'd. 345 U.S. 41 (1953).

6. *Barsky* v *United States*, 167 F2d 241, 248 (D.C. Cir. 1948); cert. denied 334 U.S. 843 (1948).

7. *Townsend* v *United States*, 95 F2d 352 (D.C. Cir. 1938); cert. denied 30.3 U.S. 664 (1938).

8. *United States* v *Orman*, 207 F2d 148, 153, 154, 156 (3d Cir. 1953). See also, *Bowers* v *United States*, 202 F2d 447 (D.C. Cir. 1953) and Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189, 236–239 (1967) for discussions of pertinence.

9. *Watkins* v *United States*, 354 U.S. 178, 209, 210 (1957).

10. *Russell* v *United States*, 369 U.S. 749, 764 (1962).

11. *House Rules and Manual* § 735(i) (1973). See § 13.4, infra, for a discussion of approval of this rule.

vestigative hearing to announce the subject of the investigation in an opening statement. When a witness refuses to answer a question on the ground of pertinence, the committee must repeat the "question under investigation" and show specifically where the question is pertinent thereto.(12)

To ascertain the subject under inquiry, the court in deciding the validity of a challenge to pertinence may look at (1) the authorizing resolution, (2) the remarks of the chairman and other members, (3) the nature of the proceedings, (4) the action of the committee by which a subcommittee investigation was authorized, and (5) the chairman's response to the witness, refusal to answer.(13) A court may also consider the historical usage of a particular procedure or inquiry:

> Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions.(14)

§ 7. —Intent of Witness

A witness cannot be convicted for refusal to testify or produce documents unless his refusal is willful,(15) that is, a deliberate and intentional act,(16) which need not, however, involve moral turpitude (17) or a bad or evil purpose or motive.(18)

Although a mistake of fact may in some cases justify a refusal to submit testimony or docu-

12. *Deutch* v *United States*, 367 U.S. 456 (1961); this case reversed a contempt conviction arising from an investigation of communist party activities "in the Albany area." The witness had refused to answer certain questions relating to his communist activities in Ithaca and at Cornell University, but, the court noted, such locations are 165 miles from Albany and thus were outside the scope of the committee's legitimate inquiry.

13. *Watkins* v *United States*, 354 U.S. 178, 212, 213 (1957).

14. *Barenblatt* v *United States*, 360 U.S. 109, 117 (1959). See also *Wilkinson* v. *United States*, 365 U.S. 399, 410 (1961).

15. 2 USC § 192; *Quinn* v *United States*, 349 U.S. 155, 165 (1955).

16. *United States* v *Bryan*, 339 U.S. 323 (1950).

17. *Braden* v *United States*, 365 U.S. 431 (1961).

18. *Wheeldin* v *United States*, 283 F2d 535 (9th Cir. 1960); cert. denied 366 U.S. 958 (1961); *Fields* v *United States*, 164 F2d 97, 100 (D.C. Cir. 1947). See Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189, 239–242, for a discussion of willfulness.

ments,[19] a mistake of law, if deliberate and intentional, will not excuse such a refusal[20] even if based on advice of counsel.[1]

In determining whether orders from a superior would justify a refusal to comply with a subpena, or whether such refusal constitutes willful behavior, courts have distinguished between a "command to assume a position," which would shield the subordinate, and a mere ratification of a subordinate's "continuous position of noncompliance," which would not.[2] In such a case, the validity of a defense that a person acted on orders of a superior would depend on whether the superior's order preceded the subordinate's refusal or the converse.

The element of willfulness has been discussed in two contexts, refusal to produce papers and refusal to answer questions. The Supreme Court held in one case that the government established a prima facie case of willful noncompliance by introducing evidence that the witness had been validly served with a lawful subpena duces tecum to produce organizational records under her custody and control and that she had intentionally refused to present them on the appointed day.[3] In a later case, the court found that a subcommittee's reasonable basis for believing that a witness could produce certain records, coupled with evidence of his failure to suggest his inability to produce them, supported an inference that he could have produced them and shifted the burden to the witness to explain or justify his refusal.[4]

It has been further held that:

> . . . anything short of a clear-cut default on the part of the witness will not sustain a conviction for contempt of Congress. . . . The witness is not required to enter into a guessing game when called upon to appear before a committee. The burden is upon the presiding officer to make clear the directions of the committee, to consider any reasonable explanations given by the witness, and then rule on the witness' response.[5]

19. *Townsend* v *United States*, 95 F2d 352, 358 (D.C. Cir. 1938).

20. *Watkins* v *United States*, 354 U.S. 178, 208 (1957); *Townsend* v *United States*, 95 F2d 352, 358 (D.C. Cir. 1938).

1. *Sinclair* v *United States*, 279 U.S. 263, 299 (1929).

2. *United States* v *Tobin*, 195 F Supp 588, 615 (D.D.C. 1961); reversed on other grounds, 306 F2d 270 (D.C. Cir. 1962); cert. denied 371 U.S. 902 (1962).

3. *United States* v *Bryan*, 339 U.S. 323, 330 (1950).

4. *McPhaul* v *United States*, 364 U.S. 372, 379 (1960).

5. *United States* v *Kamp*, 102 F Supp 757, 759, 760 (D.D.C. 1952).

A court of appeals, adopting the above reasoning, established a procedure which requires a committee to propound a question, hear the refusal, rule that the refusal to answer is not satisfactory, and then, in time to allow an opportunity for answering, repeat the question to enable the witness either to purge himself and answer or stand on his original refusal to answer.[6] A contempt conviction, it has been said, cannot stand if a committee leaves a witness to speculate about the risk of possible prosecution and does not give him a clear choice between standing on his objection or complying with a committee ruling.[7] However, it has been further indicated that a conclusive presumption of intent to violate the statute might attach to a refusal even where that refusal was made without a statement at the time of the reason therefor.[8]

§ 8. —Procedural Regularity of Hearings

A committee's failure to observe House rules or its own committee rules has been held to constitute a ground to reverse convictions for contempt or perjury. Whether a committee has complied with such rules became easier to ascertain after the House, on Mar. 23, 1955, adopted the Code of Fair Procedures which established certain procedural rights for witnesses and provided that "the Rules of the House are the rules of its committees and subcommittees so far as applicable. . . ."[9]

As an example of the requirement of compliance with procedural rules, a witness' conviction under a District of Columbia statute[10] which defined perjury as making false statements before a competent tribunal was reversed by the Supreme Court because the government at trial did not adduce evidence showing that a quorum of a committee was present when the statements alleged to be false were made.[11]

6. *Quinn* v *United States*, 203 F2d 20, 33 (D.C. Cir. 1952), aff'd., 349 U.S. 155 (1955).

7. *Bart* v *United States*, *349 U.S. 219, 223 (1955); Emspak* v *United States*, 349 U.S. 190, 202 (1955).

8. *Quinn* v *United States*, 203 F2d 20, 33 (D.C. Cir. 1952), aff'd., 349 U.S. 155 (1955).

9. The quotation is taken from Rule XI clause 27(a), *House Rules and Manual* § 735 (1973). See § 13.1, infra, for a discussion of adoption of the Code of Fair Procedures. See also § 15, infra, dealing with a related topic, the procedure for determining whether information may tend to defame, degrade, or incriminate a person.

10. 22 D.C.C. 2501 (Mar. 3, 1901).

11. *Christoffel* v *United States*, 338 U.S. 84 (1949).

But presence of a quorum of the committee at the time of the return of the subpena was held not to be necessary for conviction under the contempt statute, 2 USC §192, for refusal to produce organizational records despite the fact that the witness could have demanded attendance of a quorum and refused to produce documents until a quorum appeared.(12)

A witness' objection or failure to object may affect the validity of an argument at trial. Although the witness' failure to object to the absence of a quorum was considered and did not waive his right to raise that objection at trial in *Christoffel* v *United States*,(13) the witness' failure to make the objection at the hearing when the situation could have been remedied was considered a reason to reject this contention at trial in *United States* v *Bryan*.(14)

In another contempt case, a court of appeals following *Bryan* held that a defendant who had been convicted of failure to answer questions before a congressional committee could not, on appeal, contend that a one-man subcommittee was not valid, inasmuch as he had failed to make the objection at the congressional hearing.(15)

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12. *United States* v *Bryan*, 339 U. S. 323 (1950).

13. See 338 U.S. 84, 88 (1949), for the statement of the majority that, "In a criminal case affecting the rights of one not a member, the occasion of trial is an appropriate one for petitioner to raise the question."

14. See 339 U.S. 323, 333 (1950) in which the majority stated:

"The defect in the composition of the committee, if any, was one which could easily have been remedied. But the committee was not informed until the trial, two years after the refusal to produce the records, that respondent sought to excuse her noncompliance on the ground that a quorum of the committee had not been present. . . . To deny the committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes."

The different treatment of the same issue, timeliness of the objection, was explained by the majority as a consequence of the fact that the contempt statute considered in *Bryan*, 2 USC §192, did not require a "competent tribunal" but the D.C. perjury statute reviewed in *Christoffel* did. This distinction was criticized by Mr. Justice Jackson who commented in a concurring opinion, ". . . I do not see how we can say that what was timely for Christoffel is too late for Bryan." (*Bryan*, at 344.)

See also, *United States* v *Fleischman*, 339 U.S. 349 (1950); reh. denied, 339 U.S. 991 (1950), for another contempt case which held that the witness had waived the objection.

15. *Emspak* v *United States*, 203 F2d 54 (D.C. Cir. 1952); reversed on other grounds, 349 U.S. 190 (1955).

A subcommittee's initiation of an investigation of Communist Party activities in labor, without obtaining authorization from a majority of the full committee as required by committee rule, was held in another case to constitute a ground to reverse a contempt conviction for refusal to answer questions.(16)

§ 9. Rights of Witnesses Under the Constitution—Fifth Amendment

In addition to meeting the requirements imposed by the contempt statute, discussed in preceding sections, congressional investigators must observe limits imposed by the Bill of Rights, particularly the first,(17) fourth,(18) and fifth amendments:

> The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.(19)

The most extensive litigation has involved the fifth amendment. Availability of the privilege against self-incrimination in congressional investigations was established in 1879 when the House adopted a Judiciary Committee report stating that the fifth amendment provision, "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." could be invoked by a person in an investigation initiated with a view to impeach him, notwithstanding the fact that a congressional investigation is not a "criminal case." (20) Because the government

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Both the *Bryan* and *Emspak* cases predated Rule XI, clause 28(h), which provides that, "Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two." *House Rules and Manual* § 735(h) (1973); this clause, numbered 27(h) at the commencement of the 93d Congress 1st Session, was numbered 28(h) at the end of that session. See § 13.3, infra, for a discussion of adoption of this rule.

16. *Gojack* v *United States,* 384 U.S. 702 (1966).

17. See § 10, infra.

18. See § 11, infra.

19. *Watkins* v *United States,* 354 U.S. 178, 188 (1957). See also Liacos, Rights of Witnesses before Congressional Committees, 33 B.U.L. Rev. 337 (1953).

20. See 3 Hinds' Precedents §§ 1699 and 2514, for discussions of the refusal of George C. Seward, former Counsel General at Shanghai, China, to testify or produce subpenaed materials. See also, Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189,

could not challenge the availability of the fifth amendment, it generally focused on the character of the answers sought and adequacy of the claim of the privilege.[1]

Assertions of the fifth amendment privilege against self-incrimination have been raised in reply to questions relating to a witness' own membership or his knowledge of another person's membership in subversive organizations. Thus, the Supreme Court held that Communist Party activity might tend to incriminate a person for violation of the Smith Act and that it was not necessary to show that the answers sought would support a conviction of crime, but only that they would furnish a link in the chain of evidence needed to prosecute a witness for violation of conspiracy to violate that act.[2] Moreover, because the government could not constitutionally convict persons for refusing to testify about potentially incriminating facts, a district court dismissed contempt charges against 19 witnesses who had asserted the fifth amendment and refused to answer questions relating to Communist Party membership and activities at a Honolulu hearing of the Committee on Un-American Activities.[3]

An assertion of the privilege against self-incrimination does not have to take a particular form as long as the committee might reasonably be expected to understand it as an attempt to invoke the privilege.[4] Formulations held to be sufficient include: "the First Amendment to the Constitution, supplemented by the Fifth,"[5] "the First Amendment of the Con-

253–260 (1967); Constitution of the United States of America: Analysis and Interpretation, S. DOC. NO. 92–82, 92d Cong. 2d Sess., pp. 91, 92 (1972); and Fisk, J., Compulsory Testimony of the Congressional Witness and the Fifth Amendment, 15 Okla. L. Rev. 157 (1962), for discussions of the privilege against self-incrimination.

1. *Watkins* v *United States,* 354 U.S. 178, 196 (1957); see also *Quinn* v *United States,* 349 U.S. 155 (1955), *Emspak* v *United States,* 349 U.S. 190 (1955), *Bart* v *United States,* 349 U.S. 219 (1955), which were cited in *Watkins,* at 196.

2. *Blau* v *United States,* 340 U.S. 159 (1950).

3. Applicability of the privilege against self-incrimination to congressional hearings was recognized in *United States* v *Yukio Abe,* 95 F Supp 991 (D.C.Hawaii 1950) in an opinion entered one month prior to *Blau* v *United States.* The decision to dismiss the indictments was not reported.

4. *Quinn* v *United States,* 349 U.S. 155 (1955).

5. *Id.* at p. 164.

stitution supplemented by the Fifth Amendment,"[6] primarily the First Amendment, supplemented by the Fifth."[7]

Courts "indulge every reasonable presumption against waiver of fundamental constitutional rights" and refuse to interpret ambiguous statements as waivers of the privilege against self-incrimination.[8] A witness may waive the privilege by failing to assert it,[9] expressly disclaiming it,[10] or testifying on the same matters concerning which he later claims the privilege.[11] However, because the privilege attaches to a witness in each particular case in which he is called to testify, without reference to his declarations at some other time or place or in some other proceeding, it was held not to be waived when a witness verified allegations in prior litigation[12] or answered the same questions several years prior to committee interrogation when interviewed by an agent of the Federal Bureau of Investigation.[13]

Furthermore, a witness does not waive the privilege by giving answers which do not constitute an admission or proof of any crime.[14]

An insight into availability of the privilege may be gained by reviewing its purpose and permissible uses:

> Privilege . . . may not be used as a subterfuge.
>
> The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answers would furnish some evidence upon which he could be convicted of a criminal offense against the United States or which would lead to a prosecution of him for such offense, or

6. *United States* v *Fitzpatrick,* 96 F Supp 491, 493 (D.D.C. 1951).

7. *Emspak* v *United States,* 349 U.S. 190, 193, 197 (1955); this statement was held to be sufficient notwithstanding the fact that the witness, in response to the question, "Is it your feeling that to reveal your knowledge of them [certain individuals about whose communist activities the witness had been questioned] would subject you to criminal prosecution?" replied, "No, I don't think this Committee has a right to pry into my associations. That is my own position." *Emspak,* at 195, 196.

8. *Emspak* v *United States,* 349 U.S. 190 (1953).

9. *Id.*

10. *Hutcheson* v *United States,* 369 U.S. 599, 609 (1962).

11. *Rogers* v *United States,* 340 U.S. 367 (1951); *Presser* v *United States,* 238 F2d 233 (1960); cert. denied, 365 U.S. 316 (1960); rein. denied, 365 U.S. 858 (1960).

12. *Poretto* v *United States,* 196 F2d 392 (5th Cir. 1952).

13. *Marcello* v *United States,* 196 F2d 437 (5th Cir. 1952).

14. *United States* v *Costello,* 198 F2d 200, 202 (2d Cir. 1952).

which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution therefor.

A witness is not bound to explain why answers to apparently innocent questions might tend to incriminate him when circumstances render such reasonable apprehension evident. Once it has become apparent that the answers to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions upon the ground that such answers would tend to incriminate him.[15]

Consequently, availability of the privilege is affected more by the context in which the question is asked and the underlying circumstances than by the nature of the question. In the application of this principle, a witness was not permitted to assert the privilege in response to questions relating to his place of residence and other preliminary data in the absence of a showing that elements of incrimination might attach to that information;[16] in another case, however, the privilege was held to be properly asserted in response to a question as to whether the witness knew any individuals who had been listed in an investigating committee's interim report which referred to such individuals as possibly involved in organized crime.[17]

Similarly, a witness was permitted to refuse to answer a question as to his employment record because the question was asked "in a setting of possible incrimination."[18] And a witness with a criminal record was said to have properly invoked the fifth amendment in response to all questions except his name and address before a Senate committee investigating crime.[19]

After testifying to an incriminating fact, a witness may not refuse to answer more questions on the same subject on the ground that such answers would further incriminate. Thus, after a witness testified that she had been treasurer of the Communist Party in Denver, she could not invoke the privilege against self-incrimination when asked the name of the person to whom she had given or-

15. *United States* v *Jaffee,* 98 F Supp 191 (D.D.C. 1951). See also, Moreland, Allen B., Congressional Investigations and Private Person, 40 So. Cal. L. Rev. 189, 258, 259 (1967) for a discussion of the scope of coverage of the privilege.

16. *Simpson* v *United States,* 241 F2d 222 (9th Cir. 1957).

17. *Aiuppa* v *United States,* 201 F2d 287 (6th Cir. 1952).

18. *Jakins* v *United States,* 231 F2d 405 (9th Cir. 1956).

19. *Marcello* v *United States,* 196 F2d 437 (5th Cir. 1952).

ganizational records. The majority of the Supreme Court reasoned that upholding a claim of privilege in such a case would invite distortion of facts by permitting the witness to select any stopping place in testimony.[20]

A witness who responded that he had complied to the best of his ability with a subpena and had made available all records he possessed at the time of service was held to have waived the privilege against self-incrimination; this waiver applied to a question relating to whether he had destroyed any of the subpenaed records since the time of service.[1]

A witness who admitted attending a meeting of the Communist Party but denied that he was a member was not permitted to invoke the privilege against self-incrimination in response to questions asking him to identify other persons present at that meeting.[2]

Under Part V of the Organized Crime Control Act of 1970,[3] any witness who refuses on the basis of his privilege against self-incrimination to testify or provide information may be granted immunity by court order based upon the affirmative vote either of a majority present before either House of Congress or two-thirds of the members of a full committee for a proceeding before a committee, subcommittee, or joint committee. Furthermore, the Attorney General must be served with notice of the intention to request the order 10 or more days prior to making it. When these conditions are met and a duly appointed member of the House or committee concerned makes the request, a U.S. district court shall issue the order requiring the witness to testify or provide the information. Issuance of the order may be deferred not longer than 20 days from the date of the request upon application of the Attorney General. The effect of such an order is to compel the witness to testify or provide the information by immunizing him from use in a criminal trial not only of tes-

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20. See *Rogers* v *United States,* 340 U.S. 367 (1951) which involved questioning before a grand jury.

1. *Presser* v *United States,* 384 F2d 233 (D.C. Cir. 1960), cert. denied, 365 U.S. 816 (1960); rein. denied, 365 U.S. 855 (1960).

2. *United States* v *Singer,* 139 F Supp 847 (D.D.C. 1956); aff'd. *Singer* v *United States,* 244 F2d 349 (D.C. Cir. 1957); rev'd. on other grounds on reh., 247 F2d 535 (1957).

3. 84 Stat. 926; 18 USC §§6002, 6005. The previous immunity statute, the Compulsory Testimony Act of 1954, codified at 18 USC §3486 (1964), as amended, 18 USC §3486 (1965), which applied to any investigation relating to national security or defense, was repealed. See also 6 Cannon's Precedents §354, for a discussion of earlier cases on immunity.

timony or other information compelled under the order, but also any information directly or indirectly derived from such testimony or information.

A witness may intervene in a proceeding to grant immunity to contest the issuance of the order on the ground that the procedure prescribed by the statute has not been followed. Nonetheless, a witness may not challenge the committee's scope of inquiry, pertinence of questions propounded, or constitutionality of the statute, because the discretion of the district court in an immunity hearing does not encompass these issues.[4]

The present immunity statute[5] has been interpreted to require the court to make sure of compliance with established procedures, but does not authorize discretion to determine the advisability of granting immunity or impose conditions on such a grant.[6]

§ 10. —First Amendment

Claims involving freedom of association, belief, expression, and petition under the first amendment have sometimes been asserted in cases arising out of congressional investigations, though such claims are less frequent than those involving the privilege against self-incrimination.[7] The Supreme Court has recognized the applicability of the first amendment to investigations:

> Clearly an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by rulemaking.[8]

4. *In re McElrath*, 248 F2d 612 (D.C Cir. 1957); this case arose under 18 USC § 3486, which has been repealed.

5. 18 USC § 6005.

6. Application of U.S. Senate Select Committee on Presidential Campaign Activities, 361 F Supp 1270 (D.C. 1973).

7. See, for example, Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189, 260–265 (1967), and Bendich, A. M., First Amendment Standards for Congressional Investigations, 51 Calif. L. Rev. 267 (1963), for discussion of the First Amendment.

8. *Watkins* v *United States*, 354 U.S. 178, 197 (1957); see note 31, inserted at this point in the *Watkins* opinion, which listed other cases supporting this principle, including *United States* v *Rumely*, 345 U.S. 41, 43 (1953); *Lawson* v *United States* 176 F2d 49, 51, 52 (D.C. Cir. 1949); *Barsky* v *United States*, 167 F2d 241, 244–250 (D.C. Cir. 1948), cert. denied 334 U.S. 843 (1948); and *United*

In determining whether to accept a first amendment claim in a particular instance, courts balance the witness' right of privacy against the government's need to obtain the information:

> Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court. . . . It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred. . . . The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness.[9]
>
> Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.[10]

States v *Josephson*, 165 F2d 82, 90–92 (2d Cir. 1947), cert. denied 333 U.S. 858 (1948).

9. *Watkins* v *United States*, 354 U.S. 178, 198 (1957).

10. *Barenblatt* v *United States*, 360 U.S. 109, 126 (1959).

The decision to use a balancing test followed several developments in earlier cases. For example, courts refused to apply the "clear and present danger" rule, the traditional first amendment test, to congressional inquiries because such inquiries help determine the existence of a danger to national security and possible responses to such a danger;[11] not allowing Congress to investigate a potential danger until it had become "clear and present" would be "absurd" and impair the ability to respond.[12] Thus, for example, the power to inquire into whether a subpenaed witness was a member of the Communist Party or a believer in its principles received judicial approval.[13]

11. *United States* v *Josephson*, 165 F2d 82 (2d Cir. 1947), cert. denied 333 U.S. 858 (1948).

12. *Barsky* v *United States*, 167 F2d 241, 246, 247 (D.C. Cir. 1948), cert. denied 334 U.S. 843 (1948); reh. denied 339 U.S. 971, 972 (1950).

13. *Lawson* v *United States*, 176 F2d 49, 52 D.C. Cir. 1949).

In a later case, the right to petition and freedom of persons who had actively criticized the actions of the Committee on Un-American Activities were not deemed to have been infringed when the committee subpenaed them to testify about their activities in the Communist Party. *Braden* v *United States*, 365 U.S. 431 (1961); *Wilkinson* v *United States*, 365 U.S. 399 (1961).

The revision of the doctrine of presumption of legislative purpose and the recognition of the need for a lucid expression of authorization,[14] as well as imposition of the requirement that the delegation of power to investigate must be clearly revealed in the committee's authorizing resolution whenever first amendment rights are threatened, contributed to adoption of the balancing test.[15]

One formulation of the test to be applied by courts is the following, from a case which found an infringement of first amendment rights:

> [I]t is an essential prerequisite of the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association, and petition that the State convincingly show a substantial relation between the information sought and a subject of overruling and compelling state interest.[16]

But it should be remembered that one consequence of the balancing test is a general reluctance to interfere with pending congressional investigations on the ground that the witness may present first amendment claims before the committee or subcommittee, before the House or Senate, at trial, and on appeal.[17] Accordingly, courts will not interfere with legislative investigations unless the threat posed thereby to first amendment freedoms is sufficiently compelling and concrete, and the witness would be denied a remedy in the absence of such intervention.[18]

14. *United States* v *Rumely,* 345 U.S. 41 (1953).

15. *Watkins* v *United States,* 354 U.S. 178 (1937).

16. *Gibson* v *Florida Legislative Committee,* 372 U.S. 539, 546 (1963).

17. See, for example, *Sanders* v *McClellan,* 463 F2d 894 (D.C. Cir. 1972); *Ansara* v *Eastland,* 442 F2d 751 (D.C. Cir. 1971); *Shelton* v *United States,* 404 F2d 1292 (D.C. Cir. 1968) cert. denied 393 U.S. 1024 (1969) and *Pauling* v *Eastland,* 288 F2d 126 (D.C. Cir. 1960). But see *Stamler* v *Willis,* 415 F2d 1365 (7th Cir. 1969), cert. denied sub. nom. *Ichord* v *Stamler,* 399 U.S. 929 (1970), which held that witnesses against whom criminal charges for contempt were pending could, nonetheless, challenge alleged committee infringements on free expression in a civil action.

18. See, for example, *Pollard* v *Roberts,* 393 U.S. 14 (1968), per curiam affirmance of the three judge District Court for the Eastern District of Arkansas, 283 F Supp 248 (1968); *Gibson* v *Florida Legislative Committee,* 373 U.S. 539 (1963); *Louisiana ex rel. Germillion* v *NAACP,* 366 U.S. 293 (1961); *Bates* v *Little Rock,* 361 U.S. 516 (1960); *NAACP* v *Alabama,* 357 U.S. 449 (1958); *Sweezy* v *New Hampshire,* 354 U.S. 234 (1957), which involve infringements of the right of association by states; they

§ 11. —Fourth Amendment

The fourth amendment prohibition against unreasonable searches and seizures applies to congressional investigations.[19] A court of appeals made an unequivocal statement to this effect:

> The Fourth Amendment exempts no branch of the federal government from the commandment that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." This constitutional guaranty applies with equal force to executive, legislative and judicial action. Courts and committees rightly require answers to questions. But neither may exert this power to extort assent in invasions of homes and to seizures of private papers. Assent so extorted is no substitute for lawful process.[20]

The Supreme Court in one case held that the counsel to a Senate subcommittee who allegedly conspired with state officials to seize property and records by unlawful means in violation of the fourth amendment was not entitled to immunity under the Speech or Debate Clause and would have to appear as a defendant in a civil action and, if found liable, pay damages. However, the chairman of the subcommittee who had also been named as a party defendant was entitled to the immunity.[1]

Lower courts have adjudicated the validity of subpenas issued by committees. For example, the Supreme Court of the District of Columbia held that a Senate subpena duces tecum requiring Western Union to supply all copies of all telegrams sent or received by a law firm for a 10-month period in 1935 exceeded any legitimate exercise of the subpena power.[2]

Similarly, a federal district court expressed its view of a subpena duces tecum which specified "the minute books, contracts, reports, documents, books of account, etc., either belonging to the relator or to the Railway Audit and Inspection Company, Inc., with which he was connected" in the following manner:

> [T]he subpena on its face, shows a mere fishing expedition into the private affairs of the relator and his company, not within the scope of the com-

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did not arise as contempt proceedings from congressional investigations.

19. *Watkins* v *United States,* 354 U.S. 178, 188 (1957). See also Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189, 225–230 (1967).

20. *Nelson* v *United States,* 208 F2d 505 (D.C. Cir. 1953), cert. denied 346 U.S. 827 (1953).

1. *Dombrowski* v *Eastland,* 387 U.S. 82 (1967).

2. *Strawn* v *Western Union,* 3 USL Week 646 (SCDC, Mar. 11, 1936).

> mittee's investigation, and an encroachment upon defendant's rights under the Fourth Amendment. . . . The duces tecum part of the subpena is so lacking in specification and description, and so wide in its demands, that it is felt it could not have been ordered had the application for it been made to this court.[3]

Although courts refuse to enforce subpenas which they find to be overbroad, they refuse to limit a committee's use of information in its possession. After telegraph companies refused to comply with a Senate committee's subpena duces tecum directing them to produce all telegrams transmitted from their offices from Feb. 1 to Sept. 1 of 1935, representatives of the committee and the Federal Trade Commission examined these messages and made notes and copies. Conceding that a court could enjoin this "trespass" while it was being conducted, a court of appeals stated that it lacked authority to enjoin use of the material after the committee had gained possession.[4]

A subpena for documents held in a representative capacity need not be as specific as one for documents belonging to an individual. Thus, a subpena directing production of "All records, correspondence and memoranda of the Civil Rights Congress relating to: . . . (1) the organization of the group; (2) its affiliation with other organizations; and (3) all monies received or expended by it," did not constitute "unreasonable search and seizure."[5]

§ 12. —Sixth Amendment

Because the language of the sixth amendment stipulates its application "In all criminal prosecutions," the amendment does not apply directly to congressional investigations. Consequently, a witness is not entitled to confront or cross-examine witnesses.[6] But

3. *United States* v *Groves,* 18 F Supp 3 (W.D. Pa. 1937); because the case was decided on the point of failure to appear before the committee, the statement relating to the subpena was dictum.

4. *Hearst* v *Black,* 87 F2d 68, 71 (D.C. Cir. 1936).

5. *McPhaul* v *United States,* 364 U.S. 372, 381 (1960); compare *McPhaul* with *United States* v *Groves,* 18 F Supp 3 (W.D. Pa. 1937), note supra, which discusses a subpena for papers which belong to an individual.

6. *United States* v *Fort,* 443 F2d 670 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971). *Fort,* however, cites examples of granting a limited right of self-examination (p. 680 and n. 24). See also *Hannah* v *Larche,* 363 U.S. 420 (1960), in which the Supreme Court by analogy approved state legislative committee rules which denied the rights of confronta-

the rules of the House take cognizance of rights included in the sixth amendment, including right to counsel and compulsory process. Thus, a witness may be accompanied by his own counsel for the purpose of advising him of his constitutional rights.(7) Furthermore, if a committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, such person is entitled to request that additional witnesses be subpenaed.(8) Where the committee does not determine that evidence or testimony may defame, degrade, or incriminate any person, the chairman receives and the committee disposes of requests to subpena additional witnesses.(9)

Although sixth amendment procedural guarantees do not apply to investigative proceedings, they apply to the criminal proceedings brought as a result of them. A court of appeals reversed a contempt conviction on the ground that the question the witness refused to answer, whether he had been a "member of a Communist conspiracy," lacked the definiteness required by the sixth amendment provision, "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." (10) A count of an indictment charging that a witness committed perjury before a congressional committee when he denied that he had ever been "a sympathizer or any other kind of promoter of Communism or Communist interests" was held void for vagueness under the sixth amendment.(11)

§ 13. Rights of Witnesses Under House Rules

In addition to constitutional provisions, certain rules of the House grant rights to witnesses at investigative hearings, or establish procedures for such hear-

tion and cross-examination, in that the court sustained the rules of the Commission on Civil Rights which did not grant these rights in fact-finding investigations.

7. Rule XI clause 28(k), *House Rules and Manual* § 735(k) (1973). See § 14, infra, for precedents dealing with the right to counsel.

8. Rule XI clause 28(m), *House Rules and Manual* § 735(m) (1973). See § 15, infra, for a discussion of the effect of derogatory information.

9. Rule XI clause 28(n), *House Rules and Manual* § 735(n) (1973). See § 13.6, infra, for a discussion of adoption of this rule.

10. *O'Connor* v *United States*, 240 F2d 404 (D.C. Cir. 1956).

11. *United States* v *Lattimore*, 215 F2d 847 (D.C. Cir. 1954).

ings.[12] A rule[13] permits witnesses to submit brief and pertinent sworn statements in writing for inclusion in the record in the discretion of the committee, which is the sole judge of the pertinency of testimony and evidence adduced at its hearing. Cases decided prior to adoption of this rule indicated that a committee's refusal to permit a witness to make a statement before he was sworn,[14] or read a prepared statement[15] or a detailed legal brief objecting to a committee's authority during a hearing,[16] did not excuse refusals to be sworn or answer questions.

Another rule[17] permits a witness to refuse to be exposed to media coverage during a hearing. Prior to adoption of this rule, it was held that hearings conducted before media were not rendered invalid by the absence of a House rule on the subject, nor by the absence of rulings of the Speaker in that Congress; it was further said that rulings by Speakers in earlier Congresses prohibiting media coverage were not applicable.[18] Courts also held that the presence of microphones and cameras did not constitute such a lack of proper decorum as to render the committee an incompetent tribunal and eliminate the "competent tribunal" element of the crime of perjury.[19]

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12. See §§ 13.1 to 13.11, infra. See also, Heuble, Edward, Congressional Resistance to Reform: The House Adopts a Code for Investigating Committees, 1 Midwest J. of Poll. Sci. 313 (Nov. 1957).

13. Rule XI clause 28 (p), *House Rules and Manual* § 735(p) (1973). See § 13.10, infra, for a discussion of adoption of this rule.

14. *Eisler* v *United States*, 170 F2d 273 (D.C. Cir. 1948); cert. dismissed, 338 U.S. 883 (1948).

15. *Townsend* v *United States*, 95 F2d 352, 360 (D.C. Cir. 1938), cert. denied, 303 U.S. 664 (1938).

16. *Barenblatt* v *United States*, 240 F2d 875 (D.C. Cir. 1957); vacated and remanded, 354 U.S. 930 (1957); aff'd., 252 F2d 129 (D.C. Cir. 1958); aff'd., 360 U.S. 109 (1959).

17. Rule XI clause 33(f)(2), *House Rules and Manual* § 739b (1973). See § 13.11, infra, for a discussion of adoption of this rule.

18. *Hartman* v *United States*, 290 F2d 460 (9th Cir. 1961); reversed on other grounds, 370 U.S. 724 (1962).

District courts reached conflicting holdings on the duty of a witness to answer questions at a televised hearing. Compare *United States* v *Kleinman*, 107 F Supp 407 (D.D.C. 1952), which held that a witness was justified in refusing to testify before the media, with *United States* v *Hintz*, 193 F Supp 325 (N.D. Ill. 1952) which held that the witness was not excused for that reason. Both of these decisions predated Rule XI clause 33(f) (2).

19. *United States* v *Moran*, 194 F2d 623 (2d Cir. 1952), cert. denied, 343 U.S. 965 (1952).

Adoption of Code of Fair Procedures, Generally

§ 13.1 The House adopted the Code of Fair Procedures, establishing procedural rights for witnesses at investigative hearings.

On Mar. 23, 1955,[1] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, granting certain procedural rights to witnesses at investigative hearings.

AMENDING THE RULES OF THE HOUSE OF REPRESENTATIVES

MR. [HOWARD W.] SMITH of Virginia: Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 151 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That rule XI 25 (a) of the Rules of the House of Representatives is amended to read:

"25. (a) The Rules of the House are the rules of its committees so far as possible, except that a motion to recess from day to day is a motion of high privilege in committees. Committees may adopt additional rules not inconsistent therewith."

Sec. 2. Rule XI (25) is further amended by adding at the end thereof:

"(h) Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two.[2]

"(i) The chairman at an investigative hearing shall announce in an opening statement the subject of the investigation.[3]

"(j) A copy of the committee rules, if any, and paragraph 25 of Rule XI of the House of Representatives shall be made available to the witness.[4]

"(k) Witnesses may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.[5]

"(l) The chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt.[6]

"(m) If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—

"(1) receive such evidence or testimony in executive session;

"(2) afford such person an opportunity voluntarily to appear as a witness; and

"(3) receive and dispose of requests from such person to subpena additional witnesses.[7]

"(n) Except as provided in paragraph (m), the chairman shall receive and the committee shall dis-

1. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

2. This provision is discussed at § 13.3, infra.

3. This provision is discussed at § 13.4, infra.

4. This provision is discussed at § 13.7, infra.

5. This provision is discussed at § 14.1, infra.

6. This provision is discussed at § 13.5, infra.

7. This provision is discussed at § 15.1, infra.

pose of requests to subpena additional witnesses.

"(o) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee.[8]

"(p) In the discretion of the committee, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The committee is the sole judge of the pertinency of testimony and evidence adduced at its hearing.[9]

"(q) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the committee." [10]

MR. SMITH of Virginia: Mr. Speaker, I yield 30 minutes to the gentleman from Ohio [Mr. Brown].

Mr. Speaker, at this time I offer a committee amendment.

The Clerk read as follows:

Committee amendment offered by Mr. Smith of Virginia: On page 1, line 4, after the word "as", strike out the word "possible" and insert in lieu thereof "applicable."

The committee amendment was agreed to.

MR. SMITH of Virginia: Mr. Speaker, I offer another committee amendment.

The Clerk read as follows:

Committee amendment offered by Mr. Smith of Virginia: On page 2, line 7, after the word "witnesses", insert "at investigative hearings."

MR. SMITH of Virginia: Mr. Speaker, I think I should say a word in explanation of that amendment. The bill reads:

Witnesses may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

The real purpose of this bill has to do with investigative committees and not legislative committees. This amendment simply makes that clear, that it applies not to the legislative committees.

THE SPEAKER: [11] The question is on the committee amendment offered by the gentleman from Virginia [Mr. Smith].

The committee amendment was agreed to. . . .

MR. SMITH of Virginia: Mr. Speaker, I move the previous question on the resolution.

The Speaker: Without objection, the previous question is ordered

MR. [KENNETH B.] KEATING [of New York]: I object, Mr. Speaker.

THE SPEAKER: The question is on ordering the previous question.

The previous question was ordered.

THE SPEAKER: The question is on the resolution.

The resolution was agreed to.

A motion to reconsider was laid on the table.

The debate that preceded the adoption of the measure included an explanation as to its background and purpose: [12]

8. This provision is discussed at § 13.9, infra.

9. This provision is discussed at § 13.10, infra.

10. This provision is discussed at § 13.8, infra.

11. Sam Rayburn (Tex.).

12. 101 CONG. REC. 3569–71, 84th Cong. 1st Sess.

MR. SMITH of Virginia: Mr. Speaker, this resolution is a resolution reported by the Committee on Rules as a general guide for committees in the conduct of their hearings. As you know, there has been a lot of publicity and there has been some criticism about the conduct of hearings, particularly in investigative committees. The purpose here is to lay down a general framework or guide for the use of all legislative committees and may be supplemented by those committees from time to time as the exigencies require, so long as they do not conflict with the general purposes of this. This resolution is intended to lay down the general groundwork that will, perhaps, avoid some of the criticism that has taken place in the past.

There are two items that I think I should call particular attention to. One is the proviso that no subcommittee shall consist of less than two members. In other words, that abolishes the custom of one-man subcommittees.

The other is that when a person is named in a committee hearing and his good reputation besmirched, he shall have a prompt opportunity to appear and refute the charges.

I think those are the main things in the bill, except the provision that any witness that is called by an investigative committee shall have the right to have counsel to advise him as to his constitutional rights. . . .

MR. [EDWIN E.] WILLIS [of Louisiana]: Mr. Speaker, a group of us collaborated with the gentleman from California [Mr. Doyle] in the preparation of House Resolution 151. I was a member of that group. During the course of its consideration I will be glad to try to answer pertinent questions as to the details of the resolution. For the moment, however, I think it would be well for me to discuss the background and the broad outline of the proposal.

The most important thing to keep in mind is that the resolution simply sets forth minimum standards of conduct, particularly with reference to investigative hearings. Thus the very first paragraph of the resolution provides, "Committees may adopt additional rules not inconsistent herewith." Some committees may want to spell out their rules in greater detail. As a matter of fact, the rules of the House Committee on Un-American Activities are broader than the resolution presently before the House for consideration, but the point is that this particular committee and the other committees which may presently spell out their rules in broader terms than provided in House Resolution 151 could change their rules. Here we are amending the rules of the House itself. Since the rules of the House are binding on its committees, the net result is that the minimum standards of conduct set forth in House Resolution 151 will have to be respected by the committees. In other words, committee rules can provide for more but not less than the requirements set forth in this resolution.

MR. [CLARENCE J.] BROWN of Ohio: . . . Now, if I may, I shall try to the best of my ability, to explain in a few very short sentences just what this resolution does. I think the primary object that is accomplished or will be accomplished by the adoption of this resolution is that it does fix definitely in the rules that you cannot have 1-man subcommittees and that any subcommittee

taking evidence officially must consist of at least 2 members. Now, it does leave with the legislative committees the power and the authority to expand the rules of the House; in other words, under the present arrangement, each legislative committee, investigative committee, or special committee, is bound by the rules of the House and must follow the rules of the House. But, in addition, the committees now have the right and the authority to adopt additional rules for their own conduct if they so desire. In some instances we have had, more in another legislative body than in this one, subcommittees made up of only one person conducting the hearings. So, this resolution states very plainly in section 2 that each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two.

In other words, the House under its general rules, by the adoption of this resolution, will say that you can fix any number of members on a committee or subcommittee as a quorum, provided you do not go below two; there must be at least two there, and that meets, as the gentleman who just preceded me explained, some of the legal questions that have arisen as the result of the cases taken to the Supreme Court. It cures that.

Criticism of Code of Fair Procedures

§ 13.2 The Code of Fair Procedures was criticized in debate at the time of its adoption.

On Mar. 23, 1955,[13] the Code of Fair Procedures was criticized as not providing sufficient safeguards to witnesses by Mr. Hugh D. Scott, of Pennsylvania.

MR. SCOTT: . . . As has already been pretty generally admitted, the Doyle resolution does not do anything which was not already in the discretion of committee chairmen, that I can see, except as to the two-man quorum, and that is bad. . . .

The pitifully inadequate Doyle resolution is powerless to prevent any of the following abuses, all of which have been the subject of widespread criticism:

First. It would allow a committee to circulate "derogatory information" from its confidential files without notice to the individuals concerned and without giving him an opportunity to explain or deny the defamatory material.

Second. It would allow a committee to make public defamatory testimony given at an executive session without notice of hearing to the person defamed.

Third. It would allow a committee to issue a public report defaming individuals or groups without notice or hearing.

Fourth. It would allow a committee chairman to initiate an investigation, schedule hearings and subpena witnesses without consulting the full committee.

Fifth. It would allow a committee chairman or member publicly to defame a witness or a person under investigation.

13. 101 CONG. REC. 3573, 3574, 84th Cong. 1st Sess.

Sixth. It would not allow a person under investigation to cross-examine a witness accusing him at a public hearing.

Seventh. It would not entitle a witness to even 24 hours advance notice of a hearing at which his career or reputation would be at stake.

Eighth. It would not protect a witness from distraction, harassment, or nervousness caused by radio, TV, and motion picture coverage of hearing. This, however, is adequately taken care of for the present session by the ruling of the Speaker.(14)

Ninth. It contains no provision for enforcement of its prohibitions or for supervision of committee operations.

Tenth. Finally, and most important, it would not prevent the committee from sitting as a legislative court, trying guilt or innocence of individuals, or inquiring into matters wholly unrelated to any function or activity of the United States Government.

Alternate Codes of Fair Procedures were introduced by a Member (15) as House Resolution 447 of the 83d Congress and House Resolution 61 of the 84th Congress.(16)

14. On Feb. 25, 1952, Speaker Sam Rayburn (Tex.), in response to a parliamentary inquiry of the Minority Leader, Joseph W. Martin, Jr. (Mass.), stated, ". . . There is no authority, and as far as the Chair knows, there is no rule granting the privilege of television of the House of Representatives, and the Chair interprets that as applying to these committees and subcommittees, whether they sit in Washington, or elsewhere. . . ." See 98 CONG. REC. 1334, 1335, 82d Cong. 2d Sess., for this ruling and 98 CONG. REC. 1567–71, 82d Cong. 2d Sess., Feb. 27, 1952, for a discussion of this ruling by Members.

Quorum

§ 13.3 The House amended its rules to provide that, "Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two."

On Mar. 23, 1955,(17) the House by voice vote approved House Res-

15. Hugh D. Scott, Jr. (Pa.), who in the 83d Congress chaired the subcommittee of the Committee on Rules which proposed a Code of Fair Procedures. A Republican, Mr. Scott was a majority member of the 83d Congress and a minority member of the 84th Congress. See also 101 CONG. REC. 218–21, 84th Cong. 1st Sess., Jan. 10, 1955, for Mr. Scott's comments on these resolutions.

16. The texts of these resolutions appear at 101 CONG. REC. 3574, 3575, 84th Cong. 1st Sess., Mar. 23, 1955. Final disposition was referral to the Committee on Rules. Mr. Scott also inserted an article from the Virginia Law Review entitled Rules for Congressional Committees: An Analysis of House Resolution 447, which he and Rufus King had written. This article, which includes a compilation of precedents, studies, statutes, and court opinions on investigations, appears at 101 CONG. REC. 3575–81, 84th Cong. 1st Sess., Mar. 23, 1955.

17. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

olution 151, known as the Code of Fair Procedures. One provision of the Code relates to the minimum number of members who must attend an investigative hearing and the requisite number for a quorum at all committee meetings,[18] and provides that, "Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two."

During the debate, Members discussed the reasons for and implications of this amendment.

Commenting on the effect of the amendment, Mr. Howard W. Smith, of Virginia, stated that this amendment "abolishes the custom of oneman subcommittees." [19]

Mr. Edwin E. Willis, of Louisiana, stated that this amendment was a response to the Supreme Court decision in *Christoffel* v *United States,* 338 U.S. 84 (1949), which reversed and remanded a conviction for perjury because the government had not proved that a quorum was present at the time the allegedly false testimony was given, as required by the District of Columbia statute defining perjury as giving false testimony under oath before a "competent tribunal."

Mr. Willis also observed: [20]

> I call to your particular attention the following hint the Supreme Court gave to Congress. In the course of the decision, the Court said:
>
> > It [the Congress] of course has the power [21] to define what tribunal is competent to exact testimony and the conditions that establish its competency to do so.
>
> Following that broad hint, the other body amended its rules to provide that at an investigative hearing testimony may be received by one member. Stated differently, the Senate rules now provide that a single member constitutes a quorum. . . .
>
> But while the other body amended its rules, we did not. Accordingly, one of the provisions of House Resolution 151 provides as follows:
>
> > Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two.
>
> I repeat that it is necessary for us to adopt a rule along this line in order to meet the decision of the Supreme Court in the Christoffel case. And I submit that at an investigative hearing a quorum should be not less than two. Of course, even after the passage of

18. See House Rules and Manual § 735(h) (1973).

19. 101 CONG. REC. 3569, 84th Cong. 1st Sess.

20. 101 CONG. REC. 3571, 84th Cong. 1st Sess.

21. This "power" is the constitutional mandate, " Each House may determine the Rules of its Proceedings . . ." Art. I, § 5 clause 2.

this resolution, a particular committee may require a greater number to constitute a quorum, but under the minimum standards of conduct which this resolution imposes, the quorum in no event can be less than two.

I submit that this is a sensible rule, as are all others embodied in the resolution. I personally oppose a one-man hearing. I think fair play requires that not less than two members should be present. This conforms more closely to our notions of fair proceedings.

But there is another reason why I think at least two members should be present at all times for taking testimony and receiving evidence. Forget the honest and cooperative witnesses for the moment. They never cause trouble to anyone and, of course, all committees bend backward to protect them. I have in mind the usual witnesses who appear before investigative committees such as the Committee on Un-American Activities of which I have the honor and privilege to be a member. These witnesses are tough. They are resourceful. They are sharp and smart. There is nothing they like better than to precipitate an argument with the presiding member. Yes, they are cunning. They are offensive and sometimes they are downright insulting. The presiding member must be on his toes and he is required to make quick and delicate rulings. Two heads are better than one in situations of this kind.

And so I am opposed to a one-man hearing, not only for the protection of the witness but more importantly for the preservation of orderly proceedings and the dignity of the committee of Congress.. . .

The debate also included an exchange regarding applicability of this provision:[1]

MR. [H.R.] GROSS [of Iowa]: Under section 2, subsection (h) each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two. Does this mean in the absence of the adoption of rules that every committee, or that a standing committee such as the Committee on the Post Office and Civil Service could proceed with only two members constituting a quorum?

MR. SMITH of Virginia: Yes; I think that any subcommittee constituted of two members is sufficient.

MR. GROSS: That is with reference to subcommittees, then rule 11 deals with subcommittees, is that correct?

MR. SMITH of Virginia: To what rule does the gentleman refer?

MR. GROSS: Rule 11 section 2 (25). Does it deal only with subcommittees?

MR. SMITH of Virginia: It deals with all committees. . .

MR. [ELIJAH L.] FORRESTER [of Georgia]: . . . Let me show you gentlemen how hard it is to try to make some sort of provisions on rules of this kind. Take this particular rule of the 2-man committee. We wanted to write into that bill, and it is the sense of those who drew up the bill that where there is a committee of two, they shall be nonpartisan-one shall be a Democrat and one shall be a Republican. If you put that into the bill, and of course, we would like to have the Congress ob-

1. 101 CONG. REC. 3570, 3573, 3582,84th Cong. 1st Sess.

serve that, but if you put it into the bill, suppose you are out in California with a 2-man committee and suppose one of the members absented himself or suppose he was sick. Of course, you can see that there they are out in California and they are completely stymied. We did not put it in the bill, but we do think that is a rule that ought to be observed.

MR. [KENNETH B.] KEATING [of New York]: Mr. Speaker, will the gentleman yield on that point?

MR. FORRESTER: I yield.

MR. KEATING: With reference to that very provision, is it not the intention of the framers of this resolution that this should apply only to investigative hearings, because, certainly, there are many informal hearings by legislative committees where they take evidence with only one person sitting. It would greatly impede the work of those committees if, in a legislative committee, they were to require, always and without exception, more than one person.

MR. FORRESTER: Of course, that is the answer to that. . . .

MR. KEATING: . . . Indeed, I am fearful that the drafters of this resolution have, in one particular, imposed precisely the kind of limitation toward which I expressed unalterable opposition a few moments ago. That is at lines 10 through 12, on page 1, in the provision which allows and requires each committee to fix a number of its members to constitute a quorum, which number shall not be less than 2. This would be an unreasonable handicap and would expose the workings of our committee to exactly the vulnerability which was capitalized upon in the Christoffel case to defeat an otherwise valid conviction.

The Senate rule on the same subject, adopted after that case to meet the problem, reads as follows:

> Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

You will note that in all cases, under the Senate rule, one-third of a committee or subcommittee, including 1 member of a 3-man subcommittee, shall be a quorum for the purpose of taking sworn testimony, and that each committee and subcommittee is expressly authorized to vest this authority in a lesser number if it so wishes. This rule properly protects the committee and vests rights in it without suggesting any crippling restrictions in the event that the committee or subcommittee finds itself dealing with a perjurer.

The difficulty pointed out in the Christoffel case was that one can only commit perjury before a competent tribunal and the court held that a congressional committee consisting of less than a quorum was not such a tribunal. Even the Senate's one-third rule might give rise to difficulties since it is usual during protracted hearings for individual members to enter and leave the hearing room so long as someone is present and presiding. So the Senate made it possible for its committees, in any case where perjury might be an issue, to authorize a single member to take the testimony and therefore to prevent any recurrence of the Christoffel result.

The provision in House Resolution 151 which I am discussing does just

the opposite; it leaves in doubt what a quorum for the purpose of taking testimony might be in case the committee or subcommittee happens to overlook the formality of prescribing one—and it requires, arbitrarily, at all times and in all cases, that testimony must be taken with at least two members present. I have served as chairman of one of these investigating committees, and I know from personal experience how very difficult it is to keep a multiple quorum in the hearing room and to try to reflect accurately in the record that more than one member is present at all times. We tried, for a while, to have the reporter indicate on the record something like "at this point Mr. So and So left the hearing room," "at this point Mr. So and So reentered the hearing room," and so forth. It just will not work. And if you did not do something like that in a subsequent perjury case long after the facts, the actual physical presence of at least two members would be open to challenge and a necessary subject of proof in court.

The momentary furor stirred up last year over the subject of so-called one-man committees never impressed me very much. If any abuses were actually attributable to this situation, they were the fault not so much of the one man who ran the hearings, but of the others who, for one reason or another, were not present. In at least 99 out of 100 cases where testimony is to be taken from friendly and cooperative witnesses, it would be a terrible burden and disadvantage to require more than one member attend to build a record of the same; in the 100th case, requiring the presence of two members would not make a great deal of difference anyway. I am strongly opposed to this provision, and, if afforded the opportunity I shall propose an amendment to delete it and offer a substitute.

In the alternative, if it is the sense of a majority that some protection should be accorded witnesses who are threatened with abuse at the hands of a single member conducting a hearing to take sworn testimony, I would favor the approach recommended by Mr. Scott's subcommittee last year, namely, that such testimony could be taken in all cases by a single member unless the witness himself demanded to be heard by two or more members. Since the whole thing is only for the witness' protection, it makes good sense to let him make the demand if he wishes, and to regard it as waived otherwise.

Announcement of Subject of Investigation

§ 13.4 The House amended the rules to provide that, "The chairman at an investigative hearing shall announce in an opening statement the subject of the investigation."

On Mar. 23, 1955,[2] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which requires a chairman to announce the subject of an investigation.[3]

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2. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

3. See *House Rules and Manual* § 735(i) 1973).

During the debate questions about the effect of this amendment were raised:[4]

MR. [GEORGE] MEADER [of Michigan]: May I call the gentleman's attention to the first provision on page 2 relating to the statement by the chairman of the subject matter of the investigation. I would like to ask the gentleman three questions with respect to that provision: Does this deprive the committee of the power to determine the scope of its inquiry by requiring the chairman to state the subject of the investigation?

MR. [HOWARD W.] SMITH of Virginia: Not at all, no. All that requires is that a general statement shall be made of what a particular hearing is all about.

MR. MEADER: Second, under court decisions questions in a committee hearing must be pertinent to the inquiry. Would questions not relevant under the statement as made by the chairman but relevant under the committee's investigative jurisdiction have to be answered, or could the witness refuse to answer with impunity?

MR. SMITH of Virginia: No. The relevancy is determined by the resolution creating the special committee or the provision of the rules defining the jurisdiction of the standing committee.

MR. MEADER: A third question is, May the statement of the subject matter required to be made by the chairman be in broad terms or must it be detailed?

MR. SMITH of Virginia: Merely in broad terms, just a general statement of the subject matter of the inquiry. . . .

MR. [CLARENCE J.] BROWN of Ohio: . . . Then it goes further. Remember this deals almost primarily with investigative committees and the conduct of investigations by such committees. It says that the chairman of the committee at the beginning of an investigation shall announce in general terms in an open statement what the subject of the investigation is; in other words, you are looking into the stock market or you are looking into consumer prices or into the necessity for school construction or whatever it may be. It does not mean that you have to pinpoint every single question that you are going to ask, by any means. . . .

Criticism was made of the wording.[5]

MR. [KENNETH B.] KEATING [of New York]: In subdivision (i) at the top of page 2, where it says:

> The chairman at an investigative hearing shall announce in an opening statement the subject of the investigation.

My understanding is that the resolution authorizing any investigation covers the general subject, and it is the intention of that section to mean he shall announce the subject of the particular hearing which is then about to take place. If that is the understanding, I would think the substitution of the word "hearing" for "investigation" would be helpful.

MR. SMITH of Virginia: I think they mean the same thing. I believe you are correct in the statement you have made.

4. 101 CONG. REC. 3569, 3572, 84th Cong. 1st Sess.

5. 101 CONG. REC. 3570, 3582, 84th Cong. 1st Sess.

MR. KEATING: . . . On page 2, at line 3, the drafters of House Resolution 151 have seemingly chosen the wrong word. It is not important for the chairman to advise those present of the subject to which an investigation is being addressed. That is the subject specified in the committee's authorizing resolution and is known to everybody from the very outset. What is frequently helpful, and might well be required, is a statement of the subject matter of the particular hearing which is about to be commenced. A statement of the latter will advise the witness and his counsel of the specific grounds which the committee proposes to explore, and thus avoid surprise or misunderstanding with respect to the lines of questioning to which the witness is likely to be subjected.

Punishment of Breaches of Order

§ 13.5 The House amended its rules to provide that, "The chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."

On Mar. 23, 1955,[6] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to the chairman's authority to punish breaches of order and decorum.[7]

During the debate on the resolution, the effect of this provision was discussed:[8]

MR. [CLARENCE J.] BROWN of Ohio: . . . Then it spells out into law again what I believe the chairman of the committee already has, the power to punish breaches of order and decorum and of professional ethics on the part of counsel, by censure and exclusion from the hearings.

That legalizes, and it does away with any doubt as to the right of a chairman, in a case like that of Henry Grunewald, which was mentioned a moment ago, to say, " You are violating the rules of this committee, you are out." And he will tell the witness to get another lawyer. And the committee may cite such an offender to the House for contempt. If a lawyer simply does not obey the orders of the chairman, if he creates a disturbance, if he refuses to leave, and the situation becomes serious such that the committee wants to recommend that he be cited by the House for contempt, then that may be done and it is up to the House to take action as it sees fit.

Parliamentarian's Note: Thus the right of witnesses at investigative hearings to be accompanied by their own counsel for advice concerning their constitu-

6. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

7. See *House Rules and Manual* § 735(l) (1973).

8. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

tional rights is conditioned upon that counsel's behavior being consistent with professional ethical standards, and a witness must select another counsel if counsel is barred from committee hearings by unethical behavior.

Subpenas

§ 13.6 The House amended the rules to provide that, "Except as provided in paragraph (m), the chairman shall receive and the committee shall dispose of requests to subpena additional witnesses."

On Mar. 23, 1955,[9] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to receiving and disposing of requests to subpena additional witnesses.[10]

During the debate, the effect and wording of this provision were discussed:[11]

> MR. [KENNETH B.] KEATING [of New York]: In subsection (m), it provides that if the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, the committee shall receive and dispose of requests from such person to subpena additional witnesses.[12]
>
> In the next section, it provides that except as above provided, the chairman shall receive and the committee shall dispose of requests to subpena additional witnesses. There is a difference in the language used there. Could the gentleman point out the significance of that or the reason why the different language is used?
>
> MR. [HOWARD W.] SMITH of Virginia: It is a very slight difference. You will find that the clause you refer to (3), comes under subsection (m). That is one of the things that apply under subsection (m) where a person is defamed. Subsection (n) is one that does not pertain to that particular section relative to defamation.
>
> MR. KEATING: I realize that is the language of the resolution, but I wonder why the requests for the issuance of subpenas are differently dealt with. It seems to me that the same considerations should apply in each instance.
>
> MR. SMITH of Virginia: I do think they are substantially the same. . . .
>
> MR. [CLARENCE J.] BROWN of Ohio: . . . Then there is a general provision, not just when some person makes a defamatory statement, but generally and in regard to other matters, the chairman shall receive requests for subpenaing additional witnesses.

Committee Rules

§ 13.7 The House amended its rules to provide that, "A copy

9. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

10. See *House Rules and Manual* § 735(n) (1973.)

11. 101 CONG. REC. 3570–72, 84th Cong.1st Sess.

12. See § 15.1, infra, for a discussion of subsection (m), relating to the effect of derogatory evidence.

of the committee rules, if any, and paragraph 25 of Rule XI of the House of Representatives shall be made available to the witness."

On Mar. 23, 1955,[13] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to a witness' access to a copy of committee rules.[14]

During the debate this provision was discussed:[15]

> MR. [CLARENCE J.] BROWN of Ohio: . . . It also provides that a witness who is called before that committee, either by subpena or who comes voluntarily, is entitled to receive a copy of the committee rules, if he so desires. Certainly that is a fair provision.

Transcripts

§ 13.8 The House amended its rules to provide that, "Upon payment of the cost thereof, a witness may obtain a transcript copy of the testimony given at a public session, or, if given at an executive session, when authorized by the committee."

On Mar. 23, 1955,[16] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to a witness' access to a transcript.[17]

During the debate on the measure, this provision was discussed:[18]

> MR. [CLARENCE J.] BROWN of Ohio: . . . Finally, the witness is given the right, upon payment of the cost thereof, to obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the committee.
>
> In other words, if he wants to know what he said, if he is being cited for contempt, he may get a copy of the transcript so that he may be prepared if he has to go to court.

Release of Secret Information

§ 13.9 The House amended the rules to provide that, "No evidence or testimony taken in executive session may be

13. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

14. See *House Rules and Manual* § 735(j) (1973). On Jan. 22,1971, the language of this rule was slightly modified to, "A copy of the committee rules and this clause shall be made available to each witness." See H. Res. 5, adopted at 117 CONG. REC. 144, 92d Cong. 1st Sess.

15. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

16. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

17. See *House Rules and Manual* § 735(q) (1973).

18. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

released or used in public sessions without the consent of the committee."

On Mar. 23, 1955,[19] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to use of evidence or testimony received in executive session.[20]

During the debate on the measure, this amendment was discussed [1]

> MR. [CLARENCE J.] BROWN of Ohio: . . . It also provides that no evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee. That means, of course, a majority of the committee.[2]

Submission of Written Statements

§ 13.10 The House amended its rules to provide that, "In the discretion of the committee, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The committee is the sole judge of the pertinency of testimony and evidence adduced at its hearing."

On Mar. 23, 1955,[3] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to a witness' opportunity to submit sworn statements.[4]

During the debate, this provision was discussed: [5]

> MR. [CLARENCE J.] Brown of Ohio: . . . It also provides that in the discretion of the committee witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. Members of the House know how much time that can save.
>
> The committee is the sole judge of the pertinency of the testimony and evidence adduced at its hearing.
>
> I think they have that right now.

Media Coverage

§ 13.11 The House amended its rules to provide that, "No witness served with a subpena by the committee shall be required against his will to be photographed at any

19. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

20. See *House Rules and Manual* § 735(o) (1973).

1. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

2. See § 13.2, supra, for criticisms of this and other provisions of the Code of Fair Procedures.

3. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

4. See *House Rules and Manual* § 735(p) (1973).

5. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

hearing or to give evidence or testimony while the broadcasting of that hearing, by radio or television, is being conducted. At the request of each witness who does not wish to be subjected to radio, television, or still photography coverage, all lenses shall be covered and all microphones used for coverage turned off. This paragraph is supplementary to paragraph (m) of clause 27 of this rule, relating to the protection of the rights of witnesses."

On Jan. 22, 1971,(6) the House approved House Resolution 5, which adopted applicable provisions of the Legislative Reorganization Act of 1970,(7) including a rule(8) which requires any committee that permits media coverage of public hearings to adopt rules allowing witnesses not to be exposed to television or still cameras or microphones.

Responsibility to Protect Rights

§ 13.12 The witness is primarily responsible for protecting his rights and invoking procedural safeguards guaranteed under the rules of the House, notwithstanding the fact that he may be accompanied by counsel to advise him of his rights.

On Oct. 18, 1966,(9) during consideration of a privileged report, House Report No. 2305, relating to the refusal of Yolanda Hall to testify before the House Committee on Un-American Activities,(10) Speaker John W. McCormack, of Massachusetts, responded to a parliamentary inquiry regarding the responsibility of a witness to protect his rights.

MR. [SIDNEY R.] YATES [of Illinois]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state his parliamentary inquiry.

MR. YATES: Mr. Speaker, is it in order for me to request the Chair for an explanation of a part of the Chair's ruling; namely, that part which is directed to the representation before a committee of a witness by a lawyer?

In his ruling the Chair has indicated that counsel does not, as a matter of right, have the right to present argument, make motion, or make demands on the committee.

Does this mean, Mr. Speaker, that if an objection is to be voiced to an action

6. 117 CONG. REC. 144, 92d Cong. 1st Sess.

7. 84 Stat. 1140, Pub. L. No. 91–510, Oct. 26, 1970.

8. See *House Rules and Manual* § 739(b) (1973).

9. 112 CONG. REC. 27495, 89th Cong. 2d Sess.

10. See § 15.6, infra, for the point of order and debate regarding this report.

by the committee, that the objection must be made by the witness or the respondent himself, rather than by the counsel of the witness?

THE SPEAKER: It is incumbent upon the witness to protect himself, after consulting counsel, if he desires to consult counsel. But it is the duty of the witness to do so.

§ 14. —Right to Counsel

A witness' right to counsel[11] at an investigative hearing[12] is circumscribed by rules of the House,[13] rules of committees, precedents,[14] and court decisions. Rules of the House establish a minimum level of participation by counsel; committees either in their rules or in response to requests made at a hearing, may permit a counsel to do more than advise the witness about constitutional rights.

The Supreme Court implicitly approved a rule of the Committee on Un-American Activities which permitted counsel to accompany a witness for the purpose of advising him of his constitutional rights when it observed, "[Counsel for the witness] would not have been justified in continuing [seeking to read certain telegrams into the record], since Committee rules permit counsel only to advise a witness, not to engage in oral argument with the committee. Rule VII (b)."[15]

In General

§ 14.1 The House amended its rules to provide that, "Witnesses at investigative hearings may be accompanied by their own counsel for the purpose of advising them of their constitutional rights."

On Mar. 23, 1955,[16] the House by voice vote approved House Res-

11. See, for example, 3 Hinds' Precedents §§ 1696, 1741, 1771, 1788, 1837, 1846; 6 Cannon's Precedents § 400. 6 Cannon's Precedents § 336, for earlier precedents. For collateral sources, see Rauh, Joseph L., Jr., Representation before Congressional Committee Hearings, 50 J. of Crim. Law, Criminology, and Police Science 219 (1959), and Rauh and Pollitt, Right to and Nature of Representation before Congressional Committees, 45 Minn. L. Rev. 853 (1961).

12. This section deals only with investigative hearings on designated subject matters; it does not include investigations relating to impeachment (see Ch. 14, supra), election contests (see Ch. 9, supra), or conduct of Members (see Ch. 12, supra).

13. See §§ 14.1 and 14.2, infra.

14. See §§ 14.3 to 14.5, infra.

15. *Yellin* v *United States*, 374 U.S. 109, 112, 113 (1963).

16. 101 CONG REC. 3569, 3585, 84th Cong. 1st Sess.

olution 151, known as the Code of Fair Procedures, a provision of which permits witnesses at hearings to be accompanied by counsel.[17]

During the debate, questions were raised as to the effect of this provision:[18]

> MR. [GEORGE] MEADER [of Michigan]: May I draw the gentleman's attention to the provisions of paragraph (k) on that same page, lines 7, 8, and 9, relating to the right of witnesses to have counsel present at hearings. My question is, Would the absence of counsel where a witness demands the right to have counsel present vitiate the legal status of the inquiry?
>
> MR. [HOWARD W.] SMITH of Virginia: By no means. This is merely a privilege given to him. If he does not choose to exercise that privilege of having counsel, that is his fault.
>
> MR. MEADER: If he should demand that he be permitted to have counsel but there was no counsel present, would the committee be unable to proceed until counsel was present?
>
> MR. SMITH of Virginia: If he does not have his counsel, of course he cannot obstruct justice by using that sort of subterfuge. I have no doubt that any committee would be reasonable with him by reason of the sickness of his counsel.
>
> MR. MEADER: But the committee has not lost control over the proceeding because of this provision?
>
> MR. SMITH of Virginia: Not by any means.
>
> MR. MEADER: I think the gentleman may remember that Henry Grunewald and his counsel, William Power Maloney, delayed the King Subcommittee of the Ways and Means Committee for 6 hours with obstructionist tactics. Grunewald refused to testify because the committee finally ejected Maloney and he did not have any counsel there.
>
> MR. SMITH of Virginia: That could not occur under this rule. . . .
>
> MR. [CLARENCE J.] BROWN [of Ohio]: . . . The next provision provides for witnesses at investigative hearings—that does not mean ordinary legislative hearings where they are discussing a bill, such as a public-works project or an authorization bill, but where a committee is holding investigative hearings—that witnesses have the right to be accompanied by their own counsel, and that counsel shall have the privilege of advising them concerning their constitutional rights.
>
> That does not mean that the lawyer may sit there and answer every question of fact for the witness. But he may advise him as to his constitutional rights, whether he may plead the fifth amendment or refuse to answer on some other ground if he thinks his constitutional rights are being violated.
>
> MR. [KENNETH B.] KEATING [of New York]: . . . At lines 7 through 9 on page 2, I am troubled with the language chosen by the draftsmen, and wonder if it is exactly what was intended. Does this wording include an absolute right to be present in the event that a witness is heard in an executive session? Does it mean merely

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17. See *House Rules and Manual* § 735(k) (1973).

18. 101 CONG REC. 3569, 3572, 3582, 3583, 84th Cong. 1st Sess.

to be present in the room or to accompany the witness when he takes the stand, and if the latter, does it create a right to consult and confer without limitation during the course of the examination? Does the limitation, "concerning their constitutional rights" mean that counsel would be limited, in conferring with his client, to a discussion of the first or fifth amendments, which are the only constitutional provisions likely to be involved at any time, under normal circumstances?

May counsel not perform the usual and proper services of explanation and advice with respect to all the rights and duties pertaining to the status of the witness before the committee? . . .

Mr. Keating's inquiries were not directly addressed. He had, in earlier remarks, given his views on the background of the right to counsel: (19)

[W]e have long conceded that outsiders, appearing as witnesses before our committees, should be accorded certain rights. There is no specific basis for the right of a witness to be accompanied and advised by his counsel, nor for recognition of the traditional privileges of lawyer and client, doctor and patient, priest and penitent, and the like. But they are so universally accorded, and so deeply woven into our traditions of fairness and due process that they perhaps should be specified for the advice and comfort of all those who are called to testify. It is, as I said, only a matter of drawing the lines clearly and precisely where we wish them to lie.

19. 101 CONG. REC. 3582, 84th Cong. 1st Sess.

§ 14.2 The House amended its rules to provide that, "The chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."

On Mar. 23, 1955,(20) the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which dealt with the powers of the chairman in maintaining order.(1) During the debate on the resolution, the effect of this provision was discussed: (2)

MR. [CLARENCE J.] BROWN of Ohio: . . . Then it spells out into law again what I believe the chairman of the committee already has, the power to punish breaches of order and decorum and of professional ethics on the part of counsel, by censure and exclusion from the hearings.

That legalizes, and it does away with any doubt as to the right of a chairman, in a case like that of Henry Grunewald, which was mentioned a moment ago, to say, "You are violating the rules of this committee, you are out." And he will tell the witness to get

20. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

1. See *House Rules and Manual* § 735(1) (1973).

2. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

another lawyer. And the committee may cite such an offender to the House for contempt. If a lawyer simply does not obey the orders of the chairman, if he creates a disturbance, if he refuses to leave, and the situation becomes serious such that the committee wants to recommend that he be cited by the House for contempt, then that may be done and it is up to the House to take action as it sees fit.

Counsel's Participation

§ 14.3 The privilege granted by the rule, permitting a witness at an investigative hearing to be accompanied by counsel to advise him of his constitutional rights, does not, as a matter of right, entitle the counsel to present argument, make motions, or make demands on the committee.

On Oct. 18, 1966,[3] Speaker John W. McCormack, of Massachusetts, during the ruling on a point of order raised against House Report 2305, relating to the refusal of Yolanda Hall to testify before the Committee on Un-American Activities,[4] indicated the scope of authority of counsel in advising a witness during an investigative hearing.[5]

THE SPEAKER: The Chair is prepared to rule.

The gentleman from Illinois [Mr. Yates] has raised a point of order against the privileged report filed by the gentleman from Louisiana, citing a witness before a subcommittee of the Committee on Un-American Activities for contempt. The point of order is based on the ground that the subcommittee, while holding hearings in Chicago, failed or refused to follow the rules of the House—specifically, rule XI, clause 26(m)—and, at the demand of the witnesses' attorney, take the testimony in executive session rather than in an open hearing. . .

The Chair will also point out parenthetically, that subsection (k) of rule XI, provides:

> Witnesses at investigative hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

This privilege, unlike advocacy in a court, does not as a matter of right entitle the attorney to present argument, make motions, or make demands on the committee.

§ 14.4 Although a witness at an investigative hearing, under

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3. 112 CONG. REC. 27494, 27495, 89th Cong. 2d Sess. See also *House Rules and Manual* § 735(k) (1973).

4. See § 15.6, infra, for the point of order and debate on this report.

5. The Speaker expressed the same view of the authority of counsel in responses to points of order raised against two House reports relating to refusals to testify before the Committee on Un-American Activities. See 112 CONG. REC. 27448, 89th Cong. 2d Sess., Oct. 18, 1966, and 112 CONG. REC. 27505, 89th Cong. 2d Sess., Oct. 18, 1966, for the rulings on points of order against H. REPT. No. 2302, the refusal of Milton Mitchell Cohen, and H. REPT. No. 2306, the refusal of Dr. Jeremiah Stamler.

the House rules, may be accompanied by counsel to advise him of his constitutional rights, the witness and not counsel is primarily responsible for protecting his rights and invoking procedural safeguards guaranteed under the rules of the House.

On Oct. 18, 1966,(6) during consideration of a privileged report, House Report No. 2305, relating to the refusal of Yolanda Hall, to testify before the House Committee on Un-American Activities,(7) Speaker John W. McCormack, of Massachusetts, responded to a parliamentary inquiry regarding the responsibility of a witness to protect his rights.

MR. [SIDNEY R.] YATES [of Illinois]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state his parliamentary inquiry.

MR. YATES: Mr. Speaker, is it in order for me to request the Chair for an explanation of a part of the Chair's ruling; namely, that part which is directed to the representation before a committee of a witness by a lawyer?

In his ruling the Chair has indicated that counsel does not, as a matter of right, have the right to present argument, make motions, or make demands on the committee.

Does this mean, Mr. Speaker, that if an objection is to be voiced to an action by the committee, that the objection must be made by the witness or the respondent himself, rather than by the counsel of the witness?

THE SPEAKER: It is incumbent upon the witness to protect himself, after consulting counsel, if he desires to consult counsel. But it is the duty of the witness to do so.

§ 14.5 A House committee has discretion to refuse to allow demands of counsel at an investigative hearing and it may reject an attorney's demand that certain evidence be taken in executive session or require the witness personally to raise the issue.

On Oct. 18, 1966,(8) during consideration of a privileged report, House Report No. 2305, relating to the refusal of Yolanda Hall to testify before the House Committee on Un-American Activities,(9) the Speaker indicated that a demand that testimony be taken in executive session could be rejected at the discretion of the committee.(10)

6. 112 CONG. REC. 27495, 89th Cong. 2d Sess. See *House Rules and Manual* § 735(k) (1973) .

7. See § 15.6, infra, for this report.

8. 112 CONG. REC. 27495, 89th Cong. 2d Sess.

9. See § 15.6, infra, for this report.

10. See the ruling of Speaker John W. McCormack (Mass.), discussed in § 14.3, supra.

§ 15. Effect of Derogatory Information

In 1955, the House amended its rules to prescribe the procedures to be followed upon a determination that evidence at a hearing "may tend to defame, degrade, or incriminate a person." The provisions of the rule, and their application, are discussed in detail in succeeding sections.[11]

The three requirements of the rule are cumulative and mandatory.[12] Thus, a committee, upon determining that evidence adduced at an investigative hearing may tend to defame, degrade, or incriminate a person, must (1) receive the evidence in executive session; (2) afford the person an opportunity to appear voluntarily as a witness; and (3) receive and dispose of requests from such a person to subpena additional witnesses.

If a committee affords a witness the opportunity to appear voluntarily to testify in executive session and that opportunity is ignored by the witness, the committee cannot thereafter proceed as if it had fully complied with the rule but must issue a subpena and comply with all other requirements of the rule. However, if the witness thereafter appears in response to a subpena and, when called, asks for an executive session, the committee must determine, as provided by the rule, whether the testimony will tend to defame, degrade, or incriminate. If the committee determines that the evidence will not so tend, it may then proceed in open session.[13]

Although the rule was intended to apply to third parties rather than witnesses,[14] it has been the subject of points of order relating to rights of witnesses.[15]

In General

§ 15.1 As part of the Code of Fair Procedures, the House amended the rules to provide that, "If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate a person, it shall (1) receive

11. See § 15.1, infra, for a discussion of the rule and its adoption. See §§ 15.2–15.6, infra, for application of particular provisions.

12. See the ruling of the Chair set forth in § 15.4, infra.

13. See the proceedings discussed in § 15.6, infra. See also 112 CONG. REC. 27506, 89th Cong. 2d Sess., Oct. 18, 1966.

14. See § 15.1, infra.

15. See §§ 15.2–15.6, infra.

such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses."

On Mar. 23, 1955,[16] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, which included a provision providing safeguards to be followed in the reception of derogatory testimony.[17]

Commenting on this provision, the Chairman of the Committee on Rules, Howard W. Smith, of Virginia, stated that, ". . . when a person is named in a committee hearing and his good reputation besmirched, he shall have a prompt opportunity to appear and refute the charges.[18] The effects of this provision were further discussed:[19]

> MR. [CLARENCE J.] BROWN of Ohio: . . . Then if the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, this resolution provides that it shall receive such testimony in executive session; that is, if it is possible to do so, they may go immediately into executive session. They shall afford such person an opportunity voluntarily to appear as a witness to refute such statements or testimony against him; and it shall receive and dispose of requests from such a person to subpena additional witnesses. Those rights are given to the witness. . . .
>
> MR. [JAMES C.] MURRAY of Illinois: We had considerable discussion when another bill was up today concerning the meaning of the words "shall" and "may." I notice in line 16 on page 2, it says with reference to testimony that may tend to defame, degrade, or incriminate a person that the committee shall do so and so. Is that mandatory or is it permissive?
>
> MR. BROWN of Ohio: Where it finds that it may tend to defame, degrade, or incriminate a person, it shall do so and so; it shall receive such evidence and testimony until it satisfies itself whether it is true.
>
> MR. MURRAY of Illinois: Is that mandatory?
>
> MR. BROWN of Ohio: Yes, that is mandatory, in my opinion. They shall afford such person who had been defamed the right voluntarily to come before the committee and refute it, which is a fair thing and a procedure which practically all the committees of the House now follow.
>
> MR. [PORTER] HARDY [Jr., of Virginia]: Mr. Speaker, will the gentleman yield?
>
> MR. BROWN of Ohio: I yield to the gentleman from Virginia.

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16. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

17. See *House Rules and Manual* § 735(m) (1973).

18. 101 CONG. REC. 3569, 84th Cong. 1st Sess.

19. 101 CONG. REC. 3572, 3573, 84th Cong. 1st Sess.

MR. HARDY: On that particular point, the discussion centers around whether or not the testimony would tend to degrade or intimidate the witness. That is what the section says.

MR. BROWN of Ohio: The gentleman reads into it something that is not in there. It says "degrade any person."

MR. HARDY: That is exactly my point. It would mean, then, that if a committee held an executive session and determined that they were going to receive testimony which would indicate that an individual not the witness had misappropriated Government property, for instance, under this language it could not hold that testimony in open session.

MR. BROWN of Ohio: That is right. If I charge you with being a thief, the committee goes into executive session to explore as to whether or not I have any justification for that charge and you have the right to answer it. Then, if they determine that there is some ground for my charge against you, they can have all the open sessions they want to have.

MR. HARDY: Is there anything in here that shows that you can open that hearing up?

MR. BROWN of Ohio: Certainly, because it provides only the two things they shall do in such circumstances. . . .

MR. [EDWIN E.] WILLIS [of Louisiana]: That provision under discussion refers to a person not on the stand?

MR. BROWN of Ohio: That is right.

MR. WILLIS: It refers to defaming third parties, not the man on the stand?

MR. BROWN of Ohio: That is right.

MR. HARDY: I understand that, but suppose you have a situation that clearly shows that there has been abuse?

MR. BROWN of Ohio: What does it say here? They consider that in executive session, then they come back into open session after they have got the information and, if they decide there is some substance to your charge, or my charge against you, then they can go ahead and have all the open hearings they want.

MR. HARDY: They can have all the open hearings they want, then.

MR. WILLIS: I think this is important. The controlling part of that particular section is that "If the committee determines," then such and such happens.

MR. BROWN of Ohio: That is right.

MR. WILLIS: But the determination must be made first.

MR. BROWN of Ohio: It rests entirely with the committee.

MR. HARDY: The gentleman is absolutely correct. It is only where the person is brought up for the first time and when the committee determines that the matter should be gone into; then you can have all the public hearings you want.

MR. BROWN of Ohio: If they think the man has been defamed. If I say you are a Communist and the evidence shows you are not, then I have not told the truth. The committee determines whether or not you have been defamed.

MR. HARDY: That is exactly right. Then you can have all the public hearings you want.

MR. SMITH of Virginia: Mr. Speaker, I yield 5 minutes to the gentleman from Georgia [Mr. Forrester].

MR. [ELIJAH L.] FORRESTER [of Georgia]: . . . With regard to the particular portion which was inquired about by the gentleman from Virginia [Mr. Hardy], the answer given by the gentleman from Ohio [Mr. Brown] is absolutely correct. All on earth this provision does is that if a man's name is brought up before a committee for the first time, you go into executive session and you somewhat simulate the action of a grand jury. That is a fair provision.

MR. [EDWARD T.] MILLER of Maryland: Mr. Speaker, will the gentleman yield?

MR. FORRESTER: I yield.

MR. MILLER of Maryland: I share the view of the gentleman from Virginia that that may be the intention, but certainly the language here does not indicate how it would be possible to bring out evidence that you knew was going to degrade somebody except in executive session. I do not see any language here that permits that.

MR. FORRESTER: No matter where it is brought out, if it is in executive session, then, of course, you can deal with it, but if it is in public session, then you simply suspend and go into executive session and determine whether or not there is a reason to expose that man's name publicly. That is a right which the Congress should be the first to concede to any person. . . .

This clause aroused some criticism, as shown in the remarks below:[20]

MR. HARDY: I am in complete accord with the objectives of the committee, and I congratulate the committee on attempting to deal with a very difficult problem. However, I think that subsection (m), as now written, will hamper every investigation that is ever undertaken.

MR. FORRESTER: I do not think so. * * *

MR. [KENNETH B.] KEATING [of New York]: * * * I am also puzzled and troubled a little about subparagraph (m) and the way it is intended to work. In the first place, it specifies that "if the committee determines" that certain evidence or testimony is defamatory, degrading, or incriminating, it must then hear the same in executive session—but in order for the committee to make such a determination it would appear that some consideration of the evidence or testimony would already have to have taken place. So I wonder if the requirement is not self-defeating, in that the harm would be done before the committee would ever be in a position to provide the intended protection.

In passing, I should also like to raise a grave question about this matter of executive sessions. Undoubtedly, it is a good and desirable thing to create a right, at least in limited circumstances, for a person who is likely to be injured by testimony to have the testimony taken at a secret hearing. I favor that, if some practical way to accord it without tying the committee's hands can be worked out.

But I am also persuaded that there is, as a practical possibility at least, a considerable danger of abuse in the other direction, namely, a danger that the secret hearing may also be used as a truly terrible reincarnation of the star chamber. If a hostile and unwill-

20. 101 CONG. REC. 3573, 3583, 84th Cong. 1st Sess.

ing witness is forced to submit to lengthy examination, under oath and on record, in a secret session, he can be put at a terrible disadvantage when the committee later raises the curtain and conducts the interrogation again publicly. He is bound to everything he said, at the peril of imminent prosecution for perjury, and his interrogators are able to pick and choose from only the most damaging concessions and exactions. In some of the drafts last year this matter was handled by creating, in the witness, a right to insist upon being heard publicly if he feared the secret session. There are some possible difficulties with this, although the hostile witness who invokes such a right would probably be of little legitimate value to the committee in any case. . .[21]

Receiving Testimony in Executive Session

§ 15.2 A point of order was raised against a committee report citing a witness in contempt, on the ground that the committee had violated a House rule by not receiving certain testimony in executive session.

On Oct. 18, 1966, Mr. Sidney R. Yates, of Illinois, raised points of order against House Report Nos. 2302 [22] 2305 [23] and 2306 [24] relating to refusals of three named individuals to testify before the Committee on Un-American Activities, on the ground that the committee violated Rule XI clause 27(m), [1] by not receiving in executive session evidence and testimony which would allegedly defame, degrade, or incriminate these individuals.

Speaker John W. McCormack, of Massachusetts, overruled each point of order, stating as his reasons those set forth in sections following.[2]

Prerequisite for Committee Determination

§ 15.3 Where a person subpenaed as a witness responded to his name and then left the hearing room without making any statement other than that he refused to testify, the committee could not be said to violate the House rule relating to derogatory informa-

21. See § 13.2, supra, for other criticism of this provision.

22. See § 15.3, infra, for this point of order.

23. See § 15.6, infra, for this point of order.

24. See 112 CONG. REC. 27505, 89th Cong. 2d Sess., for this point of order.

1. See House Rules and Manual § 735(m) (1973).

2. See §§ 15.3, 15.6, infra.

tion since the proceedings had never reached the point where the testimony could be said to tend to degrade, defame, or incriminate.

On Oct. 18, 1966,[3] Speaker John W. McCormack, of Massachusetts, in response to a point of order by Mr. Sidney R. Yates, of Illinois, against privileged House Report No. 2302, citing Milton Mitchell Cohen, of Chicago, Ill., in contempt for refusal to respond to questions at a hearing, ruled that the Committee on Un-American Activities had not violated Rule XI clause 27(m),[4] because the proceedings had not reached the stage at which the committee determines whether to hear evidence or testimony in executive session.

PROCEEDINGS AGAINST MILTON MITCHELL COHEN

MR. [EDWIN E.] WILLIS [of Louisiana]: Mr. Speaker, I rise on a question of the privilege of the House, and by direction of the Committee on Un-American Activities I submit a privileged report—House Report No. 2302. . . .

MR. YATES: Mr. Speaker, I make a point of order against the resolution offered by the Committee on Un-American Activities. The committee appears here today claiming the privilege of the House. It asserts that this House has been injured, that its dignity and its integrity have been threatened, even impaired, by reason of the refusal of the respondents to give testimony to the committee at a public hearing duly convened. It now asks this House in this resolution to hold the respondent in contempt so that he may be punished by the criminal processes of the law for his refusal to testify.

Mr. Speaker, there is no doubt that the respondent did refuse to give testimony. The question I raise for the consideration of the Chair is whether a witness may be required to give such testimony when the committee itself has violated the [rights] of the respondent by refusing to follow the Rules of the House which were specifically established to protect the rights of the respondents for this purpose. . . .

This committee, the Committee on Un-American Activities, has failed and refused to follow the Code of Fair Procedure by denying the request of the respondent that his testimony be taken in executive session. . . .[5]

May a committee of this House deny the protection of the rules which were approved by this House for the purpose of protecting witnesses who request that protection? There are no precedents of the House on this point, but the Supreme Court[6] faced with a

3. See the proceedings at 112 CONG. REC. 27439–48, 89th Cong. 2d Sess.

4. See *House Rules and Manual* § 735(m) (1973).

5. See § 13.1, supra, for discussion of adoption of this code.

6. See *Yellin* v *United States*, 374 U.S. 109 (1963), which reversed a conviction because the Committee on Un-American Activities failed to comply with its own rule, not a House rule, regarding executive sessions rather

similar question decided that a committee could not compel a witness to testify under such circumstances, and the Court, the Supreme Court of the United States, vacated a criminal contempt conviction that had been entered against a defendant whose case had come up from the Committee on Un-American Activities.

Mr. Speaker, what does rule 26(m) provide? I read it, Mr. Speaker. It says this:

If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall do the following:

First. It shall receive such evidence or testimony in executive session;

Second. It shall afford such person an opportunity voluntarily to appear as a witness; and—not "or" but "and," Mr. Speaker.

Third. Receive and dispose of requests from such persons to subpena additional witnesses.

It is to be noted, Mr. Speaker, that the three requirements of the committee are not in the alternative. They are cumulative.

In his letter of May 25, the chairman of this committee wrote a letter to the respondent saying that the committee was acting pursuant to [Rule XI clause 27(m)] in offering to take the testimony in executive session. Thus, the rule had been activated and a decision had been made by the committee that the testimony was of a type that would tend to defame, degrade, or incriminate.

Mr. Speaker, in offering the witness this opportunity to appear voluntarily and give testimony in executive session, the committee was complying with section 2 of the rule.

But, Mr. Speaker, when the witnesses did not appear voluntarily, in spite of the fact that the conditions for requiring testimony to be taken in executive session were still present; namely, that the testimony would tend to degrade, defame, or incriminate, the committee determined to receive the testimony in public session. . . .

The SPEAKER: The Chair will hear the gentleman from Georgia [Mr. Weltner].

MR. [CHARLES L.] WELTNER: . . .

[T]he report before the Speaker and before the Members shows that on May 18, Mr. Cohen, without relying upon any constitutional protection, announced through his attorney that he was departing from the witness room without submitting himself to any questions by the committee, after stating only his name and address.

The rules of the House have been religiously followed in this instance, in each case, in each of the three burdens upon the House committee pursuant to rule 26(m). . . .

There was a request by his attorney that he be called and examined in executive session. The record of the hearing will show, Mr. Speaker, that subsequent to the making of that request, this committee recessed the public hearings; that it undertook to consider his request in executive session; that the factors making up the substance of his request were considered; and the request was by unanimous vote of that committee denied. . . .

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than the House rule discussed here. *Yellin* is discussed at § 1 5.6, infra.

The SPEAKER: The Chair is ruling only in these cases on this particular case concerning Milton Mitchell Cohen. The gentleman from Illinois [Mr. Yates] has raised a point of order against the privileged report filed by the gentleman from Georgia [Mr. Weltner] citing a witness before a subcommittee of the Committee on Un-American Activities of the House for contempt. The point of order is based on the ground that the subcommittee while holding hearings in Chicago failed or refused to follow the rules of the House, specifically rule XI, clause 26(m) and, at the demand of the witnesses' attorney, take the testimony in executive session rather than in an open hearing. . . .

The Chair agrees with the gentleman from Illinois that the three subclauses are not in the alternative. Each subclause stands by itself. The Chair will point out, however, that the subsection places the determination with the committee, not with the witness. . . .

Now the Chair will cite clause 26(a) of rule XI, which states that the rules of the House are the rules of its committees so far as applicable. This provision also applies to the subcommittees of any such committee. Consequently, the Chair must examine the facts to see if the subcommittee did in fact comply with clause 26(m) of rule XI.

The Chair will call attention to the fact that it is pointed out on page 8 of the report that the witness was invited to appear and testify in executive session. The invitation was ignored.

It will be noted, on pages 11 and 12 of the committee report, that the attorney for witness Cohen instructed his client not to give any testimony pending determination of a legal action in the U.S. District Court for the Northern District of Illinois.

The witness then left the hearing room, notwithstanding the admonition of the chairman of the subcommittee.

The Chair fails to see how clause 26 (m) of rule XI becomes involved since the witness left the hearing room after his attorney had instructed him not to answer any questions pending determination of the legal proceedings.

The Chair, therefore, overrules the point of order.

Committee Determinations

§ 15.4 The determination that evidence may tend to defame, degrade, or incriminate a person, a prerequisite to certain procedural steps under House rules lies with the committee and not with the witness.

On Oct. 18, 1966, Speaker John W. McCormack, of Massachusetts, in the course of ruling on the point of order discussed above, stated[7] that the committee, not

7. 112 CONG. REC. 27448, 89th Cong. 2d Sess. See § 15.3, supra, for the point of order. See also § 15.6 and 112 CONG. REC. 27505, 27506, 89th Cong. 2d Sess., Oct. 18, 1966, for the same ruling on this issue to points of order raised by Mr. Sidney R. Yates (Ill.), against H. REPT. Nos. 2305 and 2306 relating to refusals of Yolanda Hall and Dr. Jeremiah

the witness, determines whether evidence may tend to defame, degrade, or incriminate a person under Rule XI clause 27(m).[8]

The SPEAKER: . . . The point of order is based on the ground that the subcommittee while holding hearings in Chicago failed or refused to follow the rules of the House, specifically rule XI, clause 26(m) and, at the demand of the witnesses' attorney, take the testimony in executive session rather than in an open hearing. . . .

The Chair has . . . refreshed his recollection of clause 26(m), rule XI, which reads as follows:

> If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—
>
> (1) receive such evidence or testimony in executive session;
>
> (2) afford such person an opportunity voluntarily to appear as a witness; and
>
> (3) receive and dispose of requests from such person to subpena additional witnesses.

The Chair agrees with the gentleman from Illinois that the three subclauses are not in the alternative. Each subclause stands by itself. The Chair will point out, however, that the subsection places the determination with the committee, not with the witness.

§ 15.5 With respect to evidence or testimony at an investigative hearing which may tend to defame, degrade, or incriminate a person, the committee, under the rules of the House, determines whether to hold an executive session or publicize material which has been received in executive session.

On Apr. 5, 1967,[9] during consideration of House Resolution 221, providing additional expense funds for the Committee on Un-American Activities, Speaker John W. McCormack, of Massachusetts, responded to parliamentary inquiries relating to the discretion of a committee under Rule XI clause 27(m).[10]

MR. [SIDNEY R.] YATES [of Illinois]: Mr. Speaker [rule XI, 27(m)] of the Rules of the House of Representatives states as follows:

> If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—
>
> (1) receive such evidence or testimony in executive session;

Mr. Speaker, my question is this: If the committee determines that the evidence it is about to receive may tend to defame, degrade or incriminate a witness, is it not compulsory under the Rules of the House for the committee

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Stamler, respectively, to testify before the Committee on Un-American Activities.

8. See *House Rules and Manual* § 735(m) (1973).

9. 113 CONG. REC. 8420, 8421, 90th Cong. 1st Sess.

10. See *House Rules and Manual* § 735(m) (1973).

to hold such hearings in executive session?

THE SPEAKER: The Chair will state that that is a matter which would be in the control of the committee for committee action. . . .

MR. YATES: I must say that I do not understand the ruling. Is the Chair ruling that a committee can waive this rule? That it can refuse to recognize this rule?

THE SPEAKER: The Chair would not want to pass upon a general parliamentary inquiry, as distinguished from a particular one with facts, but the Chair is of the opinion that if the committee voted to make public the testimony taken in executive session, it is not in violation of the rule, and certainly that would be a committee matter.

MR. YATES: A further parliamentary inquiry, Mr. Speaker. What the Chair is now stating is that if the committee votes at a subsequent time to make public such a hearing, under the rules it may do so. But that does not bear upon the question I addressed to the Speaker, which was this: in the first instance, when testimony is to be taken by the committee, and such testimony tends to defame, degrade, or incriminate any person, must it be taken in executive session? . . .

THE SPEAKER: The Chair will be very frank. The Chair recognizes the power of the committee. If the committee goes into executive session, the Chair is not going to make a ruling under those circumstances as to whether a committee could make public testimony taken in executive session.

MR. YATES: May I pursue one further parliamentary inquiry, Mr. Speaker. The rule states:

> If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—
>
> (1) receive such evidence or testimony in executive session.

The question I addressed to the Chair was whether the committee could waive that rule.

THE SPEAKER: The rule says:

> If the committee determines

And there has to be a determination by the committee—

> that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—

First it has to make a determination. Without passing on this, the Chair can look into the future and see where the committee might make a determination, and then when it goes into executive session and receives the evidence, it may find there the evidence did not justify the original determination, or the evidence is of such a nature that it justifies being made public.

MR. YATES: I thank the Chair. Then I take it from the Chair's response to my inquiry that so long as the committee has made such a finding and has not vacated it, the rule is applicable.

THE SPEAKER: The Chair is not even going to go that far—not on this occasion. The Chair has been perfectly frank. Of course, sometimes the word "shall" I know has been construed by the courts sometimes as "may". The gentleman is familiar with that, I am sure. The Chair is not doing that on this occasion. The Chair would have to ascertain the facts in a particular case.

Consequence of Committee Determination

§ 15.6 A point of order that a committee violated a House rule relating to the reception of derogatory evidence, made against a committee report citing a witness for refusal to testify, could not be sustained where the subpenaed witness requested through counsel that evidence and testimony be taken in executive session, and the committee recessed, considered, and denied the request, having determined during the recess that these materials would not tend to defame, degrade, or incriminate any person; such committee actions, it was held, constituted compliance with the clause.

On Oct. 18, 1966,[11] Speaker John W. McCormack, of Massachusetts, overruled a point of order raised by Mr. Sidney R. Yates, of Illinois, that the Committee on Un-American Activities violated Rule XI clause 27(m),[12] by not holding an executive session; the Speaker found that the committee had duly considered and rejected the request.

PROCEEDINGS AGAINST YOLANDA HALL

MR. [EDWIN E.] WILLIS [of Louisiana]: Mr. Speaker, I rise to a question of the privilege of the House and by direction of the Committee on Un-American Activities, I submit a privileged report-House Report No. 2305.

The Clerk read as follows: . . . [13]

MR. YATES: Mr. Speaker, I make a point of order against the resolution on the grounds that it is violative of [rule XI, paragraph 27 (m)] of the rules of the House, requiring that testimony which may tend to defame, degrade, or incriminate the witness be taken in executive session. I do not intend to go into the same delineation of my reasons that I gave in connection with the preceding resolution.[14] But I suggest, with due respect, that the Chair should consider the fact that in this case, even though the Supreme Court of the United States decision is not controlling, it is nevertheless persuasive, and I should like to read to the Chair from the decision in the case of *Yellin* v. *the United States*, 374 U.S.

11. See the proceedings at 112 CONG. REC. 27486–95, 89th Cong. 2d Sess. See also 112 CONG. REC. 27500–06, 89th Cong. 2d Sess., Oct. 18, 1966, for the same ruling on a point of order raised against H. REPT. NO. 2306, regarding the refusal of Dr. Jeremiah Stamler to testify before the Committee on Un-American Activities.

12. See *House Rules and Manual* § 735(m) (1973).

13. The report is omitted.

14. See § 15.3, supra, relating to a contempt citation against Milton Mitchell Cohen, during which Mr. Sidney R. Yates (Ill.), raised similar objections.

109, page 114, where the Court recited the rule which was then under consideration as follows: (1)

> Executive hearings: If a majority of the committee or subcommittee duly appointed as provided by the Rules of the House of Representatives believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation or the reputation of other individuals, the committee shall interrogate such witness in an executive session for the purpose of determining the necessity or the advisability of conducting such interrogation thereafter in a public hearing.

Mr. Speaker, I now read from the decision of the Court on this particular rule, where the Court, discussing the rules that make up the Code of Fair Procedure that were approved in the year 1955, said as follows:

> All these rules work for the witness' benefit. They show that the committee has in a number of instances intended to assure the witness fair treatment, even the right to advice of counsel or undue publicity, and even the right not to be photographed by television cameras.
>
> Rule IX, in providing for an executive session when a public hearing might unjustly injure a witness' reputation, has the same protection import. And if it is the witness who is being protected, the most logical person to have the right to enforce those protections is the witness himself.

I respectfully suggest, Mr. Speaker, that the respondent, who was called as a witness, requested in the instant case that she be afforded the opportunity to testify in an executive session, a request that was denied by the committee. The respondent subsequently walked out on the committee without testifying.

I read from the court, to show that the respondent had no alternative under such circumstances. On page 121 the court says this:

> Petitioner has no traditional remedy, such as the writ of habeas corpus . . . by which to redress the loss of his rights. If the Committee ignores his request for an executive session, it is highly improbable that petitioner could obtain an injunction against the Committee that would protect him from public exposure. . . . Nor is there an administrative remedy for petitioner to pursue should the Committee fail to consider the risk of injury to his reputation. To answer the questions put to him publicly and then seek redress is no answer. For one thing, his testimony will cause the injury he seeks to avoid; under pain of perjury, he cannot by artful dissimulation evade revealing the information he wishes to remain confidential. For another, he has no opportunity to recover in damages. Even the Fifth Amendment is not sufficient protection, since petitioner could say many things which would discredit him without subjecting himself to the risk of criminal prosecution. The only avenue open is that which petitioner actually took. He refused to testify.

This is the decision of the Court. I respectfully suggest to the Speaker that it would sustain the dignity and integrity of the House if the interpretation of the rule for which I contend were sustained. . . .

MR. [RICHARD H.] ICHORD [of Missouri]: . . . To assist the Chair in rul-

1. The quoted rule is taken from the rules of the Committee on Un-American Activities, not the rules of the House.

ing on the point of order of the gentleman from Illinois I would point out to the Chair that the facts are essentially the same as in the Cohen case, and that the gentleman from Illinois has raised a point of order again under [rule XI 27(m)] that the witness, Yolanda Hall, should have been afforded an executive session.

Mr. Speaker, in this case the question of executive session is not at issue. . . .

I direct the Speaker's attention to page 14 of the committee report, which sets out the hearings in full.

I direct the Speaker's attention to line 16, which will make it clear to the Speaker that the witness, Yolanda Hall, did not request an executive session from the House Committee on Un-American Activities. . . .

MR. YATES: . . . I . . . refer the Chair to page 337 of the hearings where there appears a statement by Mr. Sullivan as follows:

> I ask this committee to take in executive session any testimony by my clients, that is, Dr. Stamler and Mrs. Hall, and any testimony by any other witnesses about Dr. Stamler and Mrs. Hall. That is my request.

So that the request was made, Mr. Speaker, for testimony to be taken in executive session. . . .

THE SPEAKER: The Chair is prepared to rule.

The gentleman from Illinois [Mr. Yates] has raised a point of order against the privileged report filed by the gentleman from Louisiana, citing a witness before a subcommittee of the Committee on Un-American Activities for contempt. The point of order is based on the ground that the subcommittee, while holding hearings in Chicago, failed or refused to follow the rules of the House—specifically, [rule XI, clause 27 (m)]—and, at the demand of the witnesses' attorney, take the testimony in executive session rather than in an open hearing.

The Chair will again read [clause 27 (m), rule XI], as follows:

> (m) If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—
>
> (1) Receive such evidence or testimony in executive session;
>
> (2) Afford such person an opportunity voluntarily to appear as a witness; and
>
> (3) Receive and dispose of requests from such person to subpena additional witnesses.

The Chair again agrees with the gentleman from Illinois that the three subclauses are not in the alternative. Each subclause stands by itself. The Chair will point out, however, that the subsection places the determination with the committee, not with the witness. . . .

Now the Chair will cite [clause 27(a) of rule XI], which states that the rules of the House are the rules of its committees so far as applicable. This provision also applies to the subcommittees of any such committee. Consequently, the Chair must examine the facts to see if the subcommittee did in fact comply with [clause 27(m) of rule XI].

The Chair will call attention to the fact that it is pointed out on page 8 of the report that the witness in this instance was invited to appear and testify in executive session. The invitation was ignored.

It will be noted, on pages 11 through 14 of the committee report, that the attorney for witness Hall made demand for an executive session. You will note, on page 11 of the report, that when the demand for an executive session was made, the subcommittee took a recess. It is obvious from the subcommittee chairman's statement following that recess, that the subcommittee had considered and determined not to take the testimony in executive session. The chairman so states, on page 12 of the Hall citation:

> Your motion, now made, that Mrs. Hall be now heard in executive session I deny after consideration of the subcommittee. We have complied with [rule 27(m)] and all other applicable rules of the House and of this committee.

It is patently clear to the Chair that the subcommittee did comply with [clause 27 (m)], and made the determination necessary thereunder. Accordingly, the Chair overrules the point of order.

§ 16. Calling Witnesses; Subpenas

This section discusses the calling of witnesses generally, and, specifically, subpenas ad testificandum to compel testimony, and subpenas duces tecum to compel production of papers, before the House or Senate or their committees or subcommittees.(2) It does not encompass all material relating to calling witnesses; subjects not discussed here include court subpenas for House papers,(3) investigations leading to impeachment,(4) inquiries into conduct of Members,(5) or qualifications or disqualifications of Members or Members-elect.(6)

A subpena is not a necessary prerequisite to an indictment and conviction for contempt under the

2. See § 4, supra, for a discussion of subpenas issued to the executive branch, and § 11, supra, for discussion of fourth amendment considerations. See also 1 Hinds' Precedents § 25; 2 Hinds' Precedents §§ 1313 and 1608; 3 Hinds' Precedents §§ 1668, 1671, 1673, 1695, 1696, 1699, 1700, 1714, 1732, 1733, 1738, 1739, 1750, 1753, 1763, 1766, 1800, 1801–1810, 1813–1820; 6 Cannon's Precedents §§ 336, 338, 339, 341, 342, 344, 346–349, 351, 354, 376, for earlier precedents. For related discussion, see § 13.11, supra, regarding a subpenaed witness right not to be photographed; §§ 15.1 and 13.6, supra, relating to disposition of requests to subpena witnesses when derogatory information has and has not been received, respectively; and §§ 17.4 and 19.4, infra, relating to citation of persons who have not been subpenaed. See also all precedents in § 20, infra, as they relate to refusals to appear, be sworn, testify, or produce documents in response to subpenas.

3. See Ch. 11, supra, discussing privilege.

4. See Ch. 14, Impeachment Powers, supra.

5. See Ch. 12, supra.

6. See Ch. 7, Members, supra.

statute, 2 USC § 192, because its provisions apply to contumacy by every person who has been "summoned as a witness by the authority of either House of Congress to give testimony or to produce papers. . . ."[7]

A voluntary appearance before a committee does not immunize a person against service of a subpena. Consequently, a witness who was served with a subpena at a hearing at which he appeared voluntarily and refused to answer questions could legally be indicted and convicted of contempt.[8]

A properly authorized subpena issued by a committee or subcommittee has the same force and effect as a subpena issued by the House or Senate itself.[9] Authority to issue subpenas is granted either by provisions of the rules of the House[10] or resolutions approved by the House or Senate.[11]

Because failure to comply with procedures prescribed in the rules or authorizing resolution invalidates subpenas, a subpena signed by the chairman but not authorized by a subcommittee[12] and another authorized by the chairman after consultation with one other member but not the full subcommittee,[13] were held invalid.

Parliamentarian's Note: The committee or subcommittee must actually meet with a quorum

7. *Kamp* v *United States,* 176 F2d 618 (D.C. Cir. 1948). See also, *Sinclair* v *United States,* 279 U.S. 263, 291 (1929), which held that the contempt statute extends to a case where a witness voluntarily appears as a witness. Nonetheless, the House has deleted from a contempt citation names of persons who had not been subpenaed; see § 17.4, infra.

8. *Dennis* v *United States,* 171 F2d 986 (D.C. Cir. 1948).

9. *McGrain* v *Daugherty,* 273 U.S. 135, 158 (1927). See discussion at 6 Cannon's Precedents § 341; see also *In re Motion to Quash Subpenas and Vacate Service,* 146 F Supp 792 (W.D. Pa. 1956).

10. In the 93d Congress, five committees, Appropriations, Budget, Government Operations, Internal Security, and Standards of Official Conduct, possessed authority under the rules to grant subpenas; see Rule XI clauses 2(b), 8(d), and 11(b) respectively, *House Rules and Manual* §§ 679, 691, and 703 A (1973). In the 94th Congress, all committees functioning under Rule X or XI were granted subpena authority by the standing rules and only select committees derived subpena authority from special resolutions.

11. Note: Recent changes in the procedure described herein, including methods of authorization, will be discussed in supplements to this edition as they appear.

12. *Shelton* v *United States,* 327 F2d 601 (D.C. Cir. 1963).

13. *Liveright* v *United States,* 347 F2d 473 (D.C. Cir. 1965).

present to authorize the issuance of a subpena, since under section 407 of *Jefferson's Manual* a committee "can only act when together, and not by separate consultation and consent."

Minor irregularities in the form of a subpena do not invalidate it when the meaning is clear to the person to whom it is directed. An objection to a variance between a subpena duces tecum which directed the witness to produce records of the United Professional Workers of America, and an indictment, which alleged refusal to produce records of the United Public Workers of America, of which the witness was president, was held to be frivolous, particularly because the witness called attention to the error.(14)

A subpena directing a member of the executive board of an association to produce organizational records was held not defective as being addressed to an individual member of the board rather than to the association.(15) And postponement of a hearing did not excuse a refusal to testify on a date subsequent to the one that appeared on the subpena, despite the fact that the subpena did not contain a clause directing the witness to remain until excused, when the witness was present in Washington on the later date to attend the hearing and did not raise the issue at the time.(16)

Unlike a minor irregularity in form, a finding of invalidity of part of a subpena voids the whole subpena. Following the general rule that, "one should not be held in contempt under a subpena that is part good and part bad,"(17) a court of appeals stated in one case that the court had a burden to see that the subpena was good in its entirety. Believing that a person facing punishment should not have to cull the good from the bad, the court dismissed the indictment for contempt, because the subpena exceeded the authority delegated to the committee.(18) Similarly, the contempt conviction of the Executive Director of the Port of New York Authority, who provided subpenaed materials relating to the actual activities and

14. *Flaxer* v *United States,* 235 F2d 821 (D.C. Cir. 1956), vacated and remanded, 354 U.S. 929 (1957), aff'd., 258 F2d 413 (D.C. Cir. 1958), reversed on other grounds, 358 U.S. 147 (1958).

15. *United States* v *Fleischman,* 339 U.S. 349 (1950), rein. denied, 339 U.S. 991 (1950).

16. *United States* v *Groves,* 18 F Supp 3 (W.D. Pa. 1937).

17. *Bowman Dairy Company* v *United States,* 341 U.S. 214 (1951).

18. *United States* v *Patterson,* 206 F2d 433 (D.C. Cir. 1953).

operations of the authority but refused to supply materials relating to the reasons for these activities, was reversed on the ground that the latter category exceeded the authority granted by the House to the investigative unit, a subcommittee.(19) Nonetheless, in one case it was held that the mere possibility that the general terms of a subpena could be construed to include materials protected by the first amendment could not justify a blanket refusal to produce anything, in the absence of an objection that the subpena was too broad.(20) And a witness' conviction for obstruction of justice for mutilating or concealing records subpenaed was upheld on appeal notwithstanding the fact that the subpena had not been properly authorized. A valid subpena was not considered vital, since the defendant knew the documents were desired by a congressional committee.(1)

To assure the attendance of a witness who refused to answer questions before a committee, the House or Senate may order the Speaker or President of the Senate, respectively, to issue a warrant ordering the Sergeant at Arms to arrest the witness and bring him before the bar of the parent body, if there is a reasonable belief that important evidence may otherwise be lost.(2)

Where a committee of Congress has subpenaed a witness to appear at a hearing without defining questions to be asked, the judicial branch should not enjoin in advance the holding of the hearing or suspend the subpena; the rights of a witness regarding any question actually asked at the hearing are subject to determination in appropriate proceedings thereafter.(3)

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19. *Tobin* v *United States,* 306 F2d 279 (1962), cert. denied, 371 U.S. 902 (1962).

20. *Shelton* v *United States,* 404 F2d 1292 (D. C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969).

1. *United States* v *Presser,* 292 F2d 171 (6th Cir. 1961), aff'd. 371 U.S. 71 (1961).

2. *Barry* v *United States ex rel. Cunningham,* 279 U.S. 597, 619 (1929). This case, based on an investigation of a Senator-elect, is discussed at 6 Cannon's Precedents §§ 346–349.

The fact that an alien who had been subpenaed by a House committee was arrested by Immigration and Naturalization Service officers and taken before the committee in their custody did not relieve him of his obligation to testify. Although the issue of legality or illegality of the arrest could be raised in a judicial proceeding, it was irrelevant to the committee proceedings. *Eisler* v *United States,* 170 F2d 273 (D.C. Cir. 1948), cert. dismissed, 338 U.S. 883 (1949).

3. *Mins et al.* v *McCarthy,* 209 F2d 307 (D.C. Cir. 1953).

Two recent cases discussing injunctions against compliance with congressional requests or subpenas will be treated in more detail in supplements to this edition. In an action by Ashland Oil, Inc., to enjoin the Federal Trade Commission from furnishing certain trade secrets to a congressional subcommittee, the Court of Appeals for the District of Columbia held that the Federal Trade Commission was not precluded by statute from transmitting trade secrets to Congress pursuant either to subpena or formal request. *Ashland Oil, Inc.* v *Federal Trade Commission,* 548 F2d 977 (D.C. Cir. 1976). In the other case, the Justice Department sought to enjoin American Telephone & Telegraph Co. from complying with a subpena issued by the Chairman of the House Committee on Interstate and Foreign Commerce. The information sought pursuant to the subpena related to electronic surveillance, and the executive branch contended that disclosure of the information created a risk to national security. The District Court for the District of Columbia having issued an injunction against compliance with the congressional subpena, the U.S. Court of Appeals for the District of Columbia remanded the case without decision on the merits and called for further negotiations between the parties. *United States* v *American Telephone & Telegraph Co.*, 551 F2d 384 (D.C. Cir. 1976). The Court further directed the District Court to modify the injunction with respect to information regarding domestic surveillance, disclosure of which had not been found to create an undue risk to national security.

Habeas Corpus

§ 16.1 A subcommittee may petition a court to issue a writ of habeas corpus to compel attendance of an incarcerated person at a committee hearing.

On Sept. 10, 1973,[4] the fact that the Special Subcommittee on Intelligence of the Committee on Armed Services had petitioned a U.S. district court to issue a writ of habeas corpus ad testificandum to compel the attendance of a witness, G. Gordon Liddy, before a hearing of the subcommittee, was revealed to the House in House Report No. 93–453.

BACKGROUND

At the time of the subcommittee hearings, Mr. Liddy was in confinement in the District of Columbia Jail as the result of his conviction on the Watergate breakin. Accordingly, the subcommittee petitioned Chief Judge John J. Sirica of the United States District Court for the District of Columbia for a Writ of Habeas Corpus Ad Testificandum as the only means of obtaining Mr. Liddy's presence before the subcommittee. In his discretion Judge Sirica signed that petition and an order was delivered to the United States Marshal for Mr. Liddy's appearance before the subcommittee on July

4. 119 CONG. REC. 28951, 93d Cong. 1st Sess.

20, 1973. [See Appendix 1, pp. 16–17.] Mr. Liddy appeared as ordered.

Subpena as Prerequisite for Contempt

§ 16.2 The House and not the Chair determines whether persons who have not been subpenaed may be cited for refusal to produce organizational books, records, and papers.

On Mar. 28, 1946,[5] Speaker Sam Rayburn, of Texas, responded to a point of order regarding authority to entertain a resolution citing for contempt persons who had not been subpenaed.

MR. [JOHN S.] WOOD [of Georgia]: Mr. Speaker, by direction of the Committee on Un-American Activities, I present a privileged report and ask that it be read. . . .

COMMITTEE ON UN-AMERICAN ACTIVITIES

THE SPEAKER: The Clerk will read the report of the Committee on Un-American Activities.

The Clerk read as follows:

PROCEEDING AGAINST DR. EDWARD K. BARSKY AND OTHERS

Mr. Wood, from the Committee on Un-American Activities, submitted the following report:

The Committee on Un-American Activities as created and authorized by the House of Representatives by House Resolution 5 of the Seventy-ninth Congress, caused to be issued a subpena to Dr. Edward K. Barsky, chairman of the Joint Anti-Fascist Refugee Committee, an unincorporated organization with offices at 192 Lexington Avenue, New York, N.Y. The said subpena required the said person to produce books, papers, and records of the organization for the inspection of your committee; the subpena is set forth as follows: . . .

In his appearance before the committee, Dr. Barsky stated that he was unable to produce the subpenaed materials because that authority had not been granted by the members of the executive board.

At the request of a committee member, he supplied a list of names and addresses of board members. This list appeared in the report and resolution. Thereafter the following resolution was considered:

MR. WOOD: Mr. Speaker, I offer a privileged resolution (H. Res. 573) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the House Committee on Un-American Activities as to the willful and deliberate refusal of the following persons to produce before the said committee for its inspection the books, papers, and records of an unincorporated organization known as the Joint Anti-Fascist Refugee Committee, with offices at 192 Lexington Avenue, New York, N. Y., together with all the facts relating

5. 92 CONG. REC. 2743–45, 79th Cong. 2d Sess.

thereto, under seal of the House of Representatives, to the United States attorney for the District of Columbia to the end that the said persons named below may be proceeded against in the manner and form provided by law:

Dr. Edward K. Barsky, 54 East Sixty-first Street, New York City.

Dr. Jacob Auslander, 288 West Eighty-sixth Street, New York City.

Prof. Lyman R. Bradley, New York University, New York City.

Mrs. Marjorie Chodorov, 815 Park Avenue, New York City. . . .

MR. [VITO] MARCANTONIO [of New York]: Mr. Speaker, a point of order.

THE SPEARER: The gentleman will state it.

MR. MARCANTONIO: Mr. Speaker, I make a point of order against the resolution on the ground that it seeks to have cited by this House individuals who were never subpenaed, and never given an opportunity to appear and state whether or not they would or could comply with a subpena. Under those circumstances, I maintain that insofar as those individuals are concerned this matter is not properly before the House, in that neither the resolution nor the report from the committee sets forth that these individuals were subpenaed, with the exception of Dr. Barsky. None of the others were subpenaed; none of the others came before the committee and were accorded even an opportunity to say "yes" or "no" as to whether or not they had authority or control over the records and books and whether they could or would comply with the committee's subpena. For that reason, as far as they are concerned, this resolution is not properly before this House.

THE SPEAKER: The Chair is ready to rule.

The report and the resolution are both before the House for its determination, and not the determination of the Chair. The Chair overrules the point of order.[6]

D. AUTHORITY IN CASES OF CONTEMPT

§ 17. In General

The House may try a contumacious witness at its bar[7] or pur-

6. See § 17.4, infra, discussing adoption of an amendment deleting names of all persons who had not been subpenaed.

7. *Parliamentarian's Note:* No contumacious witness has been tried at the bar of the House or Senate between 1936 and 1973. In *Groppi* v *Leslie,* 404 U.S. 496 (1972), a decision which reviewed an action of the Wisconsin legislature but nonetheless rested on congressional precedents, the U.S. Supreme Court held that a witness may not be punished for contempt unless he has been accorded

sue procedures authorized by 2 USC §§ 192–194, criminal contempt statutes passed in 1857. These statutes reflected the need for more effective sanctions and a more appropriate forum to compel disclosure from a recalcitrant witness than merely ordering him held in custody until he agreed to testify. A major shortcoming of trial before the bar, in addition to the inappropriateness of the House's procedures when functioning as a judicial tribunal, and the lack of precedent on due process requirements, was that the witness could be imprisoned only as long as the House remained in session.[8] The statute designates as a misdemeanor willful[9] default or refusal to answer any question[10] pertinent[11] to the question under inquiry[12] by any person who has been summoned as a witness[13] by authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress. Punishment for violation of the statute is a fine of not more than $1,000 nor less than $100, and imprisonment for not less than one month nor more than 12 months. This statute has withstood constitutional challenges. The Supreme Court[14] rejected the contention that reference to "any" matter under inquiry was fatally defective because it was unlimited in its extent. In reaching this conclusion the court stated that, ". . . statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible . . . avoid an unjust or absurd conclusion" and interpreted the word "any" to apply to ". . . matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action, to questions perti-

due process of law in a proceeding that leads to a finding of guilt. Although a legislative body does not have to accord all the procedural rights that a court must accord, it must grant notice and an opportunity for a hearing.

8. This description of the statute is taken from *Watkins* v *United States,* 354 U.S. 178, 207 n. 45 (1957).

9. See § 7, supra, for a discussion of willfulness as it relates to intent of the witness.

10. See § 20, infra, for a discussion of particular conduct as contumacious.

11. See § 6, supra, for a discussion of pertinence.

12. See § 1, supra, for a discussion of the permissible scope of legislative inquiry.

13. See § 16, supra, for a discussion of summoning witnesses.

14. *In re Chapman,* 166 U.S. 661, 667 (1897). 2 Hinds' Precedents § 1614.

nent thereto, and to facts or papers appearing therein." In the same case the court found that the adoption of a statute designed to aid each House of Congress in the discharge of its constitutional functions did not constitute an improper delegation of power to punish contempt.

A court of appeals[15] rejected the argument that 2 USC § 192 violated the "necessary and proper" clause of article 1, section 8, because the inherent power of Congress to compel attendance by civil contempt was a better means to achieve the legitimate congressional end of obtaining information than was criminal contempt. The court found that the decision to add criminal contempt powers to its inherent powers to insure the cooperation of witnesses provided a rational basis on which to enact 2 USC § 192. It was unwilling to strike down a means reasonably calculated to accomplish a valid congressional end simply because someone could conceive of an arguably better means to accomplish that end.

2 USC § 193 provides that no witness is privileged to refuse to testify to any fact, or to produce any paper on the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous. 2 USC § 194 establishes a procedure for certification of a contempt citation to the appropriate U.S. Attorney.[16]

The following steps precede judicial proceedings under 2 USC §§ 192–194: (1) approval by the committee, (2) calling up and reading the committee report on the floor,[17] (3) either (if Congress is in session) House approval of a resolution authorizing the Speaker to certify the report to the U.S. Attorney for prosecution, or[18] (if Congress is not in session) an independent determination by the Speaker to certify the report,[19] (4) certification by the Speaker to the appropriate U.S. Attorney for prosecution.[20]

The remaining sections in this chapter deal with proceedings

15. *United States* v *Fort*, 443 F2d 670, 676 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971).

16. See § 22, infra, for a discussion of this statute.

17. See §§ 20.1, 20.3, 20.5, 20.7, 20.9, infra, for examples.

18. See §§ 20.2, 20.4, 20.6, 20.8, 20.10, and 22.1, infra, for examples.

19. See summary and analysis in § 22, infra, for a discussion of *Wilson, et al.* v *United States,* which held that the Speaker, acting in the place of the House, must exercise independent judgment.

20. See all precedents in § 22, infra, for examples.

after a committee has voted to cite a witness for contempt and prior to grand jury action.[1]

Recommittal

§ 17.1 The House may recommit a resolution certifying the contempt of a committee witness to the committee which reported the contumacious conduct.

On July 13, 1971,[2] the House on a roll call vote recommitted a resolution certifying contempt of a witness before the Committee on Interstate and Foreign Commerce.[3]

MR. [HARLEY O.] STAGGERS [of West Virginia]: Mr. Speaker, I offer a privileged resolution, by direction of the Committee on Interstate and Foreign Commerce, and ask for its immediate consideration.

The Clerk read the resolution as follows:

H. RES. 534

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Interstate and Foreign Commerce of the House of Representatives as to the contumacious conduct of the Columbia Broadcasting System, Incorporated, and of Dr. Frank Stanton, its President, in failing and refusing to produce certain pertinent materials in compliance with a subpena *duces lecum* of a duly constituted subcommittee of said committee served upon Dr. Stanton and the Columbia Broadcasting System, Incorporated, and as ordered by the subcommittee, together with all the facts in connection therewith, under the seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that Dr. Frank Stanton and the Columbia Broadcasting System, Incorporated, may be proceeded against in the manner and form provided by law.

THE SPEAKER:[4] The gentleman from West Virginia (Mr. Staggers) is recognized for one hour. . . .

MR. STAGGERS: Mr. Speaker, I move the previous question on the resolution.

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1. For earlier precedents, see 2 Hinds' Precedents §§ 1597–1640, 3 Hinds' Precedents §§ 1666–1724, and 6 Cannon's Precedents §§ 332–353. For other materials, see Goldfarb, Ronald L., The Contempt Power, Columbia University Press, N.Y., 1963 (this work also discusses contempt of judicial proceedings); Sky, T., Judicial Reviews of Congressional Investigations—Is There an Alternative to Contempt? 31 Geo. Wash. L. Rev. 399 (1962); Beck, Carl, Contempt of Congress, A Study of the Prosecutions Initiated by the Committee on UnAmerican Activities, 1945–1957, The Hauser Press, New Orleans, 1959; and Willis, Power of Legislative Bodies to Punish for Contempt, 2 Ind. L. J. 61 (1957).

2. 117 CONG. REC. 24723, 24752, 24753, 92d Cong. 1st Sess.

3. The Committee on Interstate and Foreign Commerce recommended the contempt citation by a vote of 25 to 23, in an executive session on July 1, 1971. See 117 CONG. REC. 24723, 92d Cong. 1st Sess., July 13, 1971.

4. Carl Albert (Okla.).

The previous question was ordered.

MOTION TO RECOMMIT OFFERED BY MR. KEITH

MR. [HASTINGS] KEITH [of Massachusetts]: Mr. Speaker, I offer a motion to recommit.

THE SPEAKER: Is the gentleman opposed to the resolution?

MR. KEITH: I am, Mr. Speaker.

THE SPEAKER: The Clerk will report the motion to recommit.

The Clerk read as follows:

> Mr. Keith moves to recommit House Resolution 534 to the Committee on Interstate and Foreign Commerce.

THE SPEAKER: Without objection, the previous question is ordered on the motion to recommit.

There was no objection.

THE SPEAKER: The question is on the motion to recommit.

The question was taken; and on a division (demanded by Mr. Keith), there were—ayes 151, noes 147.

MR. STAGGERS: Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered. . . .

The question was taken; and there were—yeas 226, nays 181, answered "present" 2, not voting 24, as follows: . . .

So the motion to recommit was agreed to.

§ 17.2 The House rejected a motion to recommit to a select committee a privileged resolution from the Committee on Un-American Activities which authorized the Speaker to certify a contempt citation to the U.S. Attorney.

On Oct. 18, 1966,[5] the House by a roll call vote of 90 yeas, 181 nays, and 161 not voting, rejected a motion to recommit to a select committee a privileged resolution authorizing the Speaker to certify a committee report to the U.S. Attorney. The report cited Milton Mitchell Cohen in contempt for refusal to answer questions before the Committee on Un-American Activities. The select committee would have been instructed to examine the sufficiency of the citation.[6]

PROCEEDINGS AGAINST MILTON MITCHELL COHEN

MR. [EDWIN E.] WILLIS [of Louisiana]: Mr. Speaker, I offer a privileged resolution (H. Res. 1060) from the Committee on Un-American Activities and ask for its immediate consideration.

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5. 112 CONG. REC. 27448, 27484, 27485, 89th Cong. 2d Sess.

6. See also, for example, 112 CONG. REC. 27511, 27512, 89th Cong. 2d Sess., Oct. 18, 1966, for rejection on a roll call vote of 54 yeas to 182 nays of a motion by Mr. Sidney R. Yates (Ill.), to recommit to a select committee privileged H. Res. 1062, authorizing the Speaker to certify to a U.S. Attorney H. REPT. No. 2306, relating to the refusal of Dr. Jeremiah Stamler to testify before the Committee on Un-American Activities.

The Clerk read the resolution, as follows:

H. RES. 1060

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the refusals of Milton Mitchell Cohen to answer questions pertinent to the subject under inquiry before a duly authorized subcommittee of the said Committee on Un-American Activities, and his departure without leave, together with all the facts in connection therewith, under the seal of the House of Representatives, to the United States attorney for the northern district of Illinois, to the end that the said Milton Mitchell Cohen may be proceeded against in the manner and form provided by law. . . .

The previous question was ordered.

THE SPEAKER:[7] The question is on the resolution.

For what purpose does the gentleman from Massachusetts rise?

MR. [SILVIO O.] CONTE [of Massachusetts]: Mr. Speaker, I offer a motion to recommit.

THE SPEAKER: Is the gentleman opposed to the resolution?

MR. CONTE: I am, Mr. Speaker.

THE SPEAKER: The Clerk will report the motion to recommit.

The Clerk read as follows:

Mr. Conte moves to recommit the resolution of the Committee on Un-American Activities to a select committee of seven Members to be appointed by the Speaker with instructions to examine the sufficiency of the contempt citations under existing rules of law and relevant judicial decisions and thereafter to report it back to the House, while Congress is in session, or, when Congress is not in session, to the Speaker of the House, with a statement to its findings.[8]

THE SPEAKER: Without objection, the previous question is ordered.

The question is on the motion to recommit.

The question was taken.

MR. CONTE: Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

THE SPEAKER: Evidently a quorum is not present.

The Doorkeeper will close the doors; the Sergeant at Arms will notify absent Members, and the Clerk will call the roll.

The question was taken; and there were—yeas 90, nays 181, not voting 161, as follows: . . .

The result of the vote was announced as above recorded.

The doors were opened.

THE SPEAKER: The question is on the adoption of the resolution.

The question was taken, and the Speaker announced that the ayes appeared to have it.

MR. [JAMES C.] CLEVELAND [of New Hampshire]: Mr. Speaker, on that I demand the yeas and nays.

7. John W. McCormack (Mass.).

8. See 112 CONG. REC. 27461, 27462, 89th Cong. 2d Sess., Oct. 18, 1966, for a statement in which Mr. Conte indicated that a reason for the motion to recommit was the lawsuit filed by the witness, Milton Mitchell Cohen, and others challenging the constitutionality of the authority and procedures of the Committee on Un-American Activities.

The yeas and nays were refused.

So the resolution was agreed to.

A motion to reconsider was laid on the table.

Divisibility

§ 17.3 The Speaker stated that a resolution directing the Speaker to certify a report citing certain witnesses for contempt for refusing to testify and submit subpenaed materials was not divisible.

On May 28, 1936,[9] Speaker Joseph W. Byrns, of Tennessee, responded to a parliamentary inquiry regarding divisibility of a resolution authorizing the Speaker to certify to the U.S. Attorney House Report No. 2857.

MR. [C. JASPER] BELL [of Missouri]: Mr. Speaker, by direction of the select committee, I now present a privileged resolution and send it to the Clerks desk and ask that it be read.

The Clerk read as follows:

HOUSE RESOLUTION 532

Resolved, That the Speaker of the House of Representatives certify the report of the Select Committee to Investigate Old Age Pension Plans as to the willful and deliberate refusal of Francis E. Townsend, Clinton Wunder, and John B. Kiefer to testify before said committee, together with all the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that the said Francis E. Townsend, Clinton Wunder, and John B. Kiefer may be proceeded against in the manner and form provided by law. . . .

THE SPEAKER: The Chair recognizes the gentleman from Missouri.

MR. [EVERETT M.] DIRKSEN [of Illinois]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. DIRKSEN: Is the resolution divisible as to the three gentlemen named?

THE SPEAKER: It is not.[10]

Deletion of Names of Persons Not Subpenaed

§ 17.4 The House amended a resolution citing persons for contempt by deleting the names of all who had not been subpenaed, leaving only the name of Dr. Edward K. Barsky.

On Mar. 28, 1946,[11] the House by voice vote agreed to an amendment deleting the names of all persons who had not been subpenaed from House Resolution 573, authorizing the Speaker to certify to the U.S. Attorney the report of the Committee on Un-American

9. 80 CONG REC. 8222, 74th Cong. 2d Sess.

10. See § 17.4, infra, in which all but one of the names of persons listed in such a resolution were deleted by amendment.

11. 92 CONG. REC. 2745, 2749, 79th Cong. 2d Sess.

Activities regarding refusal to produce requested records, books, and papers.

MR. [JOHN S.] WOOD [of Georgia]: Mr. Speaker, I offer a privileged resolution (H. Res. 573) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the House Committee on Un-American Activities as to the willful and deliberate refusal of the following persons to produce before the said committee for its inspection the books, papers, and records of an unincorporated organization known as the Joint Anti-Fascist Refugee Committee, with offices at 192 Lexington Avenue, New York, N.Y., together with all the facts relating thereto, under seal of the House of Representatives, to the United States attorney for the District of Columbia to the end that the said persons named below may be proceeded against in the manner and form provided by law:

Dr. Edward K. Barsky, 54 East Sixty-first Street, New York City.

Dr. Jacob Auslander, 286 West Eighty-sixth Street, New York City.

Prof. Lyman R. Bradley, New York University, New York City.

Mrs. Marjorie Chodorov, 815 Park Avenue, New York City. . . .

MR. WOOD: Mr. Speaker, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Wood: Strike from the resolution the names of all individuals except that of Edward K. Barsky.

The amendment was agreed to.

Parliamentarian's Note: Dr. Barsky was the only person who had been subpenaed. All the others, members of the executive board of the organization, were cited in the report and resolution because the board refused to permit Dr. Barsky to produce the subpenaed materials. Mr. Wood was Chairman of the Committee on Un-American Activities.(12)

§ 18. Time for Consideration

Reports

§ 18.1 A report from a committee relating to the refusal of a witness to produce certain subpenaed documents is privileged; it is presented and read before a resolution is offered directing the Speaker to certify the refusal to a U.S. Attorney.

On Aug. 23, 1960,(13) Speaker Sam Rayburn, of Texas, indicated the order in which to read a report and resolution relating to contempt of a witness.

MR. [EMANUEL] CELLER [of New York]: Mr. Speaker, I rise to a question

12. See 92 CONG. REC. 2744, 2745, 79th Cong. 2d Sess., for the text of the report and § 19.4, infra, for a discussion of this incident as it relates to a point of order challenging citation of persons who had not been subpenaed.

13. 106 CONG. REC. 17278, 86th Cong. 2d Sess.

of the privilege of the House and offer a resolution which I send to the Clerk's desk along with a privileged report (Rept. No. 2117) of the Committee on the Judiciary detailing the facts concerning the contumacious conduct of the subject of the resolution.

THE SPEAKER: The Chair would think that the gentleman would desire to file the report first and then offer the resolution.

MR. CELLER: The report has been filed, Mr. Speaker.

THE SPEAKER: The Clerk will read the report, then.[14]

§ 18.2 Because a report on the contemptuous conduct of a witness before a committee gives rise to a question of privileges of the House (relating both to the implied constitutional power of the House and its authority under Rule IX to dispose directly of questions affecting the dignity and integrity of House proceedings), it is privileged for consideration immediately upon presentation to the House.

On July 13, 1971,[15] Speaker Carl Albert, of Oklahoma, ruled that House Report No. 92–349, citing the Columbia Broadcasting System, Inc. and its president, Frank Stanton, for contempt for refusal to submit subpenaed materials to the Committee on Interstate and Foreign Commerce, was privileged under Rule IX,[16] and consequently could be considered on the same day it was reported notwithstandIng the requirement of Rule XI clause 27(d)(4),[17] that reports from committees be available to Members for at least three calendar days prior to their consideration.

PROCEEDING AGAINST FRANK STANTON AND COLUMBIA BROADCASTING SYSTEM, INC.

MR. [HARLEY O.] STAGGERS [of West Virginia]: I rise to a question of the

14. This report cited Austin J. Tobin, executive director of the Port Authority of New York for contempt for his refusal to submit subpenaed documents before Subcommittee No. 5 of the Committee on the Judiciary. The resolution, H. Res. 606, authorized the Speaker to certify the report to a U.S. Attorney. See 106 CONG. REC. 17281, 86th Cong. 2d Sess., Aug. 23, 1960, for the text of this resolution and 106 CONG. REC. 17313 (H. REPT. No. 2120) and 17316 (H. Res. 607), 86th Cong. 2d Sess., Aug. 23, 1960, for similar proceedings against S. Sloan Colt, chairman of the board of commissioners of the Authority; and 106 CONG. REC. 17316 (H. REPT. No. 2121) and 17319 (H. Res. 608), 86th Cong. 2d Sess., Aug. 23, 1960, for similar proceedings against Joseph G. Carty, secretary of the authority.

15. 117 CONG. REC. 24720, 24721, 92d Cong. 1st Sess.

16. House Rules and Manual § 661 (1973).

17. House Rules and Manual § 735(d)(4) (1973).

privilege of the House, and I submit a privileged report (Report No. 92–349).

The Clerk proceeded to read the report.

MR. [SAM M.] GIBBONS [of Florida]: Mr. Speaker, I want to raise a point of order against the consideration of this matter at this time.

THE SPEAKER: The gentleman will state his point of order.

MR. GIBBONS: Mr. Speaker, I rise to object to the consideration of this matter at this time in that I believe that it violates clause 27, subparagraph (d)(4) of rule XI of the Rules of the House of Representatives.

Mr. Speaker, I refer to the language contained on page 381 of the House Rules and Manual, 92d Congress. I would call your attention to the fact that the rule, subparagraph (d)(4), clause 27 of rule XI was adopted last year in the Legislative Reorganization Act, and was readopted earlier this year.

Mr. Speaker, I think it would be best if I read just a portion of the rule, and this rule reads as follows:

> A measure or matter reported by any committee (except the Committee on Appropriations, the Committee on House Administration, the Committee on Rules, and the Committee on Standards of Official Conduct) shall not be considered in the House unless the report of that committee upon that measure or matter has been available to the Members of the House for at least three calendar days (excluding Saturdays, Sundays, and legal holidays) prior to the consideration of that measure or matter in the House.

Now, there is some more to that rule. The next sentence goes on to deal with the hearings of the committee, but then there is an exception to that rule, and it is:

> This subparagraph shall not apply to—
>
> (A) any measure for the declaration of war or the declaration of a national emergency, by the Congress; and
>
> (B) any executive decision, determination, or action which would become, or continue to be, effective unless disapproved or otherwise invalidated by one or both Houses of Congress.

Mr. Speaker, that rule was adopted last year. I have examined the committee report. It is obvious the reasoning for its adoption was to prevent the premature or rapid or precipitous consideration of matters such as this kind, even though they dealt with a matter of privilege. The matter of privileged matters is specifically not excepted from this rule because I think many Members helping to frame these rule changes last year felt that the Congress had not acted wisely on some of these things that have come up pretty fast.

The committee report, which is still classified as a committee print, without any number, was not available until 10:30 this morning. It is 272 pages long. I presume it is well written, I have not had a chance to read it, and I doubt that very many other Members have had a chance to read it in full.

I would hope that the Chair would sustain this point of order. I do not believe there is any grave emergency. I do not believe that the person sought to be cited, or the organization sought to be cited are about to leave the country. I would hope that the House could

consider this matter in a more rational manner and after it has had the opportunity to read and examine the report.

Mr. Speaker, I realize that some may say a matter of this sort is a matter of privilege and, therefore, is excepted from the rule. It is my contention, Mr. Speaker, that the matter of privilege was specifically not excluded from the requirement of a 3-day layover for the printing of the report but that the Committees on Appropriations, House Administration, Rules, and Standards of Official Conduct—those being the committees that generally deal with matters of privilege—were set down under specific exception and that it was never intended that citations such as this could be considered in such a preemptive type of procedure as is now about to take place.

MR. [OGDEN R.] REID of New York: Mr. Speaker, will the gentleman yield?

MR. GIBBONS: l yield to the gentleman.

MR. REID of New York: Mr. Speaker, in furtherance of the point that the gentleman is making, if the Chair will look at rule IX, it states in the rule:

> Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings;

I would say, Mr. Speaker, that the 3-day rule is an important principle, uniquely relevant to the Constitutional question. This is the very idea of the 3-day rule and I believe that today to rush through an important question does not comport with an enlightened discharge of our responsibility.

Mr. Speaker, I hope the point of order is upheld.

THE SPEAKER: Does the gentleman from West Virginia (Mr. Staggers) desire to be heard on the point of order?

MR. STAGGERS: I do, Mr. Speaker.

THE SPEAKER: The gentleman is recognized.

MR. STAGGERS: Mr. Speaker, rule IX provides that "Question of privilege shall be, first, those affecting the rights of the House collectively"—as the gentleman from New York has just read—"its safety, dignity and the integrity of its proceedings."

Privileges of the House includes questions relating to those powers to punish for contempt witnesses who are summoned to give information.

House Rule 27(d) of rule XI the so-called 3-day rule, clearly does not apply to questions relating to privileges of the House. The rule applies only to simple measures or matters reported by any committee. It excludes matters arising from the Committee on Appropriations, House Administration, Rules, and Standards of Official Conduct.

It is clear that the terms "measure" or "matter" as used in rule 27(d) do not apply to questions of privilege.

To apply it in such a way would utterly defeat the whole concept of the question of privilege.

Too, a privileged motion takes precedence over all other questions except the motion to adjourn.

The fact that the 3-day rule excludes routine matters from the Appropriations, Administration, Rules, and Standards of Official Conduct Committees clearly shows that the 3-day rule does not apply to privileged questions.

If the rule were meant to apply to questions of privilege, it surely would not make exceptions for routine business coming from regular standing committees.

THE SPEAKER: The Chair is ready to rule.

The Chair appreciates the fact that the gentleman from Florida has furnished him with a copy of the point of order which he has raised and has given the Chair an opportunity to consider it.

The gentleman from Florida (Mr. Gibbons) makes a point of order against the consideration of the report from the Committee on Interstate and Foreign Commerce on the grounds that it has not been available to Members for at least 3 days as required by clause 27(d)(4) of rule XI. The Chair had been advised that such a point of order might be raised and has examined the problems involved.

The Chair has studied clause 27(d)(4) of rule XI and the legislative history in connection with its inclusion in the Legislative Reorganization Act of 1970.

That clause provides that "a matter shall not be considered in the House unless the report has been available for at least 3 calendar days."

The Chair has also examined rule IX, which provides that:

> Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings . . . and shall have precedence of all other questions, except motions to adjourn.

Under the precedents, a resolution raising a question of the privileges of the House does not necessarily require a report from a committee. Immediate consideration of a question of privilege of the House is inherent in the whole concept of privilege. When a resolution is presented, the House may then make a determination regarding its disposition.

When a question is raised that a witness before a House committee has been contemptuous, it has always been recognized that the House has the implied power under the Constitution to deal directly with such conduct so far as is necessary to preserve and exercise its legislative authority. However, punishment for contemptuous conduct involving the refusal of a witness to testify or produce documents is now generally governed by law—Title II, United States Code, sections 192–194—which provides that whenever a witness fails or refuses to appear in response to a committee subpena, or fails or refuses to testify or produce documents in response thereto, such fact may be reported to the House. Those reports are of high privilege.

When a resolution raising a question of privilege of the House is submitted by a Member and called up as privileged, that resolution is also subject to immediate disposition as the House shall determine.

The implied power under the Constitution for the House to deal directly with matters necessary to preserve and exercise its legislative authority; the provision in rule IX that questions of privilege of the House shall have precedence of all other questions; and the fact that the report of the committee has been filed by the gentleman from West Virginia as privileged—all refute the argument that the 3-day layover requirement of clause 27(d)(4) applies in this situation.

The Chair holds that the report is of such high privilege under the inherent constitutional powers of the House and

under rule IX that the provisions of clause 27(d)(4) of rule XI are not applicable.

Therefore, the Chair overrules the point of order.

The Clerk will continue to read the report.

Point of Order Regarding House Trial

§ 18.3 The point of order was made that the House should itself try contempt cases, rather than certify such matters to the courts; the report which was objected to having just been read, the Speaker indicated that submission of such issue (which is one to be decided by the House) should be postponed until a resolution was actually presented for consideration by the House.

On May 28, 1936,[18] after the reading of a privileged report from the Select Committee on Investigating Old Age Pensions, House Report No. 2857, regarding contempt of Dr. Francis E. Townsend, president and founder, and two members of the national board of directors of Old Age Revolving Pensions, Ltd., for failure to provide subpenaed testimony and documents, Speaker Joseph W. Byrns, of Tennessee, responded to a point of order regarding the procedure to try and punish contempt.

MR. [THOMAS L.] BLANTON [of Texas]: Mr. Speaker, I make the point of order that under the Constitution of the United States the House of Representatives of the legislative branch is a separate and distinct department of government from the judiciary, or the courts, that this is undoubtedly a contempt of the House of Representatives, the legislative branch, and is a contempt that should be tried and punished, not by the courts, but by the House of Representatives itself. We ought not to pass the buck to the courts. We ought to assume the responsibility ourselves.

I admit that all three witnesses clearly are in contempt, and deserve punishment and that the House ought to try these three witnesses, convict them of contempt, and punish all three of them with a heavy fine and send them all to jail, until they can have some respect for the institutions of their country. I therefore make the point of order that the House of Representatives should try its own contempt proceedings and fix its own punishment.

THE SPEAKER: That matter is not under discussion now. This is simply a report from a select committee which has been read and which has been ordered printed. The Chair recognizes the gentleman from Missouri.

It should be noted that the Speaker did not indicate that the point of order, even if timely, would have been valid. Rather, the Speaker implied that such

18. 80 CONG. REC. 8221, 74th Cong. 2d Sess.

issues were to be determined by the House by voting on whatever resolution was presented to the House.[19]

Resolutions

§ 18.4 A resolution directing the Speaker to certify to the U.S. Attorney the refusal of a witness to respond to a subpena issued by a House committee may be offered from the floor as privileged and may be disposed of immediately.

On July 13, 1971,[20] House Resolution 534, authorizing the Speaker to certify to the U.S. Attorney a report citing the contemptuous refusal of the Columbia Broadcasting System and its president, Frank Stanton, to respond to a subpena duces tecum issued by the Committee on Interstate and Foreign Commerce, and House Report No. 92–349, citing this contempt, were offered from the floor. The resolution was considered as privileged by the Speaker.[1]

19. See § 19.2, infra, for a discussion of the proceedings as they relate to the authority of a committee to report the contempts of witnesses.

20. 117 CONG. REC. 24720, 24721, 24723, 92d Cong. 1st Sess.; see § 18.2, supra, for the text of the point of order and ruling regarding the privileged status of the report.

1. Carl Albert (Okla.).

§ 18.5 Because it is a matter of high privilege, a resolution directing the Speaker to certify an individual in contempt may be called up at any time.

On Aug. 2, 1946,[2] Speaker Sam Rayburn, of Texas, responded to a parliamentary inquiry regarding the privileged status of a resolution authorizing the Speaker to certify an individual in contempt.

PROCEEDING AGAINST RICHARD MORFORD

THE SPEAKER: For what purpose does the gentleman from Mississippi rise?

MR [JOHN E.] RANKIN [of Mississippi]: Mr. Speaker, I send to the Clerk's desk a privileged resolution and ask that it be read.

THE SPEAKER: The Clerk will read the resolution.

MR. [VITO] MARCANTONIO [of New York]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. MARCANTONIO: Mr. Speaker, has not the Speaker the power to determine the order of business by recognizing or not recognizing gentlemen requesting the consideration of various pieces of legislation? I make that parliamentary inquiry because there is very important business pending before the House—social security, appro-

2. 92 CONG. REC. 10746, 79th Cong. 2d Sess.

priations for terminal-leave pay, and for automobiles for amputees—and I see no reason why this resolution should be given preference.

THE SPEAKER: It would not be given preference if it were an ordinary resolution, but this is a resolution of high privilege.

Calendar Wednesday

§ 18.6 A report of a committee citing a witness for contempt was considered on Calendar Wednesday.

On June 26, 1946,[3] Calendar Wednesday, the House considered a privileged report from the Committee on Un-American Activities, House Report No. 2354, citing Corliss G. Lamont, chairman of the National Council of American-Soviet Friendship, Inc., for contempt for his refusal to produce subpoenaed materials.[4]

§ 19. Matters Decided by House

Content of Report

§ 19.1 The House, not the Chair, determines whether a report citing an individual for refusal to produce subpenaed materials must contain the full testimony or only selected portions thereof.

On June 26, 1946,[5] Speaker Sam Rayburn, of Texas, responded to a point of order regarding the sufficiency of a hearing transcript in a committee report citing a I witness for contempt.

PROCEEDINGS AGAINST CORLISS G. LAMONT

MR. [JOHN S.] WOOD [of Georgia]: Mr. Speaker, by direction of the Committee on Un-American Activities, I present a privileged report and ask that it be read.

The Clerk read as follows:

> The Committee on Un-American Activities, as created and authorized by the House of Representatives by House Resolution 5 of the Seventy-ninth Congress, caused to be issued a subpena to Corliss G. Lamont, chairman of the National Council of American-Soviet Friendship, Inc., with offices at 114 East Thirty-second Street, New York City, N.Y. The said subpena required the said person to produce books, papers, and records of the organization for the inspection of your committee. The subpena is set forth as follows: . . .
>
> In response to the said subpena the said Corliss Lamont appeared before your committee on February 6, 1946, and your committee then

3. See 92 CONG. REC. 7589–91, 79th Cong. 2d Sess., for the text of the report.

4. This report is discussed at § 19.1, infra.

5. 92 CONG. REC. 7589–91, 79th Cong. 2d Sess. See § 18.6, supra, for a discussion of this instance as it relates to consideration on Calendar Wednesday.

and there demanded the production of the said books, papers, and records, and the said Lamont refused to produce as required by the said subpena. The said Lamont was duly sworn by the chairman and gave his testimony under oath. The material parts of his testimony follow: . . .

MR. [VITO] MARCANTONTO [of New York]: Mr. Speaker, a point of order.

THE SPEAKER: The gentleman will state it.

MR. MARCANTONIO: Mr. Speaker, I make the point of order against the report on the ground that it does not contain all of the transcript of what transpired before the committee with respect to this witness. On page 2 of the report, at the end of the first paragraph, the committee concedes that this is not a full transcript. It states: "The material parts of his testimony follow." In other words, the House has before it only that portion of the testimony which the committee conceives to be material. This deprives the House of having the full proceedings before it; consequently, the House will be asked to vote on whether or not this witness is to be cited for contempt and whether or not the House is to recommend prosecution of this witness, without having the full story before it, without having all of the testimony before it. All that is given is part of the testimony which the committee describes as material.

I respectfully submit in support of my point of order, Mr. Speaker, that what is material and what is not material should be determined by the House, because the House has to pass on this question and the majority of the Members of this House must vote in the affirmative in order to recommend these contempt proceedings. To do so it must have the entire transcript before it. Consequently I submit that the report is defective and that the report should be referred back to the committee by the Speaker, directing it to produce the full transcript of what transpired so that the House may have the entire proceedings before it before the House Members cast their votes.

THE SPEAKER: The Chair thinks that the gentleman from New York [Mr. Marcantonio] has stated the point exactly, and that is that this is not a matter for the Chair to pass upon but is a matter for the House to pass upon. The Chair overrules the point of order.

Authority of Committee

§ 19.2 Whether a committee exceeded its authority in making a report citing certain recalcitrant witnesses in contempt was held to be a matter for the House to decide, and not a matter to be decided on the basis of a point of order raised against submission of the report.

On May 28, 1936,[6] Speaker Joseph W. Byrns, of Tennessee, responded to a point of order regarding authority to report contemptuous conduct.

THE TOWNSEND OLD-AGE PENSION PLAN

MR. [C. JASPER] BELL [of Missouri]: Mr. Speaker, by direction of the Select

6. 80 CONG. REC. 8219–22, 74th Cong. 2d Sess.

Committee Investigating Old Age Pensions, I present a privileged report (Reps. No. 2857) and send it to the Clerk's desk, and ask that the Clerk read it. . . .[7]

MR. [JOSEPH P.] MONAGHAN [of Montana]: . . . Mr. Speaker, I wish to make a point of order.

THE SPEAKER: The gentleman will state his point of order.

MR. MONAGHAN: Mr. Speaker, my point of order goes to the fact that this report is completely out of order.

THE SPEAKER: The gentleman will state his point of order. . . .

MR. MONAGHAN: The point of order I make is that the committee has exceeded its function in the process of the inquiry that the House authorized it to proceed under.

THE SPEAKER: Let the Chair make this statement. That is not under consideration now. This is simply a report of the select committee, and the question as to whether or not the committee has exceeded its authority cannot arise at this time.

MR. MONAGHAN: But the question that the committee has exceeded its authority is involved in the question of whether or not it shall be permitted to make a report of this sort.

THE SPEAKER: The committee is within its right in submitting its report; it is its duty to report what it has done in order that the House may take such action as it determines to take. Therefore, the Chair overrules that point of order.

An appeal from the decision of the Chair was laid on the table.

Need to Read Testimony

§ 19.3 The House, not the Chair, determines whether a report summarizing the testimony of witnesses and minutes of proceedings of investigative hearings is sufficient on which to base a contempt citation.

On Apr. 16, 1946,[8] Speaker Sam Rayburn, of Texas, responded to a point of order regarding reading of investigative hearing testimony before the House.

JOINT ANTI-FASCIST REFUGEE COMMITTEE

MR. [JOHN S.] WOOD [of Georgia]: Mr. Speaker, by direction of the Committee on Un-American Activities, I present a privileged report and ask that it be read.

The Clerk read as follows:

PROCEEDING AGAINST THE JOINT ANTI-FASCIST REFUGEE COMMITTEE

Mr. Wood, from the Committee on Un-American Activities, submitted the following report:

7. This report citing Dr. Francis E. Townsend, president and founder, and Clinton Wunder and John B. Kiefer, members of the national board of directors of the Old Age Revolving Pensions, Ltd., for contempt for failure to provide subpenaed testimony and documents to the select committee is omitted.

8. 92 CONG. REC. 3761, 3762, 79th Cong. 2d Sess.

The Committee on Un-American Activities, created and authorized by the House of Representatives by House Resolution 5 of the Seventy-ninth Congress, caused to be issued subpenas to the Joint Anti-Fascist Refugee Committee, an unincorporated organization, with offices at 192 Lexington Avenue, New York, N. Y., service being made upon Helen R. Bryan, executive secretary, and to the members of the executive board of the said organization whose names are listed below. The said subpena required the said persons to produce books, papers, and records for inspection by your committee. The form of the subpenas follows: . . .

Your committee has caused to be printed the testimony of each and every one of the persons named herein given on April 4, 1946, and the said testimony will be filed with the Clerk of the House as an appendix to this report. . . .

MR. [VITO] MARCANTONIO [of New York]: Mr. Speaker, a point of order.

THE SPEAKER: The gentleman will state it.

MR. MARCANTONIO: Mr. Speaker, prefacing my point of order, I would like to make a parliamentary inquiry. Must not a resolution of this nature contain the testimony, or at least a pertinent part of the testimony? It is related in the statement that the testimony is appended, but that testimony has not been read to the House, and for that reason I make the point of order that the resolution is defective.

THE SPEAKER: No resolution has been offered as yet. This is simply the report of the committee.

MR. MARCANTONIO: Very well; in the report we have before us it merely says that the testimony is appended. I submit the House should have that testimony before it. As I understand it, the Members of the House have received, what I hold in my hand, the hearings of April 4. That was received only yesterday. It contains over 100 pages of testimony. This case is very important, and I maintain that the testimony or the relevant portion of the testimony should be read to the House.

THE SPEAKER: The testimony has already been printed, and reference to it is made in this report. The other matter that the gentleman refers to is a question for the House to pass upon, and not the Speaker.

MR. MARCANTONIO: Mr. Speaker, on that point, this is most unusual. Heretofore every report that we have had upon which a resolution for contempt was based, we have read to the House the minutes of the proceedings upon which the contempt citation is requested.

MR. [JOHN E.] RANKIN [of Mississippi]: Mr. Speaker, that never has been done.

THE SPEAKER: That also is within the control of the House. The gentleman from Georgia is recognized.

Citation of Witnesses Absent Subpena

§ 19.4 The House, not the Chair, determines whether persons who have not been subpenaed may be cited for refusal to produce organizational books, records, and papers.

On Mar. 28, 1946,[9] Speaker Sam Rayburn, of Texas, re-

9. 92 CONG. REC. 2744, 2745, 79th Cong. 2d Sess.

sponded to a point of order regarding authority to entertain a resolution citing for contempt persons who had not been subpenaed.(10)

COMMITTEE ON UN-AMERICAN ACTIVITIES

THE SPEAKER: The Clerk will read the report of the Committee on Un-American Activities.

The Clerk read as follows:

PROCEEDING AGAINST DR. EDWARD K. BARSKY AND OTHERS

Mr. Wood, from the Committee on Un-American Activities, submitted the following report:

The Committee on Un-American Activities as created and authorized by the House of Representatives by House Resolution 5 of the Seventy-ninth Congress, caused to be issued a subpena to Dr. Edward K. Barsky, chairman of the Joint Anti-Fascist Refugee Committee, an unincorporated organization with offices at 192 Lexington Avenue, New York, N.Y. The said subpena required the said person to produce books, papers, and records of the organization for the inspection of your committee; the subpena is set forth as follows: . . .

In his appearance before the committee, Dr. Barsky stated that he was unable to produce the subpenaed materials because that authority had not been granted by the members of the executive board. At the request of a committee member he supplied a list of names and addresses of board members. This list appeared in the report and resolution.

MR. [JOHN S.] WOOD [of Georgia]: Mr. Speaker, I offer a privileged resolution (H. Res. 573) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the House Committee on un-American Activities as to the willful and deliberate refusal of the following persons to produce before the said committee for its inspection the books, papers, and records of an unincorporated organization known as the Joint Anti-Fascist Refugee Committee, with offices at 192 Lexington Avenue, New York, N.Y., together with all the facts relating thereto, under seal of the House of Representatives, to the United States attorney for the District of Columbia to the end that the said persons named below may be proceeded against in the manner and form provided by law:

Dr. Edward K. Barsky, 54 East Sixty-first Street, New York City.

Dr. Jacob Auslander, 286 West Eighty-sixth Street, New York City.

Prof. Lyman R. Bradley, New York University, New York City.

Mrs. Marjorie Chodorov, 815 Park Avenue, New York City. . . .

MR. [VITO] MARCANTONIO [of New York]: Mr. Speaker, a point of order.

The SPEAKER: The gentleman will state it.

Mr. MARCANTONIO: Mr. Speaker, I make a point of order against the resolution on the ground that it seeks to have cited by this House individuals

10. See summary and analysis in § 16, supra, for a discussion which indicates that a subpena is not a necessary prerequisite for a contempt conviction.

who were never subpenaed, and never given an opportunity to appear and state whether or not they would or could comply with a subpena. Under those circumstances, I maintain that insofar as those individuals are concerned this matter is not properly before the House, in that neither the resolution nor the report from the committee sets forth that these individuals were subpenaed, with the exception of Dr. Barsky. None of the others were subpenaed; none of the others came before the committee and were accorded even an opportunity to say "yes" or "no" as to whether or not they had authority or control over the records and books and whether they could or would comply with the committee's subpena. For that reason, as far as they are concerned, this resolution is not properly before this House.

The SPEAKER: The Chair is ready to rule.

The report and the resolution are both before the House for its determination, and not the determination of the Chair. The Chair overrules the point of order.(11)

§ 20. Particular Conduct as Contumacious

The contempt statute, 2 USC § 192, penalizes any person summoned as a witness by a committee who "willfully(12) makes default" or who, having appeared, "refuses to answer any question. . . ." The word "default" means failure to appear in response to a summons(13) as well as failure to produce papers.(14) With respect to a witness summoned to give testimony, "default" includes not only failure to appear, but refusal to be sworn.(15)

A district court(16) held that the contempt statute proscribes every willful failure to comply with a summons, not merely the failure to appear pursuant to a summons, and interpreted the word "default" to mean failure to give testimony or produce papers as well as refusal to testify or appear. "Default" also applies to a witness' withdrawal from a hearing without consent of the committee.(17)

11. See § 17.4, supra, in which the House agreed to an amendment deleting names of all persons who had not been subpenaed.

12. See § 7, supra, for a discussion of willfulness in relation to intent of witness.

13. *United States* v *Bryan,* 339 U.S. 323, 327 (1950). See §§ 20.1, 20.2, infra.

14. *United States* v *Bryan,* 339 U.S. 323, 327 (1950). See §§ 20.9, 20.10, infra.

15. *Eisler* v *United States,* 170 F2d 273 (D.C. Cir. 1948), cert. dismissed, 338 U.S. 883 (1949); *United States* v *Josephson,* 165 F2d 82 (2d Cir. 1947), cert. denied, 333 U.S. 838 (1948). See §§ 20.3, 20.4, infra.

16. *United States* v *Hintz,* 193 F Supp 325 (N.D. Ill. 1961).

17. *United States* v *Costello,* 198 F2d 200 (2d Cir. 1952), cert. denied, 344 U.S. 874 (1952); *Townsend* v *United States,* 95 F2d 352 (D.C. Cir. 1938), cert. denied, 303 U.S. 664 (1938). See §§ 20.7, 20.8, infra.

The portion of the statute regarding refusal to answer any question is closely related to willfulness, an element which has been read into the statute notwithstanding the fact that "willful" or "willfully" does not expressly modify refusal to answer. A court of appeals [18] explained.

> The statute uses the word "willfully" as a word of art to define the offense of failing to appear; "willfully" is not used with respect to a person "who having appeared, refuses to answer. . . . " The act of refusing (as distinguished from failing) to answer is a positive, affirmative act; the result is conscious and intended. Congress recognized that a failure to appear in response to a summons could well be due to other causes than willfulness or deliberate purpose to disobey the summons or the statute. . . . To decline or refuse to answer a question, however, is by its own nature a deliberate and willful act.

A committee's failure to give a witness a clear direction to answer a question has constituted a ground on which to reverse contempt convictions.[19]

The precedents in this section illustrate particular conduct that has been regarded as contumacious.

Refusal to Appear

§ 20.1 A committee filed a privileged report which included a contempt citation and facts relating to the refusal of a witness to appear before it.

On Apr. 22, 1947,[20] the Committee on Un-American Activities offered a privileged report, House Report No. 289, relating to a witness' refusal to appear in response to a subpena ad testificandum.

> PROCEEDINGS AGAINST EUGENE DENNIS, ALSO KNOWN AS FRANCIS WALDRON
>
> MR. [J. PARNELL] THOMAS of New Jersey: Mr. Speaker, by direction of the Committee on Un-American Activities, I present a privileged report, which I send to the Clerk's desk and ask to have read.
>
> The SPEAKER:[1] The Clerk will read the report.
>
> The Clerk read as follows:

18. *Deutch* v *United States,* 235 F2d 858 (D.C. Cir. 1956).

19. *Emspak* v *United States,* 349 U.S. 190, 202 (1955); *Quinn* v *United States,* 349 U.S. 155, 165 (1955); *Bart* v *United States,* 349 U.S. 219, 221 (1955).

20. 93 Cong. Rec. 3813, 3814, 80th Cong. 1st Sess. On the same day, the House adopted a resolution (H. Res. 193) certifying the contemptuous conduct to the appropriate U.S. attorney. See also *United States* v *Dennis,* 171 F2d 986 (D.C. Cir. 1948), aff'd. 339 U.S. 162 (1950), wherein defendant's subsequent conviction was affirmed.

1. Joseph W. Martin, Jr. (Mass.).

REPORT CITING EUGENE DENNIS, ALSO KNOWN AS FRANCIS WALDRON

The Committee on Un-American Activities as created and authorized by the House of Representatives through the enactment of Public Law No. 601, section 121, subsection Q (2), caused to be issued a subpena to Eugene Dennis, also known as Francis Waldron, who is general secretary of the Communist Party of the United States. The said subpena directed Eugene Dennis, also known as Francis Waldron, to be and appear before the said Committee on Un-American Activities on April 9, 1947, and then and there to testify touching matters of inquiry committed to the said committee; the subpena being set forth in words and figures as follows:

"By authority of the House of Representatives of the Congress of the United States of America, to Robert E. Stripling: You are hereby commanded to summon Eugene Dennis, also known as Francis Waldron, general secretary, Communist Party of the United States, to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Honorable J. Parnell Thomas is chairman, in their chamber in the city of Washington, on the 9th day of April 1947, at the hour of 10 a.m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee. Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 26th day of March 1947.

"J. PARNELL THOMAS, *Chairman.*

"Attest:

"JOHN ANDREWS, *Clerk.*"

The said subpena was duly served, as appears by the return made thereon by Robert E. Stripling, chief investigator of the Committee on Un-American Activities, who was duly authorized to serve the said subpena and who served the said subpena upon instructions received from the chairman of the Committee on Un-American Activities. The return of the service by the said Robert E. Stripling being endorsed thereon, which is set forth in words and figures as follows:

"Subpena for Eugene Dennis also known as Francis Waldron before the Committee on Un-American Activities, United States House of Representatives, served at 11:35 a.m., March 26, 1947, in the committee's chambers in Washington, D.C.

"ROBERT E. STRIPLING,

"Chief Investigator,
Committee on Un-American
Activities."

On April 7, 1947, a telegram was sent to Mr. Eugene Dennis, general secretary of the Communist party of the United States, which is set forth herein in words and figures as follows:

"April 7, 1947.

Mr. Eugene Dennis,
"General Secretary,
"Headquarters, Communist Party,
"50 East Thirteenth Street,
"New York, N.Y.

"This is to notify you that in response to the subpena which was served upon you March 26, you are to appear before the Committee on Un-American Activities, at the committee's chambers, 225 Old House Office Building, at 10 a.m., April 9, 1947, to then and there give testimony under oath concerning matters pertinent to the committee's inquiry.

"ROBERT E. STRIPLING,

"Chief Investigator,
Committee on Un-American
Activities."

The said Eugene Dennis, also known as Francis Waldron, failed to appear before the said Committee on

Un-American Activities on April 9, 1947, as directed by the subpena served upon him on March 26, 1947, and the willful and deliberate refusal of the witness to appear before the Committee on Un-American Activities is a violation of the subpena served upon him by the Committee on Un-American Activities and places the said Eugene Dennis, also known as Francis Waldron, in contempt of the House of Representatives of the United States.

§ 20.2 The House agreed to a privileged resolution directing the Speaker to certify to the appropriate U.S. Attorney a report citing a witness in contempt for refusing to appear at an investigative hearing to which he had been subpenaed.

On Feb. 5, 1952,[2] the House on a roll call vote of 316 yeas to 0 nays approved a resolution directing the Speaker to certify a report.

MR. [JOHN S.] WOOD of Georgia: Mr. Speaker, I offer a privileged resolution (H. Res. 517) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the willful default of Sidney Buchman in failing to appear before the Committee on Un-American Activities in response to a subpena duly served upon him, together with all the facts in connection therewith, under seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that the said Sidney Buchman may be proceeded against in the manner and form provided by law.. . .

THE SPEAKER:[3] The question is on the resolution.

Mr. WOOD of Georgia: On that, Mr. Speaker, I demand the yeas and nays.

The yeas and nays were ordered.

The question was taken; and there were—yeas 316, nays 0, not voting 115, as follows: . . .

So the resolution was agreed to.

Refusal to Be Sworn

§ 20.3 A committee files a privileged report which includes

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2. 98 CONG. REC. 829, 832, 82d Cong. 2d Sess. See also, as a further example, 93 CONG. REC. 3806, 3811, 80th Cong. 1st Sess., Apr. 22, 1947, for the approval, on a vote of 357 yeas to 2 nays, of H. Res. 190, directing the Speaker to certify to the U.S. Attorney for the District of Columbia, H. REPT. NO. 281, citing Leon Josephson in contempt for refusing to appear before the Committee on Un-American Activities; and 93 CONG. REC. 3814, 3820, 80th Cong. 1st Sess., Apr. 22, 1947, for the approval, on a vote of 196 yeas to 1 nay, of H. Res. 193, directing the Speaker to certify to the U.S. Attorney for the District of Columbia H. REPT. NO. 289, citing Eugene Dennis, also known as Francis Waldron, in contempt for refusing to appear before the Committee on Un-American Activities.

3. Sam Rayburn (Tex.).

a contempt citation and facts relating to the refusal of a witness to be sworn.

On Sept. 10, 1973,[4] the Committee on Armed Services filed a privileged report relating to the refusal of G. Gordon Liddy to be sworn.

PROCEEDINGS AGAINST GEORGE GORDON LIDDY

MR. [LUCIEN N.] NEDZI [of Michigan]: Mr. Speaker, I rise to a question of the privilege of the House, and, by direction of the Committee on Armed Services, I submit a privileged report (H. Rept. No. 93–453).

The Clerk read as follows:

REPORT CITING GEORGE GORDON LIDDY

INTRODUCTION

On Friday, July 20, 1973, during an executive session of the Special Subcommittee on Intelligence of the House Committee on Armed Services, Mr. George Gordon Liddy, who was called as a witness, pursuant to a Writ of Habeas Corpus, refused to be sworn prior to offering any testimony or claiming his privilege under the Fifth Amendment. A quorum being present, the subcommittee voted to report the matter to the full House Committee on Armed Services with a recommendation for reference to the House of Representatives under procedures which could ultimately result in Mr. Liddy being cited for contempt of Congress. [See Appendix 1.] On July 26, 1973 the House Committee on Armed Services met to receive the report of the Special Subcommittee on Intelligence with regard to the refusal of Mr. Liddy to be sworn. On July 31, 1973, the full committee, a quorum being present, on a record vote of 33–0, recommended the adoption of a resolution as follows:

"RESOLUTION

"*Resolved*, That the Speaker of the House of Representatives, certify the report of the Committee on Armed Services of the House of Representatives as to the refusal of George Gordon Liddy to be sworn or to take affirmation to testify before a duly authorized subcommittee of the said Committee on Armed Services on July 20, 1973, together with all the facts in connection therewith, under the seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that the said George Gordon Liddy may be proceeded against in the manner and form provided by law."

[See Appendix 2.]

BACKGROUND

At the time of the subcommittee hearings, Mr. Liddy was in confinement in the District of Columbia Jail as the result of his conviction on the Watergate breakin. Accordingly, the subcommittee petitioned Chief Judge John J. Sirica of the United States District Court for the District of Columbia for a Writ of Habeas Corpus Ad Testificandum as the only means of obtaining Mr. Liddy's presence before the subcommittee. In his discretion Judge Sirica signed that petition and an order was delivered to the United States Marshal for Mr. Liddy's appearance before the sub-

4. 119 CONG. REC. 28951, 28952, 93d Cong. 1st Sess. On the same date, the House considered the report and adopted a resolution certifying the matter to the appropriate U.S. attorney. See also *U.S.* v *Liddy,* Crim. No. 74–117 (D.D.C. 1974).

committee on July 20, 1973. [See Appendix 1, pp. 16–17.] Mr. Liddy appeared as ordered.

In his appearance Mr. Liddy was asked to rise and take the oath. He refused to take the oath as a witness. Subsequently, his counsel presented an extensive brief after which Mr. Liddy again refused to take the oath. The witness claimed he had the absolute right under the Fifth Amendment to remain completely silent with regard to any offering before the subcommittee. He sought to establish that contention based upon his current conviction on the Watergate breakin which is under appeal, and the possibility of future indictments being brought against him. He further argued a Sixth Amendment right to avoid what he claims to be prejudicial publicity in the media should he claim his Fifth Amendment rights. Mr. Liddy agreed that his refusal to be sworn was not based on any religious grounds.

AUTHORITY

The Special Subcommittee on Intelligence is a duly constituted subcommittee of the House Committee on Armed Services pursuant to House Resolution 185, 93d Congress, and the appointment made during the organization meeting of the Committee on Armed Services on February 27, 1973. [See Appendix 1, pp. 11–16.] In addition, the chairman of the subcommittee was given an order directing an inquiry into any CIA involvement in Watergate-Ellsberg matters. The subcommittee recommended those hearings on May 11, 1973, and in sixteen sessions since that date has had before it some twenty-four witnesses bearing on the subject of the inquiry. Prior to his appearance on July 20, 1973, Mr. Liddy, through his attorney, was advised by telephone of the purpose of the investigation and was asked to acknowledge that information by letter. That was done by Mr. Liddy's attorney on June 20, 1973. [See Appendix 1, pp. 17–18]. As indicated above, Mr. Liddy was properly before the subcommittee on a valid, duly executed Writ of Habeas Corpus Ad Testificandum [See Appendix 1, p. 16.]

CONCLUSION

The position of the committee is that all substantive and procedural legal prerequisites have been satisfied to date and that the House of Representatives should adopt the resolution to refer the matter to the appropriate U.S. Attorney. Title 2, United States Code, Sections 192 and 194 provide the necessary vehicles for taking this action. Section 192 provides the basis for indictment should a witness before either House of Congress refuse to answer any question pertinent to the inquiry. Section 194 provides the vehicle for certifying such a result to the appropriate U.S. Attorney. The central question is whether failure to take the oath constitutes a refusal to give testimony. We believe it does.

Accordingly, it is the position of the committee that the proceedings to date are in order and we recommend that the House adopt the resolution to report the fact of the refusal of George Gordon Liddy to be sworn to testify at a meeting of the Special Subcommittee on Intelligence on July 20, 1973 together with all the facts in connection therewith to the end that he may be proceeded against as provided by law.

A memorandum of law is contained in Appendix 3.[5]

§ 20.4 The House agreed to a privileged resolution direct-

5. Appendices 1, 2, and 3, the hearings of the subcommittee, meetings of the committee, and a legal memorandum, respectively, on pp. 28952–59, are omitted.

ing the Speaker to certify to the appropriate U.S. Attorney a report citing a witness in contempt for refusing to be sworn or make affirmation to testify at an investigative hearing.

On Sept. 23, 1970,[6] the House by a vote of 337 yeas to 14 nays approved House Resolution 1220, authorizing the Speaker to certify a report on a witness' refusal to testify to a U.S. Attorney.

MR. [RICHARD H.] ICHORD [of Missouri]: Mr. Speaker, by direction of the House Committee on Internal Security, I offer a privileged resolution (H. Res. 1220) and ask for its immediate consideration.

The Clerk read the resolution as follows:

H. RES. 1220

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Internal Security of the House of Representatives as to the refusal of Arnold S. Johnson to be sworn or to make affirmation to testify before a duly authorized subcommittee of the said Committee on Internal Security, together with all the facts in connection therewith, under the seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that the said Arnold S. Johnson may be proceeded against in the manner and form provided by law. . . .

MR. ICHORD: Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

THE SPEAKER PRO TEMPORE:[7] The question is on the resolution.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

MR. [JOHN M.] ASHBROOK [of Ohio]: Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

THE SPEAKER PRO TEMPORE: Evidently a quorum is not present.

The Doorkeeper will close the doors, the Sergeant at Arms will notify absent Members, and the Clerk will call the roll.

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6. 116 CONG. REC. 33269, 33278, 91st Cong. 2d Sess. See also, as examples, 119 CONG. REC. 28960, 28962, 28963, 93d Cong. 1st Sess., Sept. 10, 1973, for the approval, by a vote of 334 yeas to 11 nays, of H. Res. 536, directing the Speaker to certify to the U.S. Attorney for the District of Columbia, H. REPT. No. 93–453, from the Committee on Armed Services, citing G. Gordon Liddy for contempt for his refusal to be sworn or take affirmation to testify before the Special Subcommittee on Intelligence; and 93 CONG. REC. 1128, 1129, 1137, 80th Cong. 1st Sess., Feb. 18, 1947, for the approval by 370 yeas to 1 nay of H. Res. 104, directing the Speaker to certify to the U.S. Attorney for the District of Columbia the report [H. REPT. No. 43] citing Gerhart Eisler for contempt for his refusal to be sworn and testify before the Committee on Un-American Activities. Counsel for Mr. Liddy filed a memorandum outlining the English common law background of the fifth amendment. See 119 CONG. REC. 28952, 28953, 93d Cong. 1st Sess., Sept. 10, 1973.

7. Neal Smith (Iowa).

The question was taken; and there were—yeas 337, nays 14, not voting 78, as follows: . . .

So the resolution was agreed to.

The result of the vote was announced as above recorded.

The doors were opened.

A motion to reconsider was laid on the table.

Refusal to Answer Questions

§ 20.5 A committee filed a privileged report which included a contempt citation and facts relating to the refusal of a witness to answer questions.

On May 11, 1954,[8] the Committee on Un-American Activities offered a privileged report relating to the refusal of Francis X. T. Crowley to testify.[9]

PROCEEDINGS AGAINST FRANCIS X. T. CROWLEY

MR. [HAROLD H.] VELDE [of Illinois]: Mr. Speaker, by direction of the Committee on Un-American Activities, I present a privileged report (H. Rept. No. 1586).

The Clerk read the report, as follows:

> The Committee on Un-American Activities, as created and authorized by the House of Representatives, through the enactment of Public Law 601, section 121, subsection (q)(2) of the 79th Congress, and under House Resolution 5 of the 83d Congress, caused to be issued a subpena to Francis X. T. Crowley, 226 Second Avenue, Apartment 15, New York, N.Y. The said subpena directed Francis X. T. Crowley to be and appear before said Committee on Un-American Activities on May 4, 1953, at the hour of 10:30 a.m., then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee. The subpena served upon said Francis X. T. Crowley is set forth in words and figures, as follows:
>
> "By authority of the House of Representatives of the Congress of the United States of America, to George C. Williams: You are hereby commanded to summon Francis X. T. Crowley to be and appear before the Committee on Un-American Activities, or a duly authorized subcommittee thereof, of the House of Representatives of the United States, of which the Honorable Harold H. Velde is chairman, in their chamber in the city of New York, room 110, Federal Building, on Monday, Mav 4, 1953, at the hour of 10:30 a.m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.
>
> "Herein fail not, and make return of this summons.
>
> "Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 9th day of April, 1953.
>
> "HAROLD H. VELDE,
> *"Chairman.*
>
> "Attest: LYLE O. SNADER,
> *"Clerk."*
>
> The said subpena was duly served as appears by the return made thereon by George C. Williams, in-

8. 100 CONG. REC. 6400, 6401, 83d Cong. 2d Sess.

9. This citation was rescinded after Mr. Crowley answered questions before the committee. See § 21.1, infra, for the report of his purgation.

vestigator, who was duly authorized to serve the said subpena. The return of the service by the said George C. Williams, being endorsed thereon, is set forth in words and figures, as follows:

"Subpena for Francis X. T. Crowley, before the Committee on Un-American [Activities]. Served at home, 226 2d Avenue, Apt. 15, N.Y.C. on 4–24–53 at 6:32 p.m.

"GEORGE. C. WILLIAMS,
"Investigator, House of Representatives."

On May 4, 1953, a telegram was sent to Francis X. T. Crowley by Harold H. Velde, chairman of the House Committee on Un-American Activities, which is set forth in words and figures, as follows:

"NEW YORK, N.Y., *May 4, 1953.*

"FRANCIS X. CROWLEY, *226 Second Ave., New York City:*

"Your appearance before Committee on Un-American Activities is hereby postponed to Monday, June 8, 1953, 10:30 a.m., 226 House Office Building, Washington, D.C.

"HAROLD H. VELDE,
"Chairman."

The said Francis X. T. Crowley, pursuant to said subpena and in compliance therewith, appeared before the said committee on June 8, 1953, to give such testimony as required under and by virtue of Public Law 601, section 121, subsection (q)(2) of the 79th Congress, and under House Resolution 5 of the 83d Congress. The said Francis X. T. Crowley, having appeared as a witness and having been asked questions, namely:

"When you were in Boston, Mass. . . . were you a member of the West End Club of the Communist Party?

"Have you ever been associated with any members of the West End Club of Boston?

"Have you ever at any time been a member of the Communist Party?"

which questions were pertinent to the subject under inquiry, refused to answer such questions; and as a result of Francis X. T. Crowley's refusal to answer the aforesaid questions, your committee was prevented from receiving testimony and information concerning a matter committed to said committee in accordance with the terms of the subpena served upon the said Francis X. T. Crowley.

The record of the proceedings before the committee on June 8, 1953, during which Francis X. T. Crowley refused to answer the aforesaid questions pertinent to the subject under inquiry is set forth in fact as follows:

"UNITED STATES HOUSE
OF REPRESENTATIVES,
"SUBCOMMITTEE OF
THE COMMITTEE
ON UN-AMERICAN ACTIVITIES,
"Washington, D.C.,
Monday, June 8,1965.

"EXECUTIVE SESSION

The subcommittee of the Committee on Un-American Activities met, pursuant to call, at 10:43 a.m. in room 226 of the Old House Office Building, Hon. Bernard W. Kearney, presiding.

Committee member present: Representative Bernard W. Kearney (presiding).

* * * * *

"MR. KEARNEY. The committee will be in order.

"Let the record show that, for the purpose of the hearing this morning, a subcommittee has been set up composed of Mr. Kearney from New York. The hearing will be conducted under the authority granted for subcommittee by the chairman of the committee, Mr. Velde.

* * * * *

"Will you stand and be sworn?

"Do you solemnly swear the testimony you shall give before this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

"MR. CROWLEY. I do.

"TESTIMONY OF FRANCIS XAVIER THOMAS CROWLEY

"MR. KUNZIG. Mr. Crowley, are you accompanied by counsel here this morning?

"MR. CROWLEY. No; I am by myself.

"MR. KUNZIG. You understand, of course, your right to be accompanied by counsel if you so desire?

"MR. CROWLEY. I do.

"MR. KUNZIG. And it is your wish to be here present at this hearing today without counsel?

"MR. CROWLEY. Yes.

"MR. KUNZIG. Would you give your full name, please?

"MR. CROWLEY. Francis Xavier Thomas Crowley. The Thomas was a confirmation.

"MR. KUNZIG. And your present address, Mr. Crowley?

"MR. CROWLEY. 226 Second Avenue, New York.

"MR. KUNZIG. And what is your age at the present time?

"MR. CROWLEY. Twenty-seven.

* * * * *

"MR. KUNZIG. Mr. Crowley, when you were in Boston, Mass., that period of time prior to going to the University of Michigan that you have just told us about, were you a member of the West End Club of the Communist Party?

"MR. CROWLEY. Well, I can't answer that.

"MR. KEARNEY. What do you mean—you can't answer it?

"MR. CROWLEY. I won't answer it.

"MR. KEARNEY. On what grounds?

"MR. CROWLEY. It goes against my conscience to speak about it. I don't believe I should be in a position where I have to speak about anyone except my priest, and I have spoken to him about it. . . .

"MR. KEARNEY. . . . Have you ever been associated with any members of the West End Club of Boston?

"MR. CROWLEY. That comes to the same thing. I won't answer that either.

"MR. KEARNEY. You won't answer it?

* * * * *

"MR. CROWLEY. No.

"MR. KEARNEY. As I understand your testimony, you just refuse to answer any questions concerning your activities with communism?

"MR. CROWLEY. Yes, sir.

"MR. KEARNEY. Are you now a member of the Communist Party?

"MR. CROWLEY. No.

"MR. KEARNEY. Do you have any other questions?

"MR. KUNZIG. I think we better follow it up by asking: Have you ever at any time been a member of the Communist Party?

"MR. CROWLEY. I refuse to answer that."

* * * * *

Because of the foregoing, the said Committee on Un-American Activities was deprived of answers to pertinent questions propounded to said Francis X. T. Crowley relative to the subject matter which, under Public Law 601, section 121, subsection (q)(2) of the 79th Congress, and under House Resolution 5 of the 83d Congress, the said committee was instructed to investigate, and the refusal of the witness to answer questions, namely:

"When you were in Boston, Mass. . . . were you a member of

the West End Club of the Communist Party?

"Have you ever been associated with any members of the West End Club of Boston?

"Have you ever at any time been a member of the Communist Party?" which questions were pertinent to the subject under inquiry, is a violation of the subpena under which the witness had previously appeared, and his refusal to answer the aforesaid questions deprived your committee of necessary and pertinent testimony, and places the said witness in contempt of the House of Representatives of the United States.

§ 20.6 The House agreed to a privileged resolution directing the Speaker to certify to the U.S. Attorney a report citing a witness in contempt for refusing to answer questions at an investigative hearing.

On Sept. 3, 1959,(10) the House by voice vote approved a resolution directing the Speaker to certify a report citing a witness in contempt.

PROCEEDINGS AGAINST MARTIN POPPER

MR. [FRANCIS E.] WALTER [of Pennsylvania]: Mr. Speaker, I offer a privileged resolution (H. Res. 374) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of

10. 105 CONG. REC. 17934, 17935, 86th Cong. 1st Sess. See also, for example, 101 CONG. REC. 11521, 84th Cong. 1st Sess., July 26, 1955, for the voice vote approval of H. Res. 315, directing the Speaker to certify to the U.S. Attorney for the District of Columbia H. REPT. No. 1406, citing John T. Gojack, in contempt for refusing to testify before the Committee on Un-American Activities; and 100 CONG. REC. 11613, 83d Cong. 2d Sess., July 23, 1954, for the voice vote approval of H. Res. 666, directing the Speaker to certify to the U.S. Attorney for the District of Columbia H. REPT. No. 2457, citing Lloyd Barenblatt in contempt for refusing to testify before the Committee on Un-American Activities.

For related court proceedings, see *Gojack* v *United States,* 280 F2d 678 (D.C. Cir. 1960), rev'd sub nom., *United States* v *Russell,* 369 U.S. 749 (1962), wherein the court, in reversing defendant's conviction, held that a grand jury indictment under the contempt statute, 2 USC § 192, must state the subject matter under inquiry at the time of defendant's refusal to answer the committee's questions, so as to enable courts to determine the pertinency of the questions. See also *Popper* v *United States,* 306 F2d 290 (D.C. Cir. 1962), wherein the defendant's conviction was reversed because the indictment had insufficiently set forth the question under inquiry. And see *Barenblatt* v U*nited States,* 240 F2d 875 (D.C. Cir. 1957), vacated and rem'd, 354 U.S. 930, 252 F2d 129 (1958), aff'd., 360 U.S. 109 (defendant's conviction upheld).

Representatives as to the refusal of Martin Popper to answer questions before a duly constituted subcommittee of the Committee on Un-American Activities, together with all of the facts in connection therewith, under the seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that the said Martin Popper may be proceeded against in the manner and form provided by law. . . .

THE SPEAKER:[11] The question is on the resolution.

The resolution was agreed to.

A motion to reconsider was laid on the table.

Refusal to Answer Questions and Departure Without Leave

§ 20.7 A committee filed a privileged report citing a witness in contempt for his failure to answer questions and his departure without leave.

On Oct. 18, 1966,[12] the Committee on Un-American Activities offered a privileged report citing Dr. Jeremiah Stamler in contempt for his refusal to answer questions and his departure without leave.

MR. [EDWIN E.] WILLIS [of Louisiana]: Mr. Speaker, I rise to a question of the privilege of the House and by direction of the Committee on Un-American Activities I submit a privileged report (Rept. No. 2306).

The Clerk read as follows:

PROCEEDINGS AGAINST JEREMIAH STAMLER

[Pursuant to Title 2, United States Code, Sections 192 and 194]

The Committee on Un-American Activities, as created and authorized by the House of Representatives, through the enactment of Public Law 601 of the 79th Congress, section 121, subsection (q)(2), and under House Resolution 8 of the 89th Congress, duly authorized and issued a subpena to Jeremiah Stamler. The subpena directed Jeremiah Stamler to be and appear before the said Committee on Un-American Activities, of which the Honorable Edwin E. Willis is chairman, or a duly appointed subcommittee thereof. . . .

This subpena was duly served as appears by the return thereon made by Neil E. Wetterman, who was duly authorized to serve it. The return of service of said subpena is set forth in words and figures as follows: . . .

The said Jeremiah Stamler, summoned as aforesaid, appeared and was called as a witness on May 27, 1965, to give testimony, as required by the said subpena, at a meeting of a duly authorized subcommittee of the Committee on Un-American Activities at the Old U.S. Court of Appeals Building in Chicago, Ill. He was accompanied by his counsel, Albert E. Jenner, Jr., and co-counsel, Thomas P. Sullivan, Esquires.

Having been sworn as a witness, he was asked to state his full name and residence for the record, to which he responded, giving same.

Thereafter, the witness was asked the question, namely: "Would you state the place and date of your birth, Dr. Stamler?" which question

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11. Sam Rayburn (Tex.).

12. 112 CONG. REC. 27500, 27501, 89th Cong. 2d Sess. The House adopted a resolution (H. Res. 1062) certifying the contempt on the following day. *Id.* at pp. 27641, 27642. See also *Stamler* v *Willis*, 415 F2d 1365 (7th Cir. 1969), cert. denied, 399 U.S. 929 (1970).

was pertinent to the subject under inquiry. He refused to answer said question and, in addition, stated that he would not answer any further questions that might be put to him touching matters of inquiry committed to said subcommittee.

The witness then departed the hearing room without leave of said subcommittee.

The foregoing refusals by Jeremiah Stamler to answer the aforesaid question and to answer any further questions, and his willful departure without leave, deprived the Committee on Un-American Activities of pertinent testimony regarding matters which the said committee was instructed by law and House resolution to investigate, and place the said Jeremiah Stamler in contempt of the House of Representatives of the United States.

Pursuant to resolution of the Committee on Un-American Activities duly adopted at a meeting held January 13, 1966, the facts relating to the aforesaid failures of Jeremiah Stamler are hereby reported to the House of Representatives, to the end that the said Jeremiah Stamler may be proceeded against for contempt of the House of Representatives in the manner and form provided by law.

The record of the proceedings before the said subcommittee, so far as it relates to the appearance of Jeremiah Stamler, including the statement by the chairman of the subject and matter under inquiry, is set forth in Appendix I, attached hereto and made a part hereof.

Other pertinent committee proceedings are set forth in Appendix II, and made a part hereof.(13)

§ 20.8 The House agreed to a privileged resolution directing the Speaker to certify a report citing a witness in contempt for refusal to testify and his departure without leave.

On Oct. 18, 1966,(14) the House by voice vote approved a resolution directing the Speaker to certify a report citing a witness in contempt.(15)

PROCEEDINGS AGAINST MILTON MITCHELL COHEN

MR. [EDWIN E.] WILLIS [of Louisiana]: Mr. Speaker, I offer a privileged resolution (H. Res. 1060) from the Committee on Un-American Activities and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. RES. 1060

Resolved, That the Speaker of the House of Representatives certify the

13. The appendices have been omitted.

14. 112 CONG. REC. 27448, 27484, 27485, 89th Cong. 2d Sess. See also, for example, 112 CONG. REC. 27495, 27500, 89th Cong. 2d Sess., for the voice vote approval of H. Res. 1061, directing the Speaker to certify to the U.S. Attorney for the Northern District of Illinois H. REPT. No. 2305, citing Yolanda Hall in contempt for her refusal to testify and her departure without leave before the Committee on Un-American Activities.

15. Prior to approving the resolution, the House by a vote of 90 yeas to 181 nays rejected the motion of Mr. Silvio O. Conte (Mass.), to recommit this resolution to a select committee of seven members to examine the sufficiency of the citations. See § 17.2, supra, for the text of this motion to recommit.

report of the Committee on Un-American Activities of the House of Representatives as to the refusals of Milton Mitchell Cohen to answer questions pertinent to the subject under inquiry before a duly authorized subcommittee of the said Committee on Un-American Activities, and his departure without leave, together with all the facts in connection therewith, under the seal of the House of Representatives, to the United States attorney for the northern district of Illinois, to the end that the said Milton Mitchell Cohen may be proceeded against in the manner and form provided bylaw. . . .

THE SPEAKER:[16] The question is on the adoption of the resolution.

The question was taken, and the Speaker announced that the ayes appeared to have it.

Refusal to Produce Materials

§ 20.9 A committee filed a privileged report which included a contempt citation and facts relating to the refusal of a witness to produce subpenaed materials.

On Aug. 23, 1960,[17] the Committee on the Judiciary filed a privileged report relating to the refusal of a witness to produce subpenaed materials.

MR. [EMANUEL] CELLER [of New York]: Mr. Speaker, I send to the desk a privileged report (Reps. No. 2120) from the Committee on the Judiciary in relation to the conduct of S. Sloan Colt.

THE SPEAKER:[18] The Clerk will read the report.

The Clerk read as follows:

PROCEEDINGS AGAINST S. SLOAN COLT

Subcommittee No. 5 of the Committee on the Judiciary, as created and authorized by the House of Representatives through the enactment of Public Law 601, section 121, of the 79th Congress, and under House Resolution 27 and House Resolution 530, both of the 86th Congress, caused to be issued a subpena duces tecum to S. Sloan Colt, chairman, board of commissioners of the Port of New York Authority, 111 Eighth Avenue, New York, N.Y. The subpena directed S. Sloan Colt to be and appear before Subcommittee No. 5 of the Committee on the Judiciary, at 10 a.m. on June 29, 1960, in their chamber in the city of Washington, and to bring with him from the files of the Port of New York Authority certain specified documents, and to testify touching matters of inquiry committed to the subcommittee.

The subpena was duly served as appears by the return made thereon by counsel for the committee who was duly authorized to serve the subpena.

S. Sloan Colt, pursuant to the subpena duly served upon him, appeared before Subcommittee No. 5 of the Committee on the Judiciary on June 29, 1960, to give testimony as required by Public Law 601, section 121, of the 79th Congress, and by House Resolutions 27 and 530 of the 86th Congress. However, S. Sloan Colt, having appeared as a witness and having complied in part with the

16. John W. McCormack (Mass.).

17. 106 CONG. REC. 17313–15, 86th Cong. 2d Sess. A resolution certifying the contemptuous conduct was acted on immediately after the report was filed and considered.

18. Sam Rayburn (Tex.).

subpena duces tecum served upon him by bringing with him part of the documents demanded therein, (1) failed and refused to produce certain other documents in compliance with the subpena duces tecum, which documents are pertinent to the subject matter under inquiry, and (2) failed and refused to produce certain documents as ordered by the subcommittee, which documents are pertinent to the subject matter under inquiry.

At those proceedings the subcommittee chairman explained in detail the authority for the subcommittee's inquiry, the purpose of the inquiry, and its scope. The subcommittee also gave to the witness a lengthy and detailed explanation of the pertinence to its inquiry of each category of documents demanded in the subpena served upon the witness. Notwithstanding these explanations and notwithstanding a direction by the subcommittee to produce the documents required by the subpena, S. Sloan Colt contumaciously refused to produce the following categories of documents under his control and custody:

(1) Internal financial reports, including budgetary analyses, postclosing trial balances, and internal audits; and management and financial reports prepared by outside consultants;

(2) All agenda of meetings of the board of commissioners and of its committees; all reports to the commissioners by members of the executive staff; and

(3) All communications in the files of the Port of New York Authority and in the files of any of its officers and employees including correspondence, interoffice and other memorandums, and reports relating to:

(a) The negotiation, execution, and performance of construction contracts; negotiation, execution, and performance of insurance contracts, policies, and arrangements; and negotiation, execution, and performance of the public relations contracts, policies, and arrangements;

(b) The acquisition, transfer, and leasing of real estate;

(c) The negotiation and issuance of revenue bonds;

(d) The policies of the authority with respect to the development of rail transportation.

The subcommittee was thereby deprived by S. Sloan Colt of information and evidence pertinent to matters of inquiry committed to it under House Resolutions 27 and 530, 86th Congress. His persistent and illegal refusal to supply the documents as ordered deprived the subcommittee of necessary and pertinent evidence and places him in contempt of the House of Representatives.

Incorporated herein as appendix I is the record of the proceedings before Subcommittee No. 5 of the Committee on the Judiciary on the return of the subpenas duces tecum served upon S. Sloan Colt and others. The record of proceedings contains, with respect to Mr. Colt:

(1) The full text of the subpena duces tecum (appendix, pp. 21–22);

(2) The return of service of the subpena by counsel for the committee, set forth in words and figures (appendix, p. 26);

(3) The failure and refusal of the witness to produce documents required by the subpena issued to and served upon him (appendix, pp. 23–25);

(4) The explanation given to the witness as to the authority for, purpose and scope of, the subcommittee's inquiry (appendix, pp. 1–20);

(5) The explanation given the witness of the pertinence of each category of requested documents (appendix, pp. 48–52);

(6) The subcommittee's direction to the witness to produce the required documents (appendix, pp. 52–53);

(7) The failure and refusal of the witness to produce the documents pursuant to direction (appendix, pp. 53–54);

(8) The ruling of the chairman that the witness is in default (appendix, p. 55).

OTHER PERTINENT COMMITTEE PROCEEDINGS

At the organizational meeting of the Committee on the Judiciary for the 86th Congress, held on the 27th day of January 1959, Subcommittee No. 5 was appointed and authorized to act upon matters referred to it by the chairman. On June 8, 1960, at an executive session of Subcommittee No. 5 of the Committee on the Judiciary, at which Chairman Emanuel Celler, Peter W. Rodino, Jr., Byron G. Rogers, Lester Holtzman, Herman Toll, William M. McCulloch, and George Meader were present, Subcommittee No. 5 formally instituted an inquiry into the activities and operations of the Port of New York Authority under the interstate compacts approved by Congress in 1921 and 1922. At that meeting the subcommittee also unanimously resolved to request the following specified items from the files of the Port of New York Authority by letter and to subpena the same documents from the appropriate officials in the event this information was not voluntarily supplied:

(1) All bylaws, organization manuals, rules, and regulations;

(2) Annual financial reports; internal financial reports, including budgetary analyses, postclosing trial balances, and internal audits; and management and financial reports prepared by outside consultants;

(3) All agenda and minutes of meetings of the board of commissioners and of its committees; all reports to the commissioners by members of the executive staff;

(4) All communications in the files of the Port of New York Authority and in the files of any of its officers or employees including correspondence, interoffice and other memorandums, and reports relating to-

(a) The negotiation, execution, and performance of construction contracts; negotiation, execution, and performance of insurance contracts, policies, and arrangements; and negotiation, execution, and performance of public relations contracts, policies, and arrangements;

(b) The acquisition, transfer, and leasing of real estate;

(c) The negotiation and issuance of revenue bonds;

(d) The policies of the authority with respect to the development of rail transportation.

On June 29, 1960, following the appearance of the aforesaid witness, Subcommittee No. 5 of the Committee on the Judiciary, at an executive session at which all members of the subcommittee were present, unanimously resolved to report the contumacious conduct of S. Sloan Colt and others to the Committee on the Judiciary with the recommendation that the committee report this conduct to the House of Representatives together with all particulars and recommend that the House cite S. Sloan Colt for contempt of the House of Representatives.

At an executive session on June 30, 1960, the Committee on the Judiciary approved the recommendations of Subcommittee No. 5 to report to the House all details concerning the contumacious conduct of S. Sloan Colt and others, and resolved to recommend that S. Sloan Colt be cited for contempt of the House of Representatives.

MINORITY VIEWS OF REPRESENTATIVE JOHN V. LINDSAY

I cannot agree with the majority recommendations in the committee

report. The committee proceeding, calculated to form a basis for contempt citations under title 2, United States Code, section 192, in my opinion constitutes an unprecedented, unlawful, and unconstitutional exercise of Federal authority over a bistate agency, which can and should be avoided. The Port of New York Authority was created by the States of New York and New Jersey with the consent of Congress to exercise delegations of State, not Federal, powers.

My objections are threefold: (1) The committee acted without legal authority and exceeded its jurisdiction; (2) the committee lacked a legislative purpose in inquiring into the internal affairs of a bistate agency; and (3) the committee inadvisably and without caution initiated an unprecedented exercise of Federal control in the delicate area of State sovereignty despite the pleas of the two interested Governors to be accorded a hearing before the return fate of the subpenas. As a result, and I emphasize this point, the documentary material, which the witnesses did not produce, was withheld pursuant to written instructions from Governors Rockefeller and Meyner. The witnesses were damned if they complied with the subpenas and damned if they didn't. . . .

MINORITY VIEWS OF REPRESENTATIVE JOHN H. RAY

The majority of the Judiciary Committee recommends that contempt citations under title 2, United States Code, section 192, be issued against the chairman, the executive director, and the secretary of the Port of New York Authority. In my opinion the action so recommended by the majority would not only be unprecedented and unwise as a matter of Federal and State relations, it is not sanctioned by law and should and would be held unconstitutional.

§ 20.10 The House agreed to a privileged resolution directing the Speaker to certify to the appropriate U.S. Attorney a report citing a witness in contempt for refusing to produce subpenaed materials.

On Aug. 2, 1946,[19] the House by voice vote approved a resolu-

19. 92 CONG. REC. 10748, 79th Cong. 2d Sess. See also, for example, 112 CONG. REC. 1754, 1763, 89th Cong. 2d Sess., Feb. 2, 1966, for the approval, on a vote of 344 yeas to 28 nays, of H. Res. 699, directing the Speaker to certify to the U.S. Attorney for the District of Columbia, H. REPT. No. 1241, citing Robert M. Shelton, allegedly of the Ku Klux Klan, in contempt for refusal to produce subpenaed materials to the Committee on Un-American Activities (resolutions against other alleged Klan members follow the Shelton resolution. In *Shelton* v *United States*, 404 F2d 1292 (D.C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969), the defendant's conviction was upheld by the appellate court. The same defendant had earlier been convicted of contempt of Congress following an appearance before the Senate Judiciary Committee's Subcommittee on Internal Security. *United States* v *Shelton*, 148 F Supp 926 (D.D.C. 1957), aff'd., 280 F2d 701, rev'd and rem'd, 369 U.S. 749 (1962), 211 F Supp 829, aff'd., 327 F2d 601 (D.C. Cir. 1963).

See 106 CONG. REC. 17313, 86th Cong. 2d Sess., Aug. 23, 1960, for

tion citing a witness in contempt for refusal to produce subpenaed materials.

PROCEEDINGS AGAINST RICHARD MORFORD

THE SPEAKER:[20] The Clerk will read the resolution.

The Clerk read as follows:

HOUSE RESOLUTION 752

Resolved, That the Speaker of the House of Representatives certify the foregoing report of the House Committee on Un-American Activities as to the willful and deliberate refusal of the following person to produce before the said committee for its inspection certain books, papers, and records which had been duly subpenaed, and to testify under oath concerning all pertinent facts relating thereto; under seal of the House of Representatives to the United States attorney for the District of Columbia to the end that the said person named below may be proceeded against in the manner and form provided by law; Richard Morford, 114 East Thirty-second Street, New York, N.Y. . . .

The previous question was ordered.

THE SPEAKER: The question is on the resolution.

The question was taken; and on a division (demanded by Mr. Marcantonio) there were—ayes 166, noes 17.

So the resolution was agreed to.

A motion to reconsider was laid on the table.[21]

Senate Precedents

§ 20.11 The Senate agreed to a resolution directing its President to certify to a U.S. Attorney a report citing a witness in contempt for failing to appear before an investigative hearing.

On May 6, 1953,[22] the Senate approved a resolution directing its

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the approval, on a vote of 190 yeas to 60 nays, of H. Res. 606, directing the Speaker to certify to the U.S. Attorney for the District of Columbia H. REPT. No. 2117, citing Austin J. Tobin, of the Port of New York Authority in contempt for refusal to produce subpenaed materials to Subcommittee No. 5, of the Committee on the Judiciary (resolutions against other Port Authority officials follow the Tobin resolution).

In *United States* v *Tobin*, 195 F Supp 588 (D.D.C. 1961), rev'd 306 F2d 270, cert. denied, 371 U.S. 902 (1962), defendant's conviction was reversed on appeal, the court holding that certain documents demanded by the committee were not within the scope permitted by the pertinent congressional resolution.

20. Sam Rayburn (Tex.).

21. See also *Morford* v *United States*, 72 F Supp 58 (D.D.C. 1947), aff'd., 176 F2d 54 (1949), rev'd 339 U.S. 258 (1950), rem'd, 184 F2d 864, cert. denied, 340 U.S. 878 (1950). The Supreme Court initially reversed defendant's conviction because defendant had not been permitted to question four government employees on the jury panel as to the impact of Executive Order No. 9835 (the "Loyalty Order") on their ability to render a just and fair verdict. On retrial, defendant waived a jury and was convicted again.

22. 99 CONG. REC. 4603, 83d Cong. 1st Sess.

President to certify to a U.S. Attorney a contempt citation.

THE PRESIDING OFFICER:[23] Is there objection to the consideration of the resolution? There being no objection, the resolution (S. Res. 103) was considered and agreed to, as follows:

Resolved, That the President of the Senate certify the report of the Committee on Government Operations of the United States Senate as to the willful default of Russell W. Duke in failing to appear to testify before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate in response to a subpena, together with all the facts in connection therewith, under the seal of the United States Senate, to the United States attorney for the District of Columbia, to the end that the said Russell W. Duke may be proceeded against in the manner and form provided by law.

§ 20.12 The Senate agreed to a resolution directing its President to certify to a U.S. Attorney a report citing a witness in contempt for refusing to answer questions at an investigative hearing.

On Feb. 4, 1955,[24] the Senate approved a resolution directing its President to certify to a U.S. Attorney a contempt citation.

CITATION OF DIANTHA D. HOAG FOR CONTEMPT OF THE SENATE

MR. [EARLE C.] CLEMENTS [of Kentucky]: Mr. President, I move that the Senate proceed to the consideration of Calendar No. 3, Senate Resolution 31.

THE PRESIDING OFFICER:[1] The resolution will be stated by title for the information of the Senate.

THE LEGISLATIVE CLERK: A resolution (S. Res. 31) citing Diantha D. Hoag for contempt of the Senate.

THE PRESIDING OFFICER: The question is on agreeing to the motion of the Senator from Kentucky.

The motion was agreed to, and the Senate proceeded to consider the resolution which was read as follows:

Resolved, That the President of the Senate certify the report of the Committee on Government Operations of the United States Senate as to the refusal of Diantha D. Hoag to answer questions before the Senate Permanent Subcommittee on Investigations, said refusal to answer being pertinent to the subject matter under inquiry, together with all the facts in connection therewith, under

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23. Alvin R. Bush (Pa.).

24. 101 CONG. REC. 1159, 84th Cong. 1st Sess. See also, for example, 101 CONG. REC. 11678, 84th Cong. 1st Sess., July 27, 1955, for the voice vote approval of S. Res. 129, citing Joseph Starobin in contempt for refusing to answer questions before the Senate Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary; and 98 CONG. REC. 1311, 82d Cong. 2d Sess., Feb. 25, 1952, for the voice vote approval of S. Res. 281 and 282, citing Roger Simkins and Emmitt Warring, respectively, in contempt for refusing to answer questions before the Committee on the District of Columbia.

1. William S. Hill (Colo.).

the seal of the United States Senate to the United States attorney for the District of Columbia, to the end that the said Diantha D. Hoag may be proceeded against in the manner and form provided by law.

MR. [GEORGE H.] BENDER [of Ohio]: Mr. President, the Senator from Wisconsin [Mr. McCarthy], who reported the resolution to the Senate, is absent, and he asked me to pursue it for him. However, I am sure there is no need for any speech on the subject.

THE PRESIDING OFFICER: The question is on agreeing to the resolution.

The resolution (S. Res. 31) was agreed to.[2]

§ 20.13 The Senate agreed to a resolution directing its President to certify to the appropriate U.S. Attorney a report citing a witness in contempt for his refusal to answer questions and his departure without leave at an investigative hearing.

On July 19, 1968,[3] the Senate approved a resolution directing its President to certify to a U.S. Attorney a report citing a witness in contempt.

CITATION FOR CONTEMPT OF THE SENATE

MR. [ROBERT C.] BYRD of West Virginia: Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Senate Resolution 379.[4]

THE PRESIDING OFFICER:[5] The resolution will be stated by title.

THE ASSISTANT LEGISLATIVE CLERK: A resolution (S. Res. 379) citing Jeff Fort for contempt of the Senate.

THE PRESIDING OFFICER: Is there objection to the present consideration of the resolution?

There being no objection, the Senate proceeded to consider the resolution, as follows:

S. RES. 379

Resolved, That the President of the Senate certify the report of the Com-

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2. See also *United States* v *Hoag*, 142 F Supp 667 (D.D.C. 1956). The defendant was found not guilty, the court ruling that by answering a limited number of the committee's questions, she did not waive her privilege against self-incrimination under the fifth amendment. Thus, defendant's subsequent refusal to answer questions regarding possible activities on behalf of the Communist Party did not constitute violation of the statute making it an offense for a person to refuse to testify (2 USC § 192).

3. 114 CONG. REC. 22351, 22361, 22362, 90th Cong. 2d Sess. See also *United States* v *Fort*, 443 F2d 670, cert. denied, 403 U.S. 932 (1971), wherein the defendant's conviction was upheld. The right to confront witnesses was not applicable, in the court's view, because a legislative inquiry is not the same as a criminal proceeding.

4. *Parliamentarian's Note:* A resolution citing a person for contempt for refusing to answer questions is privileged under Senate rules. This particular resolution was called up by unanimous consent because it was not controversial and was considered out of the regular order of business.

5. Joseph D. Tydings (Md.).

mittee on Government Operations of the United States Senate on the appearance of Jeff Fort before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations on July 9, 1968, in Washington, District of Columbia, at which he—

(1) refused to answer one question,

(2) refused to answer any and all questions that were to be put to him by the subcommittee,

(3) departed the hearing without leave, such conduct and refusals to answer questions being pertinent to the subject matter under inquiry, together with all the facts in connection therewith, under the seal of the United States Senate, to the United States Attorney for the District of Columbia, to the end that the said Jeff Fort may be proceeded against in the manner and form provided by law. . . .[6]

THE PRESIDING OFFICER: All time has been yielded back. The question is on agreeing to Senate Resolution 379. On this question, the yeas and nays have been ordered, and the clerk will call the roll. . . .

The result was announced—yeas 80, nays 0, as follows: . . .

So the resolution (S. Res. 379) was agreed to.

§ 20.14 The Senate agreed to a resolution directing its President to certify to a U.S. Attorney a report citing witnesses in contempt for refusing to produce subpenaed materials.

On May 5, 1969,[7] the Senate agreed to a resolution directing its President to certify to a U.S. Attorney a contempt citation.

CITATION OF ALAN AND MARGARET MCSURELY FOR CONTEMPT OF CONGRESS

The resolution (S. Res. 191) citing Alan and Margaret McSurely for contempt of Congress was considered and agreed to, as follows:

S. RES. 191

Resolved, That the President of the Senate certify the report of the Com-

6. The excerpts from the report are omitted.

7. 115 CONG. REC. 11278, 91st Cong. 1st Sess. See *United States* v *McSurely*, 473 F2d 1178 (D.C. Cir. 1972), wherein defendant's conviction was reversed, the trial court having erred in receiving in evidence subpenas which were based ultimately on the fruits of an illegal search and seizure.

See also 101 CONG. REC. 10916, 84th Cong. 1st Sess., July 19, 1955, for the voice vote approval of S. Res. 135, citing Eugene C. James in contempt for refusing to produce subpenaed materials and answer questions; and 99 CONG. REC. 8883, 8884, 83d Cong. 1st Sess., July 15, 1953, for the voice vote approval of S. Res. 139, citing Timothy J. O'Mara in contempt for refusing to produce subpenaed materials and answer questions.

In *United States* v *O'Mara*, 122 F Supp 399 (1954), the defendant was convicted, the court having found, in part, that information sought was pertinent to the inquiry.

mittee on Government Operations of the United States Senate on the appearance of Alan McSurely and Margaret McSurely before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations on March 4, 1969, in Washington, District of Columbia, at which they—

(1) refused to produce books and records lawfully subpenaed to be produced before the said subcommittee, and

(2) failed to appear or to produce the said books and records pursuant to the order and direction of the chairman with the approval of the subcommittee before noon on March 7, 1969, together with all the facts in connection therewith, under the seal of the United States Senate, to the United States Attorney for the District of Columbia, to the end that the said Alan McSurely and Margaret McSurely may be proceeded against in the manner and form provided by law.

§ 21. Purging Contempt

As the following precedents reveal, a witness may be purged of, or freed from, contempt under procedures parallel to those used in citing for contempt: submission of a report of the committee and approval of a resolution authorizing the Speaker to notify the U.S. Attorney to drop the prosecution. [8]

Courts have not been sympathetic to witnesses' contentions that they have purged themselves. For example, an argument that an unexcused withdrawal from a hearing did not obstruct a committee's inquiry because the witness returned later and answered all questions put to him was held irrelevant, because a witness does not have a legal right to dictate the conditions under which he will testify.[9] In fact, a witness' offer of proof that he had purged himself by testifying freely before another Senate committee and by opening union files to its scrutiny was rejected on the ground that the defense of purging in criminal contempt has been abolished in the federal courts.[10] A court may, however, suspend the sentence of a witness convicted of violating 2 USC § 192 and give him an opportunity to avoid punishment by giving testimony before a committee whose questions he had refused to answer.

Report

§ 21.1 The Committee on Un-American Activities reported

8. See 3 Hinds' Precedents §§ 1670, 1682, 1684, 1686, 1687, 1689, 1692, 1694, 1701, 1702, for earlier precedents relating to purgation.

9. *United States* v *Costello,* 198 F2d 200 (2d Cir. 1952), cert. denied, 344 U.S. 874 (1952).

10. *United States* v *Brewster,* 154 F Supp 126, 135 (D.D.C. 1957), reversed on other grounds, 255 F2d 899 (D.C. Cir. 1958), cert. denied, 358 U.S. 842 (1958).

to the House testimony purging a witness who had been cited for his previous refusal to testify and recommended that legal proceedings against the witness be terminated.

On July 23, 1954,[11] a report purging a witness of contempt was presented and read.[12]

IN THE MATTER OF FRANCIS X. T. CROWLEY

MR. [HAROLD H.] VELDE [of Illinois]: Mr. Speaker, by direction of the Committee on Un-American Activities, I submit a privileged report (Rept. No. 2472).

The Clerk read as follows:

IN THE MATTER OF FRANCIS X. T. CROWLEY

Mr. Velde, from the Committee on Un-American Activities, submitted the following report:

The Committee on Un-American Activities, as created and authorized by the House of Representatives, through the enactment of Public Law 601, section 121, subsection (q) (2) of the 79th Congress, and under House Resolution 5 of the 83d Congress, caused to be issued a subpena to Francis X. T. Crowley, 226 Second Avenue, apartment 15, New York, N. Y. The said subpena directed Francis X. T. Crowley to be and appear before said Committee on Un-American Activities, of which the Honorable Harold H. Velde is chairman, on May 4, 1953, at the hour of 10:30 a.m., then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee.

The said Francis X. T. Crowley did appear before said committee and did refuse to answer questions pertinent to the subject under inquiry, and his refusal to answer said pertinent questions deprived your committee of necessary and pertinent testimony and placed the said witness in contempt of the House of Representatives of the United States.

In Report No. 1586, 83d Congress, 2d session, your committee reported to the House of Representatives the said actions of Francis X. T. Crowley. On May 11, 1954, the House of Representatives adopted by vote of 346 to 0, House Resolution 541, which is set forth in words and figures as follows:

"*Resolved*, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the refusal of Francis X. T. Crowley to answer questions before the said Committee on Un-American Activities, together with all the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that the said Francis X. T. Crowley may be proceeded against in the manner and form provided by law."

On June 28, 1954, the said Francis X. T. Crowley did appear voluntarily before your committee in public session in Washington, D.C., and did

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11. 100 CONG. REC. 11650, 83d Cong. 2d Sess.

12. See § 21.2, infra, for the resolution purging Mr. Crowley, and 100 CONG. REC. 6400, 6401, 83d Cong. 2d Sess., May 11, 1954, for the texts of H. REPT. No. 1586, relating to the refusal of Mr. Crowley to testify, and H. Res. 541, authorizing the Speaker to certify that report to the U.S. Attorney for legal action.

answer all questions which he had previously refused to answer. In addition, the said Francis X. T. Crowley voluntarily did give your committee extensive information concerning the operation of the Communist conspiracy in the United States of America.

At the conclusion of the testimony of the said Francis X. T. Crowley before your committee on June 28, 1954, the chairman, Hon. Harold H. Velde, made a statement which is set forth in words as follows: . . .

"MR. VELDE. May I say that we certainly do appreciate the information you have given here voluntarily to the committee.

"As I mentioned before the committee would not be authorized as a body to ask for immunity from prosecution for you. However, I do feel that many of the members of the committee, probably a big majority, feel that you have performed a service to your country by giving us the information that you have, and that would possibly be a good reason why the Attorney General should drop prosecution in your particular case for contempt.

* * * * *

"MR. VELDE. The witness is excused with the committee's thanks."

Because of the foregoing, on July 16, 1954, your committee voted that it was the sense of the committee that the said Francis X. T. Crowley, because of his voluntary answers to pertinent questions before the committee and the extensive voluntary information he offered concerning the operation of the Communist conspiracy in the United States of America, did purge himself of contempt of the House of Representatives of the United States.

Resolution

§ 21.2 The House debated and approved a resolution purging the contempt of a witness who had previously refused to testify before the Committee on Un-American Activities.

On July 23, 1954,[13] the House debated and approved a resolution authorizing the Speaker to certify to the U.S. Attorney a report purging a witness of contempt.[14]

MR. [HAROLD H.] VELDE [of Illinois]: Mr. Speaker, I offer a resolution (H. Res. 681) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives concerning the action of Francis X. T. Crowley in

13. 100 CONG. REC. 11650–52, 83d Cong. 2d Sess. See also § 21.3, infra, for the Speaker's announcement that he had certified the purgation and § 21.4, infra, for the U.S. Attorney's statement that the prosecution would be dropped.

14. See § 21.1, supra, for the report on this matter and 100 CONG. REC. 6400, 6401, for the texts of H. REPT. NO. 1586, relating to the refusal of Mr. Crowley to testify, and H. Res. 541, authorizing the Speaker to certify the report to the U.S. Attorney for legal action.

purging himself of contempt of the House of Representatives of the United States, together with all the facts in connection therewith, under seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that legal proceedings based upon the matter certified by the Speaker pursuant to H. Res. 541, 83d Congress, second session, against the said Francis X. T. Crowley may be withdrawn and dropped in the manner and form provided by law.

MR. VELDE: Mr. Speaker, I yield such time as he may desire to the gentleman from California [Mr. Jackson].

MR. [DONALD L.] JACKSON [of California]: Mr. Speaker, on May 11, 1954, the House adopted by a vote of 346 to 0, House Resolution 541 citing Francis X. T. Crowley for contempt of Congress. On June 28, 1954, Mr. Crowley again appeared before the House Committee on Un-American Activities at his own request and answered all questions, giving the Congress and the committee extensive information relative to his activities and those of others in the Communist Party.

The action here proposed, while not without precedent, is most unusual, in that the House Committee on Un-American Activities is today asking the House to concur in a committee recommendation that a witness who was previously cited by the House for contempt, and in the light of subsequent cooperation with the committee, be purged of that contempt.

It is the sense of the committee that Mr. Crowley should be purged of contempt. However, Mr. Speaker, I should like to emphasize one important point relative to Francis X. T. Crowley. When the witness refused originally to testify before the committee and later came back to testify, it is our clear understanding that he was acting upon his own initiative. He came back to testify on his own volition. He was not acting in furtherance of any conspiracy. He was not attempting to impede legitimate congressional investigations, in the opinion of the committee.

The committee wants it clearly understood that its unusual action today in recommending that Francis X. T. Crowley be considered as having purged himself of contempt must not be considered as a precedent for any witness to commit contempt on one day and attempt to purge himself of the charge on the next. In such case, a witness would thereby be able to select the time and place of giving his testimony. A congressional committee is entitled to testimony when and where it deems it necessary and proper to have that testimony. The power to decide when and where one shall testify is not properly, under the law, in the hands of a witness. The Crowley case is no precedent for any such interpretation.

It must further be remembered that Mr. Crowley came back voluntarily before the committee, and was promised nothing in the way of any remuneration, reward, or forgiveness. He understood that he was promised nothing and that he testified freely of his own will because he desired strongly so to testify.

It is the hope of the committee that the House will accept the recommendation that Mr. Crowley be purged of contempt in this instance.

MR. [JAMES G.] FULTON [of Pennsylvania]: Mr. Speaker, will the gentleman yield?

MR. JACKSON: I yield to the gentleman from Pennsylvania.

MR. FULTON: If the House adopts this recommendation as a practice, and leaving this particular case out of it, will it not weaken the Committee on Un-American Activities? Will not witnesses who become the defendants in these citations for contempt proceedings feel that they have up until the time they are brought into court to change their minds? If the committee adheres to a rule that the witnesses are required to come before the Un-American Activities Committee in the beginning and testify, will it not expedite the committee's hearings, instead of waiting for the defendant to turn milk toast later on?

MR. JACKSON: It would simplify matters a great deal if we could adopt a rule that would require them to testify in their first appearance. If that could be achieved, there would be no need for contempt proceedings in the House. However, there are instances where it is believed that a witness in good faith, through misunderstanding of the circumstances, or upon poor advice, refuses to testify. Mr. Crowley, following his appearance here, went to a priest, who recommended that he return to the committee and tell the full truth. He did so. I have tried to point out in my remarks, I will say to the gentleman from Pennsylvania, that the committee is not establishing, and wants it clearly understood that this is not to be considered as establishing, any precedent relative to purge of contempt.

MR. FULTON: Would the gentleman permit me to ask another question?

MR. JACKSON: Surely.

MR. FULTON: When a person is cited and becomes a defendant in a case before the United States district court, is it within our power, our discretion, or our jurisdiction in the House then to withdraw the citation? Why does not the gentleman who has been cited by the Un-American Activities Committee for contempt, and who refused to answer questions on his subversive activities for the overthrow of the United States Government, go to the proper authorities on the judicial side and say that he has now changed, although he committed the offense, and ask that this later repentance and change of mind be taken in mitigation of what the penalty might be? The point is this: Are we in the House responsible for relieving such a cited individual of all penalty, or should he go to the Attorney General, to whom this citation has been referred, and the judiciary, to get the penalty mitigated, now that he has changed his mind?

MR. [FRANCIS E.] WALTER [of Pennsylvania]: Mr. Speaker, will the gentleman yield?

MR. JACKSON: I yield to the gentleman from Pennsylvania.

MR. WALTER: I think it is important to understand that in this particular case we are just where we were after the vote to cite this man was taken. No further steps have been taken. The matter has not been presented to the grand jury. There has been no indictment, so that we are still in control of this entire situation.

MR. FULTON: Then will the committee at this juncture limit this type of case to the jurisdiction where it has still the actual control of the citation as in this situation? Once the citation

is handed over into the hands of a United States attorney, I believe it should be the United States attorney that goes before the court and asks for the mitigation or the dismissal.

MR. WALTER: I am quite certain that the United States attorney does not know anything about this case. It has been referred to the Department of Justice, but I do not believe the matter has gone to the United States attorney. Further, this is an unusual case in this, that this man realized after he searched his soul and conscience that he had done something injurious to his country, and he convinced us that he was willing and anxious to cooperate with the work the Congress of the United States has imposed upon this committee. It is entirely a bona fide, genuine action on the part of this man. I do not believe in the light of these circumstances he should be put to the trouble and expense of defending an action even though ultimately the United States attorney would recommend leniency.

MR. JACKSON: May I say to the gentleman it is my understanding that the Attorney General's office and the United States attorney's office are in accord with the action that is here proposed.

MR. VELDE: Mr. Speaker, will the gentleman yield?

MR. JACKSON: I yield to the gentleman from Illinois.

MR. VELDE: Let me point out, too, that this witness was not a vicious and physically contemptuous witness. He felt within his conscience, at least we members of the committee felt that he had it within his conscience, that he should refuse to answer certain questions. I certainly would not indiscriminately recommend that all these witnesses who come forward after being cited be purged by the House of Representatives. I think you can depend upon the members of our Committee on Un-American Activities, who voted unanimously to submit this resolution, to take those cases where it seems it is proper to make the purge or to ask for a purging resolution.

MR. JACKSON: I thank the gentleman. I might say that we are frequently belabored in some quarters for being unduly harsh. I believe the adoption of this resolution will indicate that the committee is trying its best to be fair and just

MR. [KIT] CLARDY [of Michigan]: Mr. Speaker, will the gentleman yield?

MR. JACKSON: I yield to the gentleman from Michigan.

MR. CLARDY: Is it not true that this witness when he came before us was a more or less confused young man who did not raise the fifth amendment, did not raise any of the amendments, but merely had a mistaken belief that by cooperating with the committee he would be violating something that was within his conscience, unlike most of those who come before the committee, and that we thought the spirit of Christian charity ought to prevail in this case because it was perhaps the first and maybe the last and only instance in which we would find a man of that character coming before us?

MR. JACKSON: Yes. I sensed that to be the feeling of the committee in this connection.

MR. CLARDY: After he had appeared the first time he became married, he consulted with his wife, he consulted

with his priest, he consulted with his friends, and finally he came back before us, because he was in his conscience convinced he could do his country a service. I would hate to see the House turn down this one case.

MR. JACKSON: I am inclined to think, if we give the House a chance, it will vote this resolution.

MR. FULTON: If the gentleman will yield, I want to ask the chairman of the Un-American Activities Committee a question. I may be pressing the point, but this is establishing a precedent which will be followed hereafter. I cannot accept the ground that maybe a member of the committee thought this was being done in charity. I would therefore ask the chairman of the Committee on Un-American Activities to state expressly the rule that will be followed by the Un-American Activities Committee in cases where there is a change of mind and the witness decides he will purge himself of this contempt after he has been cited by the House in accordance with the Un-American Activities Committee's own recommendations. I would like that stated right here for a precedent on the first one that comes up, so that there is a precedent and a rule for future cases.

MR. VELDE: The gentleman knows it is impossible for me to say what the committee will do under any of these circumstances. I am sure they will be reasonable. On top of that the House of Representatives is not establishing a precedent in the sense that it is a legal precedent established by the Supreme Court. The House of Representatives can vote on any of these resolutions as they see fit.

Mr. Speaker, I move the previous question.

The previous question was ordered.

THE SPEAKER:[15] The question is on the resolution.

The resolution was agreed to.

A motion to reconsider was laid on the table.

Certification of Purgation

§ 21.3 The Speaker informed the House when he had, pursuant to authority granted him by resolution, certified purgation of contempt to the U.S. Attorney.

On July 26, 1954,[16] Speaker Joseph W. Martin, Jr., of Massachusetts, informed the House that he had certified to the U.S. Attorney for the District of Columbia the report, House Report No. 2472, purging Francis X. T. Crowley of contempt.

CITATIONS FOR CONTEMPT

THE SPEAKER: The Chair desires to announce that pursuant to sundry resolutions of the House he did, on Friday, July 23, 1954, make certifications to the United States attorney, District of Columbia, the United States attorney, southern district of California, the United States attorney, eastern district of Michigan, the United States attorney for the district of Oregon, and the United States attorney, western district of Washington, as follows:

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15. Joseph W. Martin, Jr. (Mass.).

16. 100 CONG. REC. 12023, 12024, 83d Cong. 2d Sess.

TO THE UNITED STATES ATTORNEY
DISTRICT OF COLUMBIA: . . .

House Resolution 681, concerning the action of Francis X. T. Crowley in purging himself of contempt of the House of Representatives.(17)

U.S. Attorney's Response

§ 21.4 The Speaker laid before the House the U.S. Attorney's affirmative response to a resolution requesting withdrawal of contempt proceedings against a person who had purged himself of contempt by cooperating with a committee.

On Aug. 9, 1954,(18) Speaker Joseph W. Martin, Jr., of Massachusetts, laid before the House a letter from the U.S. Attorney for the District of Columbia.(19)

PROCEEDINGS AGAINST FRANCIS X. T. CROWLEY

The Speaker laid before the House the following communication:

AUGUST 5, 1954.

Hon. JOSEPH W. MARTIN, Jr.,
Speaker of the House of Representatives, Washington, D.C.

In re Francis X. T. Crowley, cited for contempt of the House by House Resolution 541, 83d Congress.

DEAR MR. SPEAKER: On May 12, 1954, pursuant to House Resolution 541, 83d Congress, you certified to me the contempt of the above individual for refusing to answer questions before the Committee on Un-American Activities on June 8, 1953.

On July 23, 1954, that committee by Report No. 2472, reported that Crowley on June 28, 1954, appeared voluntarily before it in public session and answered all questions which he had previously refused to answer and, in addition, voluntarily gave extensive information concerning the operation of the Communist conspiracy in this country. That committee further reported that it was the sense of the committee that Crowley had thereby purged himself of his previous contempt of the House of Representatives.

House Resolution 681 of July 23, 1954, resolved that the Speaker certify to the United States attorney House Report No. 2472, referred to above, "to the end that legal proceedings based upon the matter certified by the Speaker pursuant to House Resolution 541, 83d Congress, 2d session, against the said Francis X. T. Crowley may be withdrawn and dropped in the manner and form provided by law."

In my opinion this action by the committee and by the House has the effect of withdrawing the original citation of Crowley to my office and of relieving me of the statutory duty to put the matter before the grand jury, as provided by title 2, United States Code, section 194.

Inasmuch as Crowley has purged himself, and in view of the wish of the House, expressed in House Reso-

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17. See § 21.2, supra, for the text of H. Res. 681, and § 21.4, infra, for the response of the U.S. Attorney.

18. 100 CONG. REC. 13734, 83d Cong. 2d Sess.

19. See §§ 21.1 and 21.2, supra, for the texts, respectively, of H. REPT. NO. 2472, purging Mr. Crowley of contempt, and H. Res. 681, authorizing the Speaker to certify the report. See also 100 CONG. REC. 6400, 6401, for the texts of H. REPT. NO. 1586, relating to the original refusal to testify, and H. Res. 541, authorizing the Speaker to certify that report to the U.S. Attorney.

lution 681, that contempt proceedings against Crowley be dropped, I shall not present the matter to the grand jury and I shall close the prosecution on my records.

Sincerely,

LEO A. ROVER,
United States Attorney.

(Copy to Hon. Harold H. Velde, chairman Committee on Un-American Activities, House of Representatives, Washington, D.C.)

§ 21.5 The U.S. Attorney, in response to a letter received during an adjournment informing him that a witness who had been cited by the House for contempt had later purged himself, advised the Speaker by letter that he would not present the contempt to the grand jury and would close the prosecution on his records.

On Mar. 10, 1955,[20] the following item appeared in the *Congressional Record*.

EXECUTIVE COMMUNICATIONS, ETC.

Under clause 2 of rule XXIV, executive communications were taken from the Speaker's table and referred as follows:

527. A letter from the United States Attorney, District of Columbia, Department of Justice, relative to a letter addressed to Hon. Francis Walter, chairman, committee on Un-American Activities of the House of Representatives, relating to the case of Wilbur Lee Mahaney, Jr., cited for contempt of the House of Representatives by House Resolution 535, 83d Congress; to the Committee on Un-American Activities.[1]

Parliamentarian's Note: In a letter dated Mar. 3, 1955, the U.S. Attorney for the District of Columbia, Leo A. Rover, informed the Chairman of the Committee on Un-American Activities of the 84th Congress, Francis E. Walter, of Pennsylvania, that he would drop legal action against Wilbur Lee Mahaney, Jr., because the former chairman, Harold H. Velde, of Illinois, had by letter indicated that it was the sense of the committee that the witness had purged himself. The body of

20. 101 CONG. REC. 2659, 84th Cong. 1st Sess.

1. See 100 CONG. REC. 6386–89, 83d Cong. 2d Sess., May 11, 1954, for the texts of H. REPT. NO. 1580, citing Mr. Mahaney for contempt for refusal to testify, and H. Res. No. 535, authorizing the Speaker to certify to the U.S. Attorney the report, respectively.

Parliamentarian's Note: This letter was not laid before the House; an adjournment prevented action on a resolution certifying the purgation.

See §§ 21.1, 21.2, and 21.4, supra, for the texts of a report purging a witness, a resolution authorizing the Speaker to certify the purging report to the U.S. Attorney, and the response of the U.S. Attorney in the case of Francis X. T. Crowley, respectively, when the House was able to receive and act on the committee report because it was in session.

the U.S. Attorney's letter to Chairman Walter follows:

> By letter dated December 30, 1954, the Honorable Harold H. Velde, Chairman, Committee on Un-American Activities of the House of Representatives, informed me that on November 28, 1954, the Committee voted that it was the sense of the Committee that Mahaney, on July 30, 1954, had purged himself of the contempt theretofore committed by him in refusing to answer questions on February 16, 1954, for which refusals Mahaney had been cited for contempt by the House of Representatives on May 11, 1954.
>
> In the letter of December 30, 1954, Chairman Velde stated that the report and statement of Mahaney's purge were being forwarded to this office to the end that legal proceedings on the contempt citation against Mahaney may be withdrawn and dropped.
>
> Mr. Velde further stated that the report and statement were being forwarded directly by the Chairman of the Committee inasmuch as the House of Representatives was adjourned. It is my understanding that the Speaker of the House was out of the city and unavailable to receive and transmit the report and statement to this office as is provided by 2 U.S.C. 194 for citations of contempt when Congress is not in session.
>
> It appears, under these circumstances, that this action by the Committee may be regarded as having the effect of withdrawing the original citation of Mahaney to my office and of relieving me of the statutory duty to put the matter before the grand jury, as provided by 2 U.S.C. 194.
>
> Inasmuch as Mahaney has been considered by the Committee as having purged himself, and in view of the wish of the Committee expressed by Committee in the aforementioned letter of its Chairman, that contempt proceedings against Mahaney be dropped, I shall not present the matter to the grand jury and I shall close the prosecution on my records.
>
> For your information, I do not propose to give notification of this action to Mahaney.

§ 22. Certification to U.S. Attorney

A statute[2] imposes a duty on the Speaker of the House or President of the Senate to certify to the appropriate U.S. Attorney statements of facts relating to contumacious conduct of witnesses. The statute requires a committee to report such facts to the House or Senate when Congress is in session, or to the Speaker or President of the Senate when Congress is not in session.

When either the House or Senate receives a report of contumacious conduct from a committee, it routinely considers a resolution offered by a committee member authorizing the Speaker or President of the Senate to certify the facts to the U.S. Attorney. By reviewing this resolution, the body checks the action of the committee.

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2. 2 USC § 94. See 3 Hinds' Precedents §§ 1672, and 1691 for earlier precedents relating to certification.

Although the necessity of a certification as a prerequisite to prosecution has long been assumed,[3] some conflict has arisen among different jurisdictions with respect to such requirement. One district court held that an indictment which failed to set forth compliance with the procedure outlined in 2 USC § 194 was not fatally defective and should not be dismissed;[4] another, in a habeas corpus proceeding, held that a person charged with a violation of the contempt statute, 2 USC § 192, for refusal to testify before a committee could not legally be held under a warrant issued by a U.S. Commissioner which was based on an affidavit of the secretary of the Committee on Un-American Activities and not on a certification from the Speaker.[5]

The portion of the statute which authorizes the Speaker or President of the Senate, without action of the House or Senate, to certify statements of facts he receives while Congress is not in session—a procedure designed to avoid delay in prosecuting contumacious witnesses—was interpreted in one case to be not automatic but discretionary.[6] Thus, it was held that, in order to furnish the protection afforded by legislative review of contempt citations, the Speaker or President of the Senate must act in place of the full House or Senate in such circumstances, by examining the merits of the citation. The Speaker, stated the three-judge court, in a two to one opinion, erred in interpreting the statute to prohibit him from exercising his independent judgment notwithstanding any reservations he had about the validity of the committee's contempt citation. Accordingly, the court reversed the contempt convictions in the case.[7]

Failure to make a report or issue a certificate has been held to be a matter to be raised by way of defense.[8]

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3. *In re Chapman,* 166 U.S. 661, 667 [1897] (see 2 Hinds' Precedents §§ 1612–1614 for a discussion of this ease); *United States* v *Costello,* 198 F2d 200, 204 (2d Cir. 1952), cert. denied, 344 U.S. 374 (1952); and *Wilson* v *United States,* 369 F2d 198 (D.C. Cir. 1966).

4. *Ex Parte Frankfeld,* 32 F Supp 915 (D.D.C. 1940).

5. *United States* v *Josephson,* 74 F Supp 958 (S.D. N.Y. 1947), aff'd., 165 F2d 82 (2d Cir. 1947); cert. denied, 333 U.S. 838 (1948).

6. *Wilson, et al.* v *United States,* 369 F2d 198 (D.C. Cir. 1966). See § 22.8, infra, for further discussion.

7. This ruling would not affect the principle (§ 22.2, infra) that no action of the House is necessary when the Speaker certifies a statement of facts to the U.S. Attorney, inasmuch as the ruling deals only with the duty of the Speaker.

8. *In re Chapman,* 166 U.S. 661, 667 (1897), discussed at 2 Hinds' Prece-

During Congressional Session

§ 22.1 A contempt citation reported while Congress is in session is certified to the appropriate U.S. Attorney by the Speaker by authority of a privileged resolution.

On Sept. 3, 1959,[9] the House by voice vote approved a resolution authorizing the Speaker to certify to U.S. Attorney a report citing a witness in contempt.[10]

MR. [FRANCIS E.] WALTER [of Pennsylvania]: Mr. Speaker, I offer a privileged resolution (H. Res. 375) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the refusal of Edwin A. Alexander to answer questions before a duly constituted subcommittee of the Committee on Un-American Activities, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States Attorney for the Northern District of Illinois, to the end that the said Edwin A. Alexander may be proceeded against in the manner and form provided by law. . . .

MR. WALTER: Mr. Speaker, I move the previous question.

The previous question was ordered.

THE SPEAKER:[11] The question is on the resolution.

The resolution was agreed to.

A motion to reconsider was laid on the table.

During Adjournment

§ 22.2 The statute, 2 USC § 194, provides that when Congress is not in session, the Speaker shall certify to a U.S. Attorney reports and statements of facts submitted by investigating committees describing refusals of individuals to testify or produce subpenaed materials; consequently, no action by the House is necessary.

On Nov. 14, 1944,[12] Speaker Sam Rayburn, of Texas, explained

dents § 1614; *United States* v *Dennis*, 72 F Supp 417, 422 (D.D.C. 1947), aff'd. 171 F2d 986 (D.C. Cir. 1948), aff'd. 339 U.S. 162 (1950), and *United States* v *Shelton*, 211 F Supp 869 (D.D.C. 1962).

9. 105 CONG. REC. 17945, 86th Cong. 1st Sess.; see also, for example, §§ 20.2, 20.4, 20.6, 20.8, and 20.10, supra, for other resolutions authorizing the Speaker to certify reports to the U.S. Attorney.

10. See 22.2, infra, which states that no action of the House is necessary to authorize the Speaker to certify a statement of facts relating to a witness' contumacy received when Congress is not in session. In such a case authority for certification is 2 USC 194, rather than a resolution.

11. Sam Rayburn (Tex.).

12. 90 CONG. REC. 8163, 78th Cong. 2d Sess. See *United States* v *Rumely*,

the procedure for certifying reports to the U.S. Attorney under 2 USC § 194.(13)

EDWARD A. RUMELY AND JOSEPH P. KAMP

THE SPEAKER: The Chair desires to announce that during the past recess of the Congress the Special Committee to Investigate Campaign Expenditures authorized by House Resolution 551, Seventy-eighth Congress, reported to and filed with the Speaker statements of facts concerning the willful and deliberate refusal of Edward A. Rumely of the Committee for Constitutional Government and Joseph P. Kamp of the Constitutional Educational League, Inc., to testify and to produce the books, papers, records, and documents of their respective organizations before the said Special Committee of the House, and the Speaker, pursuant to the mandatory provisions of [2 USC § 194] certified to the United States attorney, District of Columbia, the statement of facts concerning the said Edward A. Rumely on September 26, 1944, and the statement of facts concerning the said Joseph P. Kamp on November 2, 1944.

MR. [JOHN E.] RANKIN [of Mississippi]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. RANKIN: Mr. Speaker, what is necessary to dispose of the document which the Speaker has just read? Will it require a resolution by the House or will it be referred to some committee?

THE SPEAKER: That is not necessary under the statute. It is before the court now.

MR. RANKIN: I understand, but in order to call for court action it will be necessary, as I understand it, to have a resolution from the House.

THE SPEAKER: The Chair thinks not, under the law.

Announcement of Certification

§ 22.3 The Speaker informs the House when he has, pursuant to authority granted him by resolution, certified contempt cases to U.S. Attorneys.

On Feb. 7, 1936,(14) Speaker John W. McCormack, of Massa-

197 F2d 166 (D.D.C. 1952), cert. granted, 344 U.S. 812, aff'd., 345 U.S. 41 (1953), in which defendant's conviction for contempt of Congress was reversed on grounds that his first amendment rights superseded the congressional investigative power in this instance. See also *United States* v *Kamp,* 102 F Supp 757 (D.D.C. 1952) [defendant found not guilty, as government failed to prove default beyond a reasonable doubt].

13. See § 22.1, supra, for the procedure for authorizing a certification of a report received when Congress is in session.

14. 112 CONG. REC. 2290, 89th Cong. 2d Sess. See also, for example, 105 CONG. REC. 18175, 86th Cong. 1st Sess., Sept. 4, 1959, for an announcement by Speaker Sam Rayburn (Text), that he had, pursuant to H. Res. 374 and 375, certified to the

chusetts, announced that he had certified to the U.S. Attorney for the District of Columbia contempt cases against alleged members of the Ku Klux Klan who had refused to testify.(15)

CERTIFICATIONS TO THE U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA—ANNOUNCEMENT

THE SPEAKER: The Chair desires to announce that, pursuant to sundry resolutions of the House agreed to on February 2, 1966, he did on February 3, 1966 make certifications to the U.S. attorney, District of Columbia, as follows:

House Resolution 699: The refusal of Robert M. Shelton to produce certain pertinent papers before the Committee on Un-American Activities.

House Resolution 700: The refusal of Calvin Fred Craig to produce certain pertinent papers before the Committee on Un-American Activities.

House Resolution 701: The refusal of James R. Jones to produce certain pertinent papers before the Committee on Un-American Activities.

House Resolution 702: The refusal of Marshall R. Kornegay to produce certain pertinent papers before the Committee on Un-American Activities.

House Resolution 703: The refusal of Robert E. Scoggin to produce certain pertinent papers before the Committee on Un-American Activities.

House Resolution 704: The refusal of Robert Hudgins to produce certain pertinent papers before the Committee on Un-American Activities.

House Resolution 705: The refusal of George Franklin Dorsett to produce certain pertinent papers before the Committee on Un-American Activities.

U.S. Attorney for the District of Columbia and the Northern District of Illinois reports regarding refusals of Martin Popper and Edwin W. Alexander, respectively, to testify before the Committee on Un-American Activities; 98 CONG. REC. 886, 82d Cong. 2d Sess., Feb. 6, 1952, for an announcement by Speaker Rayburn that he had, pursuant to H. Res. 517, certified to the U.S. Attorney for the District of Columbia a report regarding the refusal of Sidney Buchman to appear before the Committee on Un-American Activities; and 92 CONG. REC. 10782, 79th Cong. 2d Sess., Aug. 2, 1946, for an announcement by Speaker Rayburn that he had, pursuant to H. Res. 752 and 749, certified to the U.S. Attorney for the District of Columbia reports regarding refusals of Richard Morford and George Marshall to produce materials to the Committee on Un-American Activities.

15. When the House is in session the Speaker certifies reports of contumacy of witnesses pursuant to authority of the House granted by approval of a simple resolution. When the House is not in session, however, the Speaker certifies a statement of facts of the contumacy pursuant to authority granted by 2 USC §194. See §22.2, supra, in which the Speaker indicated that no action of the House was necessary to authorize him to certify a statement of facts as to a witness' refusal to testify or produce materials received while the Congress was not in session.

§ 22.4 At the next meeting of the House the Speaker announces that he has, during an adjournment to a day certain and pursuant to statute, certified to the U.S. Attorney of the District of Columbia statements of facts regarding the refusal of individuals to testify and produce subpenaed materials before a special committee authorized to make investigations.

On Nov. 14, 1944,[16] the first day after an adjournment to a day certain, Speaker Sam Rayburn, of Texas, announced certification of reports and statements of facts to the U.S. Attorney for the District of Columbia.

EDWARD A. RUMELY AND JOSEPH P. KAMP

THE SPEAKER: The Chair desires to announce that during the past recess of the Congress the Special Committee to Investigate Campaign Expenditures authorized by House Resolution 551, Seventy-eighth Congress, reported to and filed with the Speaker statements of facts concerning the willful and deliberate refusal of Edward A. Rumely of the Committee for Constitutional Government and Joseph P. Kamp of the Constitutional Educational League, Inc., to testify and to produce the books, papers, records, and documents of their respective organizations before the said Special Committee of the House, and the Speaker, pursuant to the mandatory provisions of Public Resolution No. 123, Seventy-fifth Congress, certified to the United States attorney, District of Columbia, the statement of facts concerning the said Edward A. Rumely on September 26, 1944, and the statement of facts concerning the said Joseph P. Kamp on November 2, 1944.

Parliamentarian's Note: Public Law No. 123, to which the Speaker referred, has been codified as 2 USC § 194.[17]

§ 22.5 On one occasion, where the Speaker, during a sine die adjournment and pursuant to statute, had certified to a U.S. Attorney a contempt case arising from a committee and reported to him, he notified the House at its next meeting through its new Speaker, who laid the communication before the House.

On Jan. 5, 1955,[18] Speaker Sam Rayburn, of Texas, laid be-

16. 90 CONG. REC. 8163, 78th Cong. 2d Sess.

17. See § 22.2 supra, which states that no action of the House is necessary in this situation.

18. 101 CONG. REC. 11, 84th Cong. 1st Sess. See also *United States* v *Russell*, 280 F2d 688 (D.C. Cir. 1960), rev'd, 369 U.S. 749 (1962) [defendant's conviction reversed, the court stating that a grand jury indictment must state the question which was under inquiry at time of defendant's default or refusal to answer].

fore the House a communication from the Speaker of the 83d Congress.[19]

MATTER OF LEE LORCH, ROBERT M. METCALF, AND NORTON ANTHONY RUSSELL

The Speaker laid before the House the following communication.

The Clerk read the communication, as follows:

JANUARY 5, 1955.

The SPEAKER,
House of Representatives,
United States, Washington, D.C.

DEAR MR. SPEAKER: I desire to inform the House of Representatives that subsequent to the sine die adjournment of the 83d Congress the Committee on Un-American Activities reported to and filed with me as Speaker a statement of facts concerning the refusal of Lee Lorch, Robert M. Metcalf, and Norton Anthony Russell to answer questions before the said committee of the House, and I, pursuant to the mandatory provisions of Public Resolution 123, 75th Congress, certified to the United States attorney, southern district of Ohio, the statement of facts concerning the said Lee Lorch and Robert M. Metcalf on December 7, 1954, and certified to the United States attorney, District of Columbia, the statement of facts concerning the said Norton Anthony Russell on December 7, 1954.

Respectfully,
JOSEPH W. MARTIN, Jr.[20]

§ 22.6 At the opening meeting of the new Congress, the Speaker announces to the House that he has during the adjournment sine die, as Speaker of the prior Congress, certified to the U.S. Attorney statements of facts regarding the refusal of individuals to testify, before investigating committees.

On Jan. 7, 1959,[1] the opening day of the 86th Congress, Speaker Sam Rayburn, of Texas, notified the House that he had certified statements of facts to U.S. Attorneys.[2]

19. See also 93 CONG. REC. 39, 40, 80th Cong. 1st Sess., Jan. 3, 1947, in which the Speaker of the 80th Congress, Joseph W. Martin, Jr. (Mass.), laid before the House a letter from the Speaker of the 79th Congress, Sam Rayburn (Tex.), relating to his certification subsequent to the *sine die* adjournment of the 79th Congress and pursuant to 2 USC 194, to the U.S. Attorney for the District of Columbia of a statement of facts relating to the refusal of Benjamin J. Fields to produce materials before the Select Committee to Investigate the Disposition of Surplus Property. See also *Fields* v *United States*, 164 F2d 97 (D.C. Cir. 1947), cert. denied, 332 U.S. 851 [defendant's conviction affirmed].

20. Mr. Martin was the Minority Leader of the 84th Congress.

1. 105 CONG. REC. 17, 86th Cong. 1st Sess. See *Wheedlin* v *United States* 283 F2d 535 (9th Cir. 1960), in which the defendant's subsequent conviction for contempt of Congress was affirmed.

2. See also 111 CONG. REC. 25, 89th Cong. 1st Sess., Jan. 4, 1965, for an

COMMITTEE ON UN-AMERICAN ACTIVITIES

THE SPEAKER: The Chair desires to announce that subsequent to the sine die adjournment of the 85th Congress, the Committee on Un-American Activities reported to and filed with the Speaker statements of fact concerning the refusal of Donald Wheedlin and Harvey O'Connor to appear in response to subpenas and to testify before duly constituted subcommittees of the Committee on Un-American Activities of the House of Representatives, and that he did, on January 1, 1959, pursuant to the mandatory provisions of Public Resolution 123, 75th Congress, certify to the U.S. attorney, southern district of California, the statement of facts concerning the said Donald Wheedlin, and to the U.S. attorney, district of New Jersey, the statement of facts concerning the said Harvey O'Connor.

§ 22.7 The Speaker informed the House when he had, pursuant to authority granted him by resolution, certified purgation of contempt to the U.S. Attorney.

On July 26, 1954,[3] Speaker Joseph W. Martin, Jr., of Massachusetts, informed the House that he had certified to the U.S. Attorney for the District of Columbia the report purging Francis X. T. Crowley of contempt.

CITATIONS FOR CONTEMPT

THE SPEAKER: The Chair desires to announce that pursuant to sundry resolutions of the House he did, on Friday, July 23, 1954, make certifications to the United States attorney, District of Columbia, the United States attorney, southern district of California, the United States attorney, eastern district of Michigan, the United States attorney for the district of Oregon, and the United States attorney, western district of Washington, as follows:

TO THE UNITED STATES ATTORNEY, DISTRICT OF COLUMBIA

* * * * *

House Resolution 681, concerning the action of Francis X. T. Crowley in purging himself of contempt of the House of Representatives.

Certification of Contempt as Discretionary

§ 22.8 A divided three-judge federal court has held that the statute (2 USC § 194) au-

announcement by Speaker John W. McCormack (Mass.), that he had, on Dec. 11, 1964, during an adjournment *sine die* of the 88th Congress and pursuant to 2 USC § 194, certified to the U.S. Attorney for the District of Columbia statements of facts regarding refusals of Russell Nixon, Dagmar Wilson, and Donna Allen to testify before the Committee on Un-American Activities. The named defendant's convictions were reversed in *Wilson* v *United States,* 369 F2d 198 (D.C. Cir. 1966). See § 22.8, infra, for discussion of the Wilson case.

3. 100 CONG. REC. 12023, 12024, 83d Cong. 2d Sess.

thorizing the Speaker to certify to a U.S. Attorney any contempt reported by a House committee between legislative sessions is not mandatory, but requires the Speaker to renew the contempt charge and exercise his discretion with respect thereto.

In *Wilson* v *United States,*[4] the court reviewed convictions of Russell Nixon, Dagmar Wilson, and Donna Allen for contempt of Congress based on refusals to answer questions at an executive session conducted by a subcommittee of the House Committee on Un-American Activities. The court reversed the convictions, holding that the alleged contempts had been improperly certified to the U.S. Attorney under the following statute:[5]

> Whenever a witness summoned as mentioned in section 192 . . . fails . . . or . . . refuses to answer any question pertinent to the subject under inquiry before either House . . . or any committee or subcommittee of either House of Congress [and] when Congress is not in session, a statement of fact constituting such failure is reported to . . . the Speaker of the House, it shall be the duty of the . . . Speaker . . . to certify, and he shall so certify, the statement of facts . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

In the view of the court, the Speaker had erred in construing the statute to be mandatory and therefore to prohibit any inquiry by him; accordingly, his "automatic certification" was held to be invalid. In reaching this conclusion, the court stressed the legislative history of the provision and the established practice of the House, both of which, in the court's view, indicated a congressional intention that reports of contempt of Congress be reviewed on their merits by the House involved if in session, or by the Speaker when Congress is not in session.

A dissenting opinion, relying in part on the principle that statutory language is to be interpreted wherever possible in its ordinary, everyday sense, stressed the unambiguous language of the statute itself. The dissent further emphasized the importance of committee reports in studying the legislative history of provisions, and indicated that the reports on the provisions regarding the Speaker's duty to certify contempt charges between sessions revealed an intent to facilitate prompt action in cases of contempt reported at such times. The practice of Congress when in session was not, in the dissenting view, considered to be

4. 369 F2d 198 (D.C. Cir. 1966).

5. 2 USC § 194.

instructive in determining the duty of the Speaker between sessions.

HINDS' PRECEDENTS

OF THE

HOUSE OF REPRESENTATIVES

OF THE

UNITED STATES

INCLUDING REFERENCES TO PROVISIONS
OF THE CONSTITUTION, THE LAWS, AND DECISIONS
OF THE UNITED STATES SENATE

By
ASHER C. HINDS, LL.D.
Clerk at the Speaker's Table

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Chapter LIII.

PUNISHMENT OF WITNESSES FOR CONTEMPT.[1]

1666. The case of Nathaniel Rounsavell, a recalcitrant witness, in 1812.

A witness having declined to answer a pertinent question before a select committee, he was arraigned before the House, and, persisting in contumacy, was committed.

In 1812 the opinion of the House seems to have been against permitting counsel to a contumacious witness arraigned at the bar of the House (footnote).

On April 6, 1812,[2] after the closing of the doors and a secret session, the doors were opened and the following preamble and resolution were agreed to:

Whereas on the 3d day of April, 1812, a committee was appointed to inquire whether there has been any, and, if any, what, violation of the secrecy imposed by this House during the present session as to certain of its proceedings, etc.; and it appearing to this House, by a report made by said committee, that, in pursuance of the powers vested in them, they had called before them Nathaniel Rounsavell for the purpose of obtaining his testimony relative to the subject of the inquiry, and that he has refused to answer on oath certain interrogatories pertinent to the subject about which the committee were empowered to inquire: Therefore,

Resolved, That the Sergeant-at-Arms be directed to bring the said Nathaniel Rounsavell immediately to the bar of this House, to answer such interrogatories as may be propounded to him by the Speaker, under the direction of the House.

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[1] Two important cases, that of Hallet Kilbourn in the House (see sections 1608–1611 of Volume II) and Elverton R. Chapman in the Senate (see sections 1612–1614 of Volume II), might also be included in this chapter, but are classified rather with reference to the prerogatives of the House.

[2] First session Twelfth Congress, Journal, pp. 276, 277, 280; Annals, p. 1266.

Then the House resolved that certain questions be put, the first being "From the conversation of what Member did you collect the information of which you spoke in your deposition before the committee, given on the 4th instant?"

Rounsavell then appeared at the bar of the House, in the custody of the Sergeant-at-Arms, and the Speaker administered him an oath of truthfulness.

Then Rounsavell refused to answer, and it was resolved that he be committed to the custody of the Sergeant-at-Arms until further order of the House. An attempt to interdict his communication with anyone except the Sergeant-at-Arms during confinement failed, 62 to 22.

April 7 the Speaker laid before the House a letter from Rounsavell in which the latter declared that he had no intention of treating the House with disrespect or indecorum, or of violating any of its privileges, or of appearing contumacious in the publication of any of its secret proceedings, etc.

Then it was voted that he should be brought to the bar and questioned. This was done and he professed his readiness to reply. But then a resolution was adopted purging him of contempt, and declaring that, by reason of the explanation of a Member, it was not necessary to inquire further. The Speaker then directed the Sergeant-at-Arms to discharge him.[1]

1667. In 1837, for refusing to obey the subpoena of a committee, Reuben M. Whitney was arrested and tried at the bar of the House.

Discussion of the right of the House to punish for contempt, with reference to English precedents.

In the resolution ordering the arrest and arraignment of Whitney the House at the same time gave him permission to have counsel.

The House ordered that Whitney, under arrest for contempt, should be furnished with a copy of the report as to his alleged contempt before arraignment.

On January 17, 1837,[2] the House agreed to this resolution:

Resolved, That so much of the President's message as relates to the "conduct of the various Executive Departments, the ability and integrity with which they have been conducted, the vigilant and faithful discharge of the public business in all of them, and the causes of complaint, from any quarter, at the manner in which they have fulfilled the objects of their creation," be referred to a select committee, to consist of nine members, with power to send for persons and papers, and with instructions to inquire into the condition of the various Executive Departments, the ability and integrity with which they have been conducted, into the manner in which the public business has been discharged in all of them, and into all causes of complaint from any quarter at the manner in which said departments, or their bureaus or offices, or any of their officers or agents of every description whatever, directly or indirectly connected with them in any manner, officially or unofficially, in duties pertaining to the public

[1] The Annals show that Rounsavell was an editor of the Alexandria Herald, who gave the information to be published in the Georgetown paper called the Spirit of Seventy-six. The information concerned proceedings on the embargo, which went on behind closed doors, and which was published before the injunction of secrecy was removed. The debate on the case of Rounsavell occupied two days in the House. There was doubt of the power of the House to compel the witness to answer, one Member saying that parliamentary history furnished them but one precedent, that of Wilkes. On the other hand, it was urged that as the House had the power to inquire it must have the power to make that inquiry effectual. The question of allowing the prisoner counsel came up, but it was replied that he was a witness, not a prisoner.

[2] Second session Twenty-fourth Congress, Journal, p. 232.

interest, have fulfilled or failed to accomplish the objects of their creation, or have violated their duties, or have injured and impaired the public service and interest; and that said committee, in its inquiries, may refer to such periods of time as to them may seem expedient and proper.

The following were appointed as the committee: Messrs. Henry A. Wise,[1] of Virginia; Dutee J. Pearce, of Rhode Island; Henry A. Muhlenberg, of Pennsylvania; Robert B. Campbell, of South Carolina; Edward A. Hannegan, of Indiana; Gorham Parks, of Maine; Levi Lincoln, of Massachusetts; Abijah Mann, jr., of New York, and John Chaney, of Ohio.

On February 9,[2] Mr. Wise made a report, in pursuance of the following proceeding of the select committee, which he handed in at the Clerk's table:

Reuben M. Whitney, who has been summoned as a witness before this committee, having, by letter,[3] informed the committee of his peremptory refusal to attend, it becomes the duty of the committee to make the House acquainted with the fact: Therefore,

Resolved, That the chairman be directed to report the letter of Reuben M. Whitney to the House, that such order may be taken as the dignity and character of the House require.

On the succeeding day this report was discussed and various propositions were made—to arrest Whitney for contempt, to summon him to appear and show cause why an attachment should not issue against him for contempt, and to cause the committee to report to the House certain circumstances occurring in the committee room during an examination of Whitney on a preceding day. The letter of Whitney was apparently read to the House, but does not appear in the Journal. There was a question as to the right of the House to punish for contempt in such a case, and elaborate arguments were made to show that the precedents of the English parliament could not be followed so far by a house of powers limited by a written constitution.

Finally, the House, by a vote of 99 yeas to 86 nays, agreed to the following:

Resolved, That whereas the select committee of this House, acting by authority of the House under a resolution of the 17th of January last, has reported that Reuben M. Whitney has peremptorily refused to give evidence in obedience to a summons duly issued by said committee, and has addressed to the committee the letter reported by said committee to the House: Therefore,

Resolved, That the Speaker of this House issue his warrant, directed to the Sergeant-at-Arms, to take into custody the person of Reuben M. Whitney, that he may be brought to the bar of the House to answer for an alleged contempt of this House; and that he be allowed counsel on that occasion should he desire it.

1668. The case of Reuben M. Whitney, continued.

In the Whitney case the validity of the subpoena, signed only by the chairman of a committee, was challenged, but sustained.

The respondent retired while the House deliberated on the mode of procedure in a case of contempt.

A person on trial at the bar of the House for contempt was given permission to examine witnesses.

---

[1] Mr. Wise belonged to the minority party, and was made chairman according to the old usage, because he moved the resolution.

[2] Journal, pp. 367–372; Debates, pp. 1685–1707.

[3] For this letter see House Report No. 194, Second session Twenty-fourth Congress, journal of the committee, p. 83. Mr. Whitney declares that he had been insulted and menaced, and declined to appear until his wrongs should be redressed and his safety assured.

In a trial at the bar of the House both questions to witnesses and their answers were reduced to writing and appear in the Journal.

In a trial at the bar of the House for contempt a committee was appointed to examine witnesses for the House.

Rule adopted in the Whitney case for disposing of objections to questions proposed to witnesses.

When a case is on trial at the bar of the House, Members are examined in their places.

In the Whitney case a proposition to examine the respondent was ruled out of order while witnesses were being examined.

On February 11 [1] the Speaker announced to the House that the Sergeant-at-Arms had made return of the service of the warrant against Reuben M. Whitney, and that the said Whitney was in custody.

This announcement was made during proceedings on another matter, at the conclusion of which Mr. John Calhoon, of Kentucky, offered this resolution, which was agreed to:

Resolved, That Reuben M. Whitney, now in custody of the Sergeant-at-Arms, be brought to the bar of this House to answer for an alleged contempt of the House in peremptorily refusing to appear and give evidence as a witness, on a summons duly issued by a select committee acting by the authority of this House, under a resolution of the 17th of January last, and in the matter of a letter, expressing said refusal, addressed by the said Reuben M. Whitney to the committee, and by the committee referred to the House; and that he be forthwith furnished with a copy of the report of said committee, and of the letter aforesaid.

On the succeeding day the Speaker announced to the House that Reuben M. Whitney was in the custody of the Sergeant-at-Arms, without the bar, awaiting the further order of the House in the premises; and that he had been furnished by the Clerk with the copies of papers, as directed by the order of the 11th instant.

Whereupon, on motion of Mr. John M. Patton, of Virginia, it was

Ordered, That Reuben M. Whitney be brought to the bar of the House.

Reuben M. Whitney was then brought to the bar of the House by the Sergeant-at-Arms, when the Speaker addressed him as follows:

Reuben M. Whitney: You have been brought before this House, by its order, to answer the charge of an alleged contempt of this House, in having peremptorily refused to give evidence in obedience to a summons duly issued by a committee of this House; which committee had, by an order of the House, power to send for persons and papers.

Before you are called upon to answer, in any manner, to the subject-matter of this charge, it is my duty, as the presiding officer of this House, to inform you that, by an order of the House, you will be allowed counsel should you desire it. If you have any request to make in relation to this subject, your request will now be received and considered by the House. If, however, you are now ready to proceed in the investigation of the charge, you will state it; and the House will take order accordingly.

To which the said Reuben M. Whitney answered as follows:

The undersigned answers that his refusal to attend the committee, upon the summons of its chairman, was not intended, or believed by him, to be disrespectful to the honorable the House of Representatives; nor does he now believe that he thereby committed a contempt of the House.

His reasons for refusing to attend the committee are truly stated in his letter to that committee.

[1] Journal, pp. 378–382; Debates, pp. 1735–1754.

He did not consider himself bound to obey a summons issued by the chairman of the committee.

He had attended, in obedience to such a summons, before another committee, voluntarily and without objection to the validity of the process; and would have attended in the same way before the present committee but for the belief that he might thereby be exposed to insult and violence.

He denies, therefore, that he has committed a contempt of the House; because,

First. The process upon him was illegal, and he was not bound to obey it; and,

Secondly. Because he could not attend without exposing himself thereby to outrage and violence.

If the House shall decide in favor of the authority of the process, and that the respondent is bound to obey it, then he respectfully asks, in such case, that, in consideration of the peculiar circumstances in which he is placed, as known to the House, the committee may be instructed to receive testimony upon interrogatories to be answered, on oath, before a magistrate, as has been done in other instances in relation to other witnesses; or that the committee be instructed to prohibit the use or introduction of secret and deadly weapons in the committee room during the examination of the witnesses.

And, in case he shall think it necessary, he prays to be heard by counsel, and to be allowed to offer testimony on the matter herein submitted.

R. M. WHITNEY.

The House was proceeding to consider the method of procedure when Mr. John M. Patton, of Virginia, made the point of order that the respondent ought to retire during the deliberations.

The Speaker [1] said that such had been the uniform course in former cases, and, believing it to be the sense of the House, he would direct the Sergeant-at-Arms to take Reuben M. Whitney from the bar, which was done.

Propositions were then made for the appointment of a committee of privileges to report a mode of procedure, and also that the respondent be discharged. Finally, under the operation of the previous question, the House agreed to the following resolution proposed by Mr. Samuel J. Gholson, of Mississippi:

Resolved, That Reuben M. Whitney be now permitted to examine witnesses before this House in relation to his alleged contempt, and that a committee of five be appointed to examine such witnesses on the part of this House; that the questions put shall be reduced to writing before the same are proposed to the witness, and the answers shall also be reduced to writing. Every question put by a Member, not of the committee, shall be reduced to writing by such Member, and be propounded to the witness by the Speaker, if not objected to; but, if any question shall be objected to, or any testimony offered shall be objected to by any Member, the Member so objecting, and the accused or his counsel, shall be heard thereon; after which the question shall be decided without further debate. If parol evidence is offered, the witness shall be sworn by the Speaker and be examined at the bar, unless they are Members of the House, in which case they may be examined in their places.

The following committee was then appointed: Messrs. Gholson, of Mississippi; Levi Lincoln, of Massachusetts; Francis Thomas, of Maryland; Benjamin Hardin, of Kentucky, and George W. Owens, of Georgia.

Reuben M. Whitney was then again placed at the bar and the resolution adopted by the House was read to him; and, being asked by the Speaker if he was ready to proceed in the trial of the case, he answered:

I am not ready to proceed at this time, and ask to be indulged until Wednesday next to make preparation. I herewith hand in a list of names of sundry persons, and respectfully request that they be summoned to attend as witnesses in the trial of the case.

This list, which appears in the Journal, contains the names of four Members of the House and two citizens.

---

[1] James K. Polk, of Tennessee, Speaker.

It was then

Ordered, That further proceedings in this trial be postponed until Wednesday next; and that Reuben M. Whitney be furnished with a copy of the resolution adopted by the House this day.

It was also

Ordered, That subpoenas issue for the witnesses named by Reuben M. Whitney, with directions to attend on Wednesday, the 15th of February instant.

On February 15, 1837,[1] the Sergeant-at-Arms was directed to place Reuben M. Whitney at the bar of the House; whereupon Reuben M. Whitney was placed at the bar of the House, accompanied by Walter Jones and Francis S. Key, as his counsel.

The Speaker addressed him as follows:

Reuben M. Whitney: You stand charged before this House with an alleged contempt of the House, in having peremptorily refused to give evidence in obedience to a summons duly issued by a committee of this House, which committee had, by an order of the House, power to send for persons and papers.

You will say whether you are now ready to proceed to trial, in the mode prescribed by the order of the House, of which you have been informed, or whether you have any request to make of the House before you are put upon your trial; if you have, it will now be received and considered by the House.

To which the said Reuben M. Whitney answered as follows: "I am ready to proceed to trial."

A motion was then made by Mr. George N. Briggs, of Massachusetts, in the words following:

Whereas, by the Eleventh rule of this House, all acts, addresses, and joint resolutions shall be signed by the Speaker; and all writs, warrants, and subpoenas, issued by order of the House, shall be under his hand and seal, attested by the Clerk;[2]

And whereas, the subpoena by virtue of which Reuben M. Whitney, now in the custody of the Sergeant-at-Arms of the House, by order of the House, for an alleged contempt, for refusing to appear and give testimony before one of the select committees of the House, was not under the hand and seal of the Speaker, attested by the Clerk, but signed by the chairman of the said select committee; therefore,

Resolved, That the refusal of Reuben M. Whitney to appear before said committee was not a contempt of this House.

Resolved, That said Whitney be forthwith discharged from the custody of this House.

In the course of debate on this resolution Mr. Abijah Mann, jr., of New York, said that this question had been raised in several other cases, notably in the committee sent to Philadelphia to investigate the affairs of the Bank of the United States. In the latter case the committee were called upon to issue the highest process in its power; and the question was then raised and mooted, with a former Speaker or with the present, he was not certain which, whether the process issued by that committee, under the powers given them to send for persons and papers, should be signed by the Speaker of the House and attested by the Clerk. The committee decided, and in that decision, if he was not mistaken, the incumbent of the chair coincided, that the summons the committee were authorized to issue, by the power to send for persons and papers, need only be signed by the chairman of that committee. When

[1] Second session Twenty-fourth Congress, Journal, pp. 407–417; Debates, pp. 1760–1773.

[2] For the forms of this rule at different periods, see sections 251 of Volume I and 1313 of Volume 11 of this work.

the House issued an order or warrant in a particular case, under this rule, the Speaker must issue the summons under his hand and seal, and it must be attested by the Clerk; but when the power was granted to a committee to send for persons and papers in a particular case, a summons signed by the chairman of the committee was sufficient.

The motion of Mr. Briggs was ordered to lie on the table by a vote of 157 yeas to 33 nays.

The House having voted to proceed, those witnesses who were Members of the House were called and sworn. Mr. John Fairfield, of Maine, was first examined. To the first question, addressed by the accused to the witness, Mr. John Calhoon, of Kentucky, objected, and was heard in support of his objection. The counsel of the accused was also heard in support of the interrogatory.

The Speaker was about to put the question, "Shall the interrogatory be propounded to the witness?" when Mr. John Bell, of Tennessee, asked the sense of the House to be taken whether, under the order of the House, the Member objecting to a question has not the right to reply to the counsel of the accused.

And the question being put to the House, "Shall a Member who objects to a question have the right to reply to the counsel of the accused?"

And it passed in the negative—yeas 94, nays 103.

Then the question was put, "Shall the interrogatory be put to the witness?" and it passed in the affirmative—yeas 131, nays 52.

While the witness was framing his answer Mr. John Chambers, of Kentucky, offered the following resolution:

Resolved, That the further examination of witnesses in the case of Reuben M. Whitney be suspended until he be examined on oath, touching the contempt of this House alleged against him; and that the committee appointed to examine witnesses in his case proceed to examine him accordingly.

The Speaker decided that, at this stage of the proceeding, the resolution was not in order.

Mr. Chambers having appealed, the appeal was laid on the table—yeas 104, nays, 66.

Mr. Fairfield then answered, and was questioned by the committee and by various Members.

Then, on motion of Mr. Thomas, it was

Ordered, That further proceedings in the case of R. M. Whitney be postponed until 12 o'clock to-morrow; and that the Clerk of the House furnish to the three other witnesses, Members of this House, who are sworn, copies of all the questions that have been propounded to the witness just examined, that they may be prepared to answer them in writing to-morrow.

The examination of witnesses was continued until February 20,[1] the record of questions and answers appearing in the Journal. From the examination it appeared that there had been personal difficulty between the respondent and Messrs. Peyton and Wise of the investigating committee, and that there had occurred in the committee room a difference which had seemed likely at one time to result in the use of weapons. The idea that the witness had been deterred by fear from

[1] Journal, p. 489; Debates, p. 1879.

responding to the subpoena of the committee was broached. Finally Mr. Amos Lane, of Indiana, offered this resolution:

Resolved, That it is inexpedient to prosecute further the inquiry into the alleged contempt of R. M. Whitney against the authority of this House; and that the said Whitney be now discharged from custody.

This resolution was agreed to, yeas 99, nays 72.

And the said Reuben M. Whitney was discharged accordingly.

1669. James W. Simonton, a witness before a House committee, was arrested and arraigned at the bar for declining to answer a material question.

In the absence of the Sergeant-at-Arms his deputy, by special resolution of the House, was empowered to serve a warrant.

Form of arraignment of a recalcitrant witness at the bar of the House.

A witness arraigned at the bar of the House for contempt was permitted to answer orally.

A recalcitrant witness, having remained obdurate when arraigned at the bar, was committed to custody.

Form of resolution authorizing investigation of published statements that Members had entered into corrupt combinations in relation to legislation.

Instance wherein a newspaper correspondent was expelled from the House for an offense connected with pending legislation.

On January 9, 1857,[1] the House agreed to the following:

Whereas certain statements have been published charging that Members of this House have entered into corrupt combinations for the purpose of passing and of preventing the passage of certain measures now pending before Congress; and whereas a Member of this House has stated that the article referred to "is not wanting in truth:" Therefore,

Resolved, That a committee, consisting of five Members, be appointed by the Speaker, with power to send for persons and papers, to investigate said charges; and that said committee report the evidence taken, and what action, in their judgment, is necessary on the part of the House, without any unnecessary delay.

On January 21,[2] Mr. James L. Orr, of South Carolina, from this committee, made the following report:

That during the progress of their investigation they have summoned as a witness J. W. Simonton, the correspondent of the New York Times; that among others, the following question was propounded to him: "You state that certain Members have approached you, and have desired to know if they could not, through you, procure money for their votes on certain bills; will you state who these Members were?"

And the said Simonton made thereto the following response: "I can not, without a violation of confidence, than which I would rather suffer anything."

In response to other questions of similar import, he said: "Two have made them direct; others have indicated to me a desire to talk with me upon these subjects, and I have warded it off, not giving them an opportunity to make an explicit proposition."

To the question, "What do I understand you to mean when you say these communications were made direct?"

Simonton replied. "I mean that, after having obtained my promise of secrecy in regard to them, they have said to me that certain measures pending before Congress ought to pay; that parties interested

[1] Third session Thirty-fourth Congress. Journal, p. 201; Globe, pp. 274–277.

[2] Journal, pp. 269–271; Globe, p. 403.

in them had the means to pay; that they individually needed money, and desired me specifically to arrange the matter in such way that if the measures passed they should receive pecuniary compensation."

The committee were impressed with the materiality of the testimony withheld by the witness, as it embraced the letter and spirit of the inquiry directed by the House to be made, but were anxious to avoid any controversy with the witness. They consequently waived the interrogatory that day to give the witness time for reflection on the consequences of his refusal, and to give him an opportunity to look into the law and practice of the House in such cases, notifying him that he would, on some subsequent day, be recalled. This was the 15th of January instant. On Tuesday, the 20th instant, the said J. W. Simonton was recalled, and the identical question first referred to was again propounded, after due notice to him that if he declined the committee would feel constrained to report his declination to the House and ask that body to enforce all its powers in the premises to compel a full and complete response. To that interrogatory he made the following reply, and we give it in full, that no injustice may be done to Simonton in this report. He said:

"Before stating the determination to which I have come on this subject I desire to say that I do not here dispute the power of the committee and I have not heretofore declined to answer the question upon any such ground. I have all respect for the committee and the House. I do not decline in order to screen the Members; my declination was based upon my convictions of duty. Since I was last before the committee, in deference to their judgment and wishes I have examined the case of Anderson *v.* Dunn, to which they referred me, and have considered very fully what I ought to do, in view of that decision as well as in view of other considerations. The result of my deliberations upon the subject has been to confirm me in the opinion that, whatever penalty I may suffer, I can not answer that question. I beg the committee to understand that I have no other motive whatever in declining but the simple one that I have stated before—that I do not see how I can answer it without a dishonorable breach of confidence. The answer to the question can by no possibility be supposed to reflect discredit upon myself, and I presume that my statement of that motive is corroborated by the facts as they appear before the committee. I must insist upon declining to answer that question."

The House will preceive that the foregoing statement shows the materiality of the testimony, and the duty of the committee to insist upon its disclosure. It shows the settled and deliberate purpose of the witness to withhold such testimony rightfully and properly demanded, and the absolute necessity for the House to interpose, with promptitude and firmness, its authority, if it intended to expose and punish corruption which may exist among its Members by ordering the investigation your committee have been pursuing, etc.

The committee consider it unnecessary to enter into an elaborate argument to establish the power of the House in this case. The summons issued under the hand of the Speaker, and was tested by the Clerk of the House; and the contumacy of the witness is a contempt of that authority. If there is doubt whether this authorizes the arrest of the party in contempt, and his confinement until the contempt is purged, besides the right to inflict other punishment afterwards, it seems to your committee that none will question the authority of the House when they recur to the statute book. By an act passed May 3, 1798 (1 U. S. Statutes, 554), authority is given to the President of the Senate, the Speaker of the House of Representatives, a Chairman of the Committee of the Whole, or a chairman of a select committee of either House, to administer oaths to witnesses in any case under their examination, and willful, absolute, and false swearing before either is declared perjury and is punishable as such. Here is express authority to swear witnesses; and false swearing is punishable as perjury. Is it, then, no contempt of the authority of this House (and the committee are acting as and for the House in this investigation) for a witness to refuse to testify to material facts within his knowledge?

The committee concur unanimously in the opinion that the House is clothed with ample power to order the party into custody, there to remain until released by the same authority or upon the expiration of the present Congress. The committee recommend the adoption of the following resolution:

"*Resolved,* That the Speaker issue his warrant, directed to the Sergeant-at-Arms, commanding him (the said Sergeant-at-Arms) to take into custody the body of the said James W. Simonton, wherever to be found, and the same forthwith to have before the said House," at the bar thereof, to answer as for a contempt of the authority of this House—accompanied by a bill (H. R. 757) more effectually to enforce the attendance of witnesses on the summons of either House of Congress and to compel them to discover testimony.[1]

[1] This bill became the act of January 24, 1857 (Stat. L., Vol. II p. 155).

The resolution ordering the arrest of Simonton was agreed to, yeas 164, nays 16.

A warrant pursuant to the said resolution was accordingly prepared, signed by the Speaker, under the seal of the House, attested by the clerk, and delivered to William G. Flood, clerk of the Sergeant-at-Arms, the latter being absent.

Subsequently, on motion of Mr. Orr, the House agreed to the following:

Resolved, That in the absence of A. J. Glosbrenner, Sergeant-at-Arms, on the business of the House, it is ordered that William G. Flood, clerk of the Sergeant-at-Arms, be authorized and directed to execute the orders of the House, directed to the Sergeant-at-Arms, during the absence of the said Sergeant-at-Arms.

Soon after William G. Flood appeared at the bar of the House and reported that he had executed the warrant of the Speaker, and that he had the body of J. W. Simonton at the bar of the House.

Thereupon a question arose as to the proper mode of procedure. Mr. Henry Winter Davis, of Maryland, proposed this resolution:

Resolved, That the Speaker do read to the person in custody the proceedings of the House touching the alleged contempt of the prisoner, and do call on him to show cause why he should not be committed for his refusal to answer the questions propounded to him by the select committee, and that he have leave to be heard now, or to-morrow at 1 o'clock, and that he have the aid of counsel if he desires it, and that in the mean time he remain in the custody of the Sergeant-at-Arms.

This resolution was criticised on the ground that it opened again the question of the witness's contempt, which was ascertained and was the justification of the arrest. Finally the House agreed to the following substitute resolution, presented by Mr. Robert P. Trippe, of Georgia, and, modified in accordance with suggestions from Mr. Orr:

Resolved, That the Speaker do forthwith inform J. W. Simonton of the charge upon which he has been arrested, and propound to him the question: Are you ready to show cause why you should not be further proceeded against for the said alleged contempt, and do you desire to be heard in person or by counsel, now or at what time?

The said J. W. Simonton was thereupon arraigned, when the Speaker addressed him as follows:

James W. Simonton: You have been arrested by the order of the House, and now stand at its bar charged with an alleged contempt of its authority in refusing to answer questions propounded to you by the select committee appointed to make investigations in relation to certain charges made against the honor and character of the House. The report of the committee, upon which the arrest has been made, will be read to you.

The said report having been read, the Speaker resumed:

The resolution which has been read to you has been adopted by the House, and in virtue thereof you have been arrested and now stand at the bar chax-ged with the offense named. In obedience to the instructions of the House, I now put to you the following interrogatories: "Are you ready to show cause why you should not be further proceeded against for the said alleged contempt, and do you desire to be heard in person or by counsel, now or at what time?"

In response to the address of the Speaker, the witness at the bar signified his desire to answer orally. The Speaker thereupon propounded the question: Shall he have leave to answer orally?

Thereupon a discussion arose, Mr. Hunphrey Marshall, of Kentucky, insisting that the witness should purge himself of contempt in writing and under oath; but the House decided the question in the affirmative.

Mr. Simonton thereupon addressed the House at some length, concluding with the request that he might be heard further hereafter by counsel.

The House then considered the disposition of the respondent, several propositions being made—to confine him in the common jail, to expel him from his reporters' seat on the floor, etc.; but finally the following was agreed to, yeas 136, nays 23:

J. W. Simonton having appeared at the bar of the House, according to its order, and the cause assigned for the said contempt being insufficient: Therefore,

Resolved, That the said J. W. Simonton be continued in close custody by the Sergeant-at-Arms, or, in his absence, by Mr. William G. Flood, during the balance of this session, or until discharged by the further order of the House, to be taken when he shall have purged the contempt upon which he was arrested, by testifying before said committee.

On February 2[1] Mr. Kelsey, claiming the floor on a question of privilege, offered this resolution, which was agreed to without debate:

Resolved, That the Sergeant-at-Arms of this House be, and he is hereby, instructed to bring James W. Simonton, now in his custody by order of the House, before the select committee appointed on the 9th ultimo, to answer, on the summons of the Speaker, such questions as may be propounded to him touching the subject-matter of said investigation by said committee.

On February 9[2] Mr. Kelsey, from the select committee, reported that J. W. Simonton had again been summoned before the committee, and his answers to the questions propounded to him were such as to render unnecessary any further examination. Under these circumstances they did not desire that he be detained longer in custody, and therefore recommended the adoption of the following:

Resolved, That James W. Simonton, now in custody of the Sergeant-at-Arms of this House, be discharged.

This resolution was agreed to.

On February 28, on report of the committee, Simonton was expelled from his seat as a reporter on the floor.

1670. In 1857 the House arrested and arraigned at its bar Joseph L. Chester, a contumacious witness.

A contumacious witness arraigned at the bar of the House was required to answer in writing and under oath.

A contumacious witness having given a respectful and sufficient answer at the bar of the House was ordered to be discharged.

On January 16, 1857,[3] Mr. William H. Kelsey, of New York, as a question of privilege, from the Select Committee on Certain Alleged Corrupt Combinations,[4] reported the following preamble and resolution:

Whereas Joseph L. Chester has been duly summoned to appear and testify before a committee of this House, appointed, in pursuance of a resolution passed on the 9th instant, to investigate certain charges of corrupt combinations of Members of this House for the purpose of passing and of preventing the passage of certain measures during the present Congress; and whereas the said Joseph L. Chester has neglected to appear before said committee pursuant to said summons; therefore,

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[1] Journal, p. 338; Globe, p. 538.

[2] Journal, p. 384; Globe, p. 630.

[3] Third session Thirty-fourth Congress, Journal, p. 241; Globe, p. 356.

[4] See preceding section for authorization of this committee.

Resolved, That the Speaker issue his warrant, directed to the Sergeant-at-Arms, commanding him, the said Sergeant-at-Arms, to take into custody the body of the said Joseph L, Chester, wherever to be found, and the same forthwith to have before the said House, at the bar thereof, to answer as for a contempt of the authority of this House.

It being objected that the House had no power to arrest the man, it was replied by Mr. James L. Orr, of South Carolina, that the language of the resolution was exactly that used for the arrest of the man who offered a bribe to Mr. Lewis Williams in 1818,[2] a case in which the Supreme Court had sustained the right of the House.

The resolution was then agreed to and a warrant was issued accordingly.

On January 24[2] the Sergeant-at-Arms appeared at the bar of the House and reported that, in pursuance of the warrant of the Speaker of the 16th instant, he had arrested Joseph L. Chester, and had him then at the bar of the House.

Mr. Kelsey submitted the following resolution, which was agreed to under the operation of the previous question:

Resolved, That the Speaker propound to Joseph L. Chester the following questions, viz:

What excuse have you for not appearing before the select committee of this House pursuant to the summons served on you on the 14th instant?

Are you ready to appear before said committee and answer to such proper questions as shall be put to you by said committee?

Mr. John Letcher, of Virginia, moved that the respondent be required to answer in writing and under oath. After debate as to the practice in analogous cases in the States, the motion was agreed to. The said Chester was conducted from the bar by the Sergeant-at-Arms.

On January 26 the Sergeant-at-Arms appeared at the bar and announced that Joseph L. Chester, heretofore arrested under the warrant of the Speaker, was now ready to answer the questions which the House had directed should be propounded to him.

The said Chester was arraigned thereupon and the following questions put to him by the Speaker:

(Here follow the two questions as above.)

Thereupon the said Chester handed to the Clerk, as his answer to the said interrogatories, a paper which was read, and appears in the journal of the House. This answer appears with the fact that it was sworn to and subscribed, duly certified by a justice of the peace. It is as follows:

To the Honorable Speaker of the House of Representatives of the United States:

To the first interrogatory propounded to me under the resolution of the House of the 24th instant, I respectfully answer that in departing from this city the day after having been subpoenaed to appear before the committee, I neither entertained nor intended any disrespect whatever to the committee or to the House; but having made arrangements before the service of the subpoena to leave for my home in Philadelphia on private business of emergency, after having been absent for a period of six weeks, I could not, without great detriment to my own affairs postpone my visit. I had every reason to believe that the committee would yet be in session some days, and, not having read the subpoena carefully, nor observed the clause requiring me not to depart without leave; and presuming that my appearance before the committee on Monday morning at farthest would be in sufficient time for their purpose, I left, announcing to Russell Frisbie, jr., with whom I board, my intention to return the next night,

[1] See section 1607 of volume II of this work.

[2] Third session Thirty-fourth Congress, Journal, pp. 291, 292, 302, 303; Globe, pp. 458, 475, 476.

if possible, so as to be before the committee even on Saturday. Indeed, I did not imagine, under the exigencies of my own private affairs, that it was absolutely necessary that I should appear before the committee on the exact day; and, had not the recent storm intervened, I should have been of my own accord before the committee on Wednesday last, without the services of the Sergeant-at-Arms. That officer I am sure will bear me witness that I evinced no disposition, either by habeas corpus or otherwise, to evade the arrest or a return to Washington. So occupied was I with my business at home that I did not even read or hear of the proceedings of the House in my case until late on Saturday, the 17th, when I went quietly to my home and there remained with my family awaiting the arrival of your officer. From all which I trust that your honorable body will attribute to me no disrespect nor disposition to avoid its mandate.

To the second interrogatory, I answer that I am entirely ready and willing so to appear and answer.

JOSEPH L. CHESTER.

And then it was

Ordered, That inasmuch as the answers of Joseph L. Chester are respectful and sufficient he be discharged from custody.

1671. In 1858 the House imprisoned John W. Wolcott for contempt in refusing as a witness to answer a question which he contended was inquisitorial, but which the House held to be pertinent.

A committee, in reporting the contumacy of a witness, included a transcript of the testimony, so as to show in what the contempt consisted.

A witness contumacious before a committee is not given a second opportunity in the committee before the House orders his arrest for contempt.

Form of warrant and return in case of arrest of a witness for contumacy.

Form of arraignment adopted in the Wolcott case.

In the Wolcott case the respondent, when arraigned, presented two answers, each in writing, sworn and subscribed, one of which appears in the Journal, while the other does not.

In the Wolcott case the House provided that the resolution ordering him to be taken into custody should be a sufficient warrant.

On January 15, 1858,[1] the House had agreed to the following resolution:

Resolved, That a committee of five Members be appointed to investigate the charges preferred against the Members and officers of the last Congress growing out of the disbursements of any sum of money by Lawrence, Stone & Co., of Boston, or other persons, and report the facts and evidence to the House, with such recommendations as they may deem proper, with authority to send for persons and papers.

The committee was, on January 18, constituted as follows: Messrs. Benjamin Stanton, of Ohio; Sydenham Moore, of Alabama; John C. Kunkel, of Pennsylvania; Augustus R. Wright, of Georgia, and William F. Russell, of New York.

On February 11[2] they made a report of the contumacy of John W. Wolcott, of Boston, Mass., bringing to the attention of the House the following testimony:

Q. Had you any funds placed in your hands, belonging to any of the manufacturers in Massachusetts, for the purpose of influencing Members of Congress upon the passage of the tariff act?—A. I had not.

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[1] First session Thirty-fifth Congress, Journal, pp. 178, 185.

[2] Journal, p. 371; Globe, pp. 684–692.

Q. Were you ever authorized by any of them to make any promises of future benefits, in the event of the passage of that act?—A. I was not.

Q. Did you, after the close of the last session of Congress, receive from the manufacturers, either in Boston or elsewhere, any funds, money, negotiable securities, or anything of that sort, to be used in that way?—A. No, sir.

Q. Did you, at any time during the months of March or April, 1857, receive from Mr. Stone any negotiable securities, or money, or credits of any kind?—A. Never. Never for any such purpose as that, either directly or indirectly.

Q. Did you receive at any time in the early part of March a considerable sum of securities for any purpose?—A. Never for any purpose connected with the tariff, either to be paid to Members of Congress, for the purpose of influencing their action, or to be paid to their agents.

Q. Nor for their benefit?—A. Nor for their benefit, either directly or indirectly.

Q. Nor in satisfaction of previous arrangements or promises?—A. Nor in satisfaction of previous arrangements or promises.

Q. Did you receive any securities at any time during the month of March last to the amount of $30,000 at one time?—A. Not for any purpose of that sort.

Q. Did you ever for any purpose?—A. Well, that would be a matter of strictly private business; I did not for the purpose of influencing Members of Congress or their agents.

The committee report that thereupon the witness asked and was granted time to consult counsel in regard to his obligation to answer the last question. On March 11 he again appeared and peremptorily refused to answer, as follows:

Q. Did you receive from the firm of Lawrence, Stone & Co. some time in March last a sum of securities or money of the amount of $30,000, more or less?—A. I did not, in March last nor at any other time, receive from Lawrence, Stone & Co. any money or securities of any amount for the purpose of influencing, or to be used in influencing, directly or indirectly, the action or vote of any Member or officer of the present or last Congress upon the tariff or any other act or measure considered by Congress, or before it, or contemplated to be before it; nor did I ever pay or promise to pay, directly or indirectly, any money or pecuniary consideration to any officer or Member of any Congress for his vote or services in the passage of, or to influence his action in relation to, the tariff or any other law; nor did I ever give any money or securities to any person for the purpose of being paid to any officer or Member of Congress for his vote or influence, directly or indirectly, upon any act under the consideration of Congress; nor have I any knowledge that any such act or thing was done by any other person.

I am advised by my counsel, Messrs. Reverdy Johnson and James M. Keith, whose opinion I have obtained since the present question was propounded to me, that the above answer is a full answer to everything which such a question may involve, falling under the jurisdiction of the House of Representatives, touching the inquiry which the committee axe constituted, and could only be constituted, to investigate. And, acting under the same legal advice, I most respectfully submit that the question in its present form is not of itself "pertinent" to the only inquiry which the House, in this instance, has a legal right to institute.

If, acting under such a power, a committee of the House can compel a witness to answer such a question as this except by saying that he did not use at all, directly or indirectly, any money, coming from any quarter, to influence, directly or indirectly, the action or vote of any Member of Congress, and that he has never paid any money to any one for such a purpose, and has no knowledge that any money was used for that purpose, or any other illegal purpose, regarding Congress or any of its officers, I respectfully submit that it gives to the committee or the House the right to inquire into my private business and social relations, which, except so far as they may tend to prove the alleged improper influencing of Members of Congress in some official duty, is as much beyond the jurisdiction of the House, and, of course, of the committee, as it would be beyond their power to investigate the private business and social relations of any other citizen, without such a charge or implication of corruption, or attempt to corrupt Congress or any of its Members, having been made.

The committee in the report then go on to say that as they have evidence that the firm of Lawrence, Stone & Co. paid to Wolcott, early in March, 1857, the sum of $58,000 in two payments, one of $33,000 and the other of $25,000, which

constituted a part of a charge of $87,000, which appeared on the books of the firm to have been expended in procuring the passage of the tariff of 1857, they believe it to be very material and important to the elucidation of the matter referred to them to know from Mr. Wolcott whether he admits the receipt of any such sum; and if so, how it was expended.

The committee thereupon recommend the adoption of this resolution:

Resolved, That the Speaker be, and he is hereby, authorized and required to issue his warrant to the Sergeant-at-Arms of this House, commanding him to arrest the said John W. Wolcott wheresoever he may be found, and have his body at the bar of the House forthwith to answer as for contempt in refusing to answer a proper and competent question propounded to him by a select committee of the House, in pursuance of the authority conferred by the House upon said committee.

This resolution was debated at length in respect to the sufficiency of the witness's answers; and also the House considered whether the fact of the contumacy should not be certified to the district attorney in accordance with the provisions of the statute recently enacted; also whether the witness was actually in contempt until the House had passed upon the questions propounded by the committee and given the witness a second opportunity to answer.

An amendment proposed by Mr. Daniel E. Sickles, of New York, proposed that the witness be again subpoenaed before the committee and that the interrogatory be again propounded to him, and then, if the answer should not be given freely and fully, the Speaker should issue his warrant for the arrest of the witness and that he should be brought before the bar of the House to show cause why he should not be punished for contempt. This amendment was disagreed to.

The original resolution as reported from the committee was agreed to, after a consideration of the answers of the witness and the powers of the House.

On February 12,[1] the Sergeant-at-Arms appeared at the bar of the House and reported that, in obedience to the warrant of the Speaker of the 11th instant, he had arrested John W. Wolcott, and now produced the said Wolcott in person to answer the same. This return seems to have been made in writing and to have been reported to the House by the Speaker:

In obedience to the written warrant, I arrested the within-named John W. Wolcott at his lodgings in this city (at Willard's Hotel) this 11th day of February, 1858.

And now, February 12, 1858, I produce the within-named John W. Wolcott in person at the bar of the House of Representatives to answer as within ordered.

A. J. GLOSSBRENNEN,
Sergeant-at-Arms, Howe of Representatives, United States.

The warrant of the Speaker was as follows:

To A. J. Glossbrenner, Sergeant-at-Arms of the House of Representatives:

You are hereby commanded to arrest John W. Wolcott, wheresoever he may be found, and have his body at the bar of the House forthwith to answer as for a contempt in refusing to answer a proper and competent question propounded to him by a select committee of the House of Representatives, in pursuance of the authority cord erred by the House upon said committee.

Witness my hand and the seal of the House of Representatives of the United States at the city of Washington this 11th day of February, 1858.

[L. S.]

JAMES L. ORR, *Speaker.*

Attest:

J. C. ALLEN, *Clerk.*

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[1] Journal, pp. 373, 374; Globe, p. 690.

Mr. Stanton submitted, as in accordance with the established practice of the House, the following resolution:

Resolved, That John W. Wolcott be now arraigned at the bar of the House and that the Speaker propound to him the following interrogatories:

"What excuse have you for refusing to answer the question propounded to you by the select committee of this House, before whom you were summoned to appear, as to whether you had received any sum of money from Lawrence, Stone & Co. some time in March, 1857?

"Are you now ready to answer that and all other questions that may be propounded to you by that committee?"

And that the said John W. Wolcott be required to answer the same in writing and under oath.

This resolution was agreed to without division, and thereupon the said Wolcott was arraigned and the interrogatories directed by the foregoing resolution were propounded to him by the Speaker.

The said Wolcott then submitted a paper in writing, subscribed and sworn to before the Speaker. This paper, which appears in full in the Journal, disclaims all intention of contempt of the House and asks until Monday, with the assistance of counsel, to purge himself of the alleged contempt.

After some debate, the following was agreed to:

Resolved, That J. W. Wolcott have until Monday next, at 1 o'clock p. m., to file his answers to the interrogatories propounded to him, and that in the meantime he remain in the custody of the Sergeant-at-Arms, with the privilege of seeing counsel.

On February 15,[1] the Sergeant-at-Arms appeared at the bar of the House with J. W. Wolcott, who submitted a paper in writing, under oath, in answer to the interrogatories heretofore propounded to him. This paper does not appear in the Journal of the House. It is a lengthy argument to show that the committee had no right to ask any question except such as related to the subject committed to them by the House by the resolution authorizing the committee. But the last question was not within the power of the House to authorize. It was not a pertinent question to the inquiry and it invaded the private affairs of a citizen. The decision of the Supreme Court in the case of Anderson *v.* Dunn was reviewed briefly, as well as the act of January 24, 1857, and the conclusion is reached that the committee had no authority to ask any but questions pertinent to the inquiry. And the refusal to answer an inquiry which was made without authority or was impertinent was not contempt. The respondent called attention to the fact that he had answered fully all the antecedent questions relating to the use of money to influence improperly the House. But the last inquiry, in his view, concerned his private business, which, he claimed, the House had no power to inquire into.

1672. The case of John W. Wolcott, continued.

A resolution relating to the discharge of a person in custody for contempt, is a matter of privilege.

Although the House imprisoned Wolcott for contempt, the Speaker also certified the case to the district attorney, in pursuance of law.

The Journal did not record the Speaker's act in certifying the Wolcott case to the district attorney.

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[1] Journal, p. 386; Globe, p. 711.

A witness imprisoned by the House for contempt was indicted under the law, whereupon the House ordered his delivery to the officers of the court.

The answer of the witness having been read, Mr. Stanton offered the following:

Whereas John W. Wolcott has failed satisfactorily to answer the questions propounded to him by order of this House and has not purged himself of the contempt with which he stands charged: Therefore be it

Resolved, That the said John W. Wolcott be committed by the Sergeant-at-Arms to the common jail of the District of Columbia, to be kept in close custody until he shall signify his willingness to answer the questions propounded to him by the select committee of this House, and all other legal and proper questions that may be propounded to him by said committee; and for the commitment and detention of the said John W. Wolcott this resolution shall be a sufficient warrant.

Resolved, That whenever the officer having the said John W. Wolcott in custody shall be informed by said Wolcott that he is ready and willing to answer the questions heretofore propounded, and all proper and legal questions that may hereafter be propounded to him by said committee, it shall be the duty of such officer to deliver the said John W. Wolcott over to the Sergeant-at-arms of this House, whose duty it shall be to take the said Wolcott immediately before the committee before whom he was summoned to appear for examination and to hold him in custody, subject to the further order of the House.

After debate, and after the House had refused, yeas 34, nays 158, to lay the resolutions on the table, they were agreed to, yeas 133, nays 55.

On March 22,[1] Mr. Alexander H. Stephens, of Georgia, offered the following resolution, with a preamble, as a question of privilege:

Whereas on the 15th day of February last, this House, by its resolution, did commit John W. Wolcott to the common jail of the District of Columbia for an infringement of the privileges of the House in refusing satisfactorily to answer certain questions put to him by order of the House, and is still held in custody under said order; and whereas afterwards, in pursuance with the provisions of law, the Speaker of the House did certify to the district attorney of the District of Columbia the facts pertaining to said case,[2] and the same were laid before the grand jury of said District, and a presentment was thereupon found against said Wolcott for the same offense; and whereas the court in which said presentment is pending have determined that said Wolcott can not be tried on said presentment so long as this House hold him in custody under its rights of privilege: Therefore,

Resolved, That the Sergeant-at-Arms is hereby authorized and directed to cause said Wolcott to be released from jail and to deliver him over to the marshal of said District of Columbia, or other person authorized to receive him, to answer to the presentment pending in said court.

Mr. John Letcher, of Virginia, made the point of order that this resolution might not be presented as a question of privilege.

The Speaker[3] said:

The witness is under execution of the sentence of the House. The order of the House has not been executed. It is being executed. The witness is in prison because of his breach of the privilege of the House, inasmuch as he was adjudged to be guilty of a contempt of the House in refusing to answer a proper and pertinent question propounded to him by one of the committees of the House. The matter came before the House as a question of privilege. He was imprisoned by virtue of the order of the House arising out of that question of privilege; and the Chair is of opinion that the resolution presented, under the circumstances, involves a question of privilege.

Debate arose as to whether it would be advisable to release the prisoner unconditionally or merely to suspend the execution of the order of the House for the con-

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[1] Journal, p. 535; Globe, p. 1239.

[2] The Journal does not appear to have any reference to this certification.

[3] James L. Orr, of South Carolina, Speaker.

venience of the court, but the latter proposition was disagreed to. Also the House, by a vote of 22 yeas to 161 nays, disagreed to a proposition to discharge the prisoner unconditionally.

The resolution of Mr. Stephens was then agreed to, yeas, 125; nays, 67. The preamble was also agreed to.[1]

1673. In 1858 the House arrested and arraigned J. D. Williamson for contempt in declining to respond to a subpoena.

Form of subpoena and return used in the case of Williamson.

The Sergeant-at-Arms indorses on a subpoena his authorization of his deputy to act in his stead.

The Sergeant-at-Arms, having arrested Williamson by order of the House, made his return verbally.

Form of arraignment adopted in the case of Williamson.

A witness arraigned for contempt, having in his answer questioned the power of the House, was permitted to file an amended answer, which was printed in full in the Journal.

On February 1, 1858,[2] Mr. Benjamin Stanton, of Ohio, from the select committee appointed to investigate certain alleged corruption in connection with recent tariff legislation, reported the following preamble and resolution:

Whereas J. D. Williamson, of the city of New York, was, on the 27th day of January, A. D., 1858, duly summoned to appear and testify before a committee of this House, appointed to investigate certain charges growing out of the alleged expenditure of money by Lawrence, Stone & Co., of Boston, in the State of Massachusetts, to influence the passage of the tariff of 1857, and has failed and refused to appear before said committee pursuant to said summons: Therefore

Resolved, That the Speaker issue his warrant directed to the Sergeant-at-Arms, commanding him to take into his custody the body of the said J. D. Williamson wherever to be found, and to have the same forthwith before the bar of this House to answer as for a contempt of the authority of this House.

Mr. Stanton also reported for the information of the House the subpoena and the returns thereon, and the answer of Mr. Williamson to the officer of the House. The subpoena was as follows:

By the authority of the House of Representatives of the Congress of the United States of America.

To A. J. Glossbrenner, Sergeant-at-Arms:

You are hereby commanded to summon Captain J. D. Williamson (of the firm of Williamson, O'Reilly & Co., Trinity buildings, New York,) to be and appear before the select committee of the House of Representatives of the United States, appointed to investigate the charges preferred against Members and officers of the last Congress growing out of the disbursement of any sum of money by Lawrence, Stone & Co,, of Boston, or other persons, to bring with him any papers in his possession connected with or referring to the expenditure of money to procure the passage of the law modifying the tariff, forthwith in their chamber at their Capitol in the city of Washington, then there to testify touching the matter of inquiry committed to said committee; and he is not to depart without the leave of said committee.

JAMES L. ORR, Speaker.

Attest:

J. C. ALLEN, *Clerk.*

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[1] Wolcott was admitted to bail in the court, and on March 17, 1859, a nolle prosequi was entered by the United States District Attorney on the payment of $1,000 and costs by the surety of Wolcott.—Senate Miscellaneous Document No. 278, second session Fifty-third Congress, p. 275.

[2] First session Thirty-fifth Congress, Journal, pp. 258, 285, 296, 305: Globe, pp. 505, 553, 581, 595.

Indorsed as follows:

WASHINGTON, *January 26, 1858.*

I hereby depute J. W. Jones for me and in my stead to execute the within order of the Speaker.

A. J. GLOSSBRENNER,

Sergeant-at-Arms, House of Representatives, United States.

I hereby certify that I served a copy of the within summons upon J. D. Williamson, at the city of New York, on the 27th day of January, 1858, by delivering said copy to him personally, and I know the person served to be the person named in said summons.

J. W. JONES.

The following letter was also read:

MY DEAR SIR: I most respectfully decline attending before the committee of the House of Representatives at Washington, in relation to the affairs of Lawrence, Stone & Co., according to a copy of a summons I received from you in our office on the 27th instant, for reasons which my attorney advises me are sufficient to prevent me from leaving the city of New York.

J. D. WILLIAMSON.

A. J. GLOSSBRENNER, *Sergeant-at-Arms, etc.*

These documents having been read, the House agreed to the preamble and resolution without debate.

On February 3, 1858, the Sergeant-at-Arms appeared at the bar of the House, and announced that he had executed the warrant of the Speaker, issued on the 1st instant, for the arrest of J. D. Williamson, and that, in pursuance thereof, he had the body of said Williamson now at the bar of the House.

Mr. John Letcher, of Virginia, having asked if the return of the Sergeant-at-Arms was in writing, the Speaker [1] said that the announcement that the witness was in custody was made verbally by the officer, in accordance with the order of the House.

Mr. Stanton thereupon stated that the members of the committee had approved a course similar to that pursued in the case of Chester in the preceding Congress, and offered the following:

Resolved, That J. D. Williamson, esq., of the city of New York, now in custody of the Sergeant-at-Arms on an attachment for contempt in refusing obedience to the summons requiring him to appear and testify before a committee of this House, be now arraigned at the bar of the House, and that the Speaker propound to him the following interrogatories:

"1. What excuse have you for not appearing before the select committee of this House, in pursuance of the summons served on you on the 27th ultimo?

"2. Are you now ready to appear before said committee and answer such proper questions as shall be put to you by said committee?"

and that the said J. D. Williamson be required to answer said questions in writing and under oath.

Then, on motion of Mr. Stanton,

Ordered, That J. D. Williamson be remanded to the custody of the Sergeant-at-Arms, and that he have until 1 o'clock p.m. tomorrow to make answer to the questions directed to be propounded to him by the foregoing resolution.

On February 4, in accordance with the order, the Sergeant-at-Arms appeared at the bar with the respondent and announced that the latter was ready to answer the questions propounded to him.

The said Williamson was thereupon arraigned, and the interrogatories were propounded to him as directed by the House.

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[1] James L. Orr, of South Carolina, Speaker.

Thereupon the said Williamson handed in the answers in writing and under oath. The answers do not appear in the Journal. To the first question he responded:

I was under the authority of the sheriff of the city and county of New York, not to leave the city without his consent, and was so advised by him and my counsel, with whom I consulted on the subject; also that it always was my opinion, and is still, that neither the House of Representatives nor the Senate has any legal right or authority to compel me to come before them or their committees to divulge the private transaction of my business which I see fit to transact in a perfectly lawful manner, and which if divulged would destroy all the business of my office, by which I am dependent on to support my family, as no person would intrust their confidential business to a firm who, to suit the different political parties that spring into power every year, would call the firm before them to expose their most confidential and private affairs, which concern only themselves, and which the Constitution of our common country gives to every man who does not violate any of the laws of the land, which I solemnly swear I have never done or violated up to this day.

The respondent further states that he had at one time the intention of testing the right of the House in this respect in the courts.

To the second interrogatory he responds that he will answer any proper questions that do not require him to violate his oath or promise or affect his integrity.

A discussion arose as to the proper course, in view of the question of privilege which the respondent had raised as to the authority of the House. The law prescribing method of procedure in the case of contumacious witnesses was examined and considered in relation to the powers which the House had formerly exercised.

Mr. Stanton proposed that the witness be remanded until the succeeding day, when the question could be further considered, but after discussion the House adopted the following substitute proposed by Mr. Alexander H. Stephens, of Georgia:

Resolved, That J. D. Williamson have leave, by his request, to withdraw his answers, and to submit amended answers, such amended answers to be submitted tomorrow at 1 o'clock p.m.; and, in the mean time, that said Williamson remain in the custody of the Sergeant-at-Arms.

On February 5 J. D. Williamson appeared at the bar of the House and submitted his amended answer, which appears in full in the Journal. The respondent explains that when the subpoena was served he was under heavy bonds, and that he was advised that they would be forfeited if he left New York voluntarily, but that the bail would not be forfeited if his attendance was compelled. He acted on this advice, not knowing that he was thereby in contempt of the House. He states that he is ready to go before the committee and answer "such proper questions" as should be put by the committee. This answer is in writing and signed and sworn to.

The answer having been read, on motion of Mr. Stanton it was

Ordered, That the said Williamson be discharged from the custody of the Sergeant-at-Arms.

1674. A person who had failed to respond to a summons was arrested and arraigned; and his excuse being satisfactory, the House ordered that he be discharged when he should have testified.

The written and sworn answer of a witness arraigned for neglecting a summons did not appear in the Journal.

On May 6, 1858, the House directed the Speaker to issue his warrant for the arrest of Robert W. Latham, who had failed to respond to a summons to appear and testify before the select committee appointed to investigate the sale of property at Willets Point, Long Island, N. Y. On May 15 the Sergeant-at-Arms appeared at the bar of the House with the said Latham, announcing that the latter had "appeared voluntarily, this morning, at his office, and avowed himself ready to answer." The Speaker thereupon asked the said Latham what excuse he had to offer, and the latter submitted a written answer. This answer, which does not appear in the Journal, shows that the witness had not intended to refuse to obey the summons, but had left town under a misapprehension. The House agreed to a resolution ordering his discharge when he should have appeared before the select committee and given his testimony. In this case the Sergeant-at-Arms appears, from the Globe account, to have made the return on the warrant in writing.[1]

1675. On February 15, 1859,[2] Mr. George Taylor, of New York, as a question of privilege, from the select committee on the accounts of the late Superintendent of Public Printing, presented a preamble and resolution in the form usual at this time, for the arrest of John Cassin, who had refused to appear before the committee as a witness. The resolution was agreed to, and on February 17th the Sergeant-at-Arms presented the said Cassin at the bar of the House. The House thereupon adopted a resolution similar to that adopted in the case of Wolcott, requiring the respondent to answer in writing and under oath, giving his excuse for not appearing, and stating whether or not he would now appear and answer. The respondent presented his answers, which do not appear in the Journal, and they being satisfactory, the House ordered his discharge.

1676. Persons in contempt for declining to testify or obey a subpoena have frequently given their testimony and been discharged without arraignment before the House.—On February 21, 1859,[3] the House, in the usual form, ordered the arrest of Harry Connelly, who had refused to testify before the committee appointed to examine the accounts of the late superintendent of public printing. On February 22 Mr. John Covode, of Pennsylvania, from the same committee, as a question of privilege, stated that Mr. Connelly, when he learned of the action of the House, had presented himself before the committee to testify. The committee, however, thought it proper that he should give himself up to the Sergeant-at-Arms, who was executing the order of the House. This had been done, and now Mr. Covode proposed an order that the said Harry Connelly be discharged from the custody of the Sergeant-at-Arms. This order was agreed to; so the said Connelly was discharged without being arraigned before the House.

1677. On January 20, 1862,[4] Mr. William S. Holman, of Indiana, from the select committee appointed to investigate Government contracts, presented the following resolution, which was agreed to:

Resolved, That the Sergeant-at-Arms be directed to bring before the bar of this House Benjamin Higdon, of Cincinnati, Ohio, to answer to an alleged contempt of its authority in refusing to obey a subpoena to appear before the special committee for the investigation of Government contracts.

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[1] First session Thirty-fifth Congress, Journal, pp. 750, 821; Globe, pp. 2002, 2164.

[2] Second session Thirty-fifth Congress, Journal, pp. 411, 430; Globe, pp. 1039, 1090.

[3] Second session Thirty-fifth Congress, Journal, pp. 451, 463; Globe, pp. 1193, 1238.

[4] Second session Thirty-seventh Congress, Journal, pp. 210, 336; Globe, pp. 400, 909.

On February 20 Mr. Holman presented in the House a report of the Sergeant-at-Arms in which he states that Mr. Higdon was arrested on February 4 at Cincinnati, but that before the arrest and after the issuing of the attachment he had gone before the committee and been permitted to testify on condition that he would pay the expenses of the Government growing out of the attachment. Mr. Higdon had paid this sum and was in Cincinnati in legal custody. Before going to the expense of bringing him to Washington it was desirable that the House should take action.

Thereupon it was

Ordered, That Benjamin Higdon be released from the service of the Speaker's warrant heretofore issued by the order of the House for his arrest.

1678. On January 14, 1863,[1] Mr. William S. Holman, of Indiana, from the select committee on Government contracts, offered the following:

Whereas Simon Stevens, a witness subpoenaed by the select committee of the House of Representatives on Government contracts, in their examination of the facts in connection with the "terms, considerations, and profits of the labor contract for the storing, hauling, and delivery, etc., of foreign goods in the city of New York," concerning which said committee were directed by the House to make inquiries, refused to answer the following inquiries propounded to him by said committee:

"How much money in the aggregate has been paid over, under the labor contract, to William Allen Butler, or to his account, or to Mr. George W. Parsons, his law partner, for account of Mr. Butler?"

"You say you held the contract from May 11, 1861, until its expiration, by its own terms, September 5, 1862. State the net profits of that contract during that time."

Now therefore

Resolved, That the Sergeant-at-Arms be directed to bring the said Simon Stevens before the bar of this House to answer said contempt.

On January 16 Mr. Holman announced to the House that Simon Stevens had been brought to the Capitol by the Sergeant-at-Arms and had appeared before the committee and answered the interrogatories satisfactorily. Therefore Mr. Holman offered the following, which was agreed to:

Ordered, That Simon Stevens, now in the custody of the Sergeant-at-Arms, be discharged upon the payment of costs.

1679. On January 24, 1867,[2] Mr. Robert S. Hale, of New York, as a question of privilege, submitted the following preamble and resolution:

Whereas J. F. Tracy was duly summoned to appear before the Joint Select Committee on Retrenchment to testify relative to an inquiry directed by a resolution of this House; and whereas the said Tracy has refused or neglected to obey the subpoena duly served upon him: Therefore

Resolved, That the Sergeant-at-Arms be directed to produce the body of said J. F. Tracy before the bar of the House to answer for his said contempt.

On the next day a proposition was made to reconsider the vote by which the preamble and resolution had been agreed to, a request having been made that Mr. Tracy might be allowed to attend an important meeting of the directors of the railroad of which he was president. The House, however, laid on the table the motion to reconsider, on the ground that private business should not be allowed to interfere with the mandate of the House. On January 28, 1867, Mr. Hale informed

[1] Third session Thirty-seventh Congress, Journal, pp. 192, 202; Globe, pp. 314, 370.

[2] Second session Thirty-ninth Congress, Journal, pp. 252, 260, 279; Globe, pp. 710, 753, 810.

the House that Mr. Tracy had appeared before the committee, testified, and satisfied them that he intended no contempt against the House. Therefore, on motion of Mr. Hale,

Ordered, That all further proceedings under the process against J. F. Tracy be suspended and that he be discharged from custody upon the payment of the fee.

1680. On July 20, 1867,[1] Mr. James F. Wilson, of Iowa, as a question of privilege, and by direction of the Judiciary Committee, offered the following preamble and resolution:

Whereas Lafayette C. Baker was, on the 2d day of July, 1867, duly summoned to appear and testify before a standing committee of this House on the Judiciary, changed with the investigation of certain allegations against the President of the United States, and has neglected to appear before said committee pursuant to said summons, therefore,

Resolved, That the Speaker issue his warrant directed to the Sergeant-at-Arms, commanding him to take into custody the body of said Lafayette C. Baker, wherever to be found, and to have the same forthwith brought before the bar of the House to answer for contempt of the authority of the House in thus failing and neglecting to appear before said committee.

On November 26 (a recess from July 20 to November 21 having intervened) Mr. Wilson announced to the House that Mr. Baker had appeared before the committee and testified, and the case did not seem to be of enough importance to ask further action of the House. Accordingly, on motion of Mr. Wilson:

Ordered, That L. C. Baker, heretofore arrested under order of the House, be discharged upon the payment of costs.

1681. On November 25, 1867, the Senate ordered the arrest of Edward E. Dunbar, a contumacious witness. On November 29 Mr. George F. Edmunds, of Vermont, on whose motion the arrest had been ordered, reported that the witness had appeared before the Committee on Retrenchment, answered the questions, and explained that he intended no contempt. Therefore, by direction of the committee, Mr. Edmunds reported a resolution for the discharge of the witness, which was agreed to.[2]

1682. On April 4, 1874,[3] the Committee on the Judiciary reported a preamble and resolution providing for the arrest of George H. Patrick, who had failed to appear before the committee and bring with him certain papers, as commanded by a subpoena issued by the committee in the course of its examination of the charges against Judge Richard Busteed.

The resolution and preamble were agreed to.

On April 20 the committee proposed the following, which was agreed to:

Resolved, That George H. Patrick, a witness in proceedings for the impeachment of Richard Busteed, United States district judge of the district of Alabama, and against whom the attachment of the House issued as for contempt, having appeared and testified before the subcommittee on the Judiciary, and his explanation of his previous nonattendance being satisfactory to the House, be, and he is hereby, discharged from arrest.

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[1] First session Fortieth Congress, Journal, pp. 244, 270; Globe, pp. 757, 796.

[2] First session Fortieth Congress, Globe, pp. 780, 810.

[3] First session Forty-third Congress, Journal, pp. 715, 716, 843; Record, pp. 2796, 3217.

1683. In 1860 a proposition to arrest a Government official for refusing to produce a paper which he declared to be entirely private in its nature, was abandoned after discussion.—On April 6,1860,[1] Mr. John Covode, of Pennsylvania, from the select committee on the subject of the alleged interference of the Executive with the legislation of Congress, submitted a report accompanied by the following resolution:

Resolved, That the Speaker issue his warrant, directed to the Sergeant-at-Arms, commanding him (the said Sergeant-at-Arms) to take into custody the body of Augustus Schell, and the same forthwith to bring before the House, at the bar thereof, to answer as for a contempt of the authority of this House in refusing to produce a paper when thereunto required by committee of this House.

The select committee, of which Mr. Covode was chairman, was authorized by the resolution creating it to make an inquiry suggested by a letter of the President referring to "the employment of money to carry elections," and was directed by the resolution to—

inquire into and ascertain the amount so used in Pennsylvania, and any other State or States, in what districts it was expended, and by whom, and by whose authority it was done, and from what sources the money was derived, and report the names of the parties implicated. And for the purpose aforesaid said committee shall have power to send for persons and papers and to report at any time.[2]

Mr. Schell, who was collector of the port of New York at the time of this examination, was required by the committee to give a list of certain contributors to a fund which had been raised in New York for use in New York and Pennsylvania in the election of 1856. Mr. Schell declined to furnish the list on the ground that it would involve a breach of confidence, and expressed the opinion that—

the power was not given the committee to ask for the production of a paper entirely private in its character.[3]

The committee, in the report which they made to the House recommending the arrest of Mr. Schell for contempt, reported the questions propounded to him and his answers thereto, and expressed the opinion that the information required was "material to the proper investigation of the matters referred to them by the House." This report was signed by Mr. Covode, Mr. A. B. Olin, of New York, and Mr. Charles R. Train, of Massachusetts. Messrs. Warren Winslow, of North Carolina, and James C. Robinson, of Illinois, signed minority views, in which the ground was taken that inquiries by the House into the acts of individual citizens in the States, if made at all, must be made of objects within its jurisdiction. "It may," they say, "in the first place, act on individual persons, private citizens, or others, in the maintenance of its own parliamentary prerogatives; secondly, it may inquire into facts in order to legislate thereon, and, thirdly, it may investigate the conduct of public officers with a view to their impeachment before the Senate." The minority then go on to argue that the question propounded to Schell had no relation essential to either of the three named objects.

On April 9 this report was recommitted.

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[1] First session Thirty-sixth Congress, Journal, pp. 678, 695, 699; Globe, pp. 1577, 1623–1625.

[2] Reports H. of R., No. 648, Journal of the committee, p. 60, first session Thirty-sixth Congress.

[3] Report No. 648, p. 64, Report No. 331, first session Thirty-sixth Congress.

1684. In 1862 Henry Wikoff was imprisoned by the House for refusing to testify before a committee.

A witness having responded orally, when arraigned for contempt, it was required that the answer be in writing.

It is for the House and not the Speaker to determine whether or not a person arraigned for contempt shall be heard before being ordered into custody.

The House, having ordered a person into custody "until he shall purge himself of said contempt," he was, on purging himself, discharged without further order.

On February 12, 1862,[1] Mr. John Hickman, of Pennsylvania, from the Committee on the Judiciary, reported the following preamble and resolution, which were agreed to by the House:

Whereas Henry Wikoff, a witness subpoenaed by the Committee on the Judiciary in their examination of the facts in connection with the alleged censorship over the telegraph, concerning which said committee were directed by the House to make inquiry, has stated that a portion of the substance of the message of the President of the United States, communicated to Congress on the 3d day of December last, was transmitted by telegraph, through his agency, to the New York Herald prior to the receipt of the said message by Congress, and has refused to state from whom he received the matter thus revealed to the public: Therefore,

Resolved, That the Sergeant-at-Arms be directed to bring the said Henry Wikoff before the bar of this House to answer said contempt.

On the same day the Sergeant-at-Arms appeared at the bar of the House and reported that he had executed the warrant of the Speaker, issued this day, for the arrest of Henry Wikoff, and that he had the body of the said Wikoff then at the bar of the House.

The said Wikoff having been arraigned, the Speaker addressed him as follows:

Henry Wikoff: You have been arrested by order of the House and now stand at its bar charged with an alleged contempt of its authority in refusing to answer a question propounded to you by the Committee on the Judiciary, which was directed to make inquiry as to an alleged censorship over the telegraph. What have you to say in answer to this charge of contempt?

The said Henry Wikoff having responded orally, Mr. Thaddeus Stevens, of Pennsylvania, raised a question that the response should be in writing, in order that the record might be complete. Thereupon, on motion of Mr. Hickman, the response was reduced to writing and submitted to said Wikoff and approved by him, as follows:

Nothing; but that while hoping not to be considered wanting in any respect to the Judiciary Committee or to the House, the information which the committee demanded of me was received, such as it was, under a pledge of strict secrecy, which I felt myself bound to respect.

Mr. Hickman thereupon presented the following:

Whereas Henry Wikoff, a witness subpoenaed to appear and testify before the Committee on the Judiciary in the matter of the investigation by said committee into the alleged telegraphic censorship of the press, and refusing to answer certain questions propounded to him on his examination, upon being brought before the bar of the House has failed to satisfy the House of the propriety of his refusal: Therefore,

[1] Second session Thirty-seventh Congress, Journal, pp. 298, 302, 310; Globe, pp. 775, 784, 785, 831.

Resolved, That the said Henry Wikoff, by reason of the premises, is in contempt of this House, and that the Sergeant-at-Arms be directed to hold said Henry Wikoff in close custody until he shall purge himself of said contempt or until discharged by order of the House.

The previous question having been demanded, Mr. Charles A. Wickliffe, of Kentucky, raised a question of order that the prisoner should not be deprived of his opportunity to be heard by the previous question.

The Speaker[1] held that this was a matter for the House to determine by its vote on the motion for the previous question.

The resolution was then agreed to.

On February 14, Mr. Hickman, from the Committee on the Judiciary, reported that the witness had answered the question propounded to him by the said committee and had thereby purged himself of the contempt of the House for which he was held in custody.

The Journal then has this entry:

The said Wikoff is therefore, under the terms of the resolution directing his arrest, released from custody.

1685. The case of Charles W. Woolley, in contempt of the House in 1868.

An instance wherein the managers of an impeachment were endowed by the House with the functions of an investigating committee.

With the adjournment of a court of impeachment the functions of the managers cease, but the House may continue them to complete an investigation already begun.

Pending consideration of a question of contempt the Speaker admitted as privileged a resolution relating to the existence of the committee which suggested the proceedings.

A contumacious witness should not be proceeded against for contempt, either before the House or under the law, until he has been arraigned and answered at the bar of the House.

A person under arrest for contempt is arraigned before being required to answer.

The answers at the arraignment in the Woolley case were in writing and one was sworn to, but neither appears in the Journal.

In the Woolley case the House did not furnish to the respondent a copy of the report of the committee at whose suggestion he was arraigned.

On May 16, 1868,[1] the House agreed to the following:

Whereas information has come to the managers which seems to them to furnish provable cause to believe that improper and corrupt means have been used to influence the determination of the Senate upon the articles of impeachment exhibited to the Senate by the House of Representatives against the President of the United States: Therefore,

Be it resolved, That for the further and more efficient prosecution of the impeachment of the President the managers be directed and instructed to summon and examine witnesses under oath, to send for persons and papers, to employ a stenographer, and to appoint subcommittees to take testimony, the expenses thereof to be paid from the contingent fund of the House.

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[1] Galusha A. Grow, of Pennsylvania, Speaker.

[2] Second session Fortieth Congress, Journal, p. 698; Globe, p. 2503.

On May 25,[1] under instruction by the managers, Mr. Benjamin F. Butler, of Massachusetts, submitted a report, accompanied by a transcript of testimony, showing that a witness, Charles W. Woolley, of Cincinnati, had both evaded the committee and declined to answer certain questions as to the receipt and disbursement of a sum of money, alleging that they were not material. The committee therefore recommended the adoption of the following resolution:

Resolved, That Charles W. Woolley, a witness heretofore duly summoned before the Committee of Managers of this House, and who, as appears by the report of the managers, has refused to answer proper inquiries put to him in the course of the investigation ordered by the House, and who has not attended upon the sessions of the committee according to its orders, but has, in contempt thereof and the orders of this House, left the city of Washington and remained absent and has not yet reported himself to the committee, be forthwith arrested by the Sergeant-at-Arms and be brought before the House at its bar by the warrant of the House duly issued by the Speaker under his hand and the seal of the House, and that said Woolley be detained by virtue thereof by the Sergeant-at-Arms until he answer for his contempt of the order of the House and abide such further order as the House may make in the premises.

Mr. Charles A. Eldridge, of Wisconsin, raised the question that the witness should be dealt with under the statute rather than by the process proposed by the Managers.

The Speaker[2] said:

The Chair overrules the point of order on the ground that the uniform usage of the House from the Twelfth Congress down to the present time has been that where a witness is before a committee of the House that is authorized to send for persons and papers and refuses to testify he is first to have an opportunity to explain to the House of Representatives why he refuses to testify. He can not be held to answer until the committee shall present the question to the House and the House shall, at its bar, through the Speaker, present to him the question and ascertain why he has refused to answer it. The very statute at large quoted by the gentleman from Wisconsin was enacted subsequent to the refusal of a witness before a committee to testify after having been imprisoned by the order of the House for his persistent refusal. The committee who had the subject under consideration reported this law, which is to be found on page 155, volume 11 of the Statutes at Large. It reads as follows:

"Shall, in addition to the pains and penalties now existing, be liable to indictment as for a misdemeanor."

Previous to that time there had been no power of punishment except the power of the House of Representatives, and that power ended whenever the House adjourned. If therefore a witness, just at the close of a constitutional term of Congress, on the 3d of March, should refuse to testify, the House of Representatives could not imprison him for a longer time than until the 4th of March, when their term expired. The bill reported by that committee was passed with the general assent of all parties in Congress, was signed by the President, and become a law. And it goes on to provide that: "When a witness shall fail to testify as above, and the facts shall be reported to the House, it shall be the duty of the Speaker to certify the fact, under the seal of the House, to the district attorney of the District of Columbia."

This law was enacted in 1856 or 1857. The Chair was a Member of the House at the time, and remembers the enactment of the law, because a witness not only refused to testify before the committee, but when brought to the bar of the House still further refused to testify.

In debate on the resolution the point was made that the House had no right to make the proposed inquest into private affairs.

The resolution was agreed to.

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[1] Journal, p. 729; Globe, pp. 2575–2581.

[2] Schuyler Colfax, of Indiana, Speaker.

On May 26[1], the Sergeant-at-Arms appeared at the bar of the House having in custody the body of Charles W. Woolley. Thereupon a question arose as to the proper course of procedure, and the Speaker cited the precedent in the case of the witness John Cassin, in the Thirty-fifth Congress, saying that the witness could not be heard until the House had adopted some order on the subject.

Thereupon, Mr. Butler, following the precedent referred to by the Speaker, offered the following resolution, which was agreed to:

Resolved, That Charles W. Woolley, esq., of the city of Cincinnati, Ohio, now in custody of the Sergeant-at-Arms on an attachment for a contempt in refusing or neglecting obedience to the summons requiring him to appear and testify before the committee of managers of the House, be now arraigned at the bar of this House and that the Speaker propound to him the following interrogatories:

1. What excuse have you for refusing to answer before the managers of impeachment of this House in pursuance to the summons served on you for that purpose?

2. Are you now ready to appear before said managers and answer such proper questions as shall be put to you by said managers of impeachment?

The said Woolley was thereupon arraigned and the interrogatories, as directed in the foregoing resolution, were propounded to him by the Speaker.

The said Woolley thereupon handed in a paper, subscribed and sworn to by himself,[2] in which he protested that he had not been guilty of contempt of the House, stated that he had not been able to obtain a copy of the report of the managers on which the resolution of arrest was based, and so had not seen the specific inquiries proposed to him and referred to, and finally asking that he be allowed a reasonable time to examine the report and consult counsel.

Mr. Charles A. Eldridge, of Wisconsin, moved that he be furnished with a copy of the report, and that he have until 12 o'clock on the next day to make further answer, and that in the meantime he remain in the custody of the Sergeant-at-Arms. After debate the motion was laid on the table, yeas 93, nays 30.

The House then resolved itself into Committee of the Whole to attend the impeachment proceedings in the Senate, and after some time returned, and the House resumed its session, after the chairman of the Committee of the Whole had reported that the respondent (Andrew Johnson) had been declared acquitted on the second and third articles, and that the court of impeachment had adjourned sine die.

The question of the contumacious witness was then resumed, and the House, by a vote of 95 yeas and 28 nays, agreed to the following:

Resolved, That the Speaker of the House again propose to C. W. Woolley the questions contained in the resolution this day adopted, and that said Woolley be informed that the House requires definite and explicit answers to the questions propounded to be made forthwith.

Thereupon the Speaker again stated the questions, and the said Woolley, in answer thereto, handed in "a paper in writing." This paper was subscribed by the witness, but not sworn to. No question seems to have been made as to this point. The paper does not appear on the Journal.

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[1] Journal, pp. 733–738; Globe, pp. 2585–2592.

[2] This paper does not appear in the Journal, nor is it described except as "a paper in writing" (Journal, p. 733).

In answer to the first question the witness explained that he had been prevented by illness from attending sessions of the committee at certain times, but that otherwise he held himself ready in every particular to respond to the order of the House, except that he had protested to the managers that their course of examination had transcended his rights and privileges as a citizen under the Constitution. He was not bound by the law of the land to submit to a scrutiny into his private affairs. To the second question the witness responded that he was ready to appear and answer proper questions, protesting that he was in no way connected with an association or combination having as its object the use of corrupt influence in respect to the impeachment, and that no money drawn by him from any bank in the city or owned or held by him, or subject to his authority or control, was in any way used in connection with the said trial.

At this point in the proceedings, after the reading of the paper submitted by the witness, Mr. Butler, in order to meet an objection that had been urged, viz, that the power of the managers and their functions had ceased with the adjournment of the court of impeachment, offered the following resolution:

Resolved, That the managers, as a committee, be empowered and directed to continue the investigation ordered by the resolution of the House of the 16th instant, with all the powers and rights conferred thereby, and to make such full investigation as will determine the truth of the matters and things set forth in the preamble to said resolution.

Mr. Charles A. Eldridge, of Wisconsin, made the point of order that the resolution was out of order at this time and could be submitted only by unanimous consent.

The Speaker overruled the point of order on the ground that it was competent for any Member, pending the consideration of a question of contempt of the authority of the House, to make motions relative to it. It was a privileged resolution growing directly out of the investigation. The Chair also expressed the opinion that the managers had ceased to be in office.

Mr. Eldridge having appealed, the appeal was laid on the table.

The resolution was then agreed to, yeas 91, nays 30.

1686. The case of Charles W. Woolley, continued.

In 1868 a contumacious witness, Charles W. Woolley, who declined to answer, for the alleged reason that the examination was inquisitorial, was imprisoned for contempt.

A witness arraigned at the bar for contempt, and having already submitted his written answers, was allowed by unanimous consent to make a verbal statement.

A witness imprisoned for contempt before a committee purges himself by stating to the House his readiness to go before the committee, and not by testifying directly to the House.

An instance wherein the Speaker announced that he had certified to the district attorney the case of a contumacious witness.

Reference to the circumstances attending the enactment of the law for punishing contumacious witnesses.

Mr. George S. Boutwell, of Massachusetts, then offered the following:

Resolved, That the said Charles W. Woolley be committed to and detained in close custody by the Sergeant-at-arms in the Capitol during the remainder of the session or until discharged by the further order of the House, to be taken when he shall have purged the contempt upon which he was arrested, by testifying before the committee authorized to continue the investigation which the managers were conducting when the contempt was committed by said Woolley.

During the debate on this resolution the witness, at the bar of the House, asked permission to make a statement.

The Speaker said that the permission would require unanimous consent.

There being no objection, the witness stated that he expected to answer such questions as the House should think proper. In other words, whenever the committee and himself differed as to the propriety of a question he should be brought to the bar of the House and the House should pass on it.

It was objected by Mr. Boutwell that such a course would virtually defeat the powers of the committee.

The question was then taken and the resolution was agreed to, yeas 81, nays 28.

On May 28, 1868,[1] Mr. John A. Bingham, of Ohio, from the committee, reported the following resolution, which was agreed to, after a motion to lay it on the table had been decided in the negative, yeas 28, nays 95:

Resolved, That Rooms A and B, opposite the room of the solicitor of the Court of Claims, in the Capitol, be, and are hereby, assigned as guardroom and office of the Capitol police and are for that purpose placed under charge of the Sergeant-at-arms of the House with power to fit the same up for the purpose specified.

Mr. Bingham then presented a preamble reciting the circumstances of the refusal of the witness to testify on the ground that the question invaded a privileged communication between attorney and client and giving extracts from testimony of witness and another, and with this preamble presented further:

And whereas your committee believe the reasons given by the witness in declining to answer are wholly untrue and evasive and the refusal to answer is a deliberate contempt of the authority of the House and done for the purpose of concealing the fact and embarrassing public justice; therefore,

Resolved, That said Woolley, for his repeated contempt of the authority of the House, be kept until otherwise ordered by the House in close confinement in the guardroom of the Capitol police by the Sergeant-at-Arms until said Woolley shall fully answer the questions above recited, and all questions put to him by said committee in relation to the subject of the investigations with which the committee is charged, and that meanwhile no persons shall communicate with said Woolley, in writing or verbally, except upon the order of the Speaker.

These preambles and resolution were agreed to.

On May 30[2] the Speaker stated to the House that he had, in accordance with the requirements of the law of January 24, 1857, certified the facts in the case to the district attorney of the District of Columbia. The Journal has in regard to this merely this entry:

The Speaker having made a statement as to his action thus far in regard to the recusant witness, C. W. Woolley, asked the instruction of the House in regard to letters and telegrams to and from said Woolley.

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[1] Journal, pp. 747, 763–765; Globe, pp. 2643, 2669.

[2] Journal, pp. 775, 776; Globe, pp. 2702–2706.

After debate as to the mode of procedure in such cases and the inexpediency of making the Speaker in any sense the custodian of the prisoner of the House agreed to the following:

Resolved, That the resolution relating to Charles W. Woolley be so modified as to place the witness in the sole custody of the Sergeant-at-Arms, subject to the order of the House, and that his counsel, family, and physician have free access to the witness.

On June 8[1] Mr. Butler, as a question of privilege from the committee, presented the following resolution, which was agreed to:

Resolved, That any communication from C. W. Woolley or his counsel, placed in the hands of the Speaker, be sent to the committee of investigation of this House, before which Woolley has been called to testify, for examination and report.

On the same day Mr. Samuel Shellabarger, of Ohio, as a question of privilege submitted the following resolution, which was agreed to without objection, on the statement by Mr. Shellabarger that the witness had indicated that he would purge himself:

Resolved, That Charles W. Woolley, now under the arrest of this House for contempt of the authority of the House, be ordered to the bar of the House for the purpose of making such statement as will purge him of his contempt of such authority.

Accordingly the witness was brought before the House, and in response to the question of the Speaker announced that he was ready to make a statement, and proffered a paper.

At this point a question was raised as to the propriety of the prisoner purging himself by a statement before the House, and it was urged that the proper way was for him to go before the committee and answer the questions. The precedent of Thaddeus Hyatt in the Senate was referred to on this point. After debate, on motion of Mr. Shellabarger, the House, by a vote of 93 yeas to 32 nays, agreed to the following:

Resolved, That in purging himself of the contempt of which Charles W. Woolley is committed by this House said Woolley shall be required to state whether he is now willing to go before the Committee of Managers of the House before which he has been summoned to testify, and make answer to the questions for the refusal to answer which he has been ordered into custody, and if he answers that he is so ready to answer before the said committee then the witness shall have that privilege so to appear and answer as soon as said committee can be convened, and that in the meantime the witness remain in custody; and in the event that the said witness answer that he is not ready to so appear before said committee and make answer to the said questions so refused to be answered, then that the said witness be recommitted for continuance of such contempt, and that such custody shall continue until the said witness shall communicate to this House through said committee that he is ready to make such answer.

Thereupon the Speaker propounded the questions to the said Woolley, as required by the resolution, and the said Woolley answered as follows:

As my client has testified in regard to the dispatches named in the resolution, and as the resolution is an order of the House for me to answer the questions, I will do so.

So the said Woolley was remanded to the custody of the Sergeant-at-Arms with

[1] Journal, pp. 816, 819, 820; Globe, pp. 2938, 2942, 2944–2947.

the privilege to appear before the committee and answer as provided for in the resolution.

On June 11[1] Mr. Butler, from the committee, stated that the witness had answered satisfactorily the questions, and the committee proposed the following resolution, which was agreed to:

Resolved, That Charles W. Woolley, having appeared before the Committee of Investigation and answered all questions put to him by the committee or its order and thus purged himself of his contempt of the House in that regard, be discharged from arrest and held only to appear and make further answer if required, according to summons.

1687. A person whose arrest had been ordered for neglect to obey a subpoena, having appeared and testified, the House arraigned him and then discharged him.

Instance wherein the answer of a person arraigned for contempt was in writing, but not sworn to and not recorded in the Journal.

On April 2, 1862,[2] Mr. Henry L. Dawes, of Massachusetts, from the Select Committee on Government Contracts, reported the following, which was considered and agreed to under the operation of the previous question:

Whereas on the 14th day of March last a subpoena was issued by the Speaker of this House, summoning, among others, one Aaron Higgins—sometimes called Aaron A. Higgins—by the name of A. Higgins, to appear before the Committee on Government Contracts forthwith at the United States Hotel in Boston, Mass., but that the said Higgins has hitherto and still does refuse or neglect to obey said summons: Therefore,

Resolved, That the Speaker of this House be directed to issue his writ of attachment against Aaron Higgins of Boston, Mass., sometimes called Aaron A. Higgins, and cause him to be brought to the bar of this House to answer as for his contempt in not obeying the said subpoena of said Speaker issued March 14, 1862.

On April 9 the Sergeant-at-Arms, by S. J. Johnson, his deputy, appeared at the bar with Aaron Higgins in custody, as commanded by the Speaker's warrant of the 2d instant. The said Higgins having been arraigned, the Speaker[3] inquired of him what excuse he had to offer for his contempt of the authority of the House in failing to obey its subpoena to appear before the Select Committee on Government Contracts; and the response of the said Higgins having been submitted and read to the House,[4] Mr. Dawes submitted the following preamble and resolution:

Whereas Aaron Higgins, now at the bar of this House in contempt for disobeying the subpoena of its Speaker, issued at the instance of the Committee on Government Contracts, has appeared before said committee, and answered under oath all such interrogatories as have been put to him by their order: Therefore,

Resolved, That the Sergeant-at-Arms be directed to discharge said Higgins from custody.

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[1] Journal, p. 838; Globe, p. 3069.

[2] Second session Thirty-seventh Congress, Journal, pp. 498, 523; Globe, pp. 1508, 1588.

[3] Galusha A. Grow, of Pennsylvania, Speaker.

[4] This is the entry of the Journal. The record of debates shows that Higgins submitted a written answer explaining his failure to respond to the subpoena. This statement was over his signature, but not under oath. (Globe, p. 1588.)

1688. Instances wherein witnesses arraigned for contempt and agreeing to testify have not been discharged until the testimony has been given.

Witnesses arraigned for contempt have frequently answered orally and not under oath.

The order of arrest sometimes specifies that it shall be made either by the Sergeant-at-Arms or his special messenger.

On January 28, 1869,[1] the House ordered the arrest of Henry Johnson, for contempt in refusing to appear before the Select Committee on Election Frauds in New York, the resolution commanding the Sergeant-at-Arms, or his special messenger, to arrest said Johnson and bring him before the House. On February 3 the Sergeant-at-Arms appeared at the bar of the House having the said Johnson in custody, and the House agreed to the usual resolution providing for the arraignment of the prisoner and his interrogation by the Speaker.

The Speaker having propounded the interrogatories, the witness replied that he had never refused to answer the subpoena, and that he was ready to answer any questions that might be put to him. The witness was not sworn before making these answers, which were oral.

A motion was made to discharge the witness from custody, but after debate the motion was tabled and the subject was postponed until the following day, after the witness should have had the opportunity of appearing before the committee and testifying.

On February 4 the chairman of the committee reported that the witness had appeared and testified, and that it appeared that the failure to appear in the first instance seemed due to some misunderstanding. The House ordered the discharge of the witness.

On February 1,[2] the House also ordered the arrest of Florence Scannel, for contempt in declining to testify before the same committee. On February 3 Mr. Scannel was arraigned and the usual resolution was passed. Upon being interrogated he answered, orally and not under oath, that he was ready to answer the question which he had refused formerly to answer. Thereupon it was ordered that he should be remanded to the custody of the Sergeant-at-Arms to appear before the committee. On February 4, the witness having appeared before the committee and testified, the House ordered that he be discharged on the payment of costs. A motion to waive the payment of the costs was decided in the negative.

On February 19 the House, by a single resolution, ordered the arrest of John H. Bell, and David W. Reeve, recusant witnesses before the same committee. On February 23 the two witnesses were brought to the bar separately, and the usual resolution for the arraignment and interrogating of them was adopted in each case. Each of the witnesses answered orally, and not under oath, explaining why he had been contumacious, and expressing readiness to attend and answer before the committee.

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[1] Third session Fortieth Congress, Journal, pp. 226, 265, 271; Globe, pp. 687, 833, 876.

[2] Journal, pp. 250, 264, 271; Globe, pp. 771, 832, 877.

The House then laid on the table motions to discharge the witnesses, in the latter case by a vote of 124 yeas to 33 nays, and the witnesses were remanded to the custody of the Sergeant-at-Arms to appear before the committee. On February 24,[1] having answered, they were discharged by the House.

1689. In 1873 Joseph B. Stewart was imprisoned for contempt of the House in refusing as a witness to answer a question which, he claimed, related to the relations of attorney and client, and therefore was inquisitorial.

The House declined to commit to custody an alleged contumacious witness until he had been arraigned and answered at the bar of the House.

An instance wherein a person was arraigned at the bar without a previous order of the House fixing the form of procedure.

An instance wherein a witness arraigned for contempt was allowed to make an unsworn oral statement, which in fact was an argument as well as an answer.

An alleged contumacious witness having been arraigned, the House declared him in contempt and then proceeded to specify the manner in which he might purge himself.

In the Stewart case the questions and answers at the examination were recorded in the Journal, the answers being oral and not under oath.

On January 29, 1873,[2] Mr. Jeremiah M. Wilson, of Indiana, from the select committee who, by resolutions of the House of January 6 and January 9, 1873, were directed to inquire into certain matters connected with the Union Pacific Railroad Company and Credit Mobilier, with authority to send for persons and papers, reported that evidence had been produced before the committee tending to show that just before the passage of the act of 1864, entitled, "An act to amend an act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean," etc., sums of money and a quantity of bonds, property of the Union Pacific Railroad Company, were brought to Washington and placed in the hands of one Joseph B. Stewart, and by him in some way disposed of. Thereafter the said Joseph B. Stewart was called and duly sworn as a witness, and testified in substance as follows: That said bonds to the amount of $100,000 or $150,000 were received by him, and that $30,000 were for his own fees; that he did not pay over any of said bonds or their proceeds to any Member of Congress or person connected with the Executive Department of the Government, and that he acted in such transaction partly for the railroad, partly for clients of his own, and partly as arbitrator between the Union Pacific Railroad Company and such other persons, and gave over the bonds to such other persons. The report goes on to state that the committee asked the said Stewart for the names of the persons to whom he gave the bonds, and that he declined to respond, alleging that the transactions were between him as attorney and his clients, and that he would

[1] Third session Fortieth Congress, Journal, pp. 392, 425, 426, 442; Globe, p. 1385, 1467, 1468.

[2] Third session Forty-second Congress, Journal, pp. 269–272; Globe, pp. 952–956.

make no statement to the committee about the business of his clients. He persisted in this attitude, although he was informed by order of the committee that he was not in this protected by the legal privilege existing between counsel and client. The committee give in their report a transcript of the questions and answers, and conclude: "The committee are of opinion and report that it is necessary for the efficient prosecution of the inquiry ordered by the House that said questions should be answered, and that there is no sufficient reason why the witness should not answer the same, and that his refusal is in contempt of this House."

Therefore the committee recommended the following resolution:

Resolved, That the Speaker do issue his warrant, directed to the Sergeant-at-Arms attending this House, or his deputy, commanding him to take into custody, wherever to be found, the body of Joseph B. Stewart, and the same in his custody to keep subject to the further order and direction of this House.[1]

Debate at first arose over the question of the alleged privilege of the transactions of the witness with his alleged clients, but Mr. John A. Bingham, of Ohio, chairman of the Committee on the Judiciary presently raised the point that the question presented was novel, and not like a case where the charge was that a person had violated the privileges of the House in the person of one of its Members. It was a question whether the House of Representatives could hold a private citizen to answer for any crime, unless he had acted to the hurt or prejudice of the Government in connection with its own officials. The witness denied that he had done that. This was not like the Burns case.

Mr. Bingham therefore offered the following substitute for the resolution:

Resolved, That the Speaker do issue his warrant, directed to the Sergeant-at-Arms attending this House, or his deputy, commanding him to take into custody, wherever to be found, the body of Joseph B. Stewart, and bring him forthwith to the bar of this House to show cause why he should not be punished for a contempt.

This amendment was agreed to, yeas 126, nays 69. The resolution as amended was then agreed to.

On January 30[2] the Sergeant-at-Arms appeared at the bar of the House, having in custody the body of Joseph Stewart.

Thereupon the said Stewart was arraigned, and the following interrogatory propounded to him by the Speaker[3] without previous order of the House:

What excuse have you for refusing to answer before the select committee of this House in pursuance of the summons served on you for that purpose?

The witness thereupon, without being sworn, proceeded to make an oral response, which not only gave his reasons, but proceeded to argument, at times reflecting on the conduct of the committee, and at such length that a point of order was made by Mr. John Coburn, of Indiana, that the person at the bar should be confined to a statement of facts.

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[1] The members of the committee signing the report were Messrs. Wilson, Samuel Shellabarger, of Ohio; George F. Hoar, of Massachusetts; Thomas Swann, of Maryland; and H. W. Slocum, of New York.

[2] Journal, pp. 276–279; Globe, pp. 982–988.

[3] James G. Blaine, of Maine.

The Speaker, however, ruled that the respondent might make an argument.

Mr. Henry W. Slocum, of New York, having raised a question as to how long the respondent might speak, the Speaker ruled that he would be governed by the hour rule.

The witness having concluded, and having denied any disrespect of the House, having declared the testimony presented to the House by the committee was inaccurate, and having by assertion and argument advanced the claim that the transactions of which the committee had interrogated him were privileged between attorney and client, concluded with a peroration in regard to the rights of the citizen under the Constitution.

The reply does not appear in the Journal, either in full or in substance.

Mr. Henry L. Dawes, of Massachusetts, offered the following resolution, which was agreed to:

Resolved, That Joseph B. Stewart, having been heard by the House pursuant to the order heretofore made requiring him to show cause why he should not answer the questions propounded to him by the committee, has failed to show sufficient cause why he should not answer the same, and that said Joseph B. Stewart be considered in contempt of the House for failure to make answer thereto.

Mr. Wilson then offered the following:

Resolved, That in purging himself of the contempt for which Joseph B. Stewart is now in custody, the said Stewart shall be required to state forthwith, or as soon as the House shall be ready to hear him, whether he is now ready to appear before the committee of this House to whom he has hitherto declined to make answers and make answers to the questions for the refusal to answer which he has been ordered into custody, and if he answers that he is ready to appear before the said committee and make answer, then the witness shall have the privilege to so appear and answer forthwith, or so soon as the said committee can be convened; and that in the meantime the witness remain in custody; and in the event that said witness shall answer that he is not ready to so appear before said committee, and make answer to the said questions so refused to be answered, then that said witness be remanded to the said custody, for the continuance of such contempt, and that such custody shall continue until the said witness shall communicate to this House, through the Speaker, that he is ready to appear before the said committee and make such answers, or until the further order of the House in the premises.

This resolution was agreed to after the House had negatived two alternative propositions looking, one to confinement in the District jail, and the other to a purging by going before the committee while in custody.

The Speaker having propounded to said Stewart the following question, viz:

Are you now willing to appear before the committee of this House to whom you have hitherto declined to make answer and make answer to the questions for the refusal to answer which you have been ordered into custody?

The said Stewart replied as follows, viz:

I disclaim any contempt for the authority of this House or its committee, and repeat, as in my testimony and before this House I have stated, that I have fully answered all questions except the matter which came, and solely came, to my knowledge in my relation as counsel, and I respectfully protest against being requested to do so, and do decline to disclose any matters confided to me as counsel.

And thereupon he was again taken into the custody of the Sergeant-at-Arms.

The Journal gives the question and answer, the answer apparently being oral and not under oath.

On February 5 and 11,[1] the Speaker laid before the House petitions and papers from said Stewart, which were referred to the committee. The first petition was introduced by the Speaker as a Member, the others were presented by unanimous consent.

On February 28,[2] near the close of the session and the Congress, on motion of Mr. Horace Maynard, of Tennessee,

Ordered, That Joseph B. Stewart, now in the custody of the Sergeant-at-Arms of the House, be discharged.

1690. In 1874 the House imprisoned in the common jail a contumacious witness, Richard B. Irwin, who contended that the inquiry proposed by the House committee was unauthorized and exceeded the power of the House.

In the Irwin case the House asserted its authority as grand inquest of the nation to investigate, with the attendant right of punishment for contempt, in case of offenses in preceding Congress.

A proposed order to the Sergeant-at-Arms to hold a person in custody in jail until the latter should have purged himself of contempt was criticised and an unconditional order was agreed to.

A question as to the authorization required to enable a committee to compel testimony.

In the Irwin case the respondent, on being arraigned, made an oral, unsworn answer, which does not appear in the Journal.

In the Irwin case the questions which the respondent had declined to answer in committee were proposed to him again at the bar of the House.

In the Irwin case the Journal does not record the responses of the witness to the questions put by the Speaker.

On December 11, 1874,[3] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Ways and Means, submitted as a question of privilege, the following:

Whereas Richard B. Irwin was, on the 10th day of September, 1874, duly summoned to appear and testify before a standing committee of this House, on the Ways and Means, charged with the investigation of certain allegations against the Pacific Mail Steamship Company, and has neglected to appear before said committee pursuant to said summons: Therefore,

Resolved, That the Speaker issue his warrant, directed to the Sergeant-at-Arms, commanding him to take into custody the body of the said Richard B. Irwin, wherever to be found, and to have the same forthwith brought before the bar of the House, to answer for contempt of the authority of the House in thus failing and neglecting to appear before said committee.

On December 21[4] Mr. Dawes stated to the House that the witness had explained satisfactorily to the committee his delay, and therefore the committee recommended the following resolution, which was agreed to by the House:

Resolved, That Richard B. Irwin be discharged from the custody of the Sergeant-at-Arms on the warrant of the Speaker of this House, he having given satisfactory reasons for having neglected to appear before the Committee on Ways and Means in answer to the summons of this House.

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[1] Journal, pp. 319, 323, 362.

[2] Journal, p. 518; Globe, p. 1919.

[3] Second session Forty-third Congress, Journal, pp. 51, 52; Record, pp. 62–64.

[4] Journal, pp. 96, 97; Record, pp. 174–182.

Mr. Dawes then submitted a report from the committee, giving extracts from the testimony of the said Irwin, wherein he had declined to answer certain questions submitted to him by the committee as to the disposition which he had made of $750,000 intrusted to him by the officials of the Pacific Mail Steamship Company for the purposes of procuring the subsidy during the period included between the months of January and May, 1872, i.e., during the term of the preceding Congress. The witness stated that this money was used by him in procuring the passage of the subsidy bill, and paid to divers persons, but that he paid none of it, nor had any understanding for the payment of any of it, to any Member of the present or the preceding Congress, or any officer of the present Congress, who was a Member or officer of the preceding Congress, or to any person under the jurisdiction of the House. When asked for the names of those employed by him he declined to answer, alleging that the jurisdiction of the committee did not give it authority to demand an answer to the question; that the jurisdiction of the committee and the House was exhausted when it appeared that none of the money was paid by him to any person under the jurisdiction of the House; that the matter arose in a prior Congress, over which the present committee and House were without jurisdiction; that as an honorable man he had no right to disclose relations existing between himself and others on a matter not within the jurisdiction of the House; and finally that the committee was not empowered by any order or resolution of the House to ask the question.

The committee concluded their report as follows: "The committee are of opinion, and report, that it is necessary for the efficient prosecution of the inquiry ordered by the House that said questions should be answered, and that there is no sufficient reason why the witness should not answer the same, and that his refusal is in contempt of this House."

Therefore the committee recommended the adoption of the following:

Resolved, That the Speaker issue his warrant, directed to the Sergeant-at-Arms, attending this House, or his deputy, commanding him to take into custody forthwith, wherever to be found, the body of Richard B. Irwin, and to bring him to the bar of the House, to show cause why he should not be punished for contempt, and in the meantime keep the said Irwin in custody to await the further order of the House.

As to the point made by the witness that the committee was not formally authorized by the House to make this investigation, Mr. Dawes showed that on January 12, 1874, the House referred to the committee the testimony taken in the preceding Congress on the subject of this subsidy; that on April 3, 1874, the House referred to the same committee a resolution introduced by a Member and relating to the same subject, and, finally, that on the 24th of March, 1874, the House agreed to the following resolution:

Resolved, That the Committee on Ways and Means are hereby authorized and empowered to send for persons and papers and administer oaths in all matters from time to time pending and under examination before said committee.

A general debate rose as to the power of the House to punish in this case, and Mr. Alexander H. Stephens, of Georgia, contended that the House could not punish, except according to law, and that the proper course was to certify to the district attorney the case of the witness, according to the act of 1857. The House had no

inherent, common-law right to punish. Mr. Benjamin F. Butler, of Massachusetts, also held that the House might not punish this witness. In investigations in relation to the impeaching power, the House could punish; so also in a case of violation of the constitutional provision that Members should be privileged while going and returning. There was also the right of investigation in so far as it was intended to instruct as to the duties before them. But the House had no right to investigate as to past offenses in another Congress.

On the other hand Mr. Dawes contended that the House was, under the Constitution, a grand inquest, with power to govern itself in all matters pertaining to the just and fair exercise of its powers. The House had never stripped itself of the power, but had repeatedly punished for contempts of this power. It was further contended that the statute did not take away the common-law right of the House to punish.

The resolution was agreed to.

On January 6 [1] the Sergeant-at-Arms appeared at the bar of the House having in custody the body of Richard B. Irwin. The said Irwin was thereupon arraigned, and the following interrogatory was propounded to him by the Speaker:

Are you now ready to answer the questions which have been addressed to you by the Committee on Ways and Means, and which you have heretofore refused to make answer to?

Thereupon the prisoner addressed the House orally, and not under oath. This, address does not appear in the Journal. The witness denied that he was in contempt of the House, since the House had never ordered the investigation and he had never refused to answer any question that the Committee on Ways and Means was authorized by the House to ask. He denied that the papers referred to the committee or the resolution of the House empowered the committee to make this investigation. He had already stated under oath that he did not employ any persons subject to the jurisdiction of this House, and that he did not pay or procure to be paid any money to such person. He disclaimed any intentional disrespect of the House, but denied the right of the House or the committee to inquire into matters existing in confidence between himself and other citizens beyond the jurisdiction of the committee. Finally he contended that the House had no right under the Constitution to deprive any citizen of liberty without due process of law.

Mr. Dawes thereupon submitted the following, which was agreed to:

Resolved, That the Speaker propose to the witness at the bar the following questions:

First. Give the names of the persons whom you employed to aid you in procuring the subsidy from Congress in 1872 for the Pacific Mail Steamship Company.

Second. What was the largest sum paid by you to any one person to aid you in procuring that subsidy?

The Speaker thereupon propounded the said questions to the said Irwin. The Journal does not give the replies, merely stating, "The said Irwin having replied." The record of debates shows that the prisoner declined to respond to the first question, but responded to the second with the statement, "Two hundred and seventy-five thousand dollars."

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[1] Journal, pp. 131, 132 , Record, pp. 291–296.

Thereupon Mr. Dawes submitted the following resolution, which was agreed to:

Resolved, That Richard B. Irwin, having been heard by the House, pursuant to the order heretofore made requiring him to show cause why he should not answer the questions propounded to him by the committee and by the Speaker of this House in pursuance of its order, has failed to show sufficient cause why he should not answer the same; and that said Richard B. Irwin be considered in contempt of the House for failure to make answer thereto.

Then Mr. Ellis H. Roberts, of New York, from the committee, offered a resolution like that adopted in the case of Stewart, providing for keeping the prisoner in custody until he should purge himself of contempt. But the resolution differed from the Stewart resolution in that it specified that the Sergeant-at-Arms should keep the prisoner in the common jail of the District. This resolution was criticised on the ground that it made the commitment contingent on a certain event—that is, on the answering of the witness. It was suggested that in habeas corpus proceedings such a provision might be a source of weakness. The resolution was also criticised because of the provision for confinement in jail. This point was debated at length. It was urged that the House had no control over the jail, that the jailer might refuse to receive the prisoner, etc. On the other hand it was shown that the House had in the case of Wolcott and others committed to the jail.

Finally Mr. Roberts withdrew the resolution proposed, and offered the following which was agreed to:

Resolved, That Richard B. Irwin be remanded to the custody of the Sergeant-at-Arms, to abide the further order of this House, and that while in such custody he be permitted to be taken by the said Sergeant-at-Arms before the Committee on Ways and Means, if he shall declare himself ready to answer such questions as may be lawfully put to him, including those asked of him by order of this House, and while he shall so remain in custody the Sergeant-at-Arms shall keep the witness in his custody in the common jail of the District of Columbia.

1691. The case of Richard B. Irwin, continued.

The Speaker, without order of the House and under the law, certifies the case of a contumacious witness to the district attorney; but the Journal may contain no record of his act.

A writ of habeas corpus being served on the Sergeant-at-Arms, who held the witness Irwin in custody for contempt, the House, after consideration, prescribed the form and manner of return.

The House having ordered the arrest of a person who had failed to obey a subpoena from a committee, and who later made explanation, an order was passed discharging him without arraignment.

After the adoption of the resolution the Speaker (Mr. Blaine) said that the law was mandatory on the Speaker to certify a case of contumacy to the district attorney. In the case of Stewart some criticism arose because that was not done. In this case, therefore, in the absence of an order from the House, he should certify the case. The Journal does not appear to have any record of such an act.

On January 7 [1] the Speaker laid before the House a petition from Irwin representing that his confinement in jail would result in serious injury to his health, and asking that the order be changed. The petition also questions the authority of the House to imprison, and states that no witness has been similarly imprisoned since the passage of the act of 1857. After debate this petition was laid on the table.

[1] Record, p. 314.

On January 8 [1] Mr. Dawes presented a letter from two physicians, representing that the confinement of the witness in the jail would be attended by results pernicious to his health. After debate this letter was presented to the Committee on Ways and Means.

Mr. Benjamin F. Butler, of Massachusetts, then offered the following, which was disagreed to, yeas 34, nays 160:

Resolved, That pending the examination and report of the Committee on Ways and Means upon the said subject, the Sergeant-at-Arms be, and is hereby, instructed to retain said Irwin in his own custody, and not in the common jail.

On January 14 [2] the Speaker laid before the House a letter from N. G. Ordway, Sergeant-at-Arms of the House, reporting as follows:

I respectfully report to you, and through you to the House of Representatives, that on the 9th day of January, 1975, a writ of habeas corpus was served upon me, directing me to produce the body of Richard B. Irwin, detained in my custody, before Arthur MacArthur, one of the judges of the supreme court of the District of Columbia, on the 12th day of said January; that thereafter, on the 12th day of January aforesaid, the time for producing the body of said Irwin was further extended to January 14, at 11 o'clock a. m., at which time I appeared before the said Judge MacArthur and presented, through my attorney, Hon. Samuel Shellabarger, the writ and resolutions of the House of Representatives upon which said Irwin was held in my custody. Whereupon Judge MacArthur decided that no return would be received by him until the body of the said Irwin was produced in court.

Inasmuch, therefore, as the production of the said Richard B. Irwin by me would release him from my custody as an officer of the House of Representatives and place him in the custody of the court, I asked for delay until to-morrow, January 15, at 11 o'clock a. m., to obtain further instructions from the House of Representatives.

Debate at once arose over the importance of the question presented. Mr. Dawes contended that the doctrine of the Nugent case (8th Philadelphia American Law Journal) applied:

Every court, including the Senate and House of Representatives, is the sole judge of its own contempts; and in case of commitment for contempt in such case, no other court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on habeas corpus.

On the other hand, it was pointed out by Mr. John A. Kasson, of Iowa, that under sections 753, 755, 758 of the the Revised Statutes it was made the duty of the judge to issue the writ, and that the person making the return should at the same time bring the body of the prisoner. On the other hand it was urged that if the body was brought it would pass into the custody of the court, and so might escape. From these divergent considerations there resulted three propositions: The reference of the subject to the Committee on the Judiciary for examination; a direction to the Sergeant-at-Arms to make return that he held the prisoner in custody under the order of the House adjudging him guilty of contempt, and a further direction not to bring the body of the prisoner before the court; and a third proposition as follows:

Resolved, That the Sergeant-at-Arms be, and is hereby, directed to make careful return to the writ of habeas corpus in the case of Richard B. Irwin that the prisoner is duly held by authority of the House of Representatives to answer any proceedings against him for contempt, and that the Sergeant-at-Arms take with him the body of said Irwin before said court when making such return, and retain said Irwin, and continue to hold him subject to the further order of this House.

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[1] Journal, p. 145; Record, pp. 345–346.

[2] Journal, pp. 179, 180; Record, pp. 471–478.

The first two propositions were rejected, but the third was agreed to after being amended, on motion of Mr. George F. Hoar, of Massachusetts, by striking out all after the word "contempt." Thus the third proposition, as amended, accomplished substantially the object of the second.

On January 15[1] Mr. Dawes reported to the House that the Sergeant-at-Arms had obeyed the order of the House, making return as directed. Mr. Dawes submitted copies of both the writ of habeas corpus and of the return of the Sergeant-at-Arms. The latter contained copies of the warrants of the Speaker for the arrest and detention of Irwin.[2] Mr. Dawes further reported that the judge, after a hearing, had insisted on the production of the body of Irwin in court.

Thereupon a debate arose again on the respective authorities of the House and the court, and whether or not the House might disregard the writ of habeas corpus. Mr. John A. Kasson presented from the Ways and Means Committee a proposition, which, after modification, was as follows:

Ordered, That the Sergeant-at-Arms, with the aid of counsel, make known to the judge issuing the writ of habeas corpus requiring the body of Richard Irwin to be brought before said judge, that he, the said Sergeant-at-Arms, has said Irwin in his custody pursuant to an order of this House, upon its judgment that the said Irwin was in contempt of the House of Representatives in refusing to give testimony as a witness, and is detained pending such examination, and for no other reason; that the House of Representatives require of him to retain the body of said Irwin in his custody until the said Irwin shall offer to purge himself of said contempt, as provided by the order of this House, and that he respectfully inform the judge that, as an officer of this House, he can not disobey the orders thereof in this respect by releasing in any way or transferring said Irwin from his custody; and further,

Ordered, That he exhibit to the said judge a copy of the order of this House, duly certified by the Clerk, adjudging the said Irwin in contempt, and the warrant of the Speaker in execution thereof, together with a copy of this order.

To this Mr. James B. Beck, of Kentucky, proposed as an amendment in the nature of a substitute, the following:

Resolved, That the Sergeant-at-Arms be, and he is hereby, directed to make careful return to the writ of habeas corpus in the case of Richard B. Irwin that the prisoner is duly held by authority of the House of Representatives to answer in proceedings against him for contempt, and that the Sergeant-at-Arms take with him the body of said Irwin before said court when making such return as required by law.

An amendment to add to the amendment the following: "And that he be further directed to obey the order of said court in the premises," was disagreed to.

The question was then taken on the substitute proposed by Mr. Beck, and it was agreed to, yeas 107, nays 64.

The original proposition as amended by the substitute was then agreed to.

On January 19[3] Mr. Dawes presented documents to show that the health of the prisoner was satisfactory, and stated that the committee were not prepared to recommend any change in his place of confinement, which was the jail.

On January 20[4] Mr. Dawes laid before the House a letter addressed to the Speaker by Richard B. Irwin, in which the latter announced his readiness to answer the questions. The letter having been read, Mr. Dawes offered the following:

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[1] Journal, pp. 189, 190; Record, pp. 509–516.

[2] Record, pp. 510, 511.

[3] Record, p. 589.

[4] Journal, p. 210; Record, p. 609.

Whereas, on the 6th instant, Richard B. Irwin was adjudged to be in contempt of this House for refusing to answer a certain question or questions propounded to him at the bar of the House and by the Committee on Ways and Means; and whereas the House did thereupon order the commitment of said Irwin to the custody of the Sergeant-at-Arms in the common jail of the District of Columbia, to abide the further order of this House; and whereas the said Irwin has this day stated in writing to the Speaker that he is ready to answer the question or questions which he has heretofore refused to answer, and others that may be lawfully put to him: Therefore,

Resolved, That so much of the resolution of January 6 as required the Sergeant-at-Arms to keep the said Irwin in the District Jail be, and the game is hereby, rescinded and that upon answering the said question or questions the said Irwin shall be discharged from the custody of the Sergeant-at-Arms.

1692. A witness being arraigned for contempt in refusing to answer a pertinent question asked by a committee agreed, when arraigned, that he would answer if so ordered by the House.

A witness being ordered by the House to answer a pertinent question before a committee, was then removed from the bar, and later, on report of the committee that he had answered, was discharged.

On January 11, 1875,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Ways and Means, which had been charged with an investigation of disbursements of money by the Pacific Mail Steamship Company to procure the passage of the subsidy bill in the previous Congress, reported that Charles Abert had declined to answer a pertinent question, and was in the judgment of the committee in contempt. Thereupon it was

Resolved, That the Speaker issue his warrant, directed to the Sergeant-at-Arms attending this House, or his deputy, commanding him to take into custody forthwith, wherever to be found, the body of Charles Abert, and him to bring to the bar of the House, to show cause why he should not be punished for contempt, and in the meantime keep the said Abert in custody to await the further order of the House.

Subsequently the Sergeant-at-Arms appeared at the bar of the House having in custody Charles Abert, alleged to be in contempt of the House.

On motion of Mr. Dawes,

Ordered, That the Speaker propound to him the question: "Will you state to the Committee on Ways and Means the names of the persons to whom you distributed $106,500 belonging to the Pacific Mail Steamship Company, according to the directions of Mr. Irwin?" and also: "Will you state the names of the person or persons who introduced to you those individuals to whom you distributed any portion of said money?"

The Speaker having propounded the said questions the witness replied that he would as far as he could on being ordered by the House.

The House then directed, by vote, that the witness should answer the questions.

Then, without further order, the witness was removed from the bar by the Sergeant-at-Arms, the Speaker[2] holding that further order was not necessary.

On January 12, on report of Mr. Dawes that the questions had been answered, the House voted to discharge the witness.

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[1] Second session Forty-third Congress, Journal, pp. 159, 163; Record, pp. 378, 379, 399.

[2] James G. Blaine, of Maine, Speaker.

1693. A witness having, when arraigned for contempt, submitted an answer disrespectful to the House, he was ordered into custody for contempt.—On January 19, 1875,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Ways and Means, made a report that in the opinion of the committee Charles A. Wetmore was in contempt for refusing to answer a question arising in the investigation of the use of money to secure the passage of the subsidy bill in the preceding Congress. Thereupon the House adopted the usual resolution for the arrest of Wetmore, and on the same day he was arraigned at the bar of the House. The prisoner then asked until the succeeding day to prepare his answer.

On January 20 the prisoner was again arraigned, and read a prepared statement, after which the House

Resolved, That Charles A. Wetmore, having, under the guise and pretense of answering to a charge of contempt, been guilty of a series of gross and wanton insults to this House, in the presence of the House, be, and hereby is, adjudged in contempt thereof, and committed to the custody of the Sergeant-at-Arms, to be detained in the common jail of the District until the further order of the House.

On the succeeding day a letter of apology being presented to the House from Wetmore, the House ordered his discharge.

1694. A witness arrested for contempt in refusing to answer, promised to respond, and was thereupon discharged and ordered before the committee.

In reporting the contumacy of a witness the committee appended to their report extracts from the examination showing the circumstances.

Instance wherein a committee, in its discretion, kept testimony secret.

On March 7, 1876,[2] Mr. Washington C. Whitthorne, of Tennessee, from the Committee on Naval Affairs, made a partial report stating that they were charged under a resolution of the House of Representatives, adopted January 14, 1876, with the duty of making inquiry into any errors, abuses, or frauds that might exist in the naval service, and were authorized to make inquires for periods in the past, and to send for persons and papers. In pursuance of the power conferred upon them by the House the committee had caused Alcaeus B. Wolfe, of Washington City, to be summoned before them for the purpose of giving testimony, and he had appeared on March 7, and after being sworn had testified in a manner shown by extracts appended. These extracts show that witness refused to answer whether or not he had ever carried any money to anybody connected with the naval service; whether or not he knew of any commissions or payments being made by contractors or claim agents to any person connected with the naval service. The committee therefore recommended this resolution, which was agreed to:

Resolved, That the Speaker issue his warrant, directed to the Sergeant-at-Arms attending this House, or his deputy, commanding him to take into custody forthwith, wherever to be found, the body of Alcaeus B. Wolfe, and bring him to the bar of the House, to show cause why he should not be punished for contempt, and in the meantime keep the said Wolfe in custody to await the further orders of the House.

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[1] Second session Forty-third Congress, Journal, pp. 205, 208, 217, 227; Record, pp. 586, 597, 618, 640.

[2] First session Forty-fourth Congress, Journal, pp. 530–534; Record, pp. 1539, 1540.

On May 8[1] the Sergeant-at-Arms appeared at the bar of the House, having in custody, as directed by the Speaker's warrant, the body of Alcaeus B. Wolfe.

Mr. Whitthorne thereupon offered the following preamble and resolution, which was agreed to:

Whereas it appears to the House that Mr. A. B. Wolfe has appeared before the House Naval Committee and answered all questions that were propounded to him by the committee: Therefore,

Resolved, That the witness, A. B. Wolfe, be discharged from the custody of the Sergeant-at-Arms and ordered before the committee for such other and further examination as they may chose to make touching the matters before them by order of this House.

It appears from the record of debate that the witness had been brought to the committee room by the Sergeant-at-Arms, and had promised to answer the questions propounded. While this statement was being made the witness, then at the bar of the House, fell in a fit. He was removed from the Hall, and Mr. Whitthorne explained further that the last clause of the resolution was inserted in order that the subpoena issued by order of the Speaker should continue binding on the witness, in case the committee should have further need of his testimony.

Mr. Whitthorne further stated that the committee deemed it proper that the testimony given by the witness should remain in possession of the committee alone and for the time be kept secret.

1695. The case of E. W. Barnes, in contempt of the House in 1877.

Form of subpoena duces tecum used for compelling production of telegrams in 1877, but criticized as too general and verbally defective.

A subpoena served by a deputy did not contain a certificate of the deputy's appointment.

The House held valid a report transmitted by telegraph from an investigating committee, and ordered the arrest of a person for contempt on the strength of it.

A person having been arrested for contempt, a communication from his counsel was laid before the House.

On December 21, 1876,[2] the Speaker laid before the House a telegram from Mr. William R. Morrison, of Illinois, chairman of the Select Committee to Investigate the Recent Election in Louisiana, communicating a record of the proceedings in the case of E. W. Barnes, manager of the Western Union Telegraph Company in New Orleans, a recusant witness. Under the authority given the committee to send for persons and papers the committee had caused a subpoena duces tecum to be issued in the following words and figures:

By Authority of the House of Representatives of the United States of America.

TO JOHN G. THOMPSON, Esq.,

Sergeant-at-Arms, or His Special Messenger:

You are hereby commanded to summon E. W. Barnes, manager of the Western Union Telegraph Company at New Orleans, La., to be and appear before the Louisiana Affairs Special Committee of the House of Representatives of the United States, of which Hon. William R. Morrison is chairman, and with you bring all telegrams sent or received by William Pitt Kellogg [here follow names of seven

[1] Journal, p. 537; Record, pp. 1563, 1564.

[2] Second session Forty-fourth Congress, Journal, pp. 127–134.

others], at the office of the Western Union Telegraph Company, New Orleans, from and after, the 15th day of August, 1876, in their chamber in the city of New Orleans, St. Charles Hotel, forthwith, then and there to testify touching matters of inquiry committed to said committee. Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 13th day of December, 1876.

[SEAL.]

SAMUEL J. RANDALL, *Speaker.*

Attest:

GEORGE M. ADAMS, *Clerk.*

On this subpoena was indorsed:

Served personally with a copy of the within at one and one-half o'clock p.m., December 13, 1876.

JOHN G. THOMPSON, *Sergeant-at-Arms.*

BY J. W. POLK, *Special Messenger.*

The witness, when he appeared before the committee, acting under instructions from officers of the company, refused to produce the telegrams, whereupon the committee voted to communicate the refusal to the House. This was done in the form of a transcript of the proceedings of the committee, signed by the chairman and attested by the clerk. Annexed to the communication was a letter from President Orton, of the telegraph company, in which he informed the committee that the company would not permit its employees to furnish the telegrams, or at least not until Congress should have approved the subpoenas of the committees and directed that their demands be enforced.

The communication from Chairman Morrison having been read to the House, Mr. J. Proctor Knott, of Kentucky, submitted this resolution:

Resolved, That the Speaker of this House issue a warrant, under his hand and the seal of the House of Representatives, directing the Sergeant-at-Arms of this House, either by himself or his special deputy, to arrest and bring to the bar of the House without delay E. W. Barnes, to answer for a contempt of the authority of this House and a breach of its privileges, in refusing to produce to the special committee, of which Hon. William R. Morrison is chairman, now sitting in the city of New Orleans, certain telegraphic dispatches, in obedience to a subpoena duces tecum, servied on him the 13th day of December, 1876, and to be dealt with as the law under the facts may require.

There was debate [1] as to the validity of a report transmitted by a committee in this way, but the Speaker sustained the proceeding. There was also debate at length on agreeing to the resolution of arrest. Mr. Garfield urged that a citizen should not be arrested on authority of a report transmitted by an agency so prone to inaccuracy as the telegraph; and Mr. George W. McCrary, of Iowa, urged that the subpoena had been drawn too general in its terms, authorizing too extensive inquiry into the private affairs of the citizen.

The resolution was agreed to by the House without debate.

On January 3, 1877,[2] the Speaker, having stated that the Sergeant-at-Arms, in pursuance of the order of the House, had taken into custody E. W. Barnes, a recusant witness before the Select Committee to Investigate the Recent Election in the State of Louisiana, the Sergeant-at-Arms appeared at the bar of the House with the said Barnes.

The Speaker then laid before the House a communication, addressed to the

[1] Record, pp. 352–358.

[2] Journal, pp. 149, 150; Record, p. 408.

Speaker by the counsel for the said Barnes, requesting delay in the appearance of Mr. Barnes until they should have had time to confer with him.

Mr. Knott submitted the following resolution, which was agreed to:

Resolved, That E. W. Barnes be allowed until Friday, the 5th day of January, 1877, at 2 o'clock p. m., to make his answer at the bar of this House to the charge of contempt of its authority and breach of its privileges pending against him; and that said Barnes be remanded to the custody of the Sergeant-at-Arms, and by him safely held until the judgment of the House be had on said charge.

1696. The case of E. W. Barnes, continued.

In 1877 the House, in the course of an investigation of the recent Presidential election, compelled the production of telegrams by an employee of the Company having actual custody of them.

A witness arraigned for contempt was accompanied by his counsel; but his request that he be heard by counsel was granted only to the extent of being permitted to respond in writing.

In an arraignment in 1877 the answer of the respondent, prepared by his counsel, was attested.

Discussion of the effect of a State law as a limitation on the right of the House to investigate.

A person arraigned at the bar for contempt was permitted to amend his answer.

On January 5, 1876,[1] the hour of 2 o'clock having arrived, in compliance with the previous order of the House, the Sergeant-at-Arms appeared at the bar of the House, having in custody E. W. Barnes, a recusant witness. Mr. Barnes was accompanied by his counsel.

Whereupon the following interrogatory was propounded to him by the Speaker:

Mr. Barnes, it is the duty of the Chair to ask you what excuse you have to offer for your failure to produce before the committee of this House, sitting at New Orleans, on the 18th day of December, 1876, or thereabouts, certain telegrams called for by subpoena duly served upon you?

The said Barnes desiring to be heard by counsel,

Ordered, That leave be granted the witness to make his statement in writing, to be read from the Clerk's desk.

The same having been read, Mr. Knott submitted the following resolution, which was agreed to:

Resolved, That the report of the committee, the answer just read to the House, and all other papers relating to the breach of the privilege of this House and contempt of its authority, alleged to have been committed by E. W. Barnes, now in custody and at the bar of the House, be referred to the Committee on the Judiciary, with instructions to report as early as practicable what action, in their judgment, should be taken by the House in relation thereto.

The record of debates shows that the witness, in reply to the question put by the Speaker, stated that, as the precedent in the case of Kilbourn would prevent his being heard by counsel, he asked that his written statement, prepared by his counsel, be read.

The Speaker expressed the opinion that this statement should be under oath, but stated that he would be governed by the opinion of the House. Some diversity

[1] Journal, p. 164; Record, pp. 452–455.

of opinion was expressed; but the question did not come to issue, as it appeared that the statement was duly attested.

On January 12, 1877,[1] Mr. Knott, from the Committee on the Judiciary, reported[2] the following resolutions:

Resolved, That E. W. Barnes be required to produce to the select committee of which Hon. William R. Morrison is chairman, the telegrams mentioned in the subpoena which had not been sent to Mobile by order of the superintendent before the service of the subpoena upon him on the 13th of December, 1876.

Resolved, That said Barnes be again brought to the bar of the House and the Speaker then demand of him if he is now willing to produce to said committee the telegrams mentioned in the subpoena which had not been sent by him to Mobile before the 13th day of December, 1876, when the subpoena was served on him, and whether he will do so.

Resolved, That if said Barnes shall answer that he is now willing to produce said telegrams to said committee, and promises to do so, he will be allowed to do so without unnecessary delay, and upon so doing he shall be discharged from custody.

In reporting these resolutions the committee took the ground that the messages were not privileged, on account of their transmittal by telegraph. A telegraphic communication was not different from one transmitted orally or on a piece of paper through the hands of a third person. (Judge Cooley, and Henisler *v.* Freedman, 2 Parsons' Select Cases, 274, and State *v.* Litchfield, 58 Maine, 267, are referred to on foregoing branch of question.)

As to the contention of the witness that the legal possession and control of the messages did not reside in him as a subordinate employee, and that he could not produce them without a breach of duty, the committee find, after discussing incidentally the law of the case, and referring especially to Lord Ellenborough's opinion (Amy *v.* Long, 9 East., 473), that Barnes actually did have the authority, given him by a general order of the telegraph company, to produce the telegrams at the time the subpoena was served on him.

The plea of the witness that the subpoena was verbally defective in the use of the word "you" for "him," was dismissed as not made in good faith.

The contention that the subpoena was in effect a "general warrant," and within the prohibition of the Fourth amendment to the Constitution, the committee dismisses on the authority of the case of The United States *v.* Orville E. Babcock (3 Dillon's C. C. R., 567).

The contention that the law of Louisiana in relation to telegraph messages, making them confidential, prevented the witness from disclosing the messages, is thus treated by the report:

It has never been questioned that the House of Representatives has the inherent power under the Constitution, from the very nature and purposes of its organization, to institute any investigation which in its judgment may be necessary to the proper discharge of any of its functions, that in such investigations it has the power to examine witnesses, and to require the production of any paper that may be necessary to render the same effectual, and that its jurisdiction in that regard is coextensive with the limits of the United States, including Louisiana. It is, furthermore, certain that it may, in the exercise of those powers, act through a committee regularly appointed and authorized for that purpose. These principles are so universally understood and admitted that it requires neither argument nor authority

[1] Journal, pp. 212–214; Record, pp. 602–608.

[2] House Report No. 99, Second session Forty-fourth Congress.

for their illustration. It follows, therefore, that the law of any State which might, either directly or by implication, undertake to abridge the exercise of any of these powers by the House would be in derogation of its constitutional functions, and to that extent absolutely void.

When the resolutions were offered on behalf of the committee, Mr. Garfield noted the fact that they were so worded as to establish the foundation of the contempt, if there should be any, in the present and not past refusal to produce the messages.

The resolutions were then agreed to without debate.

The Sergeant-at-Arms thereupon appeared at the bar of the House having in custody the witness, to whom the Speaker propounded the following question:

Mr. Barnes, are you now willing to produce before the committee sitting in New Orleans, of which William R. Morrison is chairman, the telegrams mentioned in the subpoena which had not been sent by you to Mobile before the 13th day of December, 1876, when the subpoena was served upon you?

At the suggestion of Mr. George F. Hoar, of Massachusetts, approved by the Speaker, the resolutions were read to the witness before he was required to answer.

The question then being again put by the Speaker the witness answered:

Mr. Speaker, when I left New Orleans I was necessarily superseded, being under heavy bonds and being unwilling to be responsible for the money and business of the office when not personally present; I am therefore not at present in control of anything or any messages in the New Orleans office. Should I come in possession of the messages again, and should there prove to be any such messages there as are described in the subpoena, I will willingly produce them.

The Speaker expressed the opinion that this was not the categorical answer required by the practice of the House; but, on objection being raised, did not insist that he might determine what was properly a function of the House to determine.

Mr. Knott thereupon offered this resolution:

Resolved, That the answer made by the witness, E. W. Barnes, to the questions propounded to him by the Speaker under the resolution of the House is not deemed sufficient, and that he be remanded to the custody of the Sergeant-at-Arms, and by him closely kept until he shall produce to the committee all telegrams demanded from him and be discharged from the custody by order of the House.

This resolution having been read, the witness asked leave to modify his answer; and, by unanimous consent, on motion of Mr. Bernard G. Caulfield, of Illinois, this request was allowed by the House. A request of the witness that in returning his amended answer he might be heard in verbal explanation through counsel, the Speaker held that this request could only be granted by the House; and objection arising, the request was not put to the House.

The witness thereupon answered:

I intended my answer to be such as the resolution seemed to me to require. I thought it proper in candor to inform the House as to my present circumstances. I am entirely willing to produce the messages, and will do so if I can.

Mr. Knott withdrew the resolution previously offered by him and offered the following:

Resolved, That the answer of E. W. Barnes, the witness, to the questions propounded to him by the Speaker in obedience to the resolution of the House is not deemed sufficient, and that said Barnes is hereby adjudged to be in contempt of the authority of this House, and to have committed a breach of its privileges in refusing to produce telegrams to the special committee, of which William R. Morrison

is chairman, in obedience to the subpoena served upon him on the 13th of December, 1876, and that he be remanded to the custody of the Sergeant-at-Arms, to be held in such confinement by him until said witness shall purge himself of his contempt by producing the telegrams specified in the subpoena, which he had not sent to Mobile before the subpoena was served upon him, to said select committee, or until he be discharged from custody by the order of the House.

After brief debate, this resolution was agreed to, yeas 131, nays 72.

On January 16, 1877,[1] the Speaker laid before the House the following letter:

HOUSE OF REPRESENTATIVES, *January 16, 1877.*

To the Honorable Speaker of the House of Representatives:

The undersigned would respectfully represent that he intended the answer he made to the demand made by the Speaker of him when he was last at the bar to be understood that he was entirely willing to produce all the messages demanded by the committee to the utmost extent of his power; and if allowed an opportunity he would honestly and in good faith use every effort in his power to regain possession of said messages for that purpose. He wishes to repeat that he is now willing so to do if he shall be afforded an opportunity, and that if he should fail he will still be amenable to the action of the House upon a view of all the facts which have occurred or may transpire. And he now respectfully asks the opportunity to make the effort to produce the messages to the committee, which he can not do while he remains in custody.

Yours, very respectfully,

E. W. BARNES.

On motion of Mr. Eppa Hunton, of Virginia, this letter was referred to the Committee on the Judiciary.

On January 16[2] the following resolution was reported from the Judiciary Committee (the Journal entry says "by unanimous consent"), and agreed to by the House:

Resolved, That E. W. Barnes be permitted to repair at once to New Orleans, in the custody of a deputy sergeant-at-arms, for the purpose of procuring the telegraphic dispatches heretofore mentioned in the report of the Judiciary Committee of this House, and within ten days bring them before the committee of investigation, at Washington, of which Hon. William R. Morrison is chairman, and abide the further action of this House.

On January 31, 1877,[3] Mr. Knott, by unanimous consent,[4] from the Committee on the Judiciary, offered the following resolution, which was agreed to:

Whereas E. W. Barnes has delivered to the select committee, of which Hon. W. R. Morrison is chairman, the telegrams in his possession, in pursuance of the order of this House:

Resolved, That said Barnes be, and he is hereby, discharged from custody:

1697. An official of a telegraph company not being in actual possession of dispatches demanded by the House, proceedings for contempt were discontinued.

Verbal return of the Sergeant-at-Arms on presenting a witness under arrest for contempt.

A report of an investigating committee, in the form of a letter to the Speaker, relating to contempt of a witness, was presented as a question of privilege.

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[1] Journal, p. 242; Record, p. 678.

[2] Journal, p. 244; Record, p. 694.

[3] Journal, pp. 346, 347; Record, p. 1154.

[4] The Journal has the entry "by unanimous consent." The Record indicates that "unanimous consent" was not asked.

On January 9, 1877,[1] the Speaker, as a question of privilege, laid before the House a letter from Hon. William R. Morrison, dated at New Orleans, La., December 29, 1876, in relation to the failure of William Orton to respond to a subpoena duces tecum, in the following terms:

By authority of the House of Representatives of the Congress of the United States of America.
To JOHN G. THOMPSON, Esq.,
Sergeant-at-Arms, or his special messenger:

You are hereby commanded to summon William Orton, president of the Western Union Telegraph Company, to be and appear before the select committee of the House of Representatives of the United States, of which Hon. William R. Morrison is chairman, to investigate the recent election in Louisiana, and to bring with you all telegrams in your possession or under your control received or sent by William E. Chandler, etc. [names of 12 others given], from and at New Orleans, La., Washington City, D. C., New York City, N. Y., since the 1st day of September last, at their chamber, in the city of New Orleans, La., on 26th day of December, 1876, at the hour of 12 o'clock m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee. Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 18th day of December, 1876.

[SEAL.] SAM. J. RANDALL, *Speaker.*
Attest:
GEO. M. ADAMS. *Clerk.*

As a part of the communication of the chairman, were included letters from Mr. Orton to Mr. Morrison and to Mr. Speaker Randall. In these letters the writer called attention to the wording of the subpoena which, by using the word "you" instead of "him," seemed to assume the possession of the telegrams by the Sergeant-at-Arms, and then went on to say that he (Mr. Orton) "had neither personally nor officially any possession of them; that I have never had any control over them except as an agent of the Western Union Telegraph Company, through and by the cooperation of subordinate agents; that the Western Union Telegraph Company has, without any knowledge or anticipation on my part, taken from me all power and control over all messages now in the possession of the company." He therefore asked to be excused. In his letter to Mr. Morrison Mr. Orton alleged ill health also as an excuse for not going to New Orleans.

The communication also gave minutes of the proceedings of the committee, and is signed by the chairman and attested by the clerk of the committee.

The same having been read, Mr. Eppa Hunton, of Virginia, offered a resolution, which was agreed to, yeas 160, nays 31, providing for the arrest of Mr. Orton. This resolution was substantially the same as that agreed to in the case of Mr. Barnes.

On January 15, 1877,[2] the Sergeant-at-Arms appeared at the bar of the House having in custody William Orton, and said: "In obedience to the order of the House, I have arrested and now have at its bar the witness, William Orton."

The Speaker then said:

Mr. Orton, it is the duty of the Chair to ask you what excuse you have to offer for your failure to appear before a committee of this House, sitting at New Orleans, to testify and, further, to produce before said committee, in compliance with the subpoena duces tecum, duly served on you, and dated the 18th of December, 1876?

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[1] Second session Forty-fourth Congress, Journal, pp. 190–194; Record, pp. 514–518.

[2] Journal, pp. 219–226; Record, pp. 629–631.

Mr. Orton thereupon presented an attested statement in writing in which were included copies of letters, dispatches, and other communications which had passed between him and officers and Members of the House, as well as transcripts of the records of his company showing that he had no authority to produce telegrams. He disclaimed an intention of contempt, and asked to be discharged from custody.

Thereupon the communication of Chairman Morrison, the answer of Mr. Orton, and other papers relating to the case were referred to the Judiciary Committee.

On January 17,[1] by unanimous consent, Mr. Hunton submitted this resolution, which was agreed to:

Resolved, That the Sergeant-at-Arms be, and he hereby is, authorized and allowed to permit William Orton, a witness now in custody, to return home to New York for consultation with and treatment by his attending physicians, in the company of the Sergeant-at-Arms or his deputy, to return on Friday, the 19th instant, to Washington.

On January 19[2] Mr. Hunton, from the Committee on the Judiciary, submitted the following report, which was agreed to:

That they find from the proof before them that at the time and since the service of the subpoena upon him the condition of Mr. Orton's health has been such that it would have probably imperiled his life, or at least postponed his recovery, to have made the journey to the city of New Orleans when he was requested to appear, and that for that reason he should not be held in contempt for failing to make his personal appearance at the time and place designated.

It further appears that at the time of the service of the subpoena upon him, and since, Mr. Orton has not had actual possession of the dispatches demanded with the present capacity to produce them so as to bring him within the rule laid down by Lord Ellenborough in Amey *v.* Long, 9 East, 473, indorsed by the House in the recent matter of E. W. Barnes. They therefore recommend that said Orton be discharged from custody.

1698. In 1877 the House imprisoned members of a State canvassing board for contempt in refusing to obey a subpoena duces tecum for the production of certain papers relating to the election of Presidental electors.

A subject being within the power of the House to investigate, it was held that State officers might not decline to produce records on the plea that they possessed them in their official capacities.

Several persons arraigned at the bar together for contempt made an answer in writing and signed, but not sworn to.

A resolution relating to the place of imprisonment of persons in custody for contempt was admitted as a matter of privilege.

At the end of a Congress the House, by a general order, directed the discharge of all persons in custody for contempt.

On January 16, 1877,[3] Mr. William P. Lynde, of Wisconsin, from the Committee on the Judiciary, to which was referred the report of the select committee to investigate the recent election in Louisiana in relation to the contempt and breach of the privileges of the House by J. Madison Wells, Thomas C. Anderson,

[1] Journal, p. 243.

[2] Journal, p. 258; Record, p. 753.

[3] Second session Forty-fourth Congress, Journal, pp. 242, 246, 247; Record, pp. 668–678, 695–704.

G. Casanave, and Louis M. Kenner, in refusing to produce to said committee certain papers mentioned in a subpoena duces tecum duly served upon them, and each of them, submitted a report in writing, accompanied by the following resolution:

Resolved, That the Speaker of this House issue a warrant, under his hand and the seal of the House of Representatives, directing the Sergeant-at-Arms of this House, either by himself or his special deputy, to arrest and bring to the bar of the House without delay J. Madison Wells, etc. [giving names of the others], to answer for a contempt of the authority of this House and a breach of privilege, in refusing to produce to the special committee of which Hon. William R. Morrison is chairman, now sitting in New Orleans, certain papers in obedience to a subpoena duces tecum which was duly served upon them, and to be dealt with as the law under the facts may require.

After debate, and on the succeeding day, the resolution was agreed to, yeas 158, nays 81.

The report, giving reasons for the resolutions, was read from the Clerk's desk by Mr. Lynde.[1] The report began by stating that the gentlemen named in the resolution—

claiming to be the returning board of canvassers for said State, have refused to obey a subpoena duces tecum, duly issued and served upon them, commanding them to appear before the committee now sitting in New Orleans and bring with them "all returns of elections, all consolidated statements of supervisors of elections, all statements of votes, and tally sheets for each polling place at the late election for electors for President and Vice-President of the United States, together with all affidavits, depositions, protests, and other written proofs in their possession or under their control, touching the said election in certain parishes," naming them.

The witnesses refusing to obey the subpoena have sent a written communication to the investigating committee, claiming that these papers are "a part of the records of the returning officers of elections for the State of Louisiana and are in the possession of the returning officers in their official capacity;" and submit that "the board of returning officers of elections for Louisiana is a body created by the laws of Louisiana, with specific and well-defined duties, partly ministerial and partly quasi-judicial; that their action under the law of their creation is final to the extent provided by the law, and is not subject to review by any State or national tribunal."

Your committee do not feel called upon at this time to express an opinion upon the question as to whether "the action of the returning officers is subject to review by any State or national tribunal,"

The Constitution of the United States, Article II, section 1, provides that "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

The committee claimed for Congress the right to inquire whether the persons claiming to be electors had been properly chosen, and that the power to legislate on this subject rested in Congress alone. Charges of fraud had been made against this returning board, and the witnesses were subpoenaed to appear and testify in regard to the charges.

Your committee [continues the report] are of the opinion that these charges are within the power and duty of the House to investigate, and that the returning officers, either in their individual or official capacity, can not conceal fraudulent acts or violations of law in the appointment of electors * * * under the claim that in perpetrating the fraud or violating the law they were acting in an official capacity as State officers. Courts sometimes excuse public officers from producing papers in their possession and custody upon the ground of public convenience, and substitute secondary evidence or copies of such papers for the original. But it is a rule adopted for public convenience and is never applied when the original is necessary, as in a case of forgery or perjury, or when the original alone can answer the purpose and object of the investigation. * * * It is true that courts do not require public officers to disclose secrets of state, but here are no state secrets; these papers * * * are public in their

[1] Record, p. 668.

character, and every American citizen is interested in them. Your committee do not recognize the rights of any citizen or officer, whether Federal or State, to defeat an investigation of either House which may involve the existence of the Government by refusing to appear and testify. If a State officer can be compelled to appear before a committee of this House appointed to investigate a question involving the existence of the Government, then it is for the House to determine when the power shall be exercised.

Therefore the committee reported the resolution. This was debated at length, it being urged in opposition that the appointment of electors was a State function, and that to inquire into it was an invasion of State sovereignty. The records of a State might not be thus taken by authority of Congress. The positions of Presidents Jefferson and Jackson as to production of papers were cited [1] in this connection. At the close of the debate the resolution was adopted, as stated above.

On January 27, 1877,[2] the Sergeant-at-Arms appeared at the bar of the House having in custody the bodies of those specified in the resolution of arrest.

Thereupon the following interrogatory was propounded to the said Wells, Anderson, Casanave, and Kenner:

It is the duty of the Chair to ask you what excuse you have to offer for your failure to appear before a committee of this House, sitting in the city of New Orleans, La., on the 12th day of December, 1876, and to produce before the said committee certain books and papers called for in the subpoena duces tecum duly served upon you.

To which the said Wells, Anderson, Casanave, and Kenner being severally interrogated severally replied that they desired time for consultation, and requested that they be allowed until Monday or Tuesday next at 1 o'clock to make reply to said interrogatory.

Thereupon Mr. Lynde, from the Committee on the Judiciary, reported the following resolutions:

Resolved, That J. Madison Wells, Thomas C. Anderson, G. Casanave, and Louis M. Kenner be, and are hereby, adjudged to be in contempt for a violation of the privileges of this House.

Resolved, That J. Madison Wells, etc., [names given] be, and are hereby, ordered to appear before the special committee appointed to investigate the recent election in Louisiana, of which Hon. William R. Morrison is chairman, and produce all consolidated returns of supervisors of election, all statements of votes and tally sheets for each polling place in the late election for electors of President and Vice-President, together with all affidavits, depositions, protests, and other written proofs in their possession or under their control on the 11th day of December, 1876, touching the said election in the parishes of East Baton Rouge, etc. [here follows enumeration of parishes], and that said witnesses be remanded to the custody of the Sergeant-at-Arms, and be by him closely kept until the further order of this House.

Pending action on these resolutions, by unanimous consent on motion of Mr. John Hancock, of Texas, the respondents were allowed thirty minutes for consultation, before replying to the said interrogatory.

The House thereupon proceeded to other business, and after a time the Sergeant-at-Arms again appeared at the bar of the House having in custody the bodies of the said Wells, Anderson, Casanave, and Kenner.

By unanimous consent leave was granted them to make reply to the said interrogatory in writing, to be read from the Clerk's desk. This reply [3] cited the laws of Louisiana relating to the functions of the returning board; claimed that public

[1] By Mr. William P. Frye, of Maine, Record, p. 670.

[2] Journal, pp. 313–317; Record, pp. 1065, 1072.

[3] Record, p. 1069, 1070.

records and documents of the government were not to be wrested by subpoena from sworn custody; claimed also that they should be proven by examination and exemplified copies; asserted that the investigating committee were tendered full, ample, and complete inspection of the papers in question; asserted that to have surrendered the documents on December 12, 1876, would have involved a violation of the sworn duties of the respondents; and finally declared that on January 5, 1877, under the terms of law, the papers demanded by the subpoena had been deposited with the secretary of state of Louisiana.

This reply was signed by the respondents; but Mr. Lynde raised the point that it was not sworn to. The Speaker[1] said that the practice of the House had varied, but of late it had tended in the direction of requiring the oath.

Mr. Lynde, however, waived this point.

The reply having been read, the House then agreed to the two resolutions under the operation of the previous question, the first being agreed to yeas 145, nays 87, and the second, yeas 137, nays 77.

On February 8[2] Mr. Eugene Hale, of Maine, proposed as a question of privilege a resolution directing the Sergeant-At-Arms to remove Messrs. Wells and Anderson, "now confined in this Capitol, to a place more suitable" and where the health of the witnesses might not be endangered. The Chair decided the matter to be privileged.[3] The resolution was, on motion of Mr. S. S. Cox, of New York, referred to the select committee on the late election in Louisiana with instructions to investigate and report.

On March 2,[4] three attempts were made to suspend the rules so as to consider and pass a resolution discharging Messrs. Wells, Anderson, Casanave, and Kenner from custody; but each time there was failure to get a two-thirds vote in favor of the resolutions.

On March 2,[5] (calendar day of March 3) Mr. J. Randolph Tucker, of Virginia, by unanimous consent submitted the following preamble and resolution, which were considered and agreed to:

Whereas all the investigations which have been directed by this House have been virtually closed, and no more testimony can be taken by reason of the near adjournment of the House, and the further imprisonment of witnesses in contempt of the authority of this House can not conduce to the truth sought by said investigations: Therefore,

Resolved, That the Sergeant-at-Arms be directed to discharge this day all persons held by him under order of this House for contempt of its authority.

1699. For declining to testify or to obey a subpoena duces tecum commanding him to produce certain papers to be used in impeachment proceedings against himself George F. Seward was arraigned for contempt.

After consideration a committee concluded that an official threatened with impeachment was not in contempt for declining to be sworn as a witness or to produce documentary evidence.

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[1] Samuel J. Randall, of Pennsylvania, Speaker.

[2] Journal, p. 401; Record, pp. 1359–1365.

[3] Record, p. 1360.

[4] Journal, pp. 616, 622, 631; Record, pp. 2109, 2131.

[5] Journal, p. 640: Record, p. 2143.

A person before a committee declining to give evidence, the committee tendered him oaths as a witness, which he refused.

Being arraigned for contempt, George F. Seward presented a written statement signed by himself and counsel, but not attested, and this answer appears in full in the Journal.

Form of a subpoena duces tecum issued by order of the House.

On February 22, 1879,[1] Mr. William M. Springer, of Illinois, from the Committee on Expenditures in the State Department, submitted a report in regard to the alleged contumacy of George F. Seward. The report set forth that the committee had been empowered by resolution of the House to investigate the business of the State Department, past and present, with power to send for persons and papers; that there had been referred to the committee a memorial preferring charges of misconduct in office against George F. Seward, late consul-general at Shanghai, China, and at this time minister to China. The committee having failed to obtain certain books and papers, the following subpoena duces tecum was issued on February 19:

By authority of the House of Representatives of the Congress of the United States of America.

To JOHN G. THOMPSON, Esq.,

Sergeant-at-Arms, or his special messenger:

You are hereby commanded to summon George F. Seward to be and appear before the Expenditures of State Department Committee of the House of Representatives of the United States, of which Hon. William M. Springer is chairman, and the said George F. Seward is hereby commanded and required to diligently search for and bring with him and produce before said committee all blotters, rough books, cashbooks, journals, and ledgers kept and used in the office of the consul-general at Shanghai, China, during his (said Seward's) incumbency of the office of consul-general at Shanghai, including any that may have been taken by him (said Seward) to Peking, China, in their chamber, in the city of Washington, on the 20th day of February, 1879, at the hour of 10 o'clock in the forenoon, then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 19th day of February, 1879.

[L. S.] SAM. J. RANDALL, *Speaker.*

Attest:

GEORGE M. ADAMS, *Clerk.*

The report goes on to state that Mr. Seward appeared before the committee on February 20 and answered the inquiry of the committee as to his readiness to produce the books, by an argument of his counsel as to the authority of the House to compel their production. The committee thereupon adopted a series of resolutions reciting that the books in question were public and not private; that they were necessary to the inquiry; that said Seward had possession of the books and illegally deprived the committee of their use, etc., and, finally, that, should he fail to produce them, the chairman of the committee should tender to him the following qualified oath:

You do swear that you will true answer make to such questions as may be put to you touching the possession, custody, and whereabouts of the books called for by the subpoena duces tecum served upon you?

[1] Third session Forty-fifth Congress, Journal, pp. 496, 547, 555; Record, pp. 1770–1777, 2005–2016.

And, further, it was resolved that the chairman should tender to him the general oath, as follows:

You do solemnly swear that the evidence you will give touching the matters of inquiry committed to this committee and the answers you will give to the questions propounded to you by or on behalf of this committee touching such matters shall be the truth, the whole truth, and nothing but the truth, so help you God?

These oaths being successively tendered to the witness, he stood mute in each case. Then his counsel presented an argument that the said George F. Seward was protected by the constitutional guaranty that "no person shall be compelled in any criminal case to be a witness against himself." The answer, therefore, denied the efficacy of the subpoena, and also protested that the said Seward had not been heard by counsel or otherwise on the matters of fact set forth by the committee in regard to the books and papers in question, and denied that any books, public in the light of the law, had been wrongfully withheld.

The committee, after referring to the law in regard to witnesses summoned before committees, proceeded with an argument to show that an investigation before a Congressional committee is not a criminal case within the meaning of the Constitution. Mr. Seward was not a "party," instead of a witness, simply because counsel and testimony had been heard for and against him. The committee were investigating, but not trying him.

Therefore the committee recommended the following:

Ordered, That the Speaker issue his warrant, directed to the Sergeant-at-Arms attending this House, or his deputy, commanding him to take into custody forthwith, wherever to be found, the body of George F. Seward and him bring to the bar of the House, to show cause why he should not be punished for contempt; and in the meantime keep the said George F. Seward in his custody to abide the further order of the House.

This report was signed by Messrs. Springer; Benjamin Dean, of Massachusetts; Stephen L. Mayham, of New York, and Thomas Turner, of Kentucky.

The minority of the committee, Messrs. Solomon Bundy, of New York, Thomas M. Bayne, of Pennsylvania, and Mark H. Dunnell, of Minnesota, submitted views, arguing at length to show that the inquiry was a criminal case within the meaning of the Constitution, and also arguing that the books required were not, as the committee report held, public archives such as a consul was required by law or regulation to keep, but were private books such as he should not be required to produce. The minority therefore proposed the following resolutions:

Resolved, That the reasons given by Hon. George F. Seward, through his counsel, to the committee are legally sufficient to excuse his failure to produce the books described in the subpoena duces tecum, and his standing mute when tendered the oaths required by the resolutions of the committee, adopted by a majority of this committee, and his conduct in the premises are not contumacious, but are excusable by the Constitution and laws of the United States and the acts of Congress pertaining thereto.

Resolved, That the Speaker should not issue his warrant directing the Sergeant-at-Arms to take into custody the body of George F. Seward, to the end that he be brought to the bar of the House to show cause why he should not be punished for contempt.

The question being taken first on the resolutions of the minority, they were disagreed to—yeas 119, nays 142.

The order proposed by the committee was then agreed to—ayes 105, noes 47.

In the course of the debate on the above report reference was made to the refusal of President Jackson, in 1837, to give to a committee information on which impeachment proceedings might be founded.

On February 28[1] the Sergeant-at-Arms appeared at the bar of the House having in custody the body of George F. Seward; whereupon the said Seward was arraigned and the following interrogatory propounded to him by the Speaker:

Mr. Seward, you are presented at the bar of the House, upon the order of the House, under arrest on an alleged breach of the privileges of the House, in refusing to answer certain questions propounded to you by a committee of the House, which questions that committee was authorized by the House to ask, and for standing mute when tendered an oath as a witness, and for failing to produce certain books as required by a subpoena duces tecum duly served on you. It is my duty now, by authority of the House, to ask whether you are ready to take the oath tendered to you by the chairman of the committee, to answer the questions propounded to you by the committee, and to produce the books as required by the subpoena duces tecum served on you.

The said George F. Seward, in response, presented a written statement, signed by himself and counsel, but not attested under oath. This statement appears in full in the Journal.

The statement contends that the committee were making the investigation with a view to his impeachment, and that the subpoena was void and inoperative because of the constitutional guaranty. This guaranty applied to legislative bodies, as was shown by the case Ex parte Emery (107 Mass.), wherein it was shown that an inquiry before a legislative body should not be inquisitorial, and that in this country the parliamentary usage was subordinated to constitutional provision, although in England Parliament may have been above the common law. The statement then presents the argument made by the minority of the committee as to the nature of the books demanded.

The answer having been read, Mr. Springer submitted the following resolution:

Resolved, That George F. Seward, having been heard by the House, pursuant to the order heretofore made requiring him to show cause why he should not respond to the subpoena duces tecum by obeying the same so far as the same requires the production of the books described in the subpoena duces tecum be, and is therefore, considered in contempt of the House because of his failure to produce said books.

Mr. Bundy, in behalf of the minority of the committee, submitted the following as an amendment in the nature of a substitute:

Resolved, That the answer of George F. Seward in response to the order voted by the House and issued by the Speaker, requiring him to show cause why he should not be declared in contempt, and all evidence and papers pertaining thereto, together with the reports of the committee, be referred to the Committee on the Judiciary, with instructions to report as early as practicable what action in their judgment should be taken by the House in relation thereto.

On agreeing to the substitute there were yeas 112, nays 108.

The resolution as amended was then agreed to.

It was then,

Ordered, That Mr. Seward be discharged on his own personal recognizance to appear again upon notice.

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[1] Journal, pp. 567–577; Record, pp. 2138–2144.

Subsequently, on March 1,[1] the Committee on Expenditures in the State Department reported articles of impeachment against Seward. On March 3, the last day of the session and of the Congress, an attempt to bring this report to a vote brought on a discussion as to the propriety of proceeding by impeachment against a man under arrest for contempt. The articles were not voted on.

1700. The case of George F. Seward, continued.

Discussion distinguishing a case of impeachment from the ordinary investigation for legislative purposes.

Discussion of the right of the House to demand papers of a public officer.

Discussion of the use of the subpoena duces tecum in procuring papers from public officers.

On March 3[2] Mr. Benjamin F. Butler, of Massachusetts, reported from the Committee on the Judiciary, the report in the last hours of the session being ordered to be printed and laid on the table. This report[3] I held:

The facts necessary to raise the question succinctly state themselves in this way: By resolution of the House the Committee on Expenditures in the State Department were in charge of the investigation of the official conduct of George F. Seward, late consul-general of the United States in China, and now minister resident there. Mr. Seward came before the committee—appeared by counsel; charges were filed against him for sundry malfeasances in office, looking to his impeachment if proven, and evidence was taken to sustain such charges. The committee deem it important that they should have before them certain books kept by him while such consul-general, and which, it was claimed, showed entries tending to substantiate the accusations. There was evidence before the committee tending to show that those books were the public records of the consulate and the property of the United States. Mr. Seward claimed that they were books in which he kept his governmental and his private transactions for his personal use, and that he had returned to the State Department or left in the consulate all the books of the United States. The committee procured a subpoena duces tecum directed to him, which was served on Mr. Seward, commanding him to produce these books for the purpose of being used in evidence against him. Mr. Seward appeared in obedience to the subpoena, but declined to be sworn as a witness in a case where crime was alleged against him and where articles of impeachment might be found against him, claiming through his counsel his constitutional privilege of not being obliged to produce evidence in a criminal case tending to criminate himself.

Upon this refusal the Committee on Expenditures in the State Department brought Mr. Seward before the House to show cause at its bar why he should not be sworn as a witness, and why he should not obey the order of the Home, through its subpoena, to produce the documentary evidence called for.

Mr. Seward, when before the House, in answer to the question of the Speaker, set up practically the same claim that he did before the committee. Upon a resolution proposed by the minority of such committee, the question was referred by a vote of the House to its Judiciary Committee as to whether the cause shown by Mr. Seward for not obeying the subpoena of the House and declining to be sworn as a witness was a sufficient answer.

Investigations looking to the impeachment of public officers have always been finally examined before the Judiciary Committee of the House, so far as we are instructed, and it is believed that the cue can not be found as a precedent where the party charged has ever been called upon and compelled to give evidence in such case. We distinguish this case from the case of an ordinary investigation for legislative purposes, where all parties are called upon to give such evidence (oral or written) as may tend to throw light upon the subject of investigation, but even in those cues it was early held that a person called as a witness, and not a party charged before the committee, was not bound to criminate himself, and a statute familiar to the House for the protection of witnesses under such circumstances, from having the evidence given used against them, was passed.

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[1] Journal, p. 601; Record, pp. 2350, 2362–2364.

[2] Journal, p. 670.

[3] House Report 141, third session Forty-fifth Congress.

In making an investigation of the facts charged against an officer of the United States looking to impeachment, the House acts as the grand inquest of the nation to present that officer for trial before the highest court known to our Constitution, the Senate of the United States, for such punishment as may be constitutionally imposed upon him, which is very severe in its penalties, and even then does not exonerate the party from further prosecution before the proper courts for offenses against the laws.

If these books of Mr. Seward's are his private books, kept for his personal use, or whether they contain records of his action as a public officer intermixed or otherwise with his private transactions, it is believed he can not be compelled to produce them. A public officer may well keep a duplicate set of records of his transactions as such for his own use and protection, and he may, at his will, mingle therewith his own private transactions, and as a party to a contestation between the United States and himself, looking to his trial and punishment for alleged criminal transactions, he can not be compelled to produce such books nor answer concerning them, but he is protected by the constitutional provision (which is, after all, only a translation of a clause of Magna Charta), and which is a distinguishing characteristic of criminal procedure at common law in England, as opposed to criminal procedure by the civil law in other European States. Even if he had possessed himself of public records which contained evidence to accuse him of crime in such a contestation (which makes a criminal case), it seems to your committee the question would be more than doubtful whether he could be called upon to produce such books.

A subpoena duces tecum is not the remedy of the Government. If he has embezzled or stolen the books, he may be proceeded against criminally therefor. If he refuses to produce them to his superior officer, who has a right to call for them if public books, then they may be got out of his hands by a writ of replevin or other proper process.

If the question in whom is the title to these books would be the test as to the question whether the accused himself were obliged to produce them as evidence against himself, then a question would at the outset arise, How is title to be tried? If the books are private, they are not to be produced. Can a man's title to his private property be tried and decided against him collaterally so as to deprive the accused of his rights? Your committee believe that it can not.

If, as the Committee on Expenditures in the State Department believe, these are public books, then it seems very queer to your committee that that committee have mistaken the proper procedure in a court of justice. Their subpoena duces tecum should be issued to the highest executive officer having charge, custody, and control of such public records. Since the case of Burr where a subpoena duces tecum was demanded of the court by the defendant against Thomas Jefferson, then President of the United States, and the right to have such writ issued was determined by the Chief Justice—to have a certain letter, known as "the Wilkinson letter," then on the files of the State Department produced, the usual course has been for a committee of Congress to direct a letter to the head of the proper Department, or the House, by resolution, to call upon the proper executive officer to produce the same, leaving that officer to get possession of the books from his subordinate by any lawful means. But it may be asked, Can not the House direct a subpoena to any executive officer of the Department to produce any books actually in his possession in the course of official duty, and bring them before the House for the purpose of information or to aid an inquiry? Certainly that can be done, and, in proper cases, ought to be done; but, in contemplation of law, under our theory of government, all records of the Executive Departments are under the control of the President of the United States; and although the House sometimes sends resolutions to a head of a Department to produce such books or papers, yet it is conceived that in any doubtful case no head of Department would bring before a committee of the House any of the records of the Department without permission of, or consultation with, his superior, the President of the United States; and all resolutions directed to the President of the United States to produce papers within the control of the Executive, if properly drawn, contain a clause, "if in his judgment not inconsistent with the public interest." And whenever the President has returned (as sometimes he has) that, in his judgment it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either House of Congress as either House of Congress is independent of him, and they can not call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals or records of the House or Senate.

The highest exercise of this power of calling for documents perhaps would be in the course of justice by the courts of the United States, and the House would not for a moment permit its journals to

be taken from its possession by one of its assistant clerks and carried into a court in obedience to a subpoena duly issued by the court.

The mischief of the House calling for documents might easily be a very great one. Suppose the President is engaged in a negotiation with a foreign government, one of the most delicate character upon which peace or war may depend, and which it is vitally necessary to keep secret; must he, at the call of the House, or of any committee of the House, spread upon its records such state secrets to the detriment of the country? Somebody must judge upon this point. lt clearly can not be the House or its committee, because they can not know the importance of having the doings of the Executive Department kept secret. The head of the Executive Department therefore must be the judge in such cases and decide upon his own responsibility to the people and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interest.

Your committee regret that it has been impossible for the House to furnish them sufficient time in which this grave question might be more satisfactorily and exhaustively examined; but viewing it with the best light in which we find it, we are constrained to the conclusion at which we have arrived.

Therefore, your committee report to the House that, in their opinion, George F. Seward has shown sufficient cause why he should not be sworn as a witness in the investigation of charges looking to his impeachment by the Committee on Expenditures in the State Department, and why he should not produce the books, whether they are private books solely, or, for the reason above stated, are public books, in which criminatory matter may be contained; and therefore recommend the adoption of the following resolution:

Resolved, That, under the facts and circumstances reported from the Committee on Expenditures in the State Department, George F. Seward was not in contempt of the authority of this House in refusing to be sworn as a witness or produce before said committee the books mentioned in the subpoena duces tecum.

1701. In 1891 a witness in contempt for refusing to testify before a committee was arrested and arraigned, and after purging himself of the contempt was discharged.

In the latest practice a committee in reporting the contempt of a witness shows that the testimony required is material and presents copies of the subpoena and return.

A subpoena having been served by a deputy Sergeant-at-Arms, a certificate of his appointment should accompany a report requesting arrest of the witness for contempt.

It was not thought necessary that mileage and fees should be tendered a witness before arresting him for contempt in declining to answer.

In ordering the arrest of a witness for contempt, the House embodied in a preamble the report of the committee showing the alleged contempt.

A witness arraigned for contempt answered orally and without being sworn.

A witness having promised when arraigned to testify before a committee, the House gave him permission to do so, but did not discharge him from custody until the committee reported that he had purged himself.

On January 29, 1891,[1] Mr. Nelson Dingley, of Maine, from the select committee appointed to investigate the alleged "silver pool," submitted a report, setting forth that J. A. Owenby had been duly subpoenaed to appear before the committee, that service was duly made on him, but that he had refused or neglected to obey the sub-

[1] Second session Fifty-first Congress, Journal, pp. 195, 196; Record, pp. 1973–1976.

poena.[1] The report goes on to show that the said Owenby was a material witness, inasmuch as the correspondent of the paper making the charges against Members of the House in connection with the alleged pool had in his testimony stated that Owenby was the authority for what he had stated, and claimed to have personal knowledge of the facts alleged. The report also was accompanied by copies of the subpoena, the return of the deputy sergeant-at-arms, and certificate of his appointment.

Having submitted the report, Mr. Dingley offered the following:

Ordered, That the Speaker issue his warrant directing the Sergeant-at-Arms attending this House or his deputy, commanding him to take into custody forthwith, wherever to be found, the body of J. A. Owenby, and bring him to the bar of the House, to show cause why he should not be punished for contempt; and in the meantime keep the said J. A. Owenby in his custody to await the further order of the House.

Mr. Dingley stated that this proceeding was proposed in accordance with the uniform precedents of the House. In the debate that followed it was asked whether the mileage and fees had been tendered to the witness; but Mr. Dingley replied that after consideration the committee had thought this unnecessary. The headnotes of the decision in the case of Kilbourn *v.* Thompson were read during the debate. After the debate Mr. Dingley modified his resolution by prefixing thereto the following:

Whereas the special committee appointed by the House to investigate alleged silver pools presented the following report, to wit: (Here followed the report in full).

The resolution as amended was agreed to.

On February 2,[2] the Sergeant-at-Arms appeared at the bar of the House having in custody the body of J. A. Owenby, and addressing the Speaker announced that fact.

The said Owenby was thereupon arraigned and the following interrogatory propounded to him by the Speaker:

Mr. Owenby, you have been arrested for contempt of the House in disobeying its summons. What have you to say in excuse therefor?

The said Owenby having made a statement to the House, orally and not under oath, the Speaker thereupon propounded the following interrogatory to the said Owenby:

Are you now ready to appear before the committee?

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[1] The resolution authorizing this investigation was agreed to on January 12, 1891 (second session Fifty-first Congress, Journal, p. 121), as follows:

Resolved, That the Speaker appoint a special committee of five Members of the House, and that such committee be instructed to inquire into all the facts and circumstances connected with silver pools in which Senators and Representatives were alleged to be interested; also with the said alleged purchase and sale of silver prior to and since the passage of the act of July 14, 1890, including the names of persons selling the same; and also who are the owners of the twelve millions of silver bullion which the United States is now asked to purchase. And for such purposes it shall have power to send for persons and papers and administer oaths, and shall also have the right to report at any time. The expenses of said inquiry shall be paid out of the contingent fund of the House upon vouchers approved by the chairman of said committee, to be immediately available.

[2] Journal, pp. 204, 213; Record, pp. 2068, 2150.

To which interrogatory the said Owenby replied that he was now ready to appear before said committee.

Thereupon Mr. Dingley submitted the following preamble and resolution, which was agreed to:

Whereas J. A. Owenby has been heard by the House pursuant to the order made on the 29th day of January, 1891, requiring him to show cause why he should not be punished for contempt for refusing or neglecting to respond to the subpoena named in said order by obeying the same, and has stated to the House that, in purging himself of the contempt for which he is in custody, he is now willing to obey said subpoena: Therefore,

Resolved, That the said J. A. Owenby shall have the privilege to appear forthwith before the special committee of the House to investigate alleged silver pools, etc., and testify touching matters of inquiry before said committee; and that in the meantime the said J. A. Owenby remain in the custody of the Sergeant-at-Arms under said order until the further order of the House.

On February 4, Mr. Dingley, as a privileged question, reported the following resolution, which was agreed to:

Resolved, That J. A. Owenby, having been heard by the House pursuant to the order requiring him to show cause why he should not be punished for contempt for refusing or neglecting to respond to the subpoena commanding him to appear before the special committee to investigate alleged silver pools, and, in purging himself of the contempt for which he is in custody, has appeared and testified before said committee, is hereby discharged from the custody of the Sergeant-at-Arms.

1702. In 1880 three recusant witnesses were arraigned at the bar of the Senate, and having purged themselves of contempt were discharged.

A discussion distinguishing between the serving of a warrant by deputy and the serving of a subpoena in the same way.

Should the Sergeant-at-Arms make the return on a subpoena served by his deputy?

Form of subpoena and return thereon used for summoning witnesses by a Senate committee.

Form of warrant and return thereon used by the Senate in compelling the attendance of witnesses.

On June 20, 1879,[1] in the Senate, Mr. Eli Saulsbury, of Delaware, from the Committee on Privileges and Elections, reported the following resolution for consideration; which was ordered to be printed:

Resolved, That the Committee on Privileges and Elections, to which has been referred memorials in relation to the election of Hon. J. J. Ingalls a Senator by the legislature of the State of Kansas, be, and said committee is hereby, authorized and instructed to investigate the statements and charges contained in said memorials; and for that purpose said committee is empowered to send for persons and papers, administer oaths, employ a stenographer, clerk, and sergeant-at-arms, and to do all such acts as are necessary and proper in the premises. And said committee may appoint a subcommittee of its members to take testimony in Kansas or elsewhere in the case, which shall report the testimony taken to the committee in December next; and such subcommittee shall have the same authority to administer oaths and to do other necessary acts as are herein conferred upon the full committee; and the said committee, and the subcommittee which it may appoint, may sit during the recess of the Senate for the purpose of making the investigation hereby authorized.

This resolution was agreed to on June 21.

On December 18, 1879, Mr. Saulsbury, from the Committee on Privileges and

[1] Senate Document No. 11, special session Fifty-eighth Congress, pp. 692–694.

Elections, reported the following resolution; which was considered by unanimous consent and agreed to:

Whereas J. V. Admire, E. B. Purcell, George T. Anthony, Len. T. Smith, and Levi Wilson, citizens and residents of the State of Kansas, were duly served with subpoenas in the months of September and October, 1879, issued by the subcommittee of the Senate Committee on Privileges and Elections, then sitting in Topeka, in said State of Kansas, commanding each of them to appear before said subcommittee and then and there testify in reference to the subject-matters then under consideration by said subcommittee, to wit, charges relating to the election of John J. Ingalls a Senator from said State of Kansas; and

Whereas said Admire, Purcell, Anthony, Smith, and Wilson refused to appear and testify before said subcommittee as required by said subpoenas: Therefore,

Resolved, That an attachment issue forthwith directed to the Sergeant-at-Arms of the Senate commanding him to bring said J. V. Admire, E. B. Purcell, George T. Anthony, Len. T. Smith, and Levi Wilson forthwith to the bar of the Senate to answer for contempt of a process of this body.

On January 8, 1880,[1] the Sergeant-at-Arms appeared at the bar of the Senate having in custody Leonard T. Smith, Levi Wilson, and E. B. Purcell, arrested by order of the Senate and brought to its bar to answer for a contempt of a process of the Senate.

Whereupon the Vice-President laid before the Senate the return of the writ of attachment issued to the Sergeant-at-Arms commanding him to bring J. V. Admire, George T. Anthony, Leonard T. Smith, Levi Wilson, and E. B. Purcell to answer for a contempt of a process of the Senate.

The return having been made, Leonard T. Smith, one of the witnesses, advanced and made statement of his reasons for failure to answer to the summons of the Senate and stated that he was ready and willing to go before the committee and testify.

In treatment of the witness's case questions arose which caused the reading, both of the original subpoena and return, and the writ of attachment, with the return thereon.

The subpoena and return thereon were in form as follows:

UNITED STATES OF AMERICA,

CONGRESS OF THE UNITED STATES:

To George T. Anthony, Charles H. Miller, Levi Wilson, Len. T. Smith, greeting:

Pursuant to lawful authority you are hereby commanded to appear before the subcommittee of the Committee on Privileges and Elections forthwith at their committee room at the court room, Topeka, Kansas, then and there to testify what you may know relative to the subject-matters under consideration by said committee.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

Given under my hand, by order of the committee, this 4th day of October, in the year of our Lord 1879.

ELI SAULSBURY,
Chairman Committee.

TO RICHARD J. BRIGHT,
Sergeant-at-Arms of the Senate of the United States.

[Indorsement.]

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT-AT-ARMS.

I do appoint and hereby empower J. S. Collins to serve this subpoena, and to exercise all the authority in relation thereto with which I am vested by the within order.

R. J. BRIGHT,
Sergeant-at-Arms of the Senate of the United States.

[1] Second session Forty-sixth Congress, Record, pp. 234–241.

WASHINGTON, D. C., *October 6, 1879.*

I made service of the within subpoena, through my deputy, J. S. Collins, by reading the same to the within-named Len. T. Smith, at his house at Leavenworth, Kans., at 6.05 o'clock, a. m., and on Charles H. Miller, at his residence in Leavenworth, Kans., at 6.20 o'clock on George T. Anthony, at his residence in Leavenworth, Kans., at 7 o'clock a. m., and on Levi Wilson, at 8.20 o'clock in Leavenworth, Kans., on this 6th day of October, 1879.

R. J. BRIGHT,
Sergeant-at-Arms, Senate of the United States.

The writ of attachment, with the return thereon, was read as follows:

UNITED STATES OF AMERICA, *ss:*

The Senate of the United States of America to Richard J. Bright, esq., Sergeant-at-Arms of the Senate of the United States, greeting:

By virtue of a resolution of the Senate of the United States, passed on the 18th day of December, 1879, in the following words, to wit:

Here follows the preamble and resolution in full.]

You are hereby commanded to arrest forthwith J. V. Admire, E. B. Purcell, George T. Anthony, Len. T. Smith, and Levi Wilson, wheresoever they may be found, and have their bodies at the bar of the Senate to answer for a contempt of the authority of the subcommittee of the Committee on Privileges and Elections, one of the standing committees of the Senate, and also for a contempt of the authority of the Senate of the United States in refusing to obey an order of the subcommittee of the Committee on Privileges and Elections to appear before the said subcommittee after being duly summoned thereto; and this shall be your warrant for so doing.

Hereof fail not, and make return of this warrant, with your proceedings thereon indorsed, on or before the 8th day of January, A. D. 1880.

In witness whereof I have hereunto set my hand and affixed the seal of the Senate of the United States the 19th day of December, in the year of our Lord 1879 and of the Independence of the United States of America the one hundred and fourth.

[SEAL.]

W. A. WHEELER,
Vice-President of the United States and President of the Senate.

WASHINGTON, D. C., *January 8, 1880.*

In obedience to the within warrant I have arrested and taken into custody Leonard T. Smith, Levi Wilson, and E. B. Purcell, and now produce them at the bar of the Senate.

Respectfully,

R. J. BRIGHT,
Sergeant-at-Arms United States Senate.

HON. WILLIAM A. WHEELER,
President of the Senate.

The statement of the witness as to his failure to comply with the commands of the committee being satisfactory, Mr. Samuel J. R. McMillan, of Minnesota, moved that the witness be discharged.

A question thereupon arose as to the legality of the arrest of the witness. Mr. George F. Hoar, of Massachusetts, took the ground that the Sergeant-at-Arms might not lawfully delegate the duty of serving the subpoena, and in support of this view cited the Massachusetts decision (15 Gray, 399) wherein it was held that a warrant issued by order of the Senate of the United States for the arrest of a witness in contempt could not be served by a deputy.

Mr. Benjamin H. Hill, of Georgia, called attention to the fact that the decision just cited referred to a warrant for arrest and not to a subpoena. The Committee on Privileges and Elections had drawn this distinction, and when the warrant was drawn they ordered it to be served by the Sergeant-at-Arms himself, giving him

orders not to serve it by deputy. But he conceived that it would be an absurd thing to hold that a subpoena might not be served by a deputy.

Mr. Hoar further objected that the officer who made the service should be the one to make the return.

Mr. Hill conceived this to be a technicality. Mr. David Davis, of Illinois, also held generally that, as the witness had acknowledged that he had been subpoenaed, too strict technical rules should not be insisted on.

On motion of Mr. Augustus H. Garland, of Arkansas, the pending motion was amended by the words:

That the witness, having purged himself of contempt, be discharged.

Mr. Saulsbury offered the following as a substitute:

Whereas Leonard T. Smith, now in custody of the Sergeant-at-Arms on an attachment for contempt for refusing obedience to a summons to appear before a committee of the Senate, has purged himself of contempt, and expressed his willingness to appear before the Committee on Privileges and Elections and answer such proper questions as may be put to him: Therefore,

Resolved, That said Leonard T. Smith be discharged from arrest and that he appear before said Committee on Privileges and Elections and testify under the subpoena served upon him.

Mr. Garland objected that the preamble was unnecessary, and that as the witness had purged himself it only remained to discharge him. He must be discharged absolutely and not on conditions. The Senate could not anticipate a further contempt.

The amendment of Mr. Saulsbury was disagreed to. Then the motion of Mr. McMillan as amended by Mr. Garland was agreed to.

The Vice-President [1] then said:

The witness at the bar is discharged from the rule of attachment.

Levi Wilson, another of the witnesses, having made statement of his reasons for failure to answer the summons of the Senate, on motion by Mr. Saulsbury that the witness be discharged from the rule, it was determined in the affirmative.

E. B. Purcell, another of the witnesses, having made statement of his reasons for failure to answer to the summons of the Senate, on motion by Mr. Saulsbury that the witness be discharged from the rule, it was determined in the affirmative.

On motion by Mr. Saulsbury—

Ordered, That the Sergeant-at-Arms have further time to make return concerning the failure of J. V. Admire and George T. Anthony, the other witnesses named in the writ of attachment of December 18, 1879, to answer for a contempt of a process of the Senate.

On January 20, 1880,[2] the Sergeant-at-Arms appeared at the bar of the Senate, having in custody J. V. Admire, to answer for contempt in refusing obedience to a summons of the Senate.

Whereupon the Vice-President laid before the Senate the return of the writ of attachment issued to the Sergeant-at-Arms December 18, 1879, commanding him to bring J. V. Admire, G. T. Anthony, L. T. Smith, Levi Wilson, and E. B. Purcell to answer for a contempt of a process of the Senate.

The return was read.

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[1] William A. Wheeler, of New York, Vice-President.

[2] Record, p. 415.

The witness having made statement of his reasons for failure to answer to the summons of the Senate, on motion by Mr. Saulsbury that the witness be discharged from the rule, it was determined in the affirmative.

On motion by Mr. Saulsbury—

Ordered, That George T. Anthony, the other witness named in the writ of attachment of December 18, 1879, be discharged as from contempt without appearing before the Senate.

It was stated that Mr. Anthony had been before the committee, and would return to Washington and come before the Senate if necessary.

1703. Various instances of arrest of witnesses for contempt of the Senate.—On January 8, 9, and 11, 1877,[1] the Senate took proceedings in relation to Enos Runyon, a witness who declined to answer certain questions deemed pertinent by the Senate in regard to the transmission of money to Oregon at the time of the election. The Senate ordered the arrest of Runyon, but afterwards ordered his discharge on report from the committee that he had appeared and answered the questions. He evidently was not arraigned before the Senate.

1704. On February 5, 1877,[2] the Senate ordered the arrest of J. F. Littlefield, a witness who had failed to appear, although seen in the Capitol about the time he should have appeared and was told by an officer of the Senate that he was expected to appear. The witness had appeared before the committee the day before and had not been discharged. Some objection was made to ordering an arrest under these circumstances, but it was done.

1705. On February 13, 1877,[3] the Senate ordered the arrest of Conrad N. Jordan for refusing to respond to a subpoena duces tecum. commanding him to appear before a committee of the Senate and bring certain papers. On the 23d he was brought before the Senate and arraigned. Previously he had been allowed to appear before the committee and testify. When arraigned he made a statement in writing, explaining why he had failed to respond to the subpoena. A proposition was made to direct the matter to be certified to the district attorney, but the point was made and insisted on that the witness should first have the opportunity of appearing before the committee. It was urged that the arrest had been merely for failing to appear, and not for refusal to testify. Finally, the witness having announced that he was ready to go before the committee and answer proper questions, the Senate ordered his discharge.

1706. On January 20, 1880,[4] the Senate allowed the discharge of a recusant witness against whom had been issued a warrant for arrest for contempt, but who had voluntarily appeared and testified before the committee at a time when the Senate had not been in session. The witness had then departed, leaving the promise that he would appear in person before the Senate to answer the attachment if required. The Senate did not require this, but ordered his discharge.

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[1] Second session Forty-fourth Congress, Record, pp. 473, 493, 566.

[2] Second session Forty-fourth Congress, Record, p. 1258.

[3] Second session Forty-fourth Congress, Record, pp. 1512, 1855, 1864. For form of the warrant of arrest in this case see Record, p. 1855.

[4] Second session Forty-sixth Congress, Record, p. 415.

1707. Instances wherein the House has ordered arrests which do not appear to have been made.—On June 8, 1860,[1] the following resolution was reported from the select committee appointed to investigate the alleged influence of the Executive in the House, and was agreed to by the House:

Resolved, That the Speaker of the House of Representatives be directed to issue process for the arrest of Charles A. Dunham, of New York; Alexander Hay, Gideon G. Wescott, and Albert Schofield, of the city of Philadelphia; William Kearns, of Reading, in the State of Pennsylvania.

1708. On June 27, 1862,[2] the House ordered the arrest of Michael C. Murphy, a recusant witness, but it does not appear that the witness was arrested.

1709. On April 15, 1864,[3] the House ordered the arrest of John Donahue, a witness who had been summoned and who had failed to appear before the Committee on Public Expenditures. It does not appear that the arrest was effected.

1710. On January 14, 1867,[4] the House ordered the arrest of Thomas H. Oakley, who had declined to testify before the Committee on Public Expenditures. It does not appear that Oakley was ever brought before the House.

1711. On June 30, 1876,[5] the House ordered the arrest of William F. Shaffer, a witness who had failed to appear before a committee.

1712. An instance wherein the House refused to punish contumacious witnesses.—On August 28, 1850,[6] Mr. Edward Stanly, of North Carolina, from the select committee appointed under the resolution of the House of the 6th of May relative to officeholders under the last administration interfering in elections, made a report that two witnesses, Thomas Ritchie and C. P. Sengstack, had refused to answer certain questions put to them by the committee. Mr. Stanly thereupon presented the following resolution:

Resolved, That whereas the select committee of this House, acting by the authority of the House under a resolution of the 6th of May last, have reported that Thomas Ritchie and C. P. Sengstack have peremptorily refused to give evidence in obedience to a summons duly issued by said committee; therefore,

Resolved, That the Speaker of the House issue his warrant, directed to the Sergeant-at-Arms, to take into custody the persons of said Ritchie and said Sengstack, that they may be brought to the bar of the House to answer for an alleged contempt of this House, and that they be allowed counsel on that occasion should they desire it.

On August 31, after debate which related chiefly to the political questions involved, the resolutions were disagreed to, yeas 49, nays 122.

1713. In a case where the House has the right to punish for contempt, its officers may not be held liable for the proper discharge of ministerial functions in connection therewith.—In the case of Stewart *v.* Blaine,[7]

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[1] First session Thirty-sixth Congress, Journal, p. 1034; Globe, p. 2761.

[2] Second session Thirty-seventh Congress, Journal, p. 947; Globe, p. 2986.

[3] First session Thirty-eighth Congress, Journal, p. 532; Globe, p. 1660.

[4] Second session Thirty-ninth Congress, Journal, p. 166; Globe, p. 447.

[5] First session Forty-fourth Congress, Journal, p. 1189.

[6] First session Thirty-first Congress, Journal, pp. 1318, 1336, 1345–1349; Globe, pp. 1678–1681, 1692, 1714, 1724.

[7] This was a suit for false imprisonment brought against Mr. Speaker Blaine by a witness imprisoned by order of the House. See Section 1689 of this chapter.

the opinion of the Supreme Court of the District of Columbia was delivered by Chief Justice Carter, and is as follows (1 MacArthur, p. 457):

The whole subject of controversy in this case as presented to the court is resolved in the question, Had the House of Representatives of the United States jurisdiction in the premises?

If jurisdiction over the subject and person of the plaintiff resided in the House, the ministerial functions discharged by the Speaker and Sergeant-at-Arms in the premises were justified in the jurisdiction. Under the principles of law regulating the relations of ministerial officers to those around them and affected by their acts, two questions are fundamentally important. Has the authority issuing process jurisdiction of the subject and of the person against whom process goes? These two questions answered affirmatively, nothing remains in the determination of the question as to their right to execute the process. Their liability thenceforward is regulated by the responsibility as to the manner in which they do it, a subject not made matter of complaint in this case.

The question of power to punish for contempt in the case now before the court was settled by the Supreme Court of the United States in the case of Anderson *v.* Dunn more than half a century ago after a stout contest and upon thorough deliberation. This authority has been uniformly acquiesced in for over fifty years, and until reversed must be regarded as conclusive with this court. If authority, the subject of this controversy is stare decisis.

In making this decision the court confines itself strictly to the adjudication of the case made. We are not engaged in the investigation of the rights of a citizen held in durance vile under an application by writ of habeas corpus.

The court also announces that the case of Stewart *v.* Ordway (the Sergeant-at-Arms) involved the same questions and would be decided in the same way.

1714. An early discussion as to form of resolution ordering the arrest of a contumacious witness.—On January, 12, 1849,[1] Mr. George Fries, of Ohio, from the select committee appointed to investigate the official conduct of the Commissioner of Indian Affairs, reported the following resolution:

Resolved, That the Sergeant-at-Arms be required to take David Taylor into custody and confine him unless he agrees to answer all proper questions which the select committee before whom he has been testifying shall ask of him.

Mr. Fries explained that this witness, who had been duly subpoenaed, was under examination by a subcommittee, and after having given a portion of his testimony declined to answer further. The subcommittee reported to the full committee, and in the course of the debate it was stated that the witness had declined before the full committee to testify further.

The case of Whitney was discussed as a precedent, and finally Mr. Joseph R. Ingersoll, of Pennsylvania, offered an amendment to strike out all after the word "resolved" and insert the following:

That whereas the select committee, acting by authority of the House under a resolution of the 11th of August, 1848, has reported that David Taylor has peremptorily refused, in the course of his examination before said committee, to answer any further questions which may be put to him by said committee; therefore,

Resolved, That the Speaker of this House issue his warrant, directed to the Sergeant-at-Arms, to take into custody the person of the said David Taylor, that he may be brought to the bar of the House to answer for an alleged contempt of the House, and that he be allowed counsel on that occasion should he desire it.

This resolution going over to the succeeding day, on that day Mr. Fries, by direction of the committee, withdrew the subject from the consideration of the House, and no further action was taken thereon.

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[1] Second session Thirtieth Congress, Journal, pp. 238, 242; Globe, pp. 242–244.

1715. The House having considered and determined the disposition of a person in custody, a further proposition relating thereto was held not to be privileged.—On January 30, 1873,[1] Mr. Aaron A. Sargent, of California, as a question of privilege, proposed the following:

Resolved, That the Sergeant-at-Arms, in executing the order of the House in relation to the custody of Joseph B. Stewart, shall keep the said Stewart in custody in the jail of the District of Columbia.

Mr. John F. Farnsworth, of Illinois, having objected that the resolution was not in order as a question of privilege, the Speaker[2] sustained the point of order, and, when Mr. Sargent took an appeal, said, in submitting the appeal:

An appeal having been taken from the decision of the Chair, the Chair will state that this matter was brought before the House by the committee. It has been fully adjudicated by the House. The House has voted upon sundry and divers propositions and has come to a final resolution thereon, ordering a distinct thing to be done, imposing a duty on two officers of the House—first on the Speaker, to address a certain question to the witness, and next on the Sergeant-at-Arms to take him into custody. The Chair decides that on that statement from the committee, as a privileged question, by the action of the House the privilege is exhausted. The gentleman from California desires to offer a resolution proposing to make another disposition of the subject than that which the House has just made by its vote. The Chair has ruled this resolution out as not pertaining to a question of privilege.

The appeal being stated, it was, on motion of Mr. Henry L. Dawes, of Massachusetts, laid on the table.

1716. The House has assumed the expenses incurred by Members and officers in defending suits brought by persons punished by the House for contempt.—On April 9, 1870,[3] Mr. John A. Bingham, of Ohio, presented, as a matter relating to the privileges of the House, the following resolution reported from the Committee on the Judiciary:

Resolved, That a sum not exceeding two thousand dollars, being the expenses and counsel fees incurred by Benjamin F. Butler, Member of the Fortieth Congress, in defending a suit brought against him by Charles W. Woolley, in the city of Baltimore, for his action as a Member of this House in sustaining its rights and privileges, be paid from the contingent fund of the House.

Mr. Bingham argued that the Member against whom the action was brought had done the acts for which it was brought as a Member of the House in the course of his duty as such; therefore he was defending the privileges of the House in resisting the suit.

The resolution was agreed to without division.

1717. On June 28, 18744[4], the House agreed to the following resolution:

Resolved, That the House assume the defense of the Speaker and the Sergeant-at-Arms in the suits against them by Joseph B. Stewart for alleged false imprisonment while in custody, under the order of the House, as a recusant witness, in February, 1873, recently decided against Stewart by the Supreme Court of the District of Columbia, and the expenses of said defense be paid by the Clerk from the contingent fund of the House, upon the approval of the Committee on Accounts.

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[1] Third session Forty-second Congress, Journal, p. 279; Globe, p. 988.

[2] James G. Blaine, of Maine, Speaker.

[3] Second session Forty-first Congress, Journal, p. 596; Globe, p. 2547.

[4] First session Forty-third Congress, Journal, p. 1321; Record p. 5445.

1718. In 1860 the Massachusetts court decided that a warrant directed only to the Sergeant-at-Arms of the United States Senate might not be served by deputy in that State.—On February 15, 1860,[1] Mr. John M. Mason, of Virginia, in the Senate, reported from the select committee appointed to investigate the circumstances of the raid of John Brown at Harpers Ferry,[2] a preamble and resolution reciting that F. B. Sanborn, of Concord, Mass., had failed to answer the summons of the committee to appear and testify, and providing that the President of the Senate issue a warrant "directed to the Sergeant-at-Arms, commanding him to take into custody," etc., the body of the said Sanborn. This resolution gave no authority to the Sergeant-at-Arms to delegate this power to a deputy.

The resolution was adopted by the Senate, and on April 16, 1860, Mr. Mason presented in the Senate the warrant of the Sergeant-at-Arms, with his return thereon, stating that on April 3 he had arrested the said Sanborn at Concord, and reciting the circumstances of the collecting of a mob immediately upon the arrest, and then the forcible taking of Sanborn by a deputy sheriff of the county of Middlesex, armed with a writ of habeas corpus. A copy of the record of the proceedings of habeas corpus was made a part of the return, and showed that Sanborn had been liberated on the ground that the warrant was insufficient in law. This return was referred to the Committee on the Judiciary.

On June 7,[3] Mr. James A. Bayard, of Delaware, from the Committee on the Judiciary, made a report on the subject, holding that, although in general delegated power might not be delegated, every public officer might, for merely ministerial purposes, appoint a deputy. And the service of a warrant, whether by distress upon goods and chattels or by arrest of the person, was a purely ministerial act, seemed scarcely questionable.

The committee recommended no action on the part of the Senate, expressing confidence that the higher court of Massachusetts, to which an appeal had been taken, would reverse the finding on the habeas corpus proceedings.

The case having been carried to the supreme court of Massachusetts, at the April term of 1860, in an opinion[4] delivered by Chief Justice Shaw, the court decided that—

a warrant issued by order of the Senate of the United States for the arrest of a witness for contempt in refusing to appear before a committee of the Senate, and addressed only to the Sergeant-at-Arms of the Senate, can not be served by deputy in this Commonwealth.

In the course of this opinion the court says:

The Sergeant-at-Arms of the Senate is an officer of that house, like their doorkeeper, appointed by them, and required by their rules and orders to exercise certain powers mainly with a view to order and due course of proceeding. He is not a general officer, known to the law, as a sheriff, having power to appoint general deputies, or to act by special deputation in particular cases; nor like a marshal, who holds analogous powers, and possesses similar functions, under the laws of the United States, to those of sheriffs and deputies under the State laws.

But even where it appears, by the terms of the reasonable construction of a statute, conferring an authority on a sheriff, that it was intended he should execute it personally, he can not exercise it by general deputy, and of course he can not do it by special deputation. (Wood *v.* Ross, 11 Mass., 271.)

But upon the third point, the court are all of opinion that the warrant affords no justification. Suppose that the Senate had authority, by the resolves passed by them, to cause the petitioner to be arrested

[1] First session Thirty-sixth Congress, Globe pp. 778, 1722.

[2] See section 1722 of this chapter.

[3] Senate Report No. 262.

[4] 15 Gray, p. 399.

and brought before them, it appears by the warrant issued for that purpose that the power was given alone to McNair, Sergeant-at-Arms, and there is nothing to indicate any intention on their part to have such arrest made by any other person. There is no authority in fact given by this warrant, to delegate the authority to any other person. It is a general rule of the common law, not founded on any judicial decision or statute provision, but so universally received as to have grown into a maxim, that a delegated authority to one does not authorize him to delegate it to another. Delegata potestas non potest delegari. Broom's Maxims (3d ed.) 755. This grows out of the nature of the subject. A special authority is in the nature of a trust. It implies confidence in the ability, skill, or discretion of the party intrusted. The author of such a power may extend it if he will, as is done in ordinary powers of attorney, giving power to one or his substitute or substitutes to do the acts authorized. But when it is not so extended, it is limited to the person named.

The counsel for the respondent asked what authority there is for limiting such warrant to the person named; it rather belongs to those who wish to justify under such delegated power, to show judicial authority for the extension.

On the special ground that this respondent had no legal authority to make the arrest, and has no legal authority to detain the petitioner in his custody, the order of the court is that the said Sanborn be discharged from the custody of said Carleton

The warrant, a copy of which is appended to the decision, was directed to "Dunning R. McNair, Sergeant-at-Arms," etc., in the usual form, to arrest F. B. Sanborn, and bore this indorsement:

SENATE CHAMBER, *February 16, A. D. 1860.*

I do appoint and hereby empower Silas Carleton to serve this warrant, and to exercise all the authority in relation thereto, with which I am vested by the foregoing.

D. R. MCNAIR,
Sergeant-at-Arms of the Senate of the United States.

1719. The right of a Sergeant-at-Arms charged with the arrest of a witness to intrust the duty to a deputy was discussed somewhat on January 29, 1872,[1] in the Senate, with reference to the Senate precedent of 1860.

1720. A joint committee has ordered a contumacious witness into custody.—On March 9, 1864, we find the joint committee on the conduct of the war under the authority given them by the concurrent resolution creating them, agree to the following:

Resolved, That Francis Waldron be ordered into the custody of the Sergeant-at-Arms of the Senate to be safely and securely kept until further order of the committee, said Francis Waldron having refused to testify before this committee.

And on March 11 the committee ordered the witness discharged, on the ground that his testimony could not be relied on, and no beneficial result could be obtained by forcing him to testify.[2]

1721. A witness having declined to testify before a joint committee, a question arose as to whether one House or both should take proceedings to punish for contempt.

Form of subpoena issued by a joint committee.

On December 6, 1871,[3] in the Senate, Mr. John Scott, of Pennsylvania, from the Joint Committee on the Condition of the Late Insurrectionary States, presented two reports, one relating to Clayton Camp and David Gist, of South Caro-

[1] Second session Forty-second Congress, Globe, pp. 664, 665.

[2] Second session Thirty-eighth Congress, Senate Report No. 142, journal of the committee, pp. 20, 21.

[3] Second session Forty-second Congress, Globe, pp. 24, 37, 212, 216.

lina, who, after being duly summoned, failed and refused to appear before a subcommittee, and the other relating to W. L. Saunders, of North Carolina, who, while testifying, had declined to answer certain questions pertinent to the subject of inquiry.

The report gave the following as the form of subpoena issued by the joint committee:

United States of America—Congress of the United States.

To David Gist, greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the subcommittee of the Joint Select Committee to Inquire into the Condition of the Late Insurrectionary States, on Thursday, the 20th day of July, 1871, at 10 o'clock a. m., at their committee room at Columbia, S. C., then and there to testify what you may know relative to the subject-matters under consideration by said committee.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To John R. French, Sergeant-at-Arms of the Senate of the United States, to serve and return.

Given under my hand, by order of the committee, this 18th day of July, in the year of our Lord 1871.

JOHN SCOTT,
Chairman of the Select Committee.

In the case of Saunders, which was first considered, the committee reported a preamble reciting the testimony of the witness, the authority of the committee, etc., concluding with the following:

Resolved by the Senate of the United States (the House of Representatives concurring), That W. L. Saunders, of Chapel Hill, and State of North Carolina, a witness heretofore duly summoned before a joint select committee of the two Houses of Congress, having been lawfully required to testify before a subcommittee, duly authorized by said joint select committee to take his testimony, and having, in the course of the investigation, refused to answer proper inquiries put to him by the chairman of said joint committee, be forthwith arrested by the Sergeant-at-Arms of the Senate, and brought before the Senate at its bar, by the order of the Senate duly issued by the Vice-President, under his hand and the seal of the Senate; and that said Saunders be detained, by virtue thereof, by the Sergeant-at-Arms of the Senate until he answer for his contempt of the order of the Senate in the matter aforesaid, and abide such further order as may be made in the premises.

A question arose as to the propriety of this proceeding. Mr. Scott stated that the committee knew of no precedent to guide them, but had conceived the contempt to be against the whole body of Congress, and that it would be proper and within the power of the two Houses to authorize one House to deal with the witness. Mr. George F. Edmunds, of Vermont, recalled that in a previous Congress the joint committee on retrenchment had reported a contumacious witness to the Senate, and a warrant was issued by the Senate alone and the witness compelled to answer. But no question had been made as to this procedure.

Mr. Edmunds having raised a question as to the mode of procedure proposed by the resolution reported by Mr. Scott, moved to amend it by making it a simple resolution of the Senate instead of a concurrent resolution.

In support of the amendment it was urged that each body of the members composing the joint committee was the representative of its own House, and therefore that any contempt of the committee transmitted itself to the rights and powers of the two Houses separately. And the two Houses possessed individually the

the power to punish. This power was independent with each, and each having it, no action of the other was necessary to enforce it. If the power to punish was only a concurrent authority, then neither House could delegate it, but it must be exercised by both Houses concurrently. The original form of the resolution merely amounted to the Senate asking the consent of the House of Representatives to punish a contempt against itself. A punishment in the Senate would not be a bar to subsequent punishment in the House. If the Senate required the aid of the House to lay hold on the witness, the Senate's powers would be too slender to deal with him after his arrest. Both the law and the Constitution gave to the two Houses separately the power to punish for refusal to testify, but neither gave such power to the two Houses acting together. A joint committee had not that power with regard to witnesses possessed by the select committee of the single House.

On the other hand, it was urged that the offense was against the two Houses jointly, that the act of 1857 did not apply to such a case, that as the committee was constituted by the joint action of the two Houses, it was proper for the arrest to be made under the same authority, and there could be then no harm in a trial by the Senate, as it was admitted that the Senate had a right to try on its own account. But that trial should be by consent of the other House, because the two Houses might differ in the matter.

Mr. Scott stated that precedents were rare on the subject, because joint committees were in so little favor in the English Parliament that none had been appointed since the year 1695.

On December 19 the amendment was rejected without division, and the resolution was agreed to. But on the same day a motion to reconsider the vote agreeing to the resolution was entered.

It does not appear that the matter was further acted on. The resolution relating to Camp and Gist was likewise not acted on.

1722. In 1860 the Senate imprisoned Thaddeus Wyatt in the common jail for contempt in refusing to appear as a witness.

The right to coerce the attendance of witnesses in an inquiry for legislative purposes was discussed in the Wyatt case.

Discussion of the extent of the Senate's power of investigation.

On December 14, 1859,[1] the Senate, after debate, agreed unanimously to a resolution providing that a committee be appointed to inquire into the facts attending the late invasion and seizure of the armory and arsenal at Harpers Ferry by a band of armed men, and report whether the same was attended by armed resistance to the authorities and public force of the United States, and the murder of any citizens of Virginia, or any troops sent there to protect public property; whether such invasion was made under color of any organization intended to subvert the government of any of the States of the Union; the character and extent of such organization; whether any citizens of the United States not present were implicated therein or accessory thereto by contributions of money, arms, ammunition, or otherwise; the character and extent of the military equipments in the hands or

[1] First session Thirty-sixth Congress, Globe, p. 141.

under the control of said armed band; where, how, and when the same were obtained and transported to the place invaded; also, to report what legislation, if any, is necessary by the Government for the future preservation of the peace of the country and the safety of public property—the committee to have power to send for persons and papers.

The committee was appointed, consisting of Senators James M. Mason, of Virginia; Jefferson Davis, of Mississippi; Jacob Collamer, of Vermont; Graham N. Fitch, of Indiana, and James R. Doolittle, of Wisconsin.

On February 21, 1860,[1] Mr. Mason, from the committee, reported the following preamble and resolution:

Whereas Thaddeus Hyatt, of the city of New York, was, on the 24th day of January, A. D. 1860, duly summoned to appear before the select committee of the Senate, appointed "to inquire into the facts attending the late invasion and seizure of the armory and arsenal of the United States at Harpers Ferry, in Virginia, by a band of armed men," and has failed and refused to appear before said committee, pursuant to said summons: Therefore,

Resolved, That the President of the Senate issue his warrant, directed to the Sergeant-at-Arms, commanding him to take into his custody the body of the said Thaddeus Hyatt, wherever to be found, and to have the same forthwith before the bar of the Senate to answer as for a contempt of the authority of the Senate.

After debate the resolution was agreed to, yeas 43, nays 12.

On March 6[2] the Sergeant-at-Arms appeared at the bar of the Senate having Mr. Hyatt in custody, and submitted the following preamble and resolution, which were agreed to, yeas 49, nays 6.

Resolved, That Thaddeus Hyatt, of the city of New York, now in custody of the Sergeant-at-Arms, on an attachment for contempt in refusing obedience to the summons requiring him to appear and testify before a committee of the Senate, be now arraigned at the bar of the Senate, and that the President of the Senate propound to him the following interrogatories:

First. What excuse have you for not appearing before the select committee of the Senate, in pursuance of the summons served on you on the 24th day of January, 1860?

Second. Are you now ready to appear before the said committee and answer such proper questions as shall be put to you by said committee?

And that the said Thaddeus Hyatt be required to answer said questions in writing and under oath.

On March 9[3] the witness presented a sworn statement questioning the authority of the committee and declining to answer the questions. As part of this statement he presented the argument of his counsel, Messrs. S. E. Sewall and John A. Andrew, who thus summarized the objections to the Senate's jurisdiction:

The inquisition delegated to the committee, being an inquiry as to who committed crimes, was a judicial one, and a usurpation of the functions of the judiciary.

The object of the inquisition being unconstitutional, the Senate could have no power to compel the attendance of witnesses before the committee.

The investigations being made with a view to legislation can not give the Senate authority to make a judicial inquisition as to the authors of specific crimes, if it would not otherwise have possessed such authority.

Even had the inquisition been constitutional, still, being for legislative purposes, the Senate could not coerce the attendance of witnesses.

All the powers of the Senate are derived from the Constitution, and not gained by long prescription, like those of the Houses of Parliament in Great Britain.

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[1] First session Thirty-sixth Congress, Globe, pp. 849, 859.

[2] Globe, p. 999.

[3] Globe, p. 1076.

The power of committing witnesses for contempt in cases of this kind is not given directly by the Constitution, or by necessary implication, because legislation can be effected by it without any such power.

This is not a case in which the Senate has judicial or quasi-judicial power; in which case authority to compel the attendance of witnesses as a necessary incident of the power need not be disputed.

Since the statute of 1857 has made the refusal of a witness to appear before a committee an indictable offense, the Senate can not try any such witness for a contempt, because that would be to try him for a crime without a jury, in violation of the Constitution. We deny, then, the power of the Senate committee to act as inquisitors in regard to crimes. We deny their right to drag our client from his home in New York to testify before them.

If the Senate can thus usurp some of the functions of the judiciary, what other functions of the judiciary or the executive may they not assume? The liberties of the people are gone, if the Senate by its own power can create a secret inquisitorial tribunal, and compel any witnesses they please to appear before it.

The power of punishment for contempt is always arbitrary and dangerous, whether exercised by courts or legislative bodies. The constitutions and the legislation of the United States and of the several States have been constantly aiming to limit and define it. It is dangerous, because the party injured becomes the judge in his own case both of law and fact. It involves, therefore, a violation of one of the first principles of justice, and is only to be sustained by the extremest necessity. We believe that the House and Senate have seldom been called to act in a case of alleged contempt in which the power has not been seriously questioned, and in which, from a just sense of its arbitrary character, they have not aimed to make the punishment light rather than severe. In the cases, for instance, of John Anderson and General Houston, the reprimands of the Speaker of the House appear small punishments compared with the gravity of the charges against them.

On March 12[1] Hyatt was brought to the bar and Mr. Mason proposed the following preamble and resolution, which, after long debate, were agreed to, yeas 44, nays 10:

Whereas Thaddeus Hyatt, appearing at the bar of the Senate, in custody of the Sergeant-at-Arms, pursuant to the resolution of the Senate of the 6th of March instant, was required by order of the Senate then made, to answer the following questions, under oath and in writing: "1. What excuse have you for not appearing before the select committee of the Senate, in pursuance of the summons served on you on the 24th day of January, 1860? 2. Are you ready to appear before said committee and answer such proper questions as shall be put to you by said committee?" time to answer the same being given until the 9th of March following; and whereas on the said last named day the said Thaddeus Hyatt, again appearing in like custody at the bar of the Senate, presented a paper, accompanied by an affidavit, which he stated was his answer to said questions; and it appearing, upon examination thereof, that the said Thaddeus Hyatt has assigned no sufficient excuse in answer to the question first aforesaid, and in answer to the said second question, has not declared himself ready to appear and answer before said committee of the Senate, as set forth in said question, and has not purged himself of the contempt with which he stands charged: Therefore,

Be it resolved, That the said Thaddeus Hyatt be committed by the Sergeant-at-Arms to the common jail of the District of Columbia, to be kept in close custody until he shall signify his willingness to answer the questions propounded to him by the Senate; and for the commitment and detention of said Thaddeus Hyatt, this resolution shall be a sufficient warrant.

Resolved, That whenever the officer having the said Thaddeus Hyatt in custody shall be informed by said Hyatt that he is ready and willing to answer the questions aforesaid, it shall be the duty of such officer to deliver the said Thaddeus Hyatt over to the Sergeant-at-Arms of the Senate, whose duty it shall be again to bring him before the bar of the Senate, when so directed by the Senate.

In the course of the debate preceding the adoption of this preamble and resolution, Mr. Charles Sumner, of Massachusetts, argued that the Senate had no right

[1] Globe, p. 1100.

to compel testimony required for legislative purposes only. On June 15,[1] when the Senate ordered the discharge of Hyatt from confinement, Mr. Sumner spoke again on this subject, thus summarizing his argument:

We must not forget a fundamental difference between the powers of the House of Representatives and the powers of the Senate. It is from the former that the Senator from Virginia has drawn his precedents, and here is.his mistake.

To the House of Representatives are given inquisitorial powers expressly by the Constitution, while no such powers are given to the Senate. This is expressed in the words, "the House of Representatives shall have the sole power of impeachment." Here, then, obviously, is something delegated to the House, and not delegated to the Senate—namely, those inquiries which are in their nature preliminary to an impeachment—which may or may not end in impeachment; and since, by the Constitution, every "civil officer" of the General Government may be impeached, the inquisitorial powers of the House may be directed against every "civil officer," from the President down to the lowest on the list.

This is an extensive power, but it is confined solely to the House, Strictly speaking, the Senate has no general inquisitorial powers. It has judicial powers in three cases under the Constitution:

1. To try impeachments.

2. To judge the elections, returns, and qualifications of its members.

3. To punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

In the execution of these powers, the Senate has the attributes of a court; and, according to established precedents, it may summon witnesses and compel their testimony, although it may well be doubted if a law be not necessary, even to the execution of this power.

Besides these three cases, expressly named in the Constitution, there are two others, where it has already undertaken to exercise judicial powers, not by virtue of express words, but in self-defense:

1. With regard to the conduct of its servants, as of its printer.

2. When its privileges have been violated, as in the case of William Duane, by a libel, or in the case of Nugent, by stealing and divulging a treaty while still under the seal of secrecy.

It will be observed that these two classes of cases are not sustained by the text of the Constitution; but if sustained at all, it must be by that principle of universal jurisprudence, and also of natural law, which gives to everybody, whether natural or artificial, the right to protect its own existence; in other words, the great right of self-defense. And I submit that no principle less solid could sustain this exercise of power. It is not enough to say that such a power would be convenient, highly convenient, or important. It must be absolutely essential to the self-preservation of the body; and even then, in the absence of any law, it may be open to the gravest doubts.

1723. In 1877 the Senate, after discussion, decided that certain telegrams relating to the Presidential election should be produced by a Witness.—On January 2, 1877,[2] the Committee on Privileges and Elections of the Senate, who were instructed to inquire into the recent election in Oregon, reported to the Senate that William M. Turner, manager of the Western Union Telegraph office at Jacksonville, Oreg., being called and sworn as a witness by the committee, had declined to answer certain questions, on the ground that both by the laws of Oregon and the instructions of the company he was forbidden to divulge anything that passed over the wires. The questions which the witness refused to answer were presented in the report, and concerned dispatches relating to alleged transfers of money from New York to Oregon after the election in November, and to an alleged dispatch making a request that the canvass be withheld for a time. The

[1] Globe, p. 3007.

[2] Second session Forty-fourth Congress, Record, pp. 397, 439, 476.

committee reported that it was important to have the witness answer the questions, as the answers might be material to the investigation, and therefore recommended the adoption of the following:

Resolved, That William M. Turner is in duty bound under his oath to answer the questions that have been propounded to him as above stated, and that he can not excuse himself for answering the same by reason of his official connection with the Western Union Telegraph Company as the manager of their office at Jacksonville, Oreg.

This resolution was debated at length on January 5 and 8, especially as to the principle involved in an invasion of the secrecy of the telegraph. The law of Oregon was shown to refer only to willful disclosures, and it was argued, from cases decided, that it did not preclude answers before a proper tribunal. The debate developed a general sentiment against the practice of demanding the disclosure of private dispatches, except where there was reason to believe that particular telegrams contained material information, in which case, such might be properly demanded.

The resolution was agreed to, yeas 35, nays 3.

1724. In 1860 the Senate looked to House precedents in dealing with a witness in contempt.—On February 15, 1860,[1] in the Senate, Mr. John M. Mason (of Virginia) made a report concerning certain witnesses who had failed to appear before the committee investigating the invasion of Harpers Ferry. He said that the resolution to compel the attendance of the witnesses was drawn according to the precedents of the House of Representatives, he not having found a case where a witness had declined to appear before a committee of the Senate.[2] The resolution compelling the attendance of the witnesses was agreed to.

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[1] First session Thirty-sixth Congress, Globe, p. 778.

[2] There had been such a case, however, in 1852. On August 13, 1852, a select committee of the Senate reported the contumacy of John McGinnis, a witness, with a resolution declaring that he had committed a contempt, and directing his imprisonment in the jail of the District. The resolution went over to the next day, when it was withdrawn, the witness having taken the oath and testified. (First session Thirty-second Congress, Globe, pp. 2201, 2212.)

Chapter LIV.

THE POWER OF INVESTIGATION.

1725. In 1792 the House declined to request the President to inquire into the causes of the defeat of General St. Clair's army and asserted its own right to make the investigation.

An example of difficulty caused by permitting division of a question which does not present two substantive propositions.

On March 27, 1792,[5] the following resolution was proposed:

Resolved, That the President of the United States be requested to institute an inquiry into the causes of the late defeat of the army under the command of Major-General St. Clair; and also into the causes of the detentions or delays which are suggested to have attended the money, clothing, provisions, and military stores for the use of the said army, and into such other causes as may in any manner have been productive of the said defeat.

Objection was made to this resolution on the ground that it was an invasion of the Executive department by the Legislative department; while an inquiry into the expenditure of money was the duty, not of a court-martial but of the House, and should be made by a select committee. On the other hand, it was urged that the resolution amounted to a simple request; but against this it was argued that the theory that the House was the grand inquest of the nation would lead to confusion in the Departments of the Government, and that the Constitution had limited the objects of inquiry by the House.

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[1] See also investigations undertaken with a view to impeachment. Sections 2342, 2343, 2364–2366, 2385, 2399, 2403, 2408, 2409, 2444, 2469–2471, 2486–2515 of this volume.

[2] In the case of Kilbourn the House exceeded its power in inquiring into private affairs. Section 1611 of Volume II. See also Chapman case in Senate. Section 1612 of Volume II.

[3] Conflict with the President as to right of House to inquire into his conduct. Section 1596 of Volume II. House has no power to inquire into circumstances under which the primary vote for Presidential electors is given. Section 1977 of this volume. See, also, discussion referred to in Section 1698 of this volume.

[4] As to right of House to inquire into offenses in a preceding Congress. Section 1690 of this volume. As to attempt to investigate alleged corruption in the Senate sitting for an impeachment trial. Section 2064 of this volume.

[5] First session Second Congress, Journal, pp. 551, 552 (Gales & Seaton ed.); Annals, pp. 490–494.

A division of the question being demanded, the question was put first on the following:

Resolved, That the President of the United States be requested to institute an inquiry into the causes of the late defeat of the army under the command of Major-General St. Clair.

This was decided in the negative, yeas 21, nays 35.[1]

The House then agreed to this resolution, yeas 44, nays 10:

Resolved, That a committee be appointed to inquire into the cause of the failure of the late expedition under Major-General St. Clair, and that the said committee be empowered to call for such persons, papers, and records as may be necessary to assist their inquiries.

On April 4[2] it was

Resolved, That the President of the United States be requested to cause the proper officers to lay before this House such papers of a public nature in the Executive department as may be necessary to the investigation of the causes of the failure of the late expedition under Major-General St. Clair.

1726. In 1807 the House, after mature consideration, declined to investigate charges against the chief of the Army, but requested the President to make such an inquiry.

The right and duty of the House to inquire into the manner of expenditure of public money by the Executive branch was early asserted.

The House, by resolution, called on two of its Members to state what they knew concerning charges against the chief of the Army, then under discussion.

In the early practice of the House a resolution making a request of the President was taken to him by a committee of Members.

On December 31, 1807,[3] Mr. John Randolph, of Virginia, having presented to the House certain papers in his possession, proposed the following resolution:

Resolved, That the President of the United States be requested to cause an inquiry to be made into the conduct of Brigadier-General Wilkinson, commander of the Army of the United States, in relation to his having at any time whilst in the service of the United States corruptly received money from the Government or agents of Spain.

This resolution gave rise to a long debate as to the power of the House to make such a request in relation to a military officer, as to whom the Constitution did not give the House the power that it had in the case of the impeachment of a civil officer. It was objected that it would be improper and unconstitutional for one Department of the Government to call upon another to perform its duty, as in this case the House was calling upon the Executive to do what was evidently his duty to do. On the other hand, it was contended that the House was the grand inquest of the nation, and as such had a right to make the request of the Executive.

Mr. Barent Gardenier, of New York, moved that the resolution be referred to a select committee and that the committee have power to send for persons and papers.

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[1] It will be observed that it was not necessary to vote on the second portion, since no substantive proposition remained, and it would have meant nothing had it been agreed to.

[2] Journal, p. 561; Annals, p. 536.

[3] First session Tenth Congress, Journal, p. 101 (Gales & Seaton ed.); Annals, pp. 1257–1268.

Mr. Robert Marion, of South Carolina, moved to strike out the words giving the committee power to send for persons and papers.

In support of this motion it was urged that the House had no power to send for persons and papers, because it had no authority to make an investigation into the conduct of an officer under the authority of the President and not subject to impeachment. It was urged that the powers of the House were limited by the Constitution and that it had no powers except from the Constitution. It was argued that as the House had the war-making power it certainly could inquire into the loyalty of the commander in chief. A question was also raised as to what the House would do with the testimony that it already had and that it was proposed to obtain, and the suggestion was made that the only proper course would be to transmit it to the Executive.

The question being taken on January 5,[1] the House, by 72 yeas to 38 nays, struck out the provision giving the committee power to send for persons and papers, and then, without division, decided in the negative the motion to refer to a select committee.

A resolution was agreed to calling on two Members of the House for such information as they might possess concerning General Wilkinson, and then the discussion of Mr. Randolph's original motion continued.

On January 13[2] the House, by 72 yeas to 49 nays, agreed to Mr. Randolph's resolution.

Resolutions providing for an investigation by the House were proposed during this discussion, but were withdrawn or refused consideration.

The House then ordered that copies of the papers and information relative to the conduct of General Wilkinson, that had been laid on the Clerk's table, be transmitted to the President of the United States, and Messrs. Randolph and Eppes were appointed a committee to take the papers and the resolution to the President.

Mr. John Rowan, of Kentucky, then offered the following resolution,[3] drawn evidently for the purpose of meeting the constitutional objections to making the inquiry:

Resolved, That a special committee be appointed to inquire into the conduct of Brigadier-General Wilkinson, in relation to his having at any time, while in the service of the United States, either as a civil or a military officer, been a pensioner of the Government of Spain, or corruptly received money from that Government or its agents, and that the said committee have power to send for such persons and papers as may be necessary to assist their inquiries, and that they report the result to this House, to enable this House the better to legislate on subjects of the common weal, and our foreign relations, and particularly our relation with Spain, as well as on the subject of the increase of the Army of the United States, and its regulation.

Without division the House declined to consider this resolution.

On a vote by yeas and nays the House agreed unanimously to this resolution:[4]

Resolved, That the President of the United States be requested to lay before the House of Representatives all the information which may at any time, from the establishment of the present Federal Gov-

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[1] Journal, pp. 110, 111; Annals, pp. 1296 &–1328.

[3] Journal, p. 127; Annals, p. 1461.

[2] Journal, pp. 125–127; Annals, pp. 1434–1461.

[4] Journal, p. 126; Annals, p. 1460.

ernment to the present time, have been forwarded to any Department of the Government touching a combination between the agents of any foreign government and citizens of the United States for dismembering the Union, or going to show that any officer of the United States has at anytime corruptly received money from any foreign government or its agents, distinguishing as far as possible, the period at which such information has been forwarded, and by whom.

On January 20[1] President Jefferson sent to the House a message stating that some days previous to the adoption of the resolution of the House a court of inquiry had been constituted in the case of General Wilkinson, and that the papers and information transmitted from the House had been forwarded to the judge-advocate of that court. The message also transmitted to the House such information as the Executive Department of the Government had on the subject involved in the resolution of inquiry, and explained that certain other documents had been destroyed, and that one document, a confidential letter, had been withheld, but that the writer of the letter was to be summoned before the court of inquiry to give in legal form the information contained in the letter.

The President also assured the House that the duties which the information sent by the House devolved upon him would be exercised with rigorous impartiality.

On February 4[2] the President transmitted additional documents on the subject of the inquiry, and on April 25 the House transmitted to the President additional papers relating to General Wilkinson.

On February 3, 1809[3] Mr. Randolph rose in his place and said that among the duties and rights of the House was none so important as its control over the public purse which it possessed under the Constitution. The mere form of appropriation was not all. The House-should rigorously examine into the application of the money thus appropriated. Therefore, he moved this resolution, which was agreed to without debate or division:

Resolved, That a committee be appointed to inquire whether any advances of money have been made to the Commander in Chief of the Army by the Department of War contrary to law.

Mr. Randolph was made chairman of the committee, and in due time reported.

1727. In 1810 the House, after mature consideration, determined that it had the right to investigate the conduct of General Wilkinson, although he was not an officer within the impeaching power of the House.

At the first investigation of charges against General Wilkinson the proceedings were ex parte, but at the second inquiry the House voted that he should be heard in his defense.

The House having investigated charges against General Wilkinson, of the Army, the results were transmitted to the President by the hands of a committee.

An instance wherein the precedents of Parliament were invoked and discussed.

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[1] Journal, p. 136; Annals, p. 1482.

[2] Journal, p. 159; Annals, p. 1564.

[3] Second session Tenth Congress, Journal, p. 506 (Gales & Seaton ed.); Annals, pp. 1330, 1331.

On March 21, 1810,[1] Mr. Joseph Pearson, of North Carolina, proposed this resolution:

Resolved, That a committee be appointed to inquire into the conduct of Brig. Gen. James Wilkinson in relation to his having, at any time, whilst in the service of the United States, corruptly received money from the Government of Spain, or its agents, or in relation to his having, during the time aforesaid, been an accomplice, or in any way concerned with the agents of any foreign power, or with Aaxon Burr, in a project against the dominions of the King of Spain, or to dismember these United States; that the said committee inquire generally into the conduct of the said James Wilkinson as brigadier-general of the Army of the United States; that the said committee have power to send for persons and papers and compel their attendance and production, and that they report the result to this House.

On April 3 the resolution was considered at length. It was urged in its favor[2] that the House, as the grand inquest of the nation, had a right to make this inquiry. The English House of Commons had inquired into the charge that the Duke of York, commander in chief of the army and second son of the Monarch, had speculated in commissions. If the House of Commons could do that, could not this House inquire into the conduct of a commander in chief charged with betraying the nation to the foreigner? If the House had not the absolute power of removing the commander in chief, they at least had the power of requesting the President of the United States to remove him, and if the President should not do it, the House could say that there should no longer be an Army with a commander at its head. If the powers of the House were to be circumscribed by the strict letter of the Constitution[3] where would be found the power for the investigation in 1801 of the expenses of a previous Administration which had gone out of office? It was not a necessary appendage of the power of impeachment. The true construction of the powers of the House with respect to investigation, other than for the purpose of impeachment, was that (1) the House had the power to inquire to inform themselves and the nation, and (2) the power to inquire with a view to future legislation. The legislature and the people had the right to know how the money drawn by taxation had been applied. Also the House had the right to inquire as incidental to the impeaching power, for how was a President to be impeached for protecting a corrupt officer until the officer should be proven to be corrupt? It was admitted to be true that under the Constitution no military officer could be impeached, but it did not follow that the House had no right to inquire into the state of the Army. Having undoubtedly the right to inquire into the state of the Army, they also had the right to inquire into the conduct of the individuals composing it. If this was not so it followed that the Army belonged to the President and not to the nation.[4]

In opposition to the resolution it was argued that the example of the House of Commons could not be followed safely, because the Commons had power over the Constitution, while the House of Representatives had only such powers as the Constitution conferred upon them. Among the powers granted to the House by the Constitution no gentleman could find the authority for what they now proposed to

[1] Second session Eleventh Congress, Journal, pp. 306, 339, 343–346 (Gales & Seaton ed.); Annals, pp. 1606, 1727–1757.

[2] By Mr. Timothy Pitkin, Jr., of Connecticut.

[3] Argument of Mr. Daniel Sheffey, of Virginia.

[4] Argument of Mr. Nathaniel Macon, of North Carolina.

do.[1] The Executive, the House, the Senate, each had its orbit and its responsibilities. It was now proposed that the House step in between the Executive and his duties.[2] Congress had no power to impeach a military officer, and to say that these proceedings were a step toward impeachment of the Executive was to assign a motive not revealed by the resolution or really intended. Only for purposes of impeachment was the House the grand inquest of the nation, and even then they could not compel the attendance of the civil officer whom they intended to impeach. They could compel the attendance only of their own Members. Congress could prescribe rules for the government of the Army, and if those rules were not sufficient to bring the offender to justice it was the fault of the Congress which had made them. By assuming the jurisdiction of the courts, either civil or military, the House would degrade its legislative character.

The resolution was voted on in two portions, the first clause being agreed to, yeas 87, nays 24; and the second clause, beginning with the words "That the said committee inquire generally," etc., was agreed to, yeas 78, nays 31. The whole resolution was then agreed to, yeas 80, nays 29.

On April 20,[3] a letter from General Wilkinson asking that an impartial tribunal be constituted to try him was presented to the House by the Speaker, but after being read was not acted on, the House even refusing to refer it to the Secretary of War.[4]

On May 1[5] the committee made their report. It consisted of a mass of evidence, but no recommendations for action. The committee stated in the course of debate that General Wilkinson had not expressed a wish to appear before them. Their report states that they issued a subpoena duces tecum to General Wilkinson, requiring him to submit to the committee certain papers, and that he sent papers in response to this, but upon examination they did not include certain of the papers demanded, and the committee had been unable to obtain them. The papers which the committee wished to obtain they had applied for at first from the Secretary of War, but were informed that they had been taken from that Department by General Wilkinson.

When the report was presented there was objection to it on the ground that the proceedings had been ex parte, General Wilkinson not having been invited to appear before the committee; but it was urged in response that examinations for impeachment were in the first instance ex parte.

At the next session of the Congress, on December 18, 1810,[6] the continuation of the inquiry[7] was authorized by the presentation anew of the original resolution with the addition of these words: "And that the said James Wilkinson be notified by the committee of the time and place of their sitting, and be heard in his defense." This addition was approved, 89 to 20, after considerable debate, in which it was

[1] Argument of Mr. John Smilie, of Pennsylvania.

[2] Argument of Mr. John Taylor, of South Carolina.

[3] Journal, p. 383; Annals, pp. 1932, 1933.

[4] Journal, p. 392.

[5] Journal, p. 421; Annals, pp. 2032, 2048.

[6] Third session Eleventh Congress, Journal, pp. 450–452; Annals, pp. 432–450.

[7] At this time business before a committee at the end of a session fell with the session.

objected that this addition would make the resolution still more unconstitutional, because it would make the proceeding a trial of General Wilkinson. The resolution in the amended form was agreed to, yeas 79, nays 36.

On February 26[1] the report of the committee was submitted to the House. A motion was first made to refer the report to the Committee of the Whole, and it was determined in the negative, yeas 43, nays 81. Then it was moved that the report with the documents accompanying be transmitted to the President of the United States. A proposition was made to amend by adding the words:

> Together with the report of a select committee, made to the House at the last session of Congress, on the same subject, with the documents accompanying the same.

Objection was made on the ground that the report of the preceding session had been based on ex parte examination. The amendment was disagreed to, yeas 88, nays 32. The motion to transmit the report of the present session to the President was then agreed to, yeas 76, nays 42.

Mr. Bacon and Mr. Bibb were appointed a committee to transmit the report and accompanying documents to the President.

On March 1[2] Mr. Bibb reported that the committee had performed the service.

1728. In 1861 the two Houses, by concurrent action, assumed without question the right to investigate the conduct of the war.—On December 9, 1861,[3] the Senate agreed to the following:

> *Resolved by the Senate (the House of Representatives concurring),* That a joint committee of three Members of the Senate and four Members of the House of Representatives be appointed to inquire into the conduct of the present war; that they have power to send for persons and papers, and to sit during the sessions of either House of Congress.

In the debate in the Senate Mr. James W. Grimes, of Iowa, declared it the right and duty of Congress to make the investigation, and cited as a precedent the action of the House of Representatives in investigating in 1792 the St. Clair disaster and to action of the House in 1813.[4] The debate touched only briefly on the question of constitutional authority to make such an investigation.

On December 10, in the House of Representatives, the resolution was agreed to without debate.

1729. The House very early overruled the objection that its inquiry into the conduct of clerks in the Executive Departments would be an infringement on the Executive power.—On January 16, 1818,[5] Mr. John Holmes, of Massachusetts, offered this resolution:

> *Resolved,* That a committee be appointed to inquire whether any or what clerks or other officers in either of the Departments, or in any office at the seat of the General Government, have conducted themselves improperly in their official duties, and that the committee have power to send for persons and papers.

Objection being made that the House would, by adopting this resolution, assume power over the Departments that belonged to the Executive and would

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[1] Journal, pp. 578–582; Annals, pp. 1030–1032.

[2] Journal, p. 606.

[3] Second session Thirty-seventh Congress, Journal, p. 56; Globe, pp. 29–32, 40.

[4] Apparently the precedent of 1810 is meant.

[5] First session Fifteenth Congress, Journal, pp. 152, 153; Annals, p. 783.

thus impair Executive responsibility, it was answered that the House was in the relation of a grand jury, to the nation, and that it was the duty of the House to examine into the conduct of public officers.

The resolution was agreed to, and the committee was appointed.

1730. Having the constitutional right to concur in appropriating the public money, the House has exercised also the right to examine the application of those appropriations.—On December 10, 1819,[1] Mr. Henry R. Storrs, of New York, introduced a resolution, explaining its object by saying that if there was any one point on which the House should be tenacious of its prerogatives, it was upon its constitutional right of originating revenue bills, and its concurrent right, with the Senate, of denoting, according to their own discretion, the manner in which the public moneys should be appropriated and applied.

The resolution, which was agreed to, was as follows:

Resolved, That a committee be appointed to inquire and report to this House whether any of the public moneys appropriated by Congress for the pay and subsistence of the Regular Army of the United States since the 4th day of March, 1815, have been applied to the support of any army or detachment of troops raised without the consent of this House or the authority of Congress.

Mr. Storrs was appointed chairman of the committee, and on February 28, 1820,[2] he made a report of the facts, which disclosed irregularities of the nature referred to in the resolution, and assumptions of power by the commanding officer, General Jackson. The report concludes:

The House having authorized the committee to report by bill, they have devoted their attention to the devising of some legislative remedies against the recurrence of these disorders. To prescribe the principles of the Constitution by legislative enactments might tend to impair its high and uncontrollable sanctions, and the faithful discharge of the duties of the several committees of the House furnish an adequate remedy against all abuses in the public expenditure. The committee, therefore, submit the facts contained in this report and the documents which establish them, referring them to the discretion of the House.

1731. In authorizing an investigation of the Bank of the United States in 1832 a distinction was drawn between the public relations of the bank to the Government and its dealings with private individuals.

The House sometimes fixes a date before which a committee shall report.

On March 14, 1832,[3] the House was considering this resolution, offered on a previous day by Mr. Augustin S. Clayton, of Georgia:

Resolved, That a select committee be appointed to examine into the affairs of the Bank of the United States, with power to send for persons and papers, and to report the result of their inquiries to this House.

Mr. John Quincy Adams, of Massachusetts, criticised this resolution as proposing an investigation not within the power of the House; and therefore, to prevent improper inquiry, he proposed an amendment following the words of the charter and the precedent of the investigation of 1819:

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[1] First session Sixteenth Congress, Journal, p. 31 (Gales & Sealon ed.); Annals, p. 717.

[2] Annals, p. 1542.

[3] First session Twenty-second Congress, Journal, pp. 487–494; Debates, pp. 2160–2164.

Strike out all after the word "Resolved" and insert:

That a select committee be appointed to inspect the books and examine into the proceedings of the Bank of the United States, to report thereon, and to report whether the provisions of its charter have been violated or not; that the said committee have leave to meet in the city of Philadelphia, and shall make their final report on or before the 21st of April next; that they shall have power to send for persons and papers, and to employ the requisite clerks; the expense of which shall be audited and allowed by the Committee of Accounts, and paid out of the contingent fund of the House.

In the course of the debate Mr. James K. Polk, of Tennessee, criticised the amendment as placing upon the committee a limitation as to the time within which they should make their report. He thought that there was no precedent for this.

Mr. Adams's amendment was agreed to, yeas 106, nays 92. The resolution as amended was then agreed to.

In filing, his views on May 14, as a member of the minority of this investigating committee, Mr. Adams developed his views more fully. He said: [1]

The amended resolution adopted by the House was predicated on the principle that the original resolution presented objects of inquiry not authorized by the charter of the bank, nor within the legitimate powers of the House, particularly that it looked to investigations which must necessarily implicate not only the president and directors of the bank, and their proceedings, but the rights, the interests, the fortunes, and the reputation of individuals not responsible for those proceedings, and whom neither the committee nor the House had the power to try, or even to accuse before any other tribunal. In the examination of the books and proceedings of the bank the pecuniary transactions of multitudes of individuals with it must necessarily be disclosed to the committee, and the proceedings of the president and directors of the bank, in relation thereto, formed just and proper subject of inquiry—not, however, in the opinion of the subscriber, to any extent which would authorize them to criminate any individual other than the president, directors, and officers of the bank of its branches—nor them, otherwise than as forming part of their official proceedings. The subscriber believed that the authority of the committee and of the House itself did not extend, under color of examining into the books and proceedings of the bank, to scrutinize, for animadversion or censure, the religious or political opinions even of the president and directors of the bank, nor their domestic or family concerns, nor their private lives or characters, nor their moral, or political, or pecuniary standing in society; still less could he believe the committee invested with a power to embrace in their sphere of investigation researches so invidious and inquisitorial over multitudes of individuals having no connection with the bank other than that of dealing with them in their appropriate business of discounts, deposits, and exchanges.

Mr. Adams shows that the majority of the committee did not, however, follow these principles, but investigated the personal accounts of private individuals, such as several proprietors of well-known newspapers, although no compulsory process was issued against one citizen who declined to give his attendance.

1732. In 1834 the directors of the Bank of the United States resisted the authority of the House to compel the production of books of the bank before an investigating committee.

The investigation of the Bank of the United States in 1834 was objected to on the ground that it involved a general search of the affairs of private individuals.

The committee appointed to investigate the Bank of the United States in 1834 held that its proceedings should be confidential, not to be attended by any person not invited or required.

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[1] Debates, p. 54 of Appendix.

Minority views were filed in 1834 by members of the committee appointed to investigate the affairs of the Bank of the United States.

A form of subpoena issued in 1834 and criticised as defective.

On March 18, 1834,[1] the Committee of Ways and Means, to whom had been committed the report of the Secretary, of the Treasury of his reasons for ordering the public deposits to be removed from the Bank of the United States, made a report recommending the adoption of four resolutions. The first three of these expressed the opinion that the bank ought not to be rechartered; that the public deposits ought not to be restored to it; and that the State banks, under suitable regulations, should be continued as places of deposit of public money. The fourth resolution was as follows:

Resolved, That, for the purpose of ascertaining, as fax as practicable, the cause of the commercial embarrassment and distress complained of by numerous citizens of the United States, in sundry memorials which have been presented to Congress at the present session, and of inquiring whether the charter of the Bank of the United States has been violated, and also what corruptions and abuses have existed in its management; whether it has used its corporate power, or money, to control the press, to interfere in politics or influence elections, and whether it has had any agency, through its management or money, in producing the existing pressure; a select committee be appointed to inspect the books and examine into the proceedings of the said bank, who shall report whether the provisions of the charter have been violated or not, and also what abuses, corruptions, or malpractices have existed in the management of said bank, and that the said committee be authorized to send for persons and papers, and to summon and examine witnesses on oath, and to examine into the affairs of the said bank and branches; and they are further authorized to visit the principal bank, or any of its branches, for the purpose of inspecting the books, correspondence, accounts, and other papers connected with its management or business; and that the said committee be required to report the result of such investigation, together with the evidence they may take, at as early a day as practicable.

This resolution was agreed to on April 4,[2] and the following committee were appointed: Messrs. Francis Thomas, of Maryland, Edward Everett, of Massachusetts, Henry A. Muhlenberg, of Pennsylvania, John Y. Mason, of Virginia, William W. Ellsworth, of Connecticut, Abijah Mum. jr., of New York, and Robert T. Lytle, of Ohio.

The committee reported on May 22,[3] the minority also filing views:[4]

The proceedings of the committee, in the form of extracts from its journal, are appended to the report, and show that the committee met at the North American Hotel at Philadelphia, on April 23, and informed the president of the bank that they would be ready to proceed to business on the morrow.

April 24 the committee were informed by officials of the bank that arrangements would be made to accommodate them at the bank, and that a committee of seven members of the board of directors had been appointed

to receive the committee of the House of Representatives of the United States, and to offer for their inspection such books and papers of the bank as may be necessary to exhibit the proceedings of the corporation according to the requirements of the charter.

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[1] First session Twenty-third Congress, Journal, p. 422.

[2] Journal, pp. 487–489.

[3] Journal, p. 650.

[4] The report, with extracts from the Journal of the committee and views of the minority appear as No. 481 in House Reports first session Twenty-third Congress. Minority views were also filed in the preceding investigation in 1832.

On April 26 the investigating committee agreed to and forwarded to the committee of the directors resolutions stating "that the proceedings, investigations, and examinations of this committee of the books, papers, and affairs of the bank, shall be confidential, unless otherwise ordered by the committee;" and "that the investigations of this committee into the affairs, management, and concerns of the Bank of the United States shall be conducted without the presence of any person who is not required or invited to attend the examinations of this committee." [1]

To this the board of directors responded by resolving that they could not "consent to give up the custody and possession of the books and papers of the bank, nor to permit them to be examined but in the presence of the committee appointed by the board." Considering the investigation "accusatory" in nature, the directors also thought it proper that the institution and individuals concerned should have the opportunity to be present, by their appointed representatives, at all examinations touching their character and conduct. But they protested against a secret or partial investigation.

The investigating committee, replying under date of April 29, accept the offer made by the directors of the use of a room at the bank, but with a statement of belief that

> the room thus offered would be exclusively for its occupation and that of those whose attendance might be, by the committee, required or assented to.

The committee also

> claims the right, to be exercised at its discretion, to compel the production of the books and papers of the bank for inspection, and to inspect the same in such mode as to the committee may seem best calculated to promote the object of its inquiry.

The committee denies "accusatory" intentions, does not purpose making a secret or partial examination, states that it will afford every person whose character or conduct may seem to be affected by the investigation a full opportunity of explanation and defense, but

> claims the right of determining the time and mode of giving such privilege, and therefore can not recognize the right of the directors to prescribe the course to be pursued by this committee in making its examinations.

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[1] In their minority views Messrs. Everett and Ellsworth say: "The first resolution was regarded merely as an understanding, on the part of the committee of investigation, that no publicity would be given by them, until otherwise ordered, to the matters that might appear in the course of the examination. The undersigned assented to this resolution, with the understanding of the parliamentary law that the sittings of every committee are open unless ordered to be secret by the House; and that it was not in the power of the present committee, by a vote of their own, either to shut their doors or impose secrecy on any persons who might attend. But they assented to the injunction of confidence in conformity with a usage which has prevailed in other committees of inquiry of the House, for their own convenience, as a rule binding on themselves, and with the express reservation that the adoption of this resolution should in no degree involve an assent to the principle asserted in the second. To that principle, viz, that no person should be permitted to attend during the inspection of the books of the bank and the examination of its proceedings, etc., * * * the undersigned were strenuously opposed. * * * This claim was regarded by the undersigned as being without foundation and objectionable. In the first place, as has been observed, they believed it to be contrary to the lex parliamentaria for a committee of inquiry, on its own authority, to claim the right of holding its sittings, except when deliberating and voting, in secret. It can only be constituted a secret committee by express order of the House. (See pp. 44, 45, of Report No. 481, House of Representatives, first session Twenty-third Congress.)

Again, on April 30, the committee, reiterates

that they have the power to compel the production of the books and papers of the bank for inspection; that they have the power to make such inspection in the presence of those only who may be, by the committee, required or invited to attend; and to exclude from their room all persons who, by their presence, may in any degree tend to impede the progress of the inspection of the books .and papers or incommode the members of the committee in the discharge of the high duties devolved on them by the House of Representatives.

The committee also in this communication ask if they are to have the exclusive use of the room at the bank.

The chairman of the committee of directors, replying under date of May 1, reiterates the previous decision that the custody and possession of the books of the bank can not be given up, and that they can not be examined except in the presence of the committee appointed by the board.

On May 2 the committee of investigation resolved that, as they could not have exclusive use of the room at the bank, they would hold their sittings at their room in the North American Hotel, and that the president and directors of the Bank of the United States be required to submit for the inspection of the committee at the hotel at 11 a. m. May 3 certain specified books of the bank.

The directors replied that they could not let the books and papers go out of their care and custody, or out of the banking house, as such action would be a violation of their duty, and might be deemed an abandonment of their right to be present by themselves, or by their committee or agents, at the examination.

On May 5 the investigating committee decided to go to the bank and require of the president or other officers the production of the books of the bank for the inspection of the committee. Accordingly they proceeded to the bank and requested the president and first cashier to produce the books already demanded. The president and cashier replied that they could not comply with the request, as the books were in the custody of the board of directors, who had appointed a committee to exhibit them.

On May 7 the committee of investigation received a notification from the committee of directors that the latter would be ready May 7 at 11 a.m. to exhibit books of the bank; and accordingly the committee of investigation proceeded to the bank, and called for the

minute books, containing the proceedings of the directors of the bank, and the expense book and vouchers for expenses incurred.

The committee of the directors retired to deliberate, and after a time presented to the investigating committee their resolutions. They declare that the investigation proposed involves two branches, one to ascertain whether the charter had been violated, and the other very general and indefinite; that the calls for books embrace a very wide range, including an extensive examination of the transactions, acts, and accounts of individuals, thus instituting a general search which would be an injurious invasion of private rights; that in the opinion of the directors the inquiry can only be rightfully extended to alleged violations of the charter and ought to be conducted according to certain principles and rules. Therefore the investigating committee are "respectfully required" to state specifically in writing

the purposes for which the books and papers called for are to be inspected; and, if it be to establish a violation of the charter, to state specifically and in writing what are the alleged violations to which the evidence is alleged to be applicable. The suggestion is also made that the investigating committee should furnish a specification of all the charges intended to be inquired into, and proceed with them in order.

In response to this communication the investigating committee stated that they were engaged not in a prosecution, but an inquiry, and therefore could not be "required" to specify supposed violations of the charter or state specifically the purposes for which the books were to be inspected. But the committee proceeded to request of the directors the credit books and pay lists of the bank to ascertain "whether it has used its corporate powers or money to control the press, to interfere in politics, or influence elections;" also the minute books, etc., to ascertain whether the bank "has had any agency, through its management or money, in producing the present pressure," and whether the directors have violated the charter of the bank.

The committee of the board of directors replied by declining to comply with the calls in any other manner than already laid down.

On May 9 the investigating committee authorized the issuing of the following subpoena duces tecum:

By Authority of the House of Representatives of the United States.

To BENJAMIN S. BONSALL,

Marshal of the Eastern District of Pennsylvania:

You are hereby commanded to summon Nicholas Biddle, president; Emanuel Eyre, Matthew Newkirk, John Sergeant, Charles Chauncey, John S. Henry, John R. Neff, Ambrose White, Daniel W. Coxe, John Goddard, James C. Fisher, Lawrence Lewis, John Holmes, and William Platt, directors of the Bank of the United States, to be and appear before the committee of the House of Representatives of the United States appointed on the 4th day of April, 1834, "for the purpose of ascertaining," etc. [here follows the portion of the resolution specifying the duties of the committee], in their chamber in the North American Hotel, in the city of Philadelphia, and to bring with them the credit books of said bank, showing the indebtedness of individuals to said bank on the 10th day of May instant, at the hour of 12 o'clock m., then and there to testify touching the matters of said inquiry, and to submit said books to said committee for inspection.

Herein fail not, and make return of this summons.

Witness the seal of the House of Representatives of the United States, and the signature of Hon. Francis Thomas, chairman of the said committee, at the city of Philadelphia, this ninth day of May, in the year one thousand eight hundred and thirty-four.

[SEAL.]

FRANCIS THOMAS.

Attest:

W. S. FRANKLIN,

Clerk House of Representatives U. S.[1]

[1] The directors in their reply reserved objection to the legality of this process and the service, but did not state their grounds. The minority of the committee in their views (p. 61 of report) say: "The form of the process and its mode of service are believed by the undersigned to be not less objectionable than its object, and equally fatal to its legal character; but on this topic they omit to dwell." Rule 11 of the House was as follows at that time: "All acts, addresses, and joint resolutions shall be signed by the Speaker; and all writs, warrants, and subpoenas issued by order of the House shall be under his hand and seal, attested by the Clerk." This rule has been somewhat changed since. (See sections 251 of Volume I and 1313 of Volume II of this work.)

At the appointed time President Biddle and the associates named in the subpoena appeared, and Mr. Sergeant stated—

that they came in pursuance of the precept served on them individually by the marshal, and that he would read their individual answer to it.

This answer was in writing and signed by the respondents. It declared first that they did not produce the books,

because they are not in the custody of either of us, but, as has been heretofore stated, of the board, whose views upon this subject, we would take occasion to say, have already been respectfully communicated to the committee of investigation.

As to testifying, the paper continues:

Each of us now says for himself that, considering the nature of the proceeding and the character of the inquiry, even as explained in the resolution of the committee of investigation of the 7th instant, and considering that as corporators and as directors we are parties to the proceeding, we do not consider ourselves bound to testify, and therefore respectfully decline to do so.

The committee of investigation, on May 22, reported to the House, recommending the following resolutions:

Resolved, That, by the charter of the bank of the United States, the right was expressly reserved to either House of Congress, by the appointment of a committee, to inspect the books and to examine into the proceedings of the said bank, as well as to ascertain if at any time it had violated its charter.

Resolved, That the resolution of the House of Representatives passed on the 4th of April, 1834, for the appointment of a committee, with full powers to make the investigations embraced in said resolution, was in accordance with the provisions of the charter of said bank and the power of this House.

Resolved, That the president of the board of directors of the bank of the United States, by refusing to submit for inspection the books and papers of the bank, as called for by the committee of the House of Representatives, have contemned the legitimate authority of the House, asserting for themselves powers and privileges not contemplated by the framers of their charter, nor in fairness deducible from any of the terms or provisions of that instrument.

Resolved, That either House of Congress has the right to compel the production of any such books or papers as have been called for by their committee, and also to compel said president and directors to testify to such interrogatories as were necessary to a full and perfect understanding of the proceedings of the bank at any period within the term of its existence.

Resolved, That the Speaker of this House do issue his warrant to the Sergeant-at-Arms, to arrest Nicholas Biddle, president; Manuel Eyre, Lawrence Lewis, Ambrose White, Daniel W. Coxe, John Holmes, Charles Chauncey, John Goddard, John R. Neff, William Platt, Matthew Newkirk, James C. Fisher, John S. Henry, and John Sergeant, directors of the Bank of the United States, and bring them to the bar of this House, to answer for their contempt of its lawful authority.

The report of the committee, made by Mr. Thomas, in support of the resolutions, calls attention to the fact that the bank was chartered for a great public purpose, to act as an agent of the Government in the collection and disbursement of money, and that the United States holds seven millions of the stock of the bank. The House of Representatives is the grand inquest of the nation, and as such has power to inspect all departments of the Federal Government. That there might be no doubt of the existence of this power it had been expressly reserved in the 23rd section of the charter of the bank, which provides—

that it shall be at all times lawful for a committee of either House of Congress, appointed for that purpose to inspect the books and examine into the proceedings of the corporation hereby created, and to report whether the provisions of its charter have been violated or not.

Thus the only restriction in the charter of the bank was one relating to the committee, and not to the House, and had reference, not to the extent of the examination, but to the character of the report to be made. The object of this specification was seen in the clause of the charter providing for certain legal action in the courts if the committee should find that the charter had been violated.

The committee argue that any doubt as to the reserve power of the House had long been settled by the precedents of the examinations by committees of the House in 1818 and 1832. Those committees examined into the general management of the bank, the transactions of private individuals were freely and fully examined, and were published. The managers of the bank on those occasions did not question the authority of the committees to make the examinations.

The committee say that in providing by resolution that the proceedings of the committee should be confidential they followed the precedent of the committee of 1832.

The minority of the committee, Messrs. Everett and Ellsworth, contended that the charter was a contract proposed by the Government to the stockholders, that the power of visitation and examination was one onerous to the stockholders, and to attempt to enlarge it by construction was to interpolate new and oppressive conditions into the contract. A resolution of the House passed in virtue of its general power of inquisition could not enlarge the specific provisions of law. The fact that the Government was a stockholder might give the Government rights in the matter which should not be claimed by the House, which was only one department of the Government. The law gave the House certain power in this case, and it was not within its power to give the committee a general power of search. The minority did not deny the power of the House to inquire into any alleged abuse or corruption whatsoever, and they believed that the committee was authorized to make such inquiry, but those inquiries should be conducted according to the charter and according to the principles of equity and constitutional right. The power of the committee did not authorize it to prosecute a secret inquiry of indefinite character. It did not extend the right of inspecting the books, granted for one purpose alone, so as to authorize their inspection for purposes totally different. It did not empower the committee to issue warrants of general search, and compel the appearance of citizens and the production of papers, not in proof or disproof of charges against third persons, but to enable the committee to find out from the papers whether those who should bring them were themselves guilty of misdemeanors. A general search was repugnant to the Constitution. The minority reviewed the proceedings at length, criticizing, among other things, the legality of the process issued to compel the attendance of the directors.

On May 29,[1] Mr. John Quincy Adams presented to the House resolutions declaring that any attempt to bring to the bar of the House the directors would be unconstitutional. These resolutions were not acted on.

On June 25[2] Mr. Thomas presented a resolution to make the consideration of the report of this committee a continuing order of the House. The question

[1] Journal, p. 664.

[2] Journal, pp. 831, 832.

of consideration being raised, the House voted to consider it—yeas 97, nays 65. But after consideration for a time, the resolution was superseded by privileged business. Thereafter, until the final adjournment of the session on June 30, the House was engaged in other business, so the report of the committee was not acted on.

1733. The general authority of the House to compel testimony and the production of papers in an investigation, and the relation of this right to the rights of individuals to privacy in business affairs, were discussed in 1837.—On January 3, 1837,[1] on motion of Mr. James Garland, of Virginia, the House agreed to the following:

Resolved, That a committee of nine Members be appointed, whose duty it shall be to inquire whether the several banks employed for the deposit of the public money have all, or any of them, by joint or several contract, employed an agent to reside at the seat of government to transact their business with the Treasury Department; what is the character of the business which he is so employed to transact, and what compensation he receives; whether said agent, if there be one, has been employed at the request or through the procurement of the Treasury Department; whether the business of the Treasury Department with said banks is conducted through said agent; and whether, in the transaction of any business confided to said agent, he receives any compensation from the Treasury Department; and that said committee have power to send for persons and papers.

The following were appointed the committee: Messrs. Garland, Franklin Pierce, of New Hampshire; John Fairfield, of Maine; Henry A. Wise, of Virginia; Ransom H. Gillett, of New York; Henry Johnson, of Louisiana; Thomas L. Hamer, of Ohio; Joshua L. Martin, of Alabama, and Balie Peyton, of Tennessee.

In the course of the investigation in the committee Mr. Peyton offered this resolution:[2]

Resolved, That R. M. Whitney be summoned to appear before the committee, at the room of the Committee on Commerce, on Thursday morning next, at 10 o'clock, and that he be required to bring with him the books, papers, and memoranda relating to his agency with the deposit banks; that he produce all the correspondence between himself and any person or bank going to show the existence of that agency; that he produce the originals, where in his power, and copies where the originals are not in his possession; that he produce all the contracts which he has made or proposed with and to any bank, or correspondence held in relation to the public deposits; all books, papers, etc., going to show the amount of his compensation, and the character of the business which he is employed to transact.

To the adoption of this resolution Mr. Martin objected, on the ground that he doubted the power of the committee, on the showing then before them, to require the production of all the papers therein required, and moved for a division of the resolution, so as to take the question upon ordering the subpoena for R. M. Whitney, and the subpoena duces tecum to him, separately; which motion was withdrawn, upon the understanding with the committee generally that the question of power to enforce the demand, if objected to by Mr. Whitney, to whom the subpoena duces tecum was directed, should be reserved. Whereupon the resolution was adopted without further objection.

On January 25[3] Mr. Whitney, who had previously declined to answer certain

[1] Second session Twenty-fourth Congress, Journal, pp. 164, 165; Globe, pp. 69, 73.

[2] House Report, first session Twenty-fourth Congress, No. 193, p. 2 of Journal of Report.

[3] Journal of Report, No. 193, pp. 67–80.

questions and to produce certain papers, filed with the committee a written protest, which was, by vote of the committee, ordered to be read.

In this protest the witness declared that the committee, in calling for an indefinite mass of papers, many of them private, had exceeded their inquisitorial power. The resolution under which they acted provided for three branches of investigation—first, the Treasury Department and its officers; secondly, "the several banks employed for the deposit of the public moneys;" and, lastly, himself. To the first branch of the inquiry he professed no relation, and in no manner would draw in question the power of the committee. He had answered freely every question strictly within the province of that branch of inquiry. As to the deposit banks, he denied that the mere fact of their having, in the course of their business, entered into a contract with a Department of the Government, gave one branch of the Congress any authority to examine into their business transactions or their relations with their agents. They were chartered under State laws, and were not at all under national control. There was no visitorial or supervising power over them in either branch of Congress. Even in the late Bank of the United States, chartered by Congress, it was thought necessary to confer that power by a special clause of the charter. And even then, when under examination by a committee authorized under this special provision, the bank had resisted the efforts of the committee to inquire into certain matters. The act of Congress regulating the deposits of the public moneys gave to the Secretary of the Treasury a modified right of inspection of the general accounts of the banks that should accept the public deposits, but this modified right of inspection did not imply any inherent power of Congress over the banks. It was merely a condition precedent to their being employed as depositories. As to himself personally the inquiry had two branches—first, as to whether he had been employed as agent of the banks through the procurement of the Treasury Department and had received compensation from that department; and, second, as to his business arrangements with such of the deposit banks as constituted him their agent. As to the first branch, relating as it did to the management of the Treasury Department and the disbursements of the public moneys, he had answered all questions and still held himself ready to answer all such; but the questions falling under the second branch he had not answered, on the ground that they were inquisitorial in their nature, going into the personal and private transactions and relations between himself and his employers.

I have already

[says the protest]

referred to the summons as in the nature of a subpoena duces tecum, by which myself and my papers were cited before your committee; how sweeping and indefinite are the number and the description of the papers comprehended in the citation; how deeply it searches into my correspondence—into the documents of my business and transactions—sweeping up even all the loose memoranda I may have kept relating to my agency (no matter to what other things the same memoranda may relate). All this appears on the face of the summons, and may be sufficiently inferred from the notice already taken of that document.

If the power to send for "papers," which may be rightfully delegated to and exercised by a committee of Congress, be susceptible of any more reasonable limits than that of the power to send for "persons," I am advised that it may be clearly reduced to two simple heads:

1. All that can be denominated public papers, as belonging to the public archives of any Department of the Government, and which may be required for the information of Congress upon any matter touching the public administration.

2. Such private papers in the hands of individuals as are necessary to the advancement of justice in the exercise of the judicative power of Congress, understanding that power as limited to impeachments. Then such private papers, and such only, are included as would, if produced, be competent evidence in a criminal prosecution and in a prosecution not against the party cited to produce the papers.

The rules of procedure, long established by the courts of ordinary judicature and sanctioned by veteran experience and wisdom as indispensable to the liberty and safety of the citizen, can not be dispensed with by Congress when it assumes the tribunal and exercises its constitutional functions of criminal judicature. Now, these rules have strictly limited and guarded the process for papers in criminal proceedings—as, indeed, in civil. The paper required must be described with reasonable certainty, so as to be distinguished and identified; above all, it must be made clearly to appear, before its production is required, to be competent and pertinent evidence to the issue, or, if the issue be not yet formed (as in the case of a presentment pending before a grand jury or an impeachment in course of preparation), still competent and pertinent evidence to the issue to be formed, in case the presentment be found true or the impeachment be preferred.

Therefore the witness concluded that the committee might not demand the production of a large and miscellaneous mass of private papers, the contents of which and the conclusions from which are utterly unknown beforehand. In his view the power to send for persons and papers did not go to this extent.

The committee did not attempt to compel Mr. Whitney to answer questions which he considered inquisitorial; but in their report they say:[1]

It is not the purpose of the committee to enter into a long or detailed answer to said protest; they hive not time, if they were disposed, nor is it necessary to do so. As relates to the resolution of the committee, the whole argument of the protest is based upon the idea that the committee has asserted a claim of power, in compelling the production of private papers and in examining into private transactions, which it has not done. The resolution is general, and calls for no specific paper; it calls generally for such papers, etc., as may refer to and shed light upon the inquiries directed by the House. The committee, in adopting this resolution, made it general, because they had no knowledge of the peculiar character of the papers held by the witness, whether they were of a purely private or public character, and could not, therefore, designate any particular paper for which to make a call, and because they thought it due to the witness himself that he might have the opportunity of producing such papers of a private character as he might deem necessary for the purpose of explanation if such explanation should be deemed necessary by him. Immediately following the adoption of the resolution referred to the committee made an express reservation of the question—what papers they would or would not compel the production of until the witness had determined for himself which he would or would not produce, having reference to the necessity of explanation as affecting himself. * * * The committee has not in a single instance attempted to enforce the production of any paper objected to by the witness. As to the question whether the House of Representatives has the power to direct the inquiries contained in the resolution organizing the committee, it is not deemed necessary to make any remark. In adopting the resolution it is presumed that the House well understood its power and its duty, and did not hastily institute inquiries beyond the reach of the one or the other. The committee does not claim for the House or itself the power to compel the deposit banks to expose their private concerns or private transactions to the scrutiny of the committee, nor has the committee in any instance demanded such exposure. Yet, while the committee does not assert any such claim of power, it holds it decidedly within the power of Congress to ascertain, by other competent and legal testimony, any of the transactions of the deposit banks which are calculated to affect the safety of the public funds, and to render some action on the part of Congress necessary for their security.

[1] House Report No. 193, p. 1.

1734. Members of the Presidents Cabinet, whose reputations and conduct have been assailed on the floor of the House, have sometimes asked for an investigation.—On February 1, 1805,[1] the Postmaster-General, Gideon Granger, having

> received information from various sources, that both my public and private character and conduct have been arraigned on the floor of the House of Congress by a Member of that House,

addressed a letter to the Speaker, asking an investigation. This letter was read to the House and referred to a committee.

1735. On April 3, 1850,[2] the Speaker, by unanimous consent, laid before the House a letter from Hon. George W. Crawford, Secretary of War, asking the House to investigate the charges made against him in connection with the Galphin claim. The letter, having been read, was referred to a select committee of nine members.

1736. Vice-President Calhoun asked the House, as the grand inquest of the nation, to investigate certain charges made against his conduct as Secretary of War, and the House granted the request.

The Vice-President was represented by a Member of the House before a committee of the House which was investigating charges against him.

The proceedings of an investigating committee having brought out statements reflecting on the character of a person not directly involved in the inquiry and not a Member of either House, the House refused to incorporate his explanation in the report.

In investigating charges of an impeachable offense, the committee permitted the accused to be represented by counsel and have process to compel testimony.

Investigating committees do not always confine themselves within the strict rules of evidence.

On December 29, 1826,[3] the Speaker laid before the House the following communication from the Vice-President of the United States:

> *To the Speaker of the House of Representatives of the United States.*
>
> SIR: You will please to lay before the House, over which you preside, the inclosed communication, addressed to that body.
>
> Very respectfully, yours, etc.,
>
> J. C. CALHOUN.

The inclosed communication was addressed "to the honorable Members of the House of Representatives," and began:

> An imperious sense of duty and a sacred regard to the honor of the station which I occupy compel me to approach your body, in its high character of grand inquest of the nation. * * * In claiming the investigation of the House I am sensible that under our free and happy institutions the conduct of public servants is a fair subject of the closest scrutiny; * * * but when such attacks assume the character of impeachable offenses and become in some degree official by being placed among the public records, an officer thus assailed, however base the instrument used, if conscious of innocence, can look for refuge only to the Hall of the immediate representatives of the people.

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[1] Second session Eighth Congress, Journal, pp. 113, 331, 400 (Gales & Seaton ed.); Annals, p. 1110.

[2] First session Thirty-first Congress, Journal, p. 741; Globe, p. 628.

[3] Second session Nineteenth Congress, Journal, pp. 109, 110; Debates, pp. 574, 576.

The letter goes on to state that charges had been filed in an Executive Department that he had, while Secretary of War, corruptly participated in the profits of a public contract. Therefore he challenged the freest investigation by the House. The letter was signed "J. C. Calhoun, Vice-President of the United States."

The House, without division, referred the communication to a select committee with power to send for persons and papers. Mr. John Floyd, of Virginia, was chairman of this committee, and Mr. John C. Wright, of Ohio, was second member.

On February 13, 1827,[1] Mr. Wright submitted a report, which was read and laid on the table.

Mr. Floyd "submitted to the House a paper, also purporting to be a report upon the same subject, and which contains the views of the minority thereof, in relation to the subject-matter of inquiry, which paper was read and also laid on the table."

The report states that immediately after the committee assembled they informed the Vice-President of their readiness to receive any communication that he might see fit to make. The Vice-President, in his response, expressed his wish that, to avoid the inconvenience of communication by letter, he might be represented by Mr. George McDuffie, a Member of the House. Mr. McDuffie had accordingly been admitted. The report then reviews the charges and testimony, gives the conclusions of the committee, and transmits the testimony and a written protest by Mr. McDuffie against the methods by which the committee had proceeded. This protest of Mr. McDuffie[2] was against what he termed the committee's departure—

from the fundamental principles of judicial investigation and the established rules of judicial evidence.

In particular he objected that large quantities of testimony had been admitted relative to the general administration of the War Department, and disassociated from the specific charge committed to the committee; also that on that charge private letters of Major Vandeventer to Elijah Mix had been admitted as evidence against Mr. Calhoun, although they were, as lawyers well knew, "incompetent and improper testimony." Mr. McDuffie also protested against hearsay evidence.

Admitting that it is proper for the committee to assume inquisitorial powers in this investigation [he says], and in that character to ask of the witnesses not only what they know, but what they have heard from others, it must be exceedingly apparent that the only excusable purpose, even of an inquisitorial kind, for which such questions could be propounded, is the discovery of other witnesses, by whose evidence the charges might be established.

The report also shows that at the instance of Mr. McDuffie subpnoeas were issued for witnesses to testify in behalf of the Vice-President.

The report proposed no action by the House, therefore the House disposed of it by ordering it to lie on the table and be printed, with the accompanying documents and the views of the minority.

After this had been done Mr. John Forsyth, of Georgia, by leave of the House, presented a letter signed C. Vandeventer, expressive of his regret that the committee had not accompanied their report by a communication of his explanatory of transactions as far as he was concerned with the subject of investigation, and praying that it might be received, and with accompanying documents be placed among the papers presented by the committee.

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[1] Journal, pp. 294, 295; Debates, pp. 1128–1150.

[2] House Report No. 79, page 221.

Mr. Vandeventer, who was chief clerk of the War Department, considered that the testimony presented by the committee contained reflections on his conduct, and therefore he wished his explanation to accompany those reflections.

Mr. Wright stated that the committee had received several such communications; but as they did not consider them pertinent to the inquiry committed to them, they had returned them to the senders. The committee did not see why they should enter upon an investigation to exculpate these individuals any more than all the other witnesses. They could not be diverted from the main object of inquiry by unnecessary investigations. To append documents and arguments to the report of the committee for the purpose of exculpating a witness would be a novel procedure, leading to many perplexities.

It was pointed out, on the other hand, that this man was a public officer, who was about to be injured by the publication in a report of matter reflecting on his character. But the reply was made that the proper course in such a case was to do as the Vice-President had done—ask for an investigation.

The House, without division, decided not to print the communication with the report, but laid it on the table.[1]

1737. President Jackson resisted with vigor the attempt of a committee of the House to secure his assistance in an investigation of his Administration.

The motion to lay on the table is used in committees.

On January 23, 1837,[2] the select committee appointed to investigate the Executive Departments of the Government agreed to a series of resolutions calling on the President and heads of Departments for information of various kinds. One of these resolutions was as follows:

Resolved, That the President of the United States be requested, and the heads of the several Executive Departments be directed, to furnish this committee with a list, or lists, of all officers or agents, or deputies, who have been appointed or employed and paid since the 4th of March, 1829, to the 1st of December last (if any, without authority of law, or whose Dames are not contained in the last printed register of public officers, commonly called the "Blue Book") by the President or either of the said heads of departments, respectively; and without nomination to, or the advice and consent of the Senate of the United States; showing the names of such officers or agents, or deputies; the sums paid to each; the services rendered; and by what authority appointed and paid; and what reasons for such appointments.

Resolved, That the various executive officers, in replying to the foregoing resolution, be requested, at the same time, to furnish a statement of the period at which any innovations, not authorized by law, (if such exist), had their origin, their causes, and the necessity which has required their continuance.

By order of the committee the chairman transmitted to the President of the United States a copy of the above resolutions. The copy transmitted in the letter of the chairman was attested by the clerk of the committee.

On January 27 Mr. Andrew Jackson, Jr., secretary of the President, entered the committee room and delivered to the chairman, Mr. Henry A. Wise, of Virginia, a letter addressed to Mr. Wise and giving the President's reasons for not complying

[1] Journal, p. 295; Debates, pp. 1144–1150.

[2] House Report No. 194, second session Twenty-fourth Congress, pp. 12, 13, 29–45; Journal of the committee, pp. 9, 10, 17, 23, 29, 45.

with the request of the committee. The President begins his letter by saying that the resolution adopted by the House authorizing the investigation raised an issue with his annual message, which had stated that the Executive Departments were in excellent condition. After referring to speeches made in the House by Mr. Wise and other Members on this subject, and the appointment of the special committee, he says:

The first proceeding of the investigating committee is to pass a series of resolutions, which, though amended in their passage, were, as understood, introduced by you, calling on the President and the heads of the Departments—not to answer to any specific charge; not to explain any alleged abuse; not to give information as to any particular transaction; but, assuming that they have been guilty of the charges alleged, calls upon them to furnish evidence against themselves. After the reiterated charges you have made, it was to have been expected that you would have been prepared to reduce them to specifications, and that the committee would then proceed to investigate the matters alleged. But, instead of this, you resort to generalities even more vague than your original accusations; and, in open violation of the Constitution, and of that well-established and wise maxim "that all men are presumed to be innocent until proven guilty, according to the established rules of law" you request myself and the heads of the Departments to become our own accusers, and to furnish the evidence to convict ourselves; and this call purports to be founded on the authority of that body in which alone, by the Constitution, the power of impeaching is vested. The heads of Departments may answer such a request as they please, provided they do not withdraw their own time and that of the officers under their direction from the public business to the injury thereof. To that business I shall direct them to devote themselves in preference to any illegal and unconstitutional call for information, no matter from what source it may come or however anxious they may be to meet it. For myself, I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution; and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish inquisition.

The President then lectures still further the chairman of the committee, and concludes with an expression of astonishment that the House should make such a call on the Executive when there were six standing committees of the House specifically charged with examining the details of expenditures in the Departments.

On January 30 Mr. Wise offered these resolutions in the committee:

Resolved, That the letter of the President of the United States, dated the 26th instant, addressed to the chairman of this committee and handed to him by the private secretary of the President in presence of the committee, is an official attack of the Executive upon the proceedings of the House of Representatives and of this committee, and upon the privileges of Members of both Houses of Congress, and opposes unlawful and unconstitutional resistance to the just powers of the House of Representatives and of the committee: Therefore,

Resolved, That the chairman of the committee be directed to report to the House his letter and the resolutions of this committee inclosed, addressed to the President, and the letter of the President in reply thereto, dated the 26th instant, and to submit to the consideration of the House the propriety and necessity of adopting measures to defend its proceedings; to protect the privileges of its Members; and to enforce its just powers and those of its committees; to enable this committee to discharge the duties devolved upon it by the resolution of the 17th instant, adopted by the House of Representatives.

These resolutions were laid on the table by a vote of 6 yeas, 3 nays.

On February 1 an attempt was made to consider and amend them, but it failed.

The committee in their report say:

Neither did the committee discover in the letter of the President any attack upon the proceedings of the House or the privileges of its Members, for the plain reason that neither the House nor its Members have any privilege to call upon parties accused to criminate themselves. Consequently they

could not sanction the resolution offered by the chairman to censure the President for his emphatic repulsion of what he construed to mean charges of personal accusation, and calls for self-crimination; nor could they consent to put a stop to the public business by getting up a debate in the House to enforce any pretended "privilege" of the House or its committees to compel public officers to furnish evidence against themselves.

Mr. Wise, in his minority views, argues at length the proposition that the President, by his letter, invade the privileges and prerogatives of the House.[1]

The various heads of Departments replied to the call of the committee in a manner similar to the reply of the President, stating that they could not furnish evidence to criminate themselves, as the committee had demanded.

1738. In 1837 a committee discussed the authority of the House in calling for papers from the Executive Departments and the kind of papers properly subject to its demand.—On March 3, 1837,[2] the select committee appointed on January 17 to inquire into the condition of the Executive Departments of the Government, made a report, which takes the following view of the power to send for persons and papers:

One of the powers conferred on the committee by the resolution of the House was the power to send for persons and papers. * * * At best, this is a vague and not well-defined power; incidental, and not derived from any express provision in the Constitution. In its exercise, therefore, there should be some limitation; and it should be carefully used only in cases where the direct legislation of Congress, the protection and enforcement of the privileges and rules of either House, or manifest public interest imperatively demand it. It is a judicial power, which Congress can exercise merely as a power incidental to the power "to make all laws which shall be necessary and proper."

To construe it into an unlimited power for a committee of this House to bring before them the persons of citizens from any part of the Union at their own arbitrary will, without just cause, or to compel the surrender of all papers which a committee might see fit to send for, would be to set up an incidental power of the House nowhere expressly recognized in the Constitution, which would totally annul one of the express provisions of the Constitution, to secure the citizen against these very outrages, viz, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

In applying this principle to the calls which were proposed, in this investigation, upon the President and heads of Departments, for statements and papers, the committee have considered that a public officer is not put without the pale of the protection afforded to other citizens against being required to furnish statements or evidence to accuse himself; and against unreasonable demands for papers not constituting a part of the public documents; and, in their opinion, the call for papers ought to be limited to such as are already made and on file in the Departments.

To every call for statements going to show any act of a public officer without authority of law, and for papers coming within the above description, the committee have uniformly responded in the affirmative, while, as a general rule, they have felt bound to reject all calls for statements touching motives and acts not shown to be unlawful, if proved, and for all real or supposed papers, private in their character, and not coming within the denomination of public papers on file.

If it be contended that this distinction enables a public officer to exclude from the files of his department whatever he chooses to consider private and which ought to be placed there, the answer is that this can not alter the powers of a committee of the House to send for papers nor change the nature of

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[1] The majority of the committee who made the report consisted of Messrs. Dutee J. Pearce, of Rhode Island; Henry A. Muhlenberg, of Pennsylvania; Edward A. Hannegan, of Indiana; Gorham Parks, of Maine; Abijah Mann, of New York, and John Chaney, of Ohio.

[2] House Report No. 194, pp. 6 and 7, second session Twenty-fourth Congress. The members of the committee joining in this report were Messrs. Dutee J. Pearce, of Rhode Island; Henry A. Muhlenberg, of Pennsylvania; Edward A. Hannegan, of Indiana; Gorham Parks, of Maine; Abijah Mann, of New York, and John Chaney, of Ohio.

the call; and that, if any paper, shown to be of a public character, and such as ought to be placed on file or record, is excluded there is just ground of accusation against the officer for violation of duty. But the bare suspicion that papers which ought to be on file are not there can not warrant a call for all the personal and private papers of such officer in order that the committee may decide by inspection whether there are any which ought to go into the public files.

Besides, in calls made by Congress on the President or heads of Departments, the reservation is impliedly established, by usage, of such papers as, in their opinion, can not be communicated without injury to the public service. Consequently, all calls for papers must be subject to this discretion of the public officer of whom they are required; and if he abuses that discretion he must be held responsible for it in some other form of investigation into his official conduct.

1739. A committee of the House declined to prefer any charge against a public officer before requiring him to furnish certain records of his office.—In 1839,[1] in the course of the investigation into the affairs of the New York custom-house by a select committee, a call was made upon the collector to furnish the committee with certain correspondence. In response the collector questioned the authority of the committee to make the demand on him, under the language of the resolution creating the committee:

That the said committee be required to inquire into and make report of any defalcations among the collectors, receivers, and disbursers of the public money, which may now exist; the length of time they have existed, and the causes which led to them.

This being the language, the collector requested, before he sent the correspondence asked, that he be informed whether the committee or any of its members charged him with being a defaulter.

The committee responded by repeating the call for the correspondence and by agreeing to the following resolution:

Resolved, That this committee can not recognize any authority or right whatever in any collector, receiver, or disburser of the public money to call upon "the committee," or "any of its members," to prefer or to disavow a charge of his "being a defaulter," before such officer sends "the correspondence" of his "office," when required under the authority of the House of Representatives "to send for persons and papers," to enable its committee "to inquire into, and make reports of, any defalcations among collectors, receivers, and disbursers of the public money which may now exist;" nor can this committee or "any of its members" report whether Mr. Hoyt is or is not now a defaulter until by examination of the "persons and papers" for which it has sent and will send it shall discover "who are the defaulters, the amount of defalcations, the length of time they have existed, and the causes which led to them." And when the committee shall have found the facts embraced by these inquiries or closed its investigation it will make a report thereof to the House of Representatives.

Collector Hoyt responded by asking a full investigation of his accounts and transmitting the letters called for.

1740. In 1837 a committee took the view that the House might inquire into alleged corrupt violations of duty by the Executive only with impeachment in view.—On March 3, 1837,[2] the select committee appointed on January 17 to inquire into the condition of the Executive Departments of the Government,[3] made a report which takes the following view of the investigation:

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[1] Third session Twenty-fifth Congress, House Report No. 313, pp. 326, 349.

[2] Second session Twenty-fourth Congress, House Report No. 194.

[3] The committee consisted of Messrs. Henry A. Wise, of Virginia; Dutee J. Pearce, of Rhode Island; Henry A. Muhlenberg, of Pennsylvania; Robert B. Campbell, of South Carolina; Edward A. Hannegan, of Indiana; Gorham Parks, of Maine; Levi Lincoln, of Massachusetts; Abijah Mann, of New York, and John Chaney, of Ohio. Messrs. Wise, Lincoln, and Campbell did not concur in this report.

The power of the House to institute an inquiry of this kind into the conduct of the Executive, directly personal in its application, can nowhere exist, unless it be an incident of the "sole power of impeachment" which is given to the House of Representatives by the Constitution. This power extends to the President and all civil officers of the United States on charges of treason, bribery, or other high crimes and misdemeanors. Such, in effect, were the representations upon which the resolution creating this committee was founded and the necessity of its adoption urged before the House. Such is the nature of the allegations formally put upon the journal of the committee by the mover of the resolution in the House, the chairman. * * *

It follows, therefore, that the only constitutional power under which the House of Representatives, as a coordinate branch of the Government, could constitute a committee to inquire into alleged "corrupt violations of duty" by another coordinate branch of the Government (the Executive) is the "power of impeachment."

By the terms of the resolution referred to the committee, and by the express declaration of the mover of that resolution, as well as by the legal construction of the constitutional powers of the House, this inquiry can not be brought within the only other clause of the Constitution which, by any possible implication, can be made applicable to it, viz: "that the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The allegation is nowhere made that the laws are defective in relation to the "powers vested in any Department or officer" of the Government, and that this inquiry is made to enable Congress to "make laws;" but the charges are against the individual officers for "corrupt violation" of existing laws; and the ground is expressly taken by the chairman, in his declaration under oath, "that the whole Government needs reform, and more patriotic and honest men to administer it."

The committee, therefore, conceive that they were fully warranted and imperatively required to regard this investigation in the light of a preliminary inquiry into facts and evidence to show whether a process of impeachment ought not to be instituted by the House of Representatives against the Executive and the heads of Departments.

1741. The House, in 1824, investigated, on application of the United States minister to Mexico, a controversy on a public matter between him and the Secretary of the Treasury.

The committee investigating charges against Secretary of the Treasury W. H. Crawford permitted him to be represented by counsel and to produce testimony.

Instance wherein a committee, empowered to sit during recess, was directed to file its report with the Clerk of the House.

On April 19, 1824,[1] the Speaker communicated to the House an address of Ninian Edwards, late a Senator of the United States from the State of Illinois, complaining that injustice had been done him in a report from the Secretary of the Treasury, William H. Crawford, accompanying the correspondence between the Treasury Department and the banks in the different States upon the subject of the deposits of public money in said banks, exculpating himself, and also preferring certain charges against the said Secretary.

The address contained two general charges against the Secretary: One of mismanaging the public funds, under which various illegal transactions were alleged in reference to the deposit of the public money in certain banks and the mode in which such moneys were allowed, afterwards, to be repaid; the other, imputing to the Secretary the suppression of papers and documents or failing to communicate them when they ought to have been communicated in answer to resolutions of the Houses of Congress.

[1] First session Eighteenth Congress, Journal, p. 433; Annals, p. 2431.

In this address Mr. Edwards claims the right to be heard, not only because such a right would be accorded to the humblest individual, but because it was due also to the nation, in view of his late position as Senator and his present position as minister to Mexico; and also because of the exceptional circumstances of the case. He was called upon by the House of Representatives at the last session and

was subjected to an examination which has not its parallel in the records of any free country.

An attempt having been made to impeach his credibility, he should be allowed to repel the attack.

Debate arose as to the disposition of the address. It was proposed to print it, but Mr. Daniel Webster, of Massachusetts, objected that it was incompatible with the dignity of the House to convert it into an arena where prominent men might carry on their personal contests. If an investigation was to be made the letter might be printed for information of the House, otherwise he should object.

The House finally adopted an order that the address be referred to a select committee with power to send for persons and papers. Messrs. John Floyd, of Virginia, Edward Livingston, of New York, Daniel Webster, of Massachusetts, John Randolph, of Virginia, John W. Taylor, of New York, Duncan McArthur, of Ohio, and George W. Owen, of Alabama, were appointed on this committee.

On April 22[1] Mr. Floyd, by the instructions of the committee, reported the following minutes of the proceedings of the committee:

Voted, That the committee ought to proceed to make inquiry into the matters contained in the said communication and connected therewith.

Voted, That for the purpose of such inquiry the attendance of said Ninian Edwards upon the committee, to be by them examined, is requisite, and that his attendance be accordingly ordered.

Voted, That the chairman do inform the House of the foregoing resolutions of the committee; and, inasmuch as it is suggested that the said Ninian Edwards is about to leave the United States on foreign diplomatic service,

Voted, That the chairman do move the House that information of the said communication, of the votes of the House thereon, and of the foregoing resolutions of the committee be communicated to the President.

After debate this motion was agreed to.

On April 23[2] President Monroe, by message, acknowledged the receipt of the resolution of the House, and informed the House that he had already instructed Mr. Edwards not to proceed to his mission, but to await the call of the committee of the House.

On May 25[3] Mr. Livingston made a report from the committee. The report states that immediately upon their appointment the committee communicated a copy of Mr. Edwards's address to the Secretary of the Treasury and also ordered the attendance of Mr. Edwards. The report then goes at length into the charges against the Secretary of the Treasury and appends, with other documents, the answer, in writing, to the charges of Mr. Edwards. The Secretary did not appear personally before the committee, but in his response he states that he is willing to do so. The committee state that the investigation should not be terminated until

[1] Journal, p. 445; Annals, p. 2471.

[2] Journal, p. 448; Annals, p. 2480.

[3] Journal, pp. 579, 580, 589, 590; Annals, pp. 2713, 2761, 2766; House Report No. 128.

Mr. Edwards shall have been examined, and recommend that they be allowed to sit in the recess after the adjournment of the session in order to complete the work.

Mr. Livingston then moved the adoption of the following:

Ordered, That the committee to which was referred the address of Ninian Edwards be required to sit after the adjournment of the House for such time as shall be necessary in their judgment for further examination; that any additional report which may be made by them be filed in the office of the Clerk of the House; and that any three members of the committee be a quorum for the transaction of business.

After debate, on May 26, the House struck out that portion of the order making three members of the committee a quorum and added a clause providing that the report, after being filed with the Clerk, should be by him printed and forwarded to Members of Congress.

A further order, adopted May 27,[1] empowering the Clerk to pay witnesses and the expenses of subpoenaing them, on certificate of the chairman, closed the proceedings of the House.

In making their final report,[2] the committee state that Mr. Edwards attended the committee in obedience to summons, was examined as a witness (under oath), was cross-examined by a gentleman attending on behalf of the Secretary of the Treasury, and this testimony, together with various documents and reports were communicated as part of the report. A paper in reply to the communication heretofore received by the committee from the Secretary, and another in the nature of an argument on the whole case, had also been presented by Mr. Edwards and considered by the committee. The committee express the opinion that nothing had been proved to impeach the integrity of the Secretary, but beyond that statement content themselves with presenting the facts and testimony.

An examination of the report shows that among those summoned and examined as witnesses were United States Senators Thomas H. Benton, of Missouri, and James Noble, of Indiana.[3] Also several Members of the House were examined.

It appears from the report that during the examination before the committee the Secretary of the Treasury was permitted to be represented by counsel and to summon witnesses in his own behalf.

1742. A letter from an individual, charging an officer of the Army with corruption, was considered and an investigation was ordered.—On April 13, 1816,[4] the Speaker laid before the House a letter from William Simmons, late accountant of the War Department, charging Col. James Thomas, deputy quartermaster-general in the armies of the United States, with fraud and misapplication of public moneys, which was read and laid on the table.[5]

The following resolution was then presented by a Member:

Resolved, That a committee of five members be appointed to inquire into the state of the accounts rendered and settled of James Thomas, late a deputy quartermaster-general of the United States, and also to examine all accounts connected therewith; that the said committee have power to send for persons and effects.

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[1] Journal, p. 601.

[2] Annals, p. 2770.

[3] As this examination occurred in the recess of Congress it was impossible to obtain permission of the Senate for their attendance as witnesses.

[4] First session Fourteenth Congress, Journal, pp. 465, 701; Annals, p. 1199.

[5] Under the present usages of the House, such letters, which are in the nature of memorials, are not presented in open House, but are referred through the Clerk. (See sec. 3364 of Vol. IV of this work.)

There was objection to this resolution on the ground that information on the subject had already been called for from the proper Department; that it was improper to countenance individuals in bringing private quarrels to Congress; that the letter was not couched in proper terms; and that the power to send for persons and papers should not be lightly given.

On the other hand, it was agreed that every person who came before the House on a matter of public concern was entitled to a hearing, and that the circumstances of the case suggested the propriety of an investigation.

The resolution was agreed to, and the committee, on April 24, reported the results of the inquiry.

1743. While a committee of the House reported it inexpedient for the House to investigate the charges of a subordinate against a captain in the Navy, they expressly asserted the power of the House so to do.—On February 22, 1839,[1] Mr. Charles Naylor, of Pennsylvania, from the select committee appointed on the 14th instant, "to inquire into the official conduct of Capt. Jesse D. Elliott, of the United States Navy, while in command of the squadron in the Mediterranean, in the years 1837 and 1838, and particularly into the allegations of tyranny and oppression toward the officers under his command," and to which was also referred, on the same day, the letter from the Secretary of the Navy transmitting copies of the charges preferred by Charles C. Barton, a passed midshipman, against the said Captain Elliott, made a report[2] under the direction of a majority of said committee, recommending the adoption of the following resolutions, viz:

Resolved, That an interference by the House of Representatives in the disputes that occur between subordinate officers of the Navy and their superiors, commanding squadrons, is a power which ought at all times to be exercised with great caution, and is calculated to produce insubordination in that important arm of the national defense; but, in the opinion of this committee, it is competent for the representatives of the people to investigate any abuses alleged to be committed by officers in command of squadrons, and to provide, by law, against a recurrence of such abuses; and, moreover, to investigate and ascertain whether the head of the Navy Department may have used such means as are placed in his hands by law to punish and prevent any such alleged abuses.

Resolved, That the most appropriate remedy for such subordinate officers is an appeal to the Secretary of the Navy for a court of inquiry to investigate the charges exhibited against their superiors; and from this decision the party aggrieved may appeal to the President, who, by the Constitution, is Commander in Chief of the Navy, he as well as the Secretary being liable to impeachment for a willful or corrupt violation or neglect of duty.

Then follow other resolutions reciting that for lack of time it is inexpedient for the House to undertake the investigation.

Mr. Seargent S. Prentiss, of Mississippi, moved to recommit the report, with instructions to strike out from the resolutions such parts as related to the propriety of the investigation.

Pending consideration of this motion the whole subject was laid on the table.

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[1] Third session Twenty-fifth Congress, Journal, pp. 543, 633; Globe, p. 201. The Members of this committee were: Messrs. Naylor; Ogden; Hoffman, of New York; Samuel Ingham, of Connecticut; Francis Mallory, of Virginia; Thomas L. Hamer, of Ohio, and Francis S. Lyon, of Alabama.

[2] House Report No. 295. No one, either of majority or minority, questioned the right of the House to investigate.

1744. The House determined to investigate an allegation that the decision of the Senate in an impeachment case had been determined by improper influences.

The question of order being raised that a pending resolution reflected on the Senate, the Speaker held that it was a matter for the House and not the Chair to pass on.

On May 16, 1868,[1] Mr. John A. Bingham, of Ohio, from the Managers of the impeachment of the President, offered the following resolution:

> Whereas information has come to the Managers which seems to them to furnish probable cause to believe that corrupt means have been used to influence the determination of the Senate upon the articles of impeachment exhibited to the Senate by the House of Representatives against the President of the United States; Therefore,
>
> *Be it resolved,* That for the further and more efficient prosecution of the impeachment of the President, the Managers be directed and instructed to summon and examine witnesses under oath, to send for persons and papers, to employ a stenographer, and to appoint a subcommittee to take testimony, the expenses thereof to be paid from the contingent fund of the House.

Mr. John W. Chanler, of New York, made the point of order that as this resolution reflected on the Senate it was not proper for the House to consider it.

The Speaker[2] held that the Chair could not decide that question, it being a question for the consideration of the House.

The House agreed to the preamble and resolution, yeas 88, nays 14.

1745. An instance wherein the House investigated political troubles within a State.—In 1845[3] the House investigated the troubles within the State of Rhode Island, caused by the efforts to substitute a constitution for the old colonial charter.

1746. Various instances of investigations by the House.—On February 28, 1876,[4] the House, on recommendation of the Committee on Foreign Affairs, directed that committee to investigate into the connection of the United States minister at the court of St. James with the Emma mine, so called.

1747. In 1879[5] a committee of the House investigated the conduct of Supervisor of Elections John I. Davenport, of New York, appointed by a judge of the United States circuit court and not removable by impeachment.

1748. On May 12, 1892,[6] the House authorized the investigation of the employment of Pinkerton detectives by companies engaged in interstate commerce and the transportation of the mails.

1749. The Speaker has considered it his duty to lay before the House a communication from a suspended consul-general who asked an investigation.—On January 23, 1878,[7] Mr. Speaker Randall laid before the House a letter from John C. Myers, "consul-general (under suspension) at Shanghai, China,"

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[1] Second session Fortieth Congress; Globe, p. 2503; Journal, p. 698.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] First session Twenty-eighth Congress, House Reports Nos. 546, 581.

[4] First session Forty-fourth Congress, Record, p. 1345; Journal, p. 470.

[5] Third session Forty-fifth Congress, House Report No. 135.

[6] First session Fifty-second Congress, Record, p. 4222.

[7] Second session Forty-fifth Congress, Record, p. 504.

addressed to the Speaker, requesting that an inclosed statement of the condition of his office be presented to the House and that an investigation be made.

Mr. Omar D. Conger, of Michigan, raised the question that the communication should be sent to the Department.

The Speaker said:

> This was sent to the Speaker, and it is the duty of the Speaker to transfer it to the House. The House can then do with it what it pleases.

The communication was referred to the Committee on Foreign Affairs.

Chapter LV.

THE CONDUCT OF INVESTIGATIONS.

1750. Witnesses are summoned in pursuance and by virtue of the authority conferred on a committee to send for persons and papers.—On January 15, 1858,[6] Mr. George S. Houston, of Alabama, by unanimous consent, from the Committee on the Judiciary, reported the following resolution; which was read, considered, and agreed to:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers and examine witnesses on oath in relation to the charges made against John C. Watrous, judge of the United States court for the western district of the State of Texas.

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[1] See Chapter LXIV, sections 2025–2054 of this volume, for functions of the House in investigations with a view to impeachment. Punishment of witnesses for contempt, chapter LIII, sections 1666–1724 of this volume. Instances of witnesses summoned by House in an election case, sections 598, 764 of Volume I. Authorization of investigation by Senate in the case of Smoot, section 481 of Volume I.

[2] In a contempt case at the bar of the House, section 1602 of Volume II. Testimony sometimes kept secret, section 1694 of this volume.

[3] Members called before the House as witnesses, section 1726 of this volume.

[4] As in the case of Roberts also, section 475 of Volume I.

[5] Power of a subcommittee when authorized to send for persons and papers, section 2029 of this volume. Forms of subpoenas, sections 1668, 1673, 1695, 1699, 1701, 1702, 1732.

[6] First session Thirty-fifth Congress, Journal, p. 175; Globe, p. 304.

1751. Resolution of the House authorizing a committee to make an investigation.—On April 21, 1906,[1] Mr. Charles H. Grosvenor, of Ohio, from the Committee on Rules, submitted the following resolution, which was agreed to by the House:

Resolved, That the Speaker of the House of Representatives be, and he is hereby, directed to appoint from the membership of the House a committee of five, with full power and whose duty it shall be to make a full and complete investigation of the management of the Government Hospital for the Insane and report their findings and conclusions to the House; said committee is empowered to send for persons and papers, to summon and compel the attendance of witnesses, to administer oaths, to take testimony and reduce the same to writing, and to employ such clerical and stenographic help as may be necessary, all expenses to be paid out of the contingent fund of the House.

1752. The resolutions of the House creating, empowering, and instructing the select committee which in 1856 investigated affairs in the Territory of Kansas.

The Kansas committee of 1856 was empowered by the House to employ or dismiss clerks and assistant sergeants-at-arms and to administer oaths to them.

The Kansas committee of 1856 was empowered to send for persons and papers and to arrest and bring before the House any witness in contempt.

The House requested the President, if necessary, to afford military protection to the Kansas committee of 1856.

On March 19, 1856,[1] after debate and the consideration of several propositions, the House adopted the following resolutions:

Resolved, That a committee of three of the members of this House, to be appointed by the Speaker, shall proceed to inquire into and collect evidence in regard to the troubles in Kansas generally and particularly in regard to any fraud or force attempted or practiced in reference to any of the elections which have taken place in said Territory, either under the law organizing said Territory or under any pretended law which may be alleged to have taken effect therein since; that they shall fully investigate and take proof of all violent and tumultuous proceedings in said Territory, at any time since the passage of the Kansas-Nebraska act, whether engaged in by residents of said Territory or by any person or persons from elsewhere going into said Territory and doing, or encouraging others to do, any act of violence or public disturbance against the laws of the United States, or the rights, peace, and safety of the residents of said Territory; and for that purpose said committee shall have full power to send for and examine, and take copies of, 0 such papers, public records, and proceedings as in their judgment will be useful in the premises; and also to send for persons, and examine them on oath or affirmation as to matters within their knowledge touching the matters of the said investigation; and said committee, by their chairman, shall have power to administer all necessary oaths or affirmations connected with their aforesaid duties.

Resolved further, That said committee may hold their investigations at such places and times as to them may seem advisable, and that they have leave of absence from the duties of this House until they shall have completed such investigation; that they be authorized to employ one or more clerks and one or more assistant sergeants-at-arms to aid them in their investigations, and may administer to them an oath or affirmation faithfully to perform the duties assigned to them respectively, and to keep secret all matters which may come to their knowledge touching such investigation as said committee shall direct, until the report of the same shall be submitted to this House; and said committee may discharge any such clerk or assistant sergeant-at-arms for neglect of duty or disregard of instructions in the premises, and employ others under like regulations.

Resolved further, That if any person shall in any manner obstruct or hinder said committee, or

[1] First session Fifty-ninth Congress, Record, p. 5660.

[2] First session Thirty-fourth Congress, Journal pp. 700, 707, 719; Globe, pp. 674, 692.

attempt so to do, in their said investigation, or shall refuse to attend on said committee, and to give evidence when summoned for that purpose, or shall refuse to produce any paper, book, public record, or proceeding in their possession or control, to said committee when so required, or shall make any disturbance where said committee are holding their sittings, said committee may, if they see fit, cause any and every such person to be arrested by said assistant sergeant-at-arms, and brought before this House to be dealt with as for a contempt.

Resolved further, That for the purpose of defraying the expenses of said commission there be, and hereby is, appropriated the sum of ten thousand dollars, to be paid out of the contingent fund of this House.

Resolved further, That the President of the United States be, and is hereby, requested to furnish to said committee, should they be met with any serious opposition, by bodies of lawless men, in the discharge of their duties aforesaid, such aid from any military force as may at the time be convenient to them, as may be necessary to remove such opposition, and enable said committee, without molestation, to proceed with their labors.

Resolved further, That when said committee shall have completed said investigation they report all the evidence so collected to this House.

This committee as finally appointed consisted of Messrs. William A. Howard, of Michigan; John Sherman, of Ohio, and Mordecai Oliver, of Missouri.

They reported on July 1.[1]

1753. The House sometimes enlarges the powers of a select committee after it has been created.

The House sometimes directs the Sergeant-at-Arms to attend the sittings of a committee and serve the subpoenas.

An investigating committee being empowered to sit during recess, the Speaker was authorized and directed to sign subpoenas as during a session.

On July 17, 1861,[2] Mr. William S. Holman, of Indiana, from the select committee appointed to investigate departmental contracts, reported the following resolution:

Resolved, That the provisions of the resolution appointing the select committee to inquire into and report in relation to certain contracts made by the departments for provisions, supplies, etc., be so extended as to embrace an inquiry into all the facts and circumstances of all the contracts and agreements already made, and all such contracts and agreements hereafter to be made, prior to the final report of the committee, by or with any department of the Government, in any wise connected with or growing out of the operations of the Government in suppressing the rebellion against its constituted authorities.

Resolved, That the said committee be authorized to sit during the recess of Congress, at such times and places as may be deemed proper.

Resolved, That said committee be authorized to employ a stenographer as clerk at the usual rate of compensation.

Resolved, That the Sergeant-at-Arms of the House be directed to attend in person, or by assistant, the sittings of the committee, and serve all the subpoenas put into his hands by the committee, pay the fees of all witnesses, and the necessary expenses of the committee.

Resolved, That the Speaker of the House, during the recess of Congress, is hereby authorized and directed to issue subpoenas to witnesses, upon the request of the committee, in the same manner as during the session of Congress.

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[1] On March 25, 1856 (First session Thirty-fourth Congress, Journal, p. 719; Globe, p. 728), on motion of Mr. Percy Walker, of Alabama, the House agreed to this resolution:

"*Resolved,* That the Committee on the Judiciary be instructed to inquire and report to this House whether the Kansas Investigating Committee have the power to coerce the attendance of witnesses and punish for contempts."

It does not appear that the committee reported.

[2] First session Thirty-seventh Congress, Journal, p. 98; Globe, pp. 168–171.

After debate as to the propriety of authorizing an investigation of such wide scope, the House, by a vote of 49 yeas to 77 nays, refused to lay the resolutions on the table.

The resolutions were then agreed to, yeas 81; nays 42.

1754. Committees of investigation, by authority of the House expressly given, often carry on their work by subcommittees.—In 1869,[1] the House authorized a subcommittee of the Committee of Elections to be appointed by the committee, with power to send for persons and papers, administer oaths, and investigate the elections in Louisiana, the investigation to take place during the approaching recess of Congress.

1755. On January 16, 1874,[2] the House agreed to the following:

Resolved, That the chairman of any subcommittee of the Committee on Patents be authorized to administer oaths in the investigation of any matter pending before such subcommittee.

1756. On April 7, 1876,[3] Mr. Washington C. Whitthorne, of Tennessee, by unanimous consent, submitted the following resolution, which was agreed to:

Resolved, That for the purpose of enabling the Committee of this House on Naval Affairs to discharge the duties imposed upon them by the House resolution instructing them to inquire into certain alleged abuses and frauds at the different navy-yards of the United States, and the misapplication of appropriation made for the construction of eight vessels of war, * * * it is hereby directed that said committee, through the subcommittee appointed for that purpose, consisting of Messrs. Whitthorne, Jones, Harris, and Burleigh, shall make said investigation, as far as it relates to the Philadelphia and League Island navy-yards, at said yard and at the city of Philadelphia.

On April 27 a similar resolution was agreed to, authorizing another subcommittee of the Naval Affairs Committee to make investigation at the Brooklyn Navy-Yard and in the cities of New York and Brooklyn.

1757. On May 23, 1876,[4] Mr. Joseph C. S. Blackburn, of Kentucky, by unanimous consent, submitted this resolution, which was agreed to:

Resolved, That the Louisiana investigating committee, while in New Orleans, have authority to take testimony by subcommittees in their discretion, and that the chairmen of such subcommittees be authorized to administer oaths to witnesses.

1758. On June 20, 1876,[5] Mr. Earley F. Poppleton, of Ohio, by unanimous consent, from the Committee on Expenditures on Public Buildings, submitted the following resolution, which was agreed to:

Resolved, That the Committee on Expenditures on Public Buildings be, and is hereby, authorized to send a subcommittee of said committee to New York City and such other places as the committee may deem proper and necessary for the purpose of taking testimony in matters of expenditures on public buildings in said city and elsewhere, and that said subcommittee have power to send for persons and papers and employ a stenographer, and the chairman of such subcommittee shall have power to administer oaths.

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[1] First session Forty-first Congress, Journal, p. 183; Globe, p. 588.

[2] First session Forty-third Congress, Journal, p. 249; Record, p. 716.

[3] First session Forty-fourth Congress, Journal, pp. 766, 874.

[4] First session Forty-fourth Congress, Journal, p. 1000.

[5] First session Forty-fourth Congress, Journal, p. 1130; Record, p. 3942.

1759. On April 21, 1890,[1] on motion of Mr. John F. Lacey, of Iowa, the Committee on Elections reported the following resolution, which was agreed to by the House:

Resolved, That the subcommittee of the Committee on Elections, charged with the investigation of the contest of Clayton *v.* Breckinridge, are authorized to employ such deputy sergeants-at-arms, not exceeding three, and additional stenographers, as may be deemed necessary by them for their assistance in said investigation.

1760. A committee charged with an investigation may ask the House to broaden the scope of its authority.—On January 12, 1857,[2] the select committee appointed to investigate certain alleged combinations among Members for preventing or furthering legislation corruptly, directed its chairman to report to the House for consideration a resolution to broaden the scope of the committee's authority, so that it might not only investigate as to corrupt transactions in relation to bills "now pending" before the House, but also in regard to bills before the House at any time during the session. On January 13 the committee were notified by the Clerk of the House that the resolution had been agreed to by the House.

1761. A committee making an investigation sometimes makes a report asking the House for instructions.—On April 12, 1850,[3] Mr. Armistead Burt, of South Carolina, reported from the select committee appointed to investigate the connection of Hon. George W. Crawford, Secretary of War, with the Galphin claim, that the committee were in some doubt as to the extent of the investigation which they were empowered to make, and asking the House for instructions. The House thereupon agreed to a resolution instructing the committee. Mr. Burt made his report asking for the instructions by unanimous consent.

1762. The House, by general order, has revoked the powers of all its existing committees of investigation.—On November 25, 1867,[4] the House passed a general order revoking leaves to committees to send for persons and papers, examine witnesses, or travel at the public expense.

1763. The two Houses, by concurrent resolution, constituted a joint select committee of investigation, with power to send for persons and papers and sit during the recess of Congress.

By concurrent resolution the two Houses empowered the Vice-President and Speaker to sign subpoenas during the recess of Congress.

On January 13, 1864,[5] the Senate sent to the House a concurrent resolution, which, as amended by the House and concurred in by the Senate, had this final form:

Resolved, That a joint committee of three members of the Senate and four Members of the House of Representatives be appointed to inquire into the conduct and expenditures of the present war; and may further inquire into all the facts and circumstances of contracts and agreements already made, and such contracts and agreements hereafter to be made, prior to the final report of the committee, by or with any Department of the Government, in anywise connected with or growing out of the operations

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[1] First session Fifty-first Congress, Journal, p. 503; Record, p. 3628.

[2] Third session Thirty-fourth Congress, House Report No. 243, pp. 39, 40.

[3] First session Thirty-first Congress, Journal, p. 785; Globe, p. 717.

[4] First session Fortieth Congress, Journal, p. 265; Globe, p. 791.

[5] First session Thirty-ninth Congress, Journal, pp. 136, 155, 156, 167; Globe, pp. 173, 260, 275.

of the Government in suppressing the rebellion against its constituted authority; and that the said committee shall have authority to sit during the sessions of either House of Congress, and during the recess of Congress, and at such times and places as said committee shall deem proper, and also employ a stenographer as clerk, at the usual rate of compensation.

And be it further resolved, That the said committee shall have power to send for persons and papers, and that the Sergeant-at-Arms of the House or of the Senate, as the said committee may direct, shall attend in person, or by assistant, the sittings of the said committee, and serve all subpoenas put into his hands by the committee, pay the fees of all witnesses, and the necessary and proper expenses of the committee.

And be it further resolved, That the Speaker of the House, or the Vice-President and President of the Senate, shall be authorized to issue subpoenas to witnesses during the recess of Congress upon the request of the committee in the same manner as during the sessions of Congress, and said committee shall have authority to report in either branch of Congress at any time.

1764. In 1871,[1] the House and Senate agreed to the following concurrent resolution, which originated in the Senate and was amended in the House:

Resolved by the Senate of the United States (the House of Representatives concurring), That a joint committee consisting of seven Senators and fourteen Representatives be appointed, whose duty it shall be to inquire into the condition of the late insurrectionary States so far as regards the execution of the laws and the safety of the lives and property of the citizens of the United States, with leave to report at any time during the next or any subsequent session of Congress the result of their investigations to either or both Houses of Congress, with such recommendations as they may deem expedient; that said committee be authorized to employ clerks and stenographers, to sit during the recess, and to send for persons and papers, to administer oaths and take testimony, and to visit at their discretion, through subcommittees, any portions of said States during the recess of Congress; and all expenses of said committee shall be paid out of the contingent fund of the Senate, upon vouchers approved by the chairman of said committee.

1765. Instance of legislation directing and empowering executive officers of the Government to investigate and report.—On February 12, 1906,[2] the Senate passed the following joint resolution (S. R. 32) instructing the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies, and report on the same from time to time:

Whereas persons engaged or wishing to engage in mining and shipping bituminous coal and other products from one State of the United States to other States of the United States complain, * * * etc.: Therefore, be it

Resolved by the Senate and House of Representatives in Congress assembled, That the Interstate Commerce Commission be authorized and instructed to immediately inquire, * * * etc.

On February 13[3] this resolution was received in the House and referred to the Committee on Interstate and Foreign Commerce.

On February 23[4] the House agreed to the joint resolution with the following amendments:

Strike out the preamble and all after the enacting clause and insert the following:

"That the Interstate Commerce Commission be, and is hereby, authorized and instructed immediately to inquire, investigate, and report to Congress, or to the President when Congress is not in session, from time to time, as the investigation proceeds:

"First. Whether any common carriers by railroad, subject to the interstate-commerce act, or either of them, own or have any interest in, by means of stock ownership in other corporations or otherwise,

[1] First session Forty-second Congress, Journal, pp. 89, 141; Globe, pp. 180, 534, 537.

[2] First session Fifty-ninth Congress, Record, pp. 2424–2431.

[3] Record, p. 2493.

[4] Record, p. 2885.

any of the coal or oil which they or either of them, directly or through other companies which they control or in which they have an interest, carry over their or any of their lines as common carriers, or in any manner own, control, or have any interest in coal lands or properties or oil lands or properties.

"Second. Whether the officers of any of the carrier companies aforesaid, or any of them, or any person or persons charged with the duty of distributing cars or furnishing facilities to shippers, are interested, either directly or indirectly, by means of stock ownership or otherwise, in corporations or companies owning, operating, leasing, or otherwise interested in any coal mines, coal properties, or coal traffic, oil, oil properties, or oil traffic over the railroads with which they or any of them axe connected or by which they or any of them are employed.

"Third. Whether there is any contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several States, in which any common carrier engaged in the transportation of coal or oil is interested, or to which it is a party; and whether any such common carrier monopolizes or attempts to monopolize or combines or conspires with any other carrier, company or companies, person or persons, to monopolize any part of the trade or commerce in coal or oil or traffic therein among the several States, or with foreign nations, and whether or not, and if so to what extent, such carriers, or any of them, limit or control, directly or indirectly, the output of coal mines or the price of coal and oil fields or the price of oil.

"Fourth. If the Interstate Commerce Commission shall find that the facts, or any of them, set forth in the three paragraphs above do exist, then that it be further required to report as to the effect of such relationship, ownership, or interest in coal or coal properties and coal traffic, or oil, oil properties or oil traffic aforesaid, or such contracts or combinations in form of trust or otherwise, or conspiracy, or such monopoly or attempt to monopolize or combine or conspire as aforesaid, upon such person or persons as may be engaged independently of any other persons in mining coal or producing oil and shipping the same, or other products, who may desire to so engage, or upon the general public as consumers of such coal or oil.

"Fifth. That said Commission be also required to investigate and report the system of car supply and distribution in effect upon the several railway lines engaged in the transportation of coal or oil as aforesaid, and whether said systems are fair and equitable, and whether the same are carried out fairly and properly; and whether said carriers, or any of them, discriminate against shippers or parties wishing to become shippers over their several lines, either in the matter of distribution of cars or in furnishing facilities or instrumentalities connected with receiving, forwarding, or carrying coal or oil as aforesaid.

"Sixth. That said Commission be also required to report as to what remedy it can suggest to cure the evils above set forth, if they exist.

"Seventh. That Said Commission be also required to report any facts or conclusions which it may think pertinent to the general inquiry above set forth.

"Eighth. That said Commission be required to make this investigation at its earliest possible convenience and to furnish the information above required from time to time and as soon as it can be done consistent with the performance of its public duty."

Amend the title so as to read:

"Joint resolution instructing the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies in coal and oil and report on the same from time to time."

This amendment was agreed to by the Senate and the joint resolution became a law.[1]

1766. Decision of the Supreme Court that a law of Congress empowering the Federal courts to compel testimony before the Interstate Commerce Commission was constitutional.

Discussion of the power of investigation possessed by Congress in relation to the individual's right of privacy.

On May 26, 1894[2] the Supreme Court of the United States decided the case of Interstate Commerce Commission *v.* Brimson, Mr. Justice Harlan delivering the

[1] 34 Stat. L., p. 823.

[2] 154 U. S. p. 447; 155 U.S., p. 3. See also Hale *v.* Henkel, 201 U. S., p. 43; American Tobacco Company v. Werckmeister, 207 U. S., p. 284.

opinion of the court, and Mr. Justice Brewer, with the concurrence of the Chief Justice and Mr. Justice Jackson, filing a dissenting opinion. The case involved was an appeal which brought up for review a judgment of the circuit court, delivered on a petition of the Interstate Commerce Commission, based on the twelfth section of the act authorizing the Commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documents, books, and papers, the said law being as follows:

The Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

The opinion of the court thus propounds the question at issue:

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the Commission?

After discussing the powers of Congress over interstate commerce and its right to obtain full information, the court says:

It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.

After arguing that when Congress has the right to do a certain thing it may select such means as it may deem proper, the court says:

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control.

The opinion of the court goes on to discuss what is a case or controversy to which, under the Constitution, the judicial power of the United States extends, and concludes that the petition of the Interstate Commerce Commission in accordance with the terms of the law in question was such as could properly be brought under judicial cognizance. The opinion continues:

We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. (Kilbourn *v.* Thompson, 103 U. S., 168, 190.) We said in Boyd *v.* United States (116 U. S., 616, 630)—and it can not be too often repeated—that the principles that embody the essence of constitutional liberty and

security forbid all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice Field in In re Pacific Railway Commission(32 Fed. Rep., 241, 250), "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others."

After referring to the case of Counselman *v.* Hitchcock (142 U. S., p. 547) as one wherein the guaranties of personal rights are fully discussed, the opinion cites various other cases and reaffirms that these duties assigned the circuit court are judicial in their nature:

The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him or to produce books, papers, etc., in his possession and called for by that body is one that can not be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in Anderson *v.* Dunn (6 Wheat, 204) and in Kilbourn *v.* Thompson (103 U. S., 168, 190), of the exercise by either House of Congress of its right to punish disorderly behavior upon the part of its Members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See Whitcomb's case (120 Mass., 118) and authorities there cited.

After discussion of further phases of the case, the court proceeds to remand the case to the circuit court that the latter may proceed with the case on its merits.

The minority opinion dissented from the proposition that the proceeding in question was judicial in its nature, and held that the courts could not be turned into commissions of inquiry to aid legislative action, and held that the Commission or the legislature should seek information by the ordinary processes of legislative or administrative bodies.

1767. A decision that the Federal courts may not be made by act of Congress an agency for compelling testimony before a commission.—On August 29, 1887,[1] Circuit Justice Field, in the northern district of California, delivered the opinion of the court in the matter of the application of the Pacific Railway Commission. This Commission had been created under the act of Congress of March 3, 1887, "authorizing an investigation of the books, accounts, and methods of railroads which have received aid from the United States, and for other purposes." The act authorized the President to appoint three Commissioners to make a searching investigation into the business of the railways in question, and also to ascertain and report—

whether any of the directors, officers, or employees of said companies, respectively, have been, or are now, directly or indirectly, interested, and to what amount or extent, in any other railroad, steamship, etc., * * * or other business company or corporation, and with which any agreements, undertakings, or leases have been made or entered into; * * * and further, to inquire and report whether said companies, or either of them, or their officers or agents, have paid any money or other valuable consideration, or done any other act or thing for the purpose of influencing legislation.

[1] 32 Federal Reporter, p. 241.

The act further provided that the Commissioners, or either of them, should have the power—

to require the attendance and testimony of witnesses, and the production of all books, papers, contracts, agreements, and documents relating to the matter under investigation, and to administer oaths; and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of books, papers, and documents.

The act further provided:

That any of the circuit or district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring any such person to appear before said Commissioners, or either of them, as the case may be, and produce books and papers, if so ordered, and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

In the discharge of their duties the Commission attended at San Francisco, and called before them Leland Stanford, president of the Central Pacific Railroad Company, one of the companies which received aid in bonds from the Government. Mr. Stanford's testimony showed that he had expended for "general expenses "large sums of the railroad's money, but he declined to answer interrogatories intended to develop the facts as to whether or not any of these sums had been used to influence legislation. He furthermore took the ground that the money expended did not affect the Government's interest in the road; the matter was one merely between himself and the stockholders and directors of the road.

Mr. Stanford, in resisting the efforts of the Commission, further made the point that the Commission propounded questions involving criminality on his part. In respect to this point the law creating the Commission provided—

that the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The district attorney, acting for the Commission, moved in the circuit court for a peremptory order to compel the witness to answer the interrogatories.

This motion was denied, Circuit Justice Field delivering the opinion of the court. In the course of this opinion he said especially in reference to the action of counsel for respondent in assailing the validity of the act creating the Commission:

The Pacific Railway Commission, created under the act of Congress of March 3, 1887, is not a judicial body; it possesses no judicial powers-; it can determine no rights of the Government, or of the companies whose affairs it investigates. Those rights will remain the subject of judicial inquiry and determination as fully as though the Commission had never been created; and in such inquiry its report to the President of its action will not be even admissible as evidence of any of the matters investigated. It is a mere board of inquiry, directed to obtain information upon certain matters, and report the result of its investigations to the President, who is to lay the same before Congress. In the progress of its investigations, and in the furtherance of them, it is in terms authorized to invoke the aid of the courts of the United States in requiring the attendance and testimony of witnesses, and the production of books, papers, and documents. And the act provides that the circuit or district court of the United States, within the jurisdiction of which the inquiry of the Commission is had, in case of contumacy or refusal of any person to obey a subpoena to him, may issue an order requiring such person to appear before the Commissioners, and produce books and papers, and give evidence touching the matters in question.

The investigation directed is to be distinguished from the inquiries authorized upon taking the census. The Constitution provides for an enumeration of the inhabitants of the States at regular periods, in order to furnish a basis for the apportionment of Representatives, and, in connection with the ascertainment of the number of inhabitants, the act of Congress provides for certain inquiries as to their age, birth, marriage, occupation, and respecting some other matters of general interest, and for the refusal of anyone to answer them a small penalty is imposed. (Rev. Stat., sec. 2171.) There is no attempt in such inquiries to inquire into the private affairs and papers of anyone, nor are the courts called upon to enforce answers to them. Similar inquiries usually accompany the taking of a census of every country and are not deemed to encroach upon the rights of the citizen. And in addition to the inquiries usually accompanying the taking of a census, there is no doubt that Congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. It may inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business, and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it can not compel the production of the private books and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain.

Of all the rights of the citizen few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault but exemption of his private affairs, books, and papers from the inspection and scrutiny of others.

The opinion then goes on to discuss the rights of the citizen to privacy, citing and commenting on the cases of Boyd *v.* United States (116 U. S., 616) and Kilbourn *v.* Thompson (103 U. S., 168), and then discusses the functions of the courts, concluding that, whether the act creating the Pacific Railroad Commission intended to force the answering of all questions, or only such as were proper in view of the principles of law, it was yet in either case void:

The Federal courts, under the Constitution, can not be made the aids to any investigation by a commission or a committee into the affairs of anyone. * * * The conclusions we have thus reached disposes of the petition of the railway commissioners, and renders it unnecessary to consider whether the interrogatories propounded were proper in themselves, or were sufficiently met by the answers given by Mr. Stanford, or whether any of them were open to objection for the assumptions they made, or the imputations they implied. It is enough that the Federal courts can not be made the instruments to aid the commissioners in their investigations.

1768. The parliamentary law as to the examination of witnesses.

Rule for asking questions of a person under examination before a committee or at the bar of the House.

According to the parliamentary law questions asked a witness are recorded in the Journal.

The parliamentary law provides that the answers of witnesses before the House shall not be written down, but such is not the rule before committees.

A person under examination at the bar withdraws while the House deliberates on the objection to a question.

Either House may request of the other the attendance of a person in custody of the latter House.

Either House may request by message, but not command, the attendance of a Member of the other House.

A message requesting the attendance of a Member of the other House should state clearly the purpose thereof.

According to the parliamentary law neither House compels its Members to attend the other House in obedience to a request.

The parliamentary law relating to the appearance of counsel.

Jefferson's Manual, in Section XIII, has the following in regard to the examination of witnesses:

Common fame is a good ground for the House to proceed by inquiry, and even to accusation. (Resolution House of Commons, 1 Car. 1, 1625; Rush, L. Parl., 115; Grey, 16–22, 92; 8 Grey, 21, 23, 27, 45.)

Witnesses are not to be produced but where the House has previously instituted an inquiry (2 Hats., 102), nor then are orders for their attendance given blank. (3 Grey, 51.)

When any person is examined before a committee, or at the bar of the House, any member wishing to ask the person a question must address it to the speaker or chairman, who repeats the question to the person, or says to him, "You hear the question; answer it." But if the propriety of the question be objected to, the Speaker directs the witness, counsel, and parties to withdraw, for no question can be moved or put or debated while they are there. (2 Hats., 108.) Sometimes the questions are previously settled in writing before the witness enters. (Ib., 106, 107; 8 Grey, 64.) The questions asked must be entered in the joumals. (3 Grey, 81.) But the testimony given in answer before the House is never written down; but before a committee, it must be, for the information of the House, who are not present to hear it. (7 Grey, 52, 334.)

If either House have occasion for the presence of a person in custody of the other, they ask the other their leave that he may be brought up to them in custody. (3 Hats., 52.)

A member, in his place, gives information to the House of what he knows of any matter under hearing at the bar. (Jour. H. of C., Jan. 22, 1744–5.)

Either House may request, but not command, the attendance of a member of the other. They are to make the request by message of the other House, and to express clearly the purpose of attendance, that no improper subject of examination may be tendered to him. The House then gives leave to the member to attend, if he choose it; waiting first to know from the member himself whether he chooses to attend, till which they do not take the message into consideration. But when the peers are sitting as a court of criminal judicature, they may order attendance, unless where it be a case of impeachment by the Commons. There, it is to be a request. (3 Hats., 17; 9 Grey, 306, 406; 10 Grey, 133.)

Counsel are to be heard only on private, not on public, bills, and on such points of law only as the House shall direct. (10 Grey, 61.)

1769. The Speaker, the chairman of the Committee of the Whole, or any other committee, or any Member may administer oaths to witnesses in any case under examination.

The statutes provide that a person summoned as a witness who fails to appear or refuses to testify shall be punished by fine or imprisonment.

No witness is privileged to refuse to testify when examined by the House or its committee on the ground that his testimony would disgrace himself.

Testimony given before a House or its committee may not be used as evidence against the witness in any court, except in case of alleged perjury

The statutes provide that the fact of a witness' contumacy shall be certified by the Speaker under seal of the House to the district attorney of the District of Columbia.

The law in relation to witnesses (ses. 101–104, 859, R. S.) provides:

SEC. 101.[1] The President of the Senate, the Speaker of the House of Representatives, or a chairman of a Committee of the Whole, or of any committee of either House of Congress [or any Member],[2] is empowered to administer oaths to witnesses in any case under their examination.[3]

SEC. 102.[4] Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisoned in a common jail for not less than one month nor more than twelve months.

SEC. 103.[5] No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

SEC. 859.[6] No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the same privilege.

SEC. 104.[7] Whenever a witness summoned as mentioned in section 102 fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

1770. The House may in a resolution creating a committee of investigation empower it to examine witnesses, but may not give it leave to report at any time, except by a special order changing the rules.—On May 13, 1878,[8] Mr. Clarkson N. Potter, of New York, as a question of privilege, presented a preamble and resolution reciting the allegation of the legislature of Maryland, that, by reason of fraudulent returns from the States of Florida and Louisiana, due effect had not been given to the electoral vote cast by Maryland on December 6, 1876, alleging fraud with the connivance of high officials of the Government, and providing for the appointment of a select committee with power to administer oaths and "leave to report at any time." The resolution also conferred on the chairman the power to administer oaths.

Mr. Omar D. Conger, of Michigan, made the point of order that the resolution changed or enlarged the law with respect to the power of administering oaths to witnesses.

The Speaker[9] overruled the point of order.

Mr. James A. Garfield, of Ohio, made the point of order against that portion

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[1] Acts of 1798 and 1817, 1 Stat. L., p. 554; 3 Stat. L., p. 345.

[2] 23 Stat. L., p. 60.

[3] Act of May 3, 1798. This law was proposed to obviate the inconveniences that had been experienced in the examination of witnesses (second session Fifth Congress, Journal, pp. 203, 250; Annals, p. 1069). On July 6, 1797 (first session Fifth Congress, Annals, p. 458), during proceedings relating to the impeachment of William Blount, the Speaker had declined to administer the oath to witnesses without authority, and the House declined to give him authority.

[4] Act of 1857, 11 Stat. L., p. 155.

[5] Act of 1862, 12 Stat. L., p. 333.

[6] Acts of 1857 and 1862, 11 Stat. L., p. 156; 12 Stat. L., p. 333.

[7] Act of 1857, 11 Stat. L., p. 156.

[8] Second session Forty-fifth Congress, Journal, pp. 1072–1074; Record, pp. 3444, 3445.

[9] Samuel J. Randall, of Pennsylvania, Speaker.

of the resolution giving the committee leave to report at any time, as that would change the order of business prescribed by the rules.

The Speaker sustained the point of order.

1771. A former regulation as to counsel appearing before committees.—On May 20, 1876,[1] the House, on the recommendation of the Judiciary Committee, agreed to the following:

Resolved, That all persons or corporations employing counsel or agents to represent their interests in regard to any measure pending at any time before this House or any committee thereof, shall cause the name and authority of such counsel or agent to be filed with the Clerk of the House; and no person whose name and authority are not so filed shall appear as counsel or agent before any committee of this House.

1772. Instance wherein a witness summoned before an investigating committee was accompanied by counsel.—On June 4, 1878[2] James E. Anderson, a witness before the select committee appointed to investigate the Presidential election of 1876, was accompanied by counsel, who sat behind him and consulted with him during the examination.

1773. A question proposed to be propounded by a member of a committee directly to a witness should not be amended, but should be allowed or rejected in its original form.—On January 25, 1837,[3] in the committee appointed to examine into the management of the deposit banks, Mr. Balie Peyton, of Tennessee, a member of the committee, propounded to a witness this question:

Did Amos Kendall recommend you, or use his influence to procure you an office, agency, or appointment in the deposit bank of this city about the time before alluded to? Was such an application complied with or rejected, on the part of said bank?

Mr. Ransom H. Gillett, of New York, offered the following amendment:

To insert after "Amos Kendall," the words "while be was agent of the Treasury Department."

The Chair[4] decided the motion to be out of order; that interrogatories proposed to be sent to witnesses at a distance, as propounded by the committee were amendable; but those propounded to witnesses in the presence of the committee by individual members were not, but must be either allowed or rejected by the committee.

Mr. Gillett, having appealed, the decision of the Chair was sustained, yea's 5, nays 2.

1774. The validity of testimony taken when a quorum of a committee was not present has been doubted.—On December 17, 1862,[5] the select committee appointed to investigate Government contracts, adopted the following:

Resolved, That inasmuch as certain testimony has been taken by one member of the committee, in the absence of a quorum, touching the official conduct of certain Federal officers in New York, under objection from them, therefore the committee will examine such testimony, and whenever it appears that the testimony of any such witness so taken is found to affect the official character of any such person, such witness shall be reexamined, and so far as his testimony on reexamination affects the official conduct of any Federal officer in New York, it shall be submitted to him for his inspection.

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[1] First session Forty-fourth Congress, Journal, p. 985; Record, p. 3230.

[2] Third session Forty-fifth Congress, Mis. Doc. 31, Vol. 1, p. 48.

[3] Second session Twenty-fourth Congress, House Report No. 193, journal of the committee, p. 83.

[4] James Garland, of Virginia, Chairman.

[5] Third session Thirty-seventh Congress, House Report No. 49, pp. 25, 26.

1775. During an investigation by a committee, if a question is objected to, the committee decides whether or not it shall be put.—On May 26, 1856,[1] while the select committee appointed to consider the assault upon Senator Charles Sumner by Preston S. Brooks, of South Carolina, a Member of the House, were examining Mr. Sumner at his lodgings, whither the committee proceeded, Mr. Alexander C. M. Pennington, of New Jersey, a member of the committee, objected to a question propounded by Mr. Howell Cobb, of Georgia, another member of the committee. Thereupon the question "Shall the question be received?" was put, and decided in the negative.

1776. Instance wherein a Speaker gave testimony before a committee of investigation.—On December 12, 1772,[2] Mr. Speaker Blaine was sworn and testified before the select committee appointed to investigate the transactions of the Credit Mobilier.

1777. Members have been summoned before committees to testify as to statements made by them in debate; but in one case a Member formally protested that it was an invasion of his constitutional privilege.—In 1837[3] the select committee appointed to investigate the condition of the Executive Departments of the Government, of which Mr. Henry A. Wise, of Virginia, was chairman, summoned Mr. John Bell, of Tennessee, a Member of the House, and required him. under oath, to respond to this question:

> Do you, of your own knowledge, know of any act by either of the heads of the Executive Departments which is either corrupt or a violation of their official duties?

Against this examination Mr. Bell protested, as follows:

> I therefore protest against the course of the committee in subjecting me to such an examination as a private injury, a gross personal injustice, and an act, in its consequences to me, oppressive, tyrannical, and without any sufficient ground of public interest or necessity to justify it.
>
> I protest against it as an emanation of Executive power and influence[4] unconstitutionally exerted over the proceedings of the House of Representatives, an influence wholly incompatible with the due independence of Congress as a coordinate department of Government.
>
> I protest against it as a violation of my privilege as a Member of the House of Representatives, the committee having no rightful power to summon or examine me as a witness in the manner proposed. The Constitution declares (Art. I, see. 6) in relation to this subject that "for any speech or debate in either House, they (Members of Congress) shall not be questioned in any other place." This Protection will amount to nothing if I may be put upon trial before this committee and be required to answer upon oath as to the grounds upon which I have made statements of any kind in the House, and it is no argument against this objection to say that I may refuse to answer if I think proper. I have a right to be free from the conclusions which may be drawn from my silence when questioned under such circumstances.
>
> I protest against it as a proceeding in derogation of the fundamental powers and privileges of the House of Representatives. Public rumor, uncontradicted by any authentic denial, has heretofore been regarded as evidence sufficient upon which to found statements in debate, and to institute inquiries into the abuses of public administration. In the House of Commons of Great Britain common fame is held to

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[1] First session Thirty-fourth Congress, journal of the committee; Globe, p. 1353.

[2] Third session Forty-second Congress, House Report No. 77, page I of the proceedings of the committee.

[3] Second session Twenty-fourth Congress, House Report No. 194, p. 85.

[4] President Jackson in a letter to the committee had suggested that they summon such Members of the House as had charged corruption in debate and require them under oath to state what they knew. See Journal of the committee, p. 18.

be sufficient evidence on which to found an impeachment. But who will hereafter enter freely into the debates of Congress upon the numerous questions connected with the purity of the administration? Who will incur the risk of being able to measure his language and qualify his assertions so exactly as to enable him to subscribe an affidavit as to their accuracy when called upon by a committee composed of a majority of his political opponents?

In fine I protest against the course of the committee as unprecedented, so far as I know, in the history of a free government; as a direct attack on the public liberty, inasmuch as the perfect freedom of debate in Congress is essential to its preservation; as a proceeding which could only originate or find countenance at a period when the principles of civil and political liberty are either grossly misunderstood or disregarded; as a proceeding fit only to be employed under an arbitrary government, as the means of suppressing all inquiry into the abuses and corruptions with which it maintains its unjust authority, and upon these several grounds I might object to answer the interrogatory which has been propounded to me. Yet as I am of the opinion that the unjust, unconstitutional, oppressive, and personal objects intended to be effected by the author of this proceeding, and the public injury consequent thereupon, would be rather promoted than defeated by my silence, I think proper, under all the circumstances, to waive all my privileges, whether attached to me as a citizen or as a Member of Congress, and to answer according to my best judgment as to all questions of mere opinion, and, according to the best of my knowledge, information, and belief, as to all matters of fact, except so far as I may think proper to withhold any matter of private confidence or the names of those from whom I may have received material information.

The committee in their report[1] say that they do not consider the position assumed by Mr. Bell "just or reasonable."

1778. In 1839[2] the select investigating committee appointed to examine into the defalcations in the New York custom-house, summoned Mr. Churchill C. Cambreleng, a Member of the House, to testify concerning a charge which he had made in the course of debate in the House.

Mr. Cambreleng responded without objection.

1779. Discussion of the privilege of a witness summoned to testify before a committee of the House.—On March 2, 1875, Mr. E. Rockwood Hoar, of Massachusetts, from the Committee on the Judiciary,[3] made a report[4] on the bill (H. R. 4855) "to provide for the protection of witnesses required to attend before either branch of Congress or a committee of the same."

The report makes this statement of the circumstances suggesting the bill:

It appeared that the attendance of Whitelaw Reid was required before the Committee on Ways and Means as a witness upon an investigation ordered by this House, in which that committee was authorized to send for persons and papers. He attended accordingly, and after his examination, but before a reasonable time had been afforded for his return to his home in New York, he was arrested and held to bail under a criminal prosecution for a libel and a summons to appear in a civil suit for a libel was also served upon him. He was not arrested in the civil suit, and has made no application for the protection of the House or for their interference in his behalf. We are of the opinion that his arrest upon the criminal process was lawful, and that, if he was entitled to exemption from the service of civil process, he can assert his privilege, if he is disposed to do so, in the court before which such process was made returnable. There is therefore nothing in the case of Mr. Reid which requires the action of the House.

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[1] Report No. 194, p. 15.

[2] Third session Twenty-fifth Congress, House Report No. 313, pp. 317, 318, 415.

[3] This committee had been directed on January 19 to inquire whether the arrest of Mr. Reid was an invasion of the privileges of the House. (Second session Forty-third Congress, Journal, p. 203.)

[4] Second session Forty-third Congress, House Report No. 273.

The committee go on to say:

We find that, by the settled parliamentary law of England and America, a witness in attendance upon either branch of Congress, or a committee thereof, with power to send for persons and papers, whether regularly summoned or attending voluntarily upon notice and request, is privileged from arrest, except in case of treason, felony, or breach of the peace. This exception is held to include all indictable crimes and offenses. But it is an open question whether a witness coming within the jurisdiction of the courts of a State or of the District, and only amenable to the service of process by reason of his personal presence, is protected against the service of civil process upon him, which does not require his arrest or detention. Different courts of highly respectable authority have made opposing decisions upon the question. We are not aware that it has ever been determined by the Supreme Court of the United States.

Therefore the committee, believing that "as far as civil rights are concerned" the witness "brought into the District by a superior power should not be regarded as within it for any other purpose than that of giving his testimony and that he should not have his condition changed to his prejudice on that account," recommended the passage of the bill.

The bill passed the House March 2, 1875,[1] and was sent to the Senate, where it was referred to the Judiciary Committee and was not reported therefrom.

1780. The House sometimes transmits to the courts reports in regard to witnesses who have apparently testified falsely.—On March 3, 1875,[2] the House agreed to the following resolution reported from the Committee on Ways and Means.:

Resolved, That the Clerk of this House transmit to the United States district attorney for the District of Columbia a copy of the evidence taken before the Committee on Ways and Means upon the question of a corrupt use of money to procure the passage of an act providing for an additional subsidy for the China mail service, with direction to lay so much of the same as relates to the truth of the testimony given by William S. King and John G. Schumaker before the grand jury of said district for such action as the law seems to require.

1781. On February 26, 1859,[3] Mr. William E. Niblack, of Indiana, from the select committee appointed to investigate the accounts of the late Superintendent of Public Printing, made a report in regard to the testimony of Peter S. Duvall before the said committee, accompanied by the following resolution:

Resolved, That a copy of this report be certified to the United States district attorney for the District of Columbia for such action in the premises as the circumstances in his opinion require.

Mr. Niblack explained that the witness had made statements which were contradicted by the statements of two other witnesses, as well as by strong corroborative testimony.

The resolution was agreed to.

1782. An investigating committee sometimes reports testimony to the House with the recommendation that it be sealed and so kept in the files until further order of the House.—On June 9, 1846[4] the select committee

[1] Second session Forty-third Congress, Journal, pp. 614, 615; Record, pp. 2066, 2081.

[2] Second session Forty-third Congress, Journal, p. 636.

[3] Second session Thirty-fifth Congress, Journal, p. 494; Globe p. 1408.

[4] First session Twenty-ninth Congress, Journal, pp. 924, 983; Globe pp. 946, 948, 988.

appointed to investigate certain charges made by the Hon. Charles J. Ingersoll against the Hon. Daniel Webster for official misconduct while Secretary of State, made a report, presenting these resolutions:

Resolved, That the testimony taken in this investigation be sealed up by the Clerk, under the supervision of the committee, indorsed "confidential," and deposited in the archives of the House, and that the same be not opened unless by its order.

Resolved, That this report be laid on the table and printed, and that the select committee be discharged from the further consideration of the subject.

Mr. Jacob Brinkerhoff, of Ohio, made a minority report, recommending that the testimony and exhibits taken before the committee be printed.

On June 17, at the suggestion of the majority of the committee, a resolution was passed ordering the printing of all the testimony.

1783. The House sometimes orders that testimony taken by an investigating committee be taken in charge by the Clerk, to be by him delivered to the next House.—On March 2, 1867,[1] the House ordered the Clerk to lay before the next House of Representatives the testimony and report of the select committee which investigated the affairs of the southern railroads, also the papers on the judiciary's investigation of affairs in the State of Maryland.

On March 8, 1867,[2] the House ordered the testimony in the Maryland case referred to the Judiciary Committee with instructions.

1784. On March 3, 1875,[3] the House agreed to the following resolution:

Resolved, That a copy of the testimony taken before the Committee on Ways and Means upon the question of a corrupt use of money to procure the passage of an act providing for an additional subsidy for the China mail service be delivered to the Clerk of the House of Representatives, to be by him laid before the House at the first session of the Forty-fourth Congress, to the end that they may make further inquiry and take due action upon the questions affecting William S. King and John G. Schumaker, and further proceed thereon as they shall deem just.

1785. The House sometimes directs the Speaker to certify to the Executive authority testimony taken by a House committee and affecting an official.—On May 16, 1876,[4] the House agreed to the following resolution:

Resolved, That the Speaker of the House be, and he is hereby, directed to certify to the proper authorities of the District of Columbia the testimony heretofore taken by the order of this House relating to the conduct of A. M. Clapp as Congressional Printer, to the end that he may be indicted and prosecuted.

Resolved, That the Committee on the Judiciary be, and they are hereby, instructed to inquire whether A. M. Clapp, Congressional Printer, is an officer who may be impeached under the Constitution of the United States, and report to the House at as early a day as practicable.

1786. A telegram from a person beyond reach of the process of the House and not verified by oath was held not competent evidence for the consideration of an investigating committee.

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[1] Second session Thirty-ninth Congress, Journal, pp. 597, 609.

[2] First session Fortieth Congress, Journal, p. 61.

[3] Second session Forty-third Congress, Journal, p. 636.

[4] First session Forty-fourth Congress, Journal, p. 963.

A charge that the chairman of an investigating committee had suppressed evidence was presented as a matter of privilege.

On May 2, 1876,[1] the House agreed to a resolution directing the Judiciary Committee to investigate the sale of certain bonds of the Little Rock and Fort Smith Railroad Company to the Union Pacific Railroad Company. No allegation was made that any Member was involved in the inquiry; and it does not appear that the Judiciary Committee reported to the House that the progress of the investigation had involved the name of any Member.[2] But on June 5, 1876, Mr. James G. Blaine, of Maine, rising to a question of privilege[3] alleged that the investigation had in fact been aimed at him and that certain evidence favorable to him had been suppressed. He therefore offered, as privileged, the following resolution:

Resolved, That the Committee on the Judiciary be instructed to report forthwith to the House whether, in acting under the resolution of the House of May 2 relative to the purchase by the Pacific Railroad Company of seventy-five land-grant bonds of the Little Rock and Fort Smith Railroad, it has sent any telegram to one Josiah Caldwell, in Europe, and received a reply thereto. And, if so, to report said telegram and reply, with the date when said reply was received and the reasons why the same has been suppressed.

After debate, by a vote of 125 yeas and 97 nays, the resolution was referred to the Committee on the Judiciary. On August 3[4] the report, which was in the nature of a vindication of Air. J. Proctor Knott, of Kentucky, chairman of the committee, was reported by unanimous vote of the committee. But debate arising, and members of the committee expressing divergent views, the report was recommitted.

On August 15[5] the same report was again presented, accompanied by minority views. The report states that in the course of the investigation authorized under the resolution of May 2 it was developed that Caldwell had made certain statements as to the subject-matter of the investigation. These statements were excluded as evidence, first, because irrelevant, and, second, because Caldwell was in Europe, beyond the reach of the process of the House. Under these circumstances it was determined by the committee that a telegram should be sent by the chairman to Caldwell, asking him to appear before the committee and testify. The report goes on:

After the action of the committee, and before any communication had been had with Caldwell, a telegram purporting to come from him was delivered to the chairman, as follows:

"Have just read in New York papers Scott's evidence about our bond transaction, and can fully corroborate it. I never gave Blaine any Fort Smith bonds, directly or otherwise. I have three foreign railway contracts on my hands, which makes it impossible for me to leave without great pecuniary loss, or would gladly voluntarily come home and so testify. Can make affidavit to this effect and mail it if desired."

The resolution referred to your committee in substance demands that this telegram be made part of the testimony taken by the subcommittee engaged in the investigation under the Tarbox resolution.

If this demand is to be complied with, it must be upon the ground that such telegram is competent evidence in this investigation.

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[1] First session Forty-fourth Congress, Journal, pp. 906, 907; Record, p. 2884.

[2] As required by the parliamentary law.

[3] Mr. Blaine had previously, on April 24, made a personal explanation on this subject. Record, pp. 2724, 2725.

[4] Record, pp. 5123–5132, House Report No. 801; Journal, p. 1376.

[5] Record, p. 5691, House Report No. 842; Journal, p. 1503.

The report concludes that it was not, (1) because not made under oath, although witnesses actually present before the committee were required to testify under oath; (2) because there was not the slightest evidence that Mr. Caldwell sent the telegram, the mere receipt of it not establishing its authenticity in absence of the original message written by the sender;[1] (3) because the copy of the message raised no presumption as to the original and would not have done so even had it been in direct response to a telegram.[2]

Therefore the telegram was not an instrument of evidence, and the chairman in withholding it did not suppress evidence. The committee also find that the chairman acted in good faith and without a purpose to injure any person involved in the investigation, and therefore recommend the indefinite postponement of the resolution.

The minority dissented from the report because it was brought in during the last hours of the session, because there had not been sufficient investigation, and because a speech of the chairman[3] Mr. Knott, made subsequent to the drafting of the report, had cast doubt upon the assertion that he was innocent of the charge.

The report was adopted,[4] on a vote by tellers, 81 ayes to 39 noes.

1787. A member of the Cabinet who had been implicated by the terms of a resolution creating a committee of investigation was permitted to have witnesses summoned.—In 1878[5] the select committee of the House created to investigate the Presidential election of 1876 granted the application of the Secretary of the Treasury, John Sherman (who had been accused in the preamble of the resolution creating the committee and who appeared by counsel before the committee), to take certain testimony.

Thus, on June 21, 1878,[6] Thomas H. Jenks was sworn as a witness called in the interest of Mr. Sherman.

1788. Latitude permitted by an investigating committee to the counsel of an executive officer who had been implicated by the terms of the resolution creating the committee.—In 1878[7] the House select committee on Alleged Frauds in the Presidential Election of 1876 permitted John Sherman, Secretary of the Treasury, whose conduct had been impeached in the preamble of the resolution creating the committee of investigation, to be represented before the committee by counsel (Mr. Shellabarger), but the counsel was not permitted to ask questions, and questions that the counsel desired to ask were required to be communicated to the witness through some member of the committee.

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[1] The following cases are cited in support: Matterson *v.* Noyes, 25 Ill., 59; Williams *v.* Buckell, 37 Miss., 682; Durke *v.* Vermont Central R. R. Co., 29 Vt., 39; Hawley *v.* Whipple, 48 N. H., 487.

[2] Here is cited case of Hawley *v.* Whipple, 48 N. H., 487.

[3] The chairman being personally concerned, Mr. Eppa Hunton, of Virginia, made the report.

[4] Record, p. 5691; Journal, p. 1503.

[5] Third session Forty-fifth Congress, House Report No. 140, p. 43; House Miscellaneous Document No. 31, p. 1469, vol. 4.

[6] Third session Forty-fifth Congress, House Miscellaneous Document No. 31, Vol. I, p. 279.

[7] Third session Forty-fifth Congress, House Miscellaneous Document No. 31, page 11. For preamble and resolution reflecting on Mr. Sherman, second session Forty-fifth Congress, Journal, p. 1072.

1789. Instance wherein an investigating committee permitted a person implicated by testimony already given to appear and testify.—On February 8, 1879,[1] while the select committee appointed to investigate the alleged frauds in the Presidential election of 1876 were investigating the cipher dispatches, a letter was received from Samuel J. Tilden, taking

> the liberty of requesting that before you leave [the committee were sitting in New York] an opportunity be permitted me to appear before you to submit some testimony which I deem pertinent to the inquiry with which you are charged.

Mr. Tilden's name had been implicated in testimony already given.

The committee gave him leave to appear, and he appeared and testified.

1790. When the House desires the testimony of Senators it is proper to ask and obtain leave for them to attend.—On March 29, 1816,[2] Mr. Hugh Nelson, of Virginia, offered this resolution, which was agreed to:

> *Resolved,* That a committee be appointed to inquire into the official conduct of Matthias B. Tallmadge, one of the district judges for the State of New York, and to report their opinion whether the said Matthias B. Tallmadge hath so acted in his judicial capacity as to require the interposition of the constitutional power of this House, and that the said committee be authorized to send for persons, papers, and records.

Mr. Nelson was appointed chairman of this committee, and on April 8[3] reported from the committee a resolution which was agreed to by the House, as follows:

> *Resolved,* That the Senate of the United States be requested to permit the attendance of the Honorable Nathan Sanford, a Member of their body, before the committee of the House of Representatives appointed to inquire into the official conduct of Judge Tallmadge, to be examined touching the subjects contained in the preceding report relating to the alleged misconduct of Judge Tallmadge in his office as one of the judges of the district court for the State of New York.[4]

On April 12, 1816,[5] the Senate passed a resolution permitting the attendance of Mr. Sanford, as requested by the House, and informed the House of that fact by message.

On April 17[6] the House resolved to postpone further proceedings in the inquiry until the next session of Congress.

1791. On April 19, 1832,[7] during the trial of Samuel Houston at the bar of the House for assault on a Member of the House because of words spoken in debate, the accused sent to the Chair a request that the House pass the proper order to enable him to obtain the attendance of Senators Felix Grundy and Alexander Buckner to testify. A Member of the House requested that the names of two other Senators, Thomas Ewing and John Tipton, be added.

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[1] Third session Forty-fifth Congress, House Miscellaneous Document No. 31, pt. 4, p. 262.

[2] First session Fourteenth Congress, Journal, p. 544; Annals, p. 1290.

[3] Journal, p. 605; Annals, p. 1349.

[4] In a similar manner the House on Jan. 27, 1819, asked and obtained permission that Senators Daggett and Hunter should testify before a committee of the House. Second session Fifteenth Congress, Journal, pp. 212, 216.

[5] Journal, p. 637; Annals, p. 310.

[6] Journal, p. 669.

[7] First session Twenty-second Congress, Journal, p. 613.

The House then agreed to the following:

Ordered, That a message be sent to the Senate, informing the Senate that the House of Representatives request the attendance of Felix Grundy, Alexander Buckner, Thomas Ewing, and John Tipton, Members of the Senate, to give evidence before the House of Representatives, now sitting on the trial of Samuel Houston, accused of a breach of the privileges of the House of Representatives by assaulting and beating Mr. Stanbery, a Member of that House.

The message having been delivered to the Senate by the Clerk, the Senators therein named appeared, and were conducted by the Sergeant-at-Arms to the seats which had been prepared for them within the Hall.

When the message of the House was received in the Senate,[1] Mr. Daniel Webster, of Massachusetts, said that as this was a case of emergency he would move that the pending bill be laid aside. This being done, Mr. Webster moved that leave be given the Senators named to attend the House of Representatives. This motion was agreed to.

The Senators were sworn, like other witnesses, when they testified before the House.[2]

1792. A committee of the House having summoned certain Senators by subpoena, the summons was either disregarded or obeyed under pro test.— In 1837[3] in the course of an investigation into the condition of the Executive Departments of the Government, a select committee, of which Mr. Henry A. Wise, of Virginia, was chairman, summoned to appear and testify before it the following Members of the Senate: John C. Calhoun, of South Carolina, and Hugh L. White and Felix Grundy, of Tennessee. It does not appear that the House had previously obtained from the Senate the customary permission to ask their attendance.

Mr. Calhoun neither attended on the committee nor replied to their call.[4]

Messrs. White and Grundy appeared and announced their willingness to testify, but filed protests, which were entered on the journal of the committee.

Mr. White's protest, filed January 28, 1837, is as follows:

I now appear before your committee at the time specified in the subpoena, but not in obedience to its mandate. I am a Member of the Senate of the United States, now in session, and in the daily discharge of my duties as a Senator, and while I am thus engaged do deny that any committee of the House of Representatives has the power, by its mandate, to compel me to absent myself from the body of which I am a Member. I do therefore protest against the power assumed by your committee in the issuance and service of said subpoena; but at the same time that I feel it my duty thus to protest against the exercise of a power which I believe is not vested in your committee, I assure them that I will at all times, when my duties as Senator do not compel me to be elsewhere, voluntarily attend and give them, upon oath, all the information I possess in relation to any of the matters which may come within the range of their investigation. I respectfully ask that this protest may be entered on the journal of your proceedings lest hereafter it may be thought I have sanctioned the exercise of a power which, it is easy to foresee, may be so used as to destroy that body of which I am an humble Member.

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[1] Debates, p. 802.

[2] Journal, p. 659.

[3] Second session Twenty-fourth Congress, House Report No. 194; Journal of Committee, pp. 26, 27, 44, 45.

[4] Report No. 194, p. 14. The committee, in fact, by an entry on their journal, explained that the subpoena summoning Mr. Calhoun was inadvertently issued; and by the terms of their explanation seem to disclaim any right to take a Senator from his duties. (Journal of the Committee, pp. 40, 41.)

Mr. Grundy's protest, which was filed on February 7, says:

I can not recognize the authority of your committee to call a Senator from his duties in that body of which he is a Member to appear and give testimony before them. Reserving to the Senate, however, of which I belong, the entire control of each of its Members in relation to their respective duties, I will, if notified when the committee wish to examine me (should I not at the time be engaged in the business of the Senate), voluntarily wait upon the committee and give testimony upon the subjects of inquiry directed by the House of Representatives.

1793. In 1878,[1] in the select committee to investigate the Presidential election of 1876, a letter of Stanley Matthews, of Ohio, a Member of the Senate, declining the invitation of the committee to appear before it and testify, was read, and caused discussion as to the right of the House to subpoena a Senator. Messrs. B. F. Butler, of Massachusetts, and S. S. Cox, of New York, discussed it particularly. Mr. Butler said:

The President of the Senate pro tempore (the late acting Vice-President), acting in obedience to an invitation much less formal, has sat in that chair within the last fifteen minutes. Members of the Senate have frequently and always attended when called upon. From a knowledge of public affairs reaching back thirty years, I can say (and I have had occasion to examine the matter before) that never has that invitation been refused during the existence of this Government. I have sat on committees before which Mr. Sumner appeared on invitation. I have sat on committees before which other Senators have appeared. In this very room the Vice-President of the United States, Mr. Colfax, attended on the invitation of a committee (in the Credit Mobilier investigation). Senator Patterson, of New Hampshire, appeared here on the invitation of that committee. Members of the House appeared here. The Speaker of the House came here and was a witness before that committee. And the question is to be determined now, if it is raised, whether that invitation can be, with due respect to us and the House which we represent, slighted.

The committee, on motion of Mr. Butler, voted to issue a subpoena for Mr. Matthews.

On June 10, 1878,[2] the chairman of the committee, Mr. Potter, sent the subpoena to Mr. Matthews with a courteous note. The above proceedings took place before the adjournment of Congress.

On August 12, 1878[3] (after Congress had adjourned), the committee then being in New York, the chairman stated that a summons had been issued to Mr. Matthews and had been served on him and a return made, but Mr. Matthews had not appeared and had indicated that he would not appear. Mr. Butler thought a minute to report him to the House should be made on the records of the committee.

On August 16,[4] on motion of Mr. Butler, the entry was made on the records of the committee.

1794. A Senator having neglected to accept an invitation or respond to a subpoena requesting him to testify before a House committee, the House by message requested that the Senate give him leave to attend.

The Senate neglected to respond to a request of the House that a Senator be permitted to attend a House committee.

Form of subpoena issued to secure the attendance of a Senator.

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[1] Third session Forty-fifth Congress, House Miscellaneous Document No. 31, pp. 148–153.

[2] P. 160 of Miscellaneous Document No. 31.

[3] P. 874 of Miscellaneous Document No. 31.

[4] P. 956 of Miscellaneous Document No. 31.

On June 17, 1878,[1] Mr. Benjamin F. Butler, of Massachusetts, from the committee appointed to investigate the electoral count in Florida and Louisiana, submitted a report setting forth that the committee had invited Hon. Stanley Matthews, a Senator from the State of Ohio, to appear before them and give testimony, believing him to be a material witness to certain facts necessary and important to be known and relating to the subject-matter of the investigation. In response to this invitation Mr. Matthews had written to the chairman of the committee a letter setting forth that he had, on June 5,[2] called the attention of the Senate to the testimony given before the House committee tending to implicate him in certain alleged frauds and wrongs in connection with the election in Louisiana, and the Senate had referred the subject to a committee of investigation. Mr. Matthews asserted that he had no knowledge whatever of any matter relating to the subject, except in so far as appeared in the evidence before the House committee, and he reserved that for explanation before the Senate committee. Therefore, without intending any disrespect for the House or its committee, he felt constrained by a sense of duty toward the Senate and himself to decline the invitation. The report, in the form of the recitation of a preamble, goes on to state that the committee on June 10 ordered the issue of the following subpoena:

By authority of the House of Representatives of the Congress of the United States of America.
JOHN G. THOMPSON, ESQ.,

Sergeant-at-Arms, or his Special Messenger:

You are hereby commanded to summon the Hon. Stanley Matthews to be and appear before the special investigating committee of the House of Representatives of the United States, of which the Hon. Clarkson N. Potter is chairman, in their chamber, in the city of Washington, on Tuesday, June 11, 1878, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this Summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 10th day of June, 1878.

[SEAL.]

SAMUEL J. RANDALL, *Speaker.*

Attest:

GEORGE M. ADAMS, *Clerk.*

At the same time, and with this summons, a letter was handed to Mr. Matthews from the chairman of the committee, assuring him that the committee did not intend to cause him inconvenience in the discharge of his duties as Senator.

The preamble and resolution then continue:

And whereas the said Matthews failed to appear in answer to said summons at the time and place named before your committee or at any other time and place; and

Whereas it may be that the duties of said Matthews as Senator and the exigencies of the public service require the presence of said Matthews in his place as Senator, so that he could not appear in answer either to the invitation or summons of your committee as aforesaid, of which exigencies the Senate alone can judge: Therefore,

Be it resolved, That the House of Representatives do send the following message to the Senate of the United States in this behalf:

IN THE HOUSE OF REPRESENTATIVES, *June 17, 1878.*

Resolved, That the House of Representatives do request the Senate to give leave to Hon. Stanley Matthews, Senator from the State of Ohio, to attend before the committee of the House of Representatives

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[1] Second session Forty-fifth Congress, Journal, pp. 1383–1387; Record, pp. 4765–4767.

[2] See Record, p. 4119.

now charged with the investigation of the frauds in the electoral vote of the States of Louisiana and Florida, to give such evidence of facts concerning the subject-matter of said investigation as may be in his knowledge or possession as he may be required.

Mr. Butler explained that the resolution was in the exact form laid down by May's Parliamentary Practice.

The resolution was agreed to, yeas 104, nays 18.

On June 18[1] in the Senate the message from the House was taken up, and Mr. William A. Wallace, of Pennsylvania, proposed the following resolution:

Resolved, That the Senate, in compliance with the resolution of the House of Representatives of yesterday, do allow the attendance of Hon. Stanley Matthews, a Member of this House, before the committee of the House of Representatives now charged with the investigation of alleged frauds in the electoral votes of the States of Louisiana and Florida, for the purpose of giving such evidence of facts concerning the subject-matter of said investigation as may be in his knowledge or possession.

Ordered, That the Secretary notify the House of Representatives accordingly.

Objection being made to the immediate adoption of this resolution, it was referred to the Committee of Privileges and Elections.[2]

1795. An instance wherein a committee of the House took the testimony of a Senator, although consent of the Senate had not been obtained. (Footnote.)

A Member having stated that a portion of a House document had been suppressed, the House, on request of the printers, ordered an investigation.

On January 21, 1823,[3] the Speaker laid before the House a letter from Messrs. Gales and Seaton, printers of the House, asking an investigation of a charge, made in the Washington Republican (newspaper), that as printers of the House they had suppressed portions of a public document relating to the relations of Secretary of the Treasury Wm. H. Crawford with certain banks.

It was urged that the House should not proceed on mere newspaper rumor to an investigation; but a Member, Mr. John W. Campbell, of Ohio, having stated that his own investigations had shown a suppression of a portion of a House document, the matter was referred to a select committee.

That committee reported on January 30. They stated that, while they had been sensible of the importance of the charge as affecting Messrs. Gales and Seaton, they had also been mindful that it involved a contempt of the authority and dignity of the House.

To the investigation of such a subject [says their report], involving at once the confidence which this House and the nation shall repose in the information upon which it acts, the character of one of the first officers of the Government, and the fidelity of the public printers, your committee have not proceeded without the most cautious inspection of the documents submitted to them, and the most solemn sanction to the testimony of the witnesses, upon which their opinion was to be founded.

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[1] Record, p. 4809.

[2] Senate Journal, p. 762. It does not appear that the committee reported the resolution. See also Third session Forty-fifth Congress, House Miscellaneous Document No. 31, pp. 148–153, 160, 874, 956.

[3] Second session Seventeenth Congress, Annals, pp. 652–656, 735–739.

The committee, having found that the printers were not responsible for the suppression, recommended:

The interesting nature of the present inquiry has suggested to your committee the propriety of submitting to the House the expediency of appointing some Member or Members of its own body, in every ewe, to superintend the publication of all documents which may hereafter be printed by order of the House.

On February 5,[1] Mr. Campbell offered a resolution which, after long debate, was agreed to, providing for an investigation to ascertian by whom the suppression was made.

On February 27 [2] the committee reported the results of an exhaustive examination, including testimony given under oath by witnesses, including Members of the House and Senate.[3] The report included no recommendations for action.

1796. The House, by resolution, authorized its Clerk to produce papers and its Members to give testimony before a court of impeachment.—On July 6, 1876,[4] Mr. Scott Lord, of New York, from the managers on the part of the House to conduct the impeachment of William W. Belknap, reported this resolution, which was agreed to:

Resolved, That the Clerk of this House, on the request of the managers to conduct the impeachment against William W. Belknap, appear before the Senate, sitting as a court of impeachment, with such papers of the House as the managers may require, and that the members of the Committee on Expenditures in the War Department have permission to appear and testify in such court in regard to such impeachment, and to produce such papers in relation thereto as the managers may require.

1797. The Secretary of the Senate obeyed a subpoena duces tecum, of a House investigating committee.—On June 5, 1878,[5] George C. Gorham, secretary of the Senate, obeying a subpoena duces tecum of the House of Representatives, appeared before the select committee to investigate the Presidential election of 1876, and being sworn, produced the papers called for and testified.

1798. The Senate has not considered that its privilege forbade the House to summon one of its officers as a witness.—On June 27, 1832,[6] in the Senate, Mr. John Holmes, of Maine, offered this resolution:

Resolved, That the assistant doorkeeper of the Senate be permitted to attend as a witness before a committee of the House of Representatives, agreeably to his summons.

Mr. Holmes said that the doorkeeper had been summoned by a document under the signature of the Clerk, with the seal of the House, and that the resolution conformed with the practice of the British Parliament.

Mr. Henry Clay, of Kentucky, did not concur that the constitutional privileges of Senators extended to the officers of the body. On his motion the resolution was laid on the table.

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[1] Journal, p. 198; Annals, pp. 829, 860–885.

[2] Annals, p. 1126.

[3] Senator Ninian Edwards, of Illinois, was a witness, but it does not appear that the House obtained of the Senate the usual permission to summon him.

[4] First session Forty-fourth Congress, Journal, p. 1221; Record, p. 4422.

[5] Third session Forty-fifth Congress, Miscellaneous Document 31, Vol. I, p. 63.

[6] First session Twenty-second Congress, Debates, p. 1127.

1799. A telegram from the chairman of a committee making investigations in a distant place, addressed to the Speaker and on the subject of contumacious witnesses, was held in order as a communication of high privilege.—On December 16, 1876,[1] the Speaker laid before the House a telegram from Mr. William R. Morrison, of Illinois, chairman of the select committee investigating affairs in Louisiana, addressed to the Speaker, and informing the House through him that the efforts of the committee to obtain testimony had been resisted, and that the process of the House would be needed.

Mr. George F. Hoar, of Massachusetts, raised the question of order that a telegraphic dispatch sent by a particular Member was not a proper mode of communicating to the House, and not a proper mode of submitting a report from a committee.

The Speaker[2] ruled that the communication could be received as a question of high privilege. It came addressed to the Speaker as Speaker, and through the ordinary telegraphic channel.

Mr. Hoar did not appeal, but stated that after reflection it seemed to him that the decision of the Chair was right.

1800. A Sergeant-at-Arms, serving subpoenas for a committee, makes his return and it is entered on the journal of the committee.—When the Sergeant-at-Arms, who is serving a committee having power to send for persons and papers, is unable to find the person whom he has been commanded to produce, he makes a return of that fact to the committee and it is entered on the journal of the committee. Thus, on February 15, 1857,[3] the Sergeant-at-Arms made a return which appears as follows on the journal of the select committee appointed to investigate certain alleged corrupt combinations among Members:

> The Sergeant-at-Arms returned that he had diligently sought Horace Greely in the city of New York, and learned that he (Mr. Greely) had gone to the West, probably to Ohio or Iowa, and that the time of his return was uncertain.

1801. The House may confer upon the subcommittees of a committee the power to send for persons and papers.

A general investigation having been conducted by subcommittees, the several reports were made to the committee and appended to its general report.

Minority views may accompany the report of a subcommittee made to the committee.

By the resolution adopted December 4, 1876, three special committees were each authorized to detail subcommittees, each subcommittee to have power to send for persons and papers in making investigation. The mode of proceeding is illustrated by the report of the select committee on the recent election in Louisiana. That report[4] Was made to the House by Mr. William R. Morrison, of Illinois, its chairman, on February 1, 1877. It was signed by himself and nine of his associates. Appended to it were the reports[5] of four subcommittees, which had conducted

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[1] Second session Forty-fourth Congress, Record, p. 244.

[2] Samuel J. Randall, of Pennsylvania, Speaker.

[3] Third session Thirty-fourth Congress, House report No. 243, p. 52.

[4] Second session Forty-fourth Congress, Report No. 156, Part I.

[5] Part I, pp. 21, 55, 117, 143.

examinations in different localities. The members of the subcommittee concurring in one of these subcommittee reports generally, but not in every case, appended their signatures.

The minority of the main committee also filed their views,[1] appending their signatures thereto, and appended to this statement of minority views, were the views of the minority of each subcommittee,[2] generally signed by the member making it.

1802. A committee not being able to decide the question of issuing certain subpoenas, authorized a member of the committee to exhibit its journal, so that the House might act.—On June 1, 1860,[3] Mr. Warren Winslow, of North Carolina, a member of the select committee appointed to investigate the alleged influence of the Executive in the House, and corruption in elections, submitted[4] a paper containing a statement of certain proceedings of the committee in regard to a subpoena for certain witnesses. The paper was the journal of the committee, and it showed that Mr. Winslow had moved that subpoenas be issued for certain witnesses, and that on this motion the vote was ayes 2, noes 2. So the motion failed. The journal of the committee also showed that the committee voted that Mr. Winslow be allowed to have, for use in the House, the journal of the committee for the record of the action on the motion to issue the subpoenas.

Mr. Winslow thereupon presented to the House the following resolution:

Resolved, That the Speaker be directed to issue his warrant, directed to the Sergeant-at-Arms, ordering him to summon the following-named persons to appear forthwith before the select committee, etc.

On June 2, after debate, this resolution was agreed to, yeas 166, nays 4.

1803. The committee regulates the summoning of its witnesses.—On June 2, 1860,[5] in the select committee appointed to investigate the subject of Executive influence over legislation, corruption in elections, etc., it was—

Ordered, That hereafter witnesses shall be summoned pursuant to the order of the committee; and that the Clerk shall enter upon the journal of this committee the name of the witnesses so ordered to be summoned, at the time such order shall be made.

Protests had previously been made that witnesses had appeared who had not been summoned by order of the committee.

1804. A Committee of the Whole, charged with an investigation in 1792, was given the power to send for persons and papers.—On November 13, 1792,[6] the House—

Resolved, That the Committee of the Whole House, to whom is referred the report of the committee appointed to inquire into the causes of the failure of the expedition under Major-General St. Clair, be empowered to send for persons, papers., and records for their information.

It does not appear that the Committee of the Whole availed itself of this permission.

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[1] Report No. 156, Part II.

[2] Part II, pp. 27, 31, 43.

[3] First session Thirty-sixth Congress, Journal, pp. 972, 983; Globe, pp. 2543, 2571.

[4] The Journal does not indicate whether by unanimous consent, or as privileged. The Globe shows that Mr. Winslow claimed privilege, although on what ground does not appear. He had simply been authorized by the committee to use a certain paper in the House.

[5] First session Thirty-sixth Congress, House report No. 648, p. 86.

[6] Second session Second Congress, Journal, p. 619 (Gales & Seaton ed.); Annals, p. 685.

1805. A question as to issuing a warrant for the arrest of a person who has avoided a summons by seeking a foreign country.—On February 8, 1875,[1] a proposition was made to cause the issue of a warrant for the arrest of William S. King, who was alleged to have avoided the summons of the House to appear and testify by going to Canada. A copy of the summons, had been mailed to him in Canada, but an officer of the House had been unable to serve the summons on him on American soil. It was urged against the procedure that a man could not be in contempt who had not had a process legally served on him, and that it would be impossible to arrest him in Canada. In behalf of the resolution, it was urged that its adoption would be a precautionary measure, enabling the witness to be obtained should he return to this country. The proposition was not pressed to a decision.

1806. The Speaker may be authorized and directed to issue subpoenas during a recess of Congress.—On July 30, 1861,[2] the House adopted a resolution allowing the select committee empowered to ascertain and report the number and names of disloyal persons employed by the Government to sit and take testimony during the coming recess of Congress, and as a part of this leave adopted the following:

Resolved, That the Speaker of the House, during the recess of Congress, is hereby authorized and directed to issue subpoenas, upon the request of the committee, in the same manner as during the session of Congress.

1807. Form of subpoena for summoning witnesses to testify before a committee of the House, and of the return thereon.—Subpoenas issued by the Speaker for summoning witnesses to appear before a committee are as follows in form:

By authority of the House of Representatives of the Congress of the United States of America.

TO THE SERGEANT-AT-ARMS, or his SPECIAL MESSENGER:

You are hereby commanded to summon to be and appear before the committee of the House of Representatives of the United States, of which the Hon. is chairman, in their chamber in the city of Washington, on , at the hour of , then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this day of , 19 ,

, *Speaker.*

Attest: , *Clerk.*

On the back of the printed form of subpoena is the form for the return:

Subpoena for before the Committee on the .

Served . ,

Sergeant-at-Arms, House of Representatives.

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[1] Second session Forty-third Congress, Record, p. 1070.

[2] First session Thirty-seventh Congress, Journal, p. 180.

1808. Forms of subpoenas used at different times.—On January 21, 1839,[1] the select committee chosen to investigate the defalcations in the custom-house at New York adopted the following form of the warrant for the summoning of witnesses to appear before said committee:

By authority of the House of Representatives of the United States.

The select committee appointed by the House of Representatives to investigate the defalcations of public officers, to , greeting:

You are hereby commanded to summon to appear before said committee, at , in the city of , on instant, at o'clock , to testify, and the truth to speak, touching or concerning the subjects of investigation before said committee.

Witness, James Harlan, chairman of said committee, at , in the city of , this day of January, in the year 1839; and in the 63d year of the independence of the United States.

, *Chairman.*

1809. On January 25, 1837[2] in the select committee appointed to investigate the Executive Departments of the Government, Mr. Henry A. Wise, of Virginia, proposed, and the committee unanimously agreed to, the following form of subpoena to witnesses:

To the Sergeant-at-Arms of the House of Representatives:

You will cause to be summoned to appear before the committee of investigation appointed under a resolution of the House of the 17th day of January, at o'clock, on , to testify, and the truth to say, touching the matters of inquiry before the said committee.

HENRY A. WISE, *Chairman.*

1810. Instance of the authorization of a subpoena by telegraph.—On June 11, 1879,[3] the Senate, without debate, agreed to the following:

Resolved, That E. R. Wheeler, of Spencer, Mass., be summoned by telegraphic subpoena to appear without delay before the Committee on Post-Offices and Post-Roads to give evidence in a matter pending before said committee.

1811. The House has, by resolution, demanded of certain of its Members the production of papers and information.

A paper presented in the House by a Member in response to the order of the House is mentioned in the Journal, but not printed in full.

On January 7, 1808,[4] during consideration of a proposition relating to a proposed investigation of the conduct of the General of the Army of the United States, Mr. William A. Burwell, of Virginia, proposed this resolution:

Resolved, That Mr. John Randolph, Representative in Congress from the State of Virginia, and Mr. Daniel Clark, Delegate from the Territory of Orleans, be requested to lay upon the clerk's table all papers and other information in their possession in relation to the conduct of Brig. Gen. James Wilkinson, while in the service of the United States, in corruptly receiving money from the Government or agents of Spain.

Considerable debate arose over this resolution, involving, however, rather the merits of the proposed investigation than the power of the House to compel its Members to give testimony, although the latter subject was touched on somewhat.[5]

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[1] Third session Twenty-fifth Congress, House Report No. 313, p. 294.

[2] Second session Twenty-fourth Congress, House Report No. 194, journal of the committee, p. 13.

[3] First session Forty-sixth Congress, Record, p. 1910.

[4] First session Tenth Congress, Journal, pp. 114, 117, 121, 122. (Gales & Seaton ed.) Annals, pp. 1313–1357, 1387–1391.

[5] Annals, p. 1262.

The resolution was agreed to, yeas 90, nays 19.

On January 8 Mr. Clark presented to the House a certain document, and on January 11 Mr. Clark presented a written statement, sworn to by himself and properly attested by the chief judge of the circuit court of the District of Columbia.[1]

1812. In 1876, after examination and discussion, the House declared its right through a subpoena duces tecum to compel the production of books, papers, and especially telegrams.—On December 16, 1876,[2] the Speaker laid before the House a telegraphic message from Mr. William R. Morrison, of Illinois, chairman of the select committee investigating affairs in Louisiana, informing the House that the efforts of the committee to obtain testimony had been resisted, and that the process of the House would be required. Accompanying the message was a communication from William Orton, president of the Western Union Telegraph Company, stating that the company had decided to instruct its employees not to produce before committees of either House of Congress messages received or sent by representatives of either of the two parties, or at least not to produce such telegrams until after Congress should have approved the subpoenas of the committee.

This communication from Mr. Morrison was referred to the Committee on the Judiciary with instructions to report what action the House should take.

On December 20 the committee, through Mr. William P. Lynde, of Wisconsin, reported:

> That the communication fails to inform the House of the names of the person or persons who refuse to produce papers and telegrams, or the circumstances under which the refusal was made. The House has the power to compel the production of books, papers, and telegrams mentioned in the investigation before the committee, and any witness who shall refuse to produce such papers or telegrams when required should be brought to the bar of the House to answer a violation of the privilege of the House.
>
> The committee report the following resolutions and recommend their adoption:
>
> *Resolved,* That whenever any witness duly subpoenaed to appear before any committee of investigation of the House refuses to appear before such committee or refuses to produce any books, papers, or telegrams in his possession or under his control, when required, the committee shall report the name of such witness, and the facts and circumstances relating to such refusal, for the action of the House.
>
> *Resolved,* That whenever a witness has been duly subpoenaed to appear before a committee of this House any person who shall tamper with such witness in regard to the evidence to be given by him before the committee, or who shall interfere with or prevent the attendance of such witness before the committee to give testimony, or interfere with or prevent, or endeavor to intimidate or prevent, such witness from producing any books, papers, or telegrams required by the committee, on the facts being reported to the House such person shall be brought to the bar of the House to answer for a breach of the privileges of the House.

This report gave rise to a lengthy debate as to the proper practice and the rights and powers of the House in the matter to compelling the production of papers. A proposition of Mr. Frank H. Hurd, of Ohio, was offered as an amendment in the form of an additional resolution, as follows, and was disagreed to, yeas 93, nays 122:

> *Resolved,* That the subpoenas issued by House committees commanding telegrams, books, papers, and other documents to be produced should describe them with such convenient particularity as may be, in order that they may be made capable of identification; and in cases where telegrams are ordered to be produced they should be described by reference to the names of the parties sending and receiving the same, the general subject-matter of their contents, and the date, as near as may

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[1] The presentation of this document is mentioned in the Journal, but it is not printed in full there.

[2] Second session Forty-fourth Congress, Journal, pp. 90, 117–120; Record, pp. 244, 324–330.

be, of their transmission; but the committees charged with the inquiry shall not be required to make such description when, after having determined that they have reasonable ground to believe that telegrams are material to such inquiry, they shall be ignorant of the parties to such telegrams, of their contents, and dates; but any description which will enable such telegrams to be identified shall be deemed sufficient.

Another view was embodied in two resolutions offered by Mr. J. Proctor Knott, of Kentucky, as a substitute for the resolutions of the committee. This substitute was agreed to, yeas 116, noes 33, as follows:

Resolved, That there is nothing in the law rendering a communication transmitted by telegraph any more privileged than a communication made orally or in any other manner whatever; that this House has the power through its subpoenas, under the hand and seal of the Speaker, to require any person to appear before any committee to which it has given authority to examine witnesses, and send for persons and papers, and bring with him such books or papers, whether the paper be telegraphic messages or others, for the inspection of such committee, as such committee may deem necessary to the investigation with which such committee may have been charged; and that such committee may order and direct any witness who may be brought before it to produce to the committee any book or paper, whether such paper be a telegraphic despatch or other, which may appear to be in his possession or under his control, which said committee may deem necessary to the investigation with which it may have been charged; and that any person upon whom such subpoena shall have been served who shall disobey the same, or, having appeared as a witness, shall disobey the order of such a committee to produce any book or paper which he shall have been ordered by such committee to produce, should be brought to the bar of the House upon a report of the facts by the committee to answer for a contempt of the authority of the House and dealt with as the law under the facts may require.

Resolved, That any person who shall prevent, or attempt to prevent, any person who shall have been subpoenaed to appear before any committee of this House from so appearing or from testifying before said committee, or from producing any book or paper which such witness may have been required to produce, or prevent or attempt to prevent any such witness from speaking the truth before such committee, should, upon a report by the committee of all the facts, be brought to the bar of the House to answer for a contempt, and dealt with as the law under the facts may require.

The resolutions as amended were then adopted.

1813. Instance wherein the House empowered the Ways and Means Committee to send for persons and papers in any matter arising out of business referred to the committee.—On February 13, 1873,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Ways and Means, presented the following resolution, which was agreed to without division:

Resolved, That the Committee of Ways and Means be, and they are hereby, authorized to send for persons and papers in any matter of examination pending before said committee arising out of business referred to it by the House of Representatives.

The committee took testimony under this resolution.[2]

1814. The Senate has authorized the compulsory attendance of witnesses in legislative inquiries.—On January 18, 1882,[3] in the Senate, Mr. James Z. George, of Mississippi, from the Committee on Claims, offered the following:

Resolved, That the Committee on Claims be empowered to summon and examine witnesses to testify in regard to the claim of J. M. Wilbur for relief, now pending before said committee, etc.

This resolution was agreed to, Mr. Justin S. Morrill, of Vermont, asking if it did not introduce a novel procedure into legislation, but making no further opposition.

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[1] Third session Forty-second Congress, Journal, p. 387; Globe, p. 1322.

[2] Journal, p. 461.

[3] First session Forty-seventh Congress, Record, p. 471.

1815. On June 7, 1860,[1] Mr. James A. Bayard, of Delaware, from the Committee on Judiciary of the Senate, made a report concerning the sufficiency of a warrant issued for the arrest of a witness who had disregarded the summons of the committee appointed to investigate the circumstances of the raid of John Brown at Harpers Ferry. In the course of this report the assumption is made that the Senate does have power to summon witnesses to give testimony for legislative purposes.

1816. The House, after extended discussion, assumed the right to compel the attendance of witnesses in an inquiry entirely legislative in its character.

In a debate as to the right of the House to compel the attendance of witnesses for a legislative inquiry, the precedents of Parliament were considered.

On December 31, 1827,[2] Mr. Rollin C. Mallary, of Vermont, by direction of the Committee on Manufactures, submitted the following resolution:

Resolved, That the Committee on Manufactures be vested with the power and authority to send for persons and papers.

Mr. Thomas J. Oakley, of New York, proposed an amendment striking out the words

vested with power and authority to send for persons and papers,

and inserting as follows:

empowered to send for and to examine persons, on oath, concerning the present condition of our manufactures, and to report the minutes of such examination to this House.

An extended debate arose over this proposition. It was stated in its favor that the committee, in framing the tariff bill,[3] found many conflicting memorials before them. and that the truth could be arrived at best by oral testimony. This course had been pursued by the House of Commons. The power asked for could not be considered dangerous, for the subject deeply affected the interests of the people, and it was proposed merely to compel the attendance of witnesses, a power exercised in the most insignificant cases of litigation between persons. The viva voce examination was much more satisfactory than the written memorials. The common law of Parliament should dictate that the legislature must possess the power requisite to procure the information needed in order to act understandingly. Committees of investigation enjoyed the power. Indeed, it seemed true that committees already had the power to examine under oath, the statutes conferring on the chairmen the power to administer oaths.

In opposition it was argued that no one could cite a case in the House of Representatives where a demand for like powers had been made by a committee whose duties were similar to those of the Committee on Manufactures. The power to send for persons and papers had hithherto been exercised by the committees having judicial functions and exercising the judicial power of the House. To send the

[1] First session Thirty-sixth Congress, Senate Report No. 262.

[2] First session Twentieth Congress, Journal, pp. 101, 102; Debates, pp. 862, 890.

[2] At this period the Committee on Manufactures sometimes reported revenue bills.

Sergeant-at-Arms to all parts of the country to compel citizens to attend and testify on a tariff matter would be an extraordinary exercise of a power hitherto used only in cases of contested elections and impeachments. The powers of the House of Representatives could not be compared with those of the House of Commons, since the latter was restrained by no written constitution. And it had not been made plain that the House of Commons had ever issued a compulsory process in such a case.

It appears from the debate that Mr. Oakley's amendment was intended to authorize the committee to send for and examine witnesses, but not to compel their attendance against their will.

The amendment was agreed to, 100 ayes to 78 noes. The resolution as amended was then agreed to, yeas 102, nays 88.

1817. On April 4, 1828,[1] Mr. James Hamilton, of South Carolina, from the Select Committee on Retrenchment in the Expenses of the Government, reported this resolution:

Resolved, That the select committee on the subject of retrenchment be empowered to send for persons and papers, for the purpose of continuing and completing the examination.

Objection was made to this resolution by several Members, notably Messrs. Silas Wood and Henry R. Storrs, and James Strong, of New York, who urged that so great a power should always be under the control of the House, and should not be delegated except for certain specified purposes. Mr. Strong thought that the witnesses and documents wanted ought to be named.

Mr. Hamilton having stated to the House the objects to which the power was to be applied, the resolution was agreed to by the House.

1818. On January 16, 1844,[2] on motion of Mr. Cave Johnson, of Tennessee, by leave,, the following resolution was presented and agreed to:

Resolved, That a subpoena issue to Col. Charles K. Gardner, the secretary of the commissioners for adjusting Cherokee claims, for the purpose of giving evidence before the Committee on Indian Affairs; and that he bring with him all records and papers connected with said business.

1819. On March 7, 1844,[3] the House, on motion of Mr. Cave Johnson, of Tennessee,

Ordered, That a subpoena be issued to summon Gen. John H. Eaton to appear as a witness before the Committee on Indian Affairs.

1820. On June 14, 1882[4] the House, by resolution, authorized the issuance of a subpoena summoning Frank Kraft, a stenographer, to appear before a subcommittee of the Committee of Elections and present his notes in order to compare them with the printed depositions before the committee, there being a question as to an alleged alteration of the testimony. The House at the same time authorized the subcommittee to administer oaths.

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[1] First session Twentieth Congress, Journal, p. 474; Debates, p. 2157.

[2] First session Twenty-eighth Congress, Journal, p. 242; Globe, p. 153.

[3] First session Twenty-eighth Congress, Journal, p. 534; Globe, p. 363.

[4] First session Forty-seventh Congress, Journal, p. 1475; Record, p. 4913.

1821. An instance wherein the chairman of an investigating committee administered the oath to himself and testified.—On January 27, 1837,[1] in the select committee appointed to examine into the condition of the Executive Departments of the Government, and of which Mr. Henry A. Wise, of Virginia, was chairman, Mr. Abijah Mann, of New York, moved that Mr. Wise be sworn, as he wished to propound to him certain questions.

Mr. Wise was sworn by reading himself the oath and kissing the book.

1822. Form of oath administered to witnesses before a committee.—On January 27, 1837,[1] in the select committee appointed to examine into the condition of the Executive Departments of the Government, Mr. Henry A. Wise, of Virginia, the chairman, submitted, and the committee agreed to unanimously, the following form of oath to be administered to witnesses:

> You do solemnly swear that the evidence you shall give touching the subjects of investigation of this committee shall be the truth, the whole truth, and nothing but the truth; so help you God.

1823. The authority to administer oaths should be given by law rather than by rule of either House.—On April 5, 1876,[2] at the time of the impeachment of Secretary Belknap, Mr. George F. Edmunds, of Vermont, called attention to the fact that the rule of the Senate provided that the presiding officer of the Senate should administer the oath to the Members of the Senate sitting as a court. Mr. Edmunds said that he found no law which authorized the President of the Senate to administer this oath, and it seemed to him to stand on the rule alone. Therefore a doubt arose as to the constitutional requirement for the oath. That meant a legal and binding oath, of course, and it was understood that a legal oath was one administered by someone having authority under law to administer oaths. Therefore Mr. Edmunds proposed that the Chief Justice of the United States be invited to administer the oath. This motion was agreed to, and the oath was so administered.

1824. On February 5, 1884,[3] Mr. Nathaniel J. Hammond, of Georgia, from the Committee on the Judiciary, made a report on the bill to authorize the chairman of a subcommittee of any committee of the House to administer oaths. The report says:

> It may be true that chairmen of such subcommittees have frequently before administered oaths. But the authority is wanting, in the opinion of this committee; and even if it be doubtful, this act should pass, because in every indictment for perjury the indictment must set forth, among other things, by what court and before whom the oath was taken, averring such court or person to have competent authority to administer the same.[4]

1825. The rules provide for the rate of compensation of witnesses summoned to appear before the House or either of its committees.

Present form and history of Rule XXXVIL

Rule XXXVII provides:

> The rule for paying witnesses subpoenaed to appear before the House or either of its committees shall be as follows: For each day a witness shall attend, the sum of $2; for each mile he shall travel in coming to or going from the place of examination, the sum of 5 cents each way; but nothing shall be paid for traveling when the witness has been summoned at the place of trial.

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[1] Second session Twenty-fourth Congress, House report No. 194; Journal of the committee, p. 14.

[2] First session Forty-fourth Congress, Record, p. 2212.

[3] First session Forty-eighth Congress, House Report No. 194.

[4] Revised Statutes, section 5396.

This is the form adopted in 1880. It was taken from old Rule 138, which dated from May 31, 1872,[1] and is practically the same, except that the rule of compensation was then $4 a day instead of $2. The debate on February 27, 1880,[2] shows that $2 was fixed as being the rate paid witnesses in United States courts.[3]

The compensation of a witness residing in the District of Columbia was before the adoption of this rule fixed by statute at a sum not exceeding $2 a day.[4]

1826. Reference to the statute providing for taking testimony in private claims pending before a committee.—The statutes provide for the taking of testimony before masters in chancery on private claims pending before committees of the house.[5]

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[1] Second session Forty-second Congress, Cong. Globe, p. 4090.

[2] Second session Forty-sixth Congress, Record, p. 1206.

[3] On February 2, 1804 (first session Eighth Congress, Journal, p. 564; Annals, p. 966), the House by resolution provided that witnesses summoned before any committee during that session should be paid, out of the contingent fund, at the rate of $2.50 a day and 12½ cents mileage; and for every messenger sent after witnesses, $3 for every 20 miles.

[4] 19 Stat. L., p. 41.

[5] 20 Stat. L., p. 278.

Chapter LVI.

INVESTIGATIONS OF CONDUCT OF MEMBERS.

1827. A Member on his own responsibility presenting a statement of a charge against another Member, a resolution of investigation was held to be privileged.

A Member who had moved an investigation requested that he be not appointed one of the committee, as he would have to appear as a witness.

On September 4, 1888,[3] Mr. William D. Kelley, of Pennsylvania, as a question of privilege, offered the following resolution:

Resolved, That the special committee engaged in investigating the construction of the new Library building be directed to inquire and report to this House whether any Member of the House, acting by and for himself or in concert and combination with others, has sought by persuasion, intimidation, or other corrupt or improper means to influence or control the action of Mr. J. L. Smithmeyer, the architect of said building, in the selection, acceptance, or approval of inferior or improper materials to be used in the construction of said building.

Mr. Kelley supported this resolution by the statement on his own responsibility that there was evidence to sustain the charge and that he would produce it before the committee.

The Speaker[4] said:

The Chair thinks this is a privileged resolution as it relates to the conduct of a Member of the House.

The resolution was agreed to, with an amendment providing that the investigation should be by a select committee.

Mr. Kelley requested that he be not appointed on the committee, because he should have to appear before the committee.

The Speaker appointed the committee on September 8, Mr. Kelley not being included in the number.

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[1] As to the status, in reference to privilege, of a proposition to investigate the conduct of a Member at a time before he became a Member. Sec. 2725 of this volume.

[2] Instance wherein a committee failed to report the testimony at once. Sec. 2637 of this volume.

[3] First session Fiftieth Congress, Journal, p. 2724; Record, pp. 8258, 8415.

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

1828. Propositions to investigate charges against Members have been presented as questions of privilege.—On June 11, 1862,[1] Mr. John A. Bingham, of Ohio, as a question of privilege, submitted the following preamble and resolution:

Whereas information has been received by the Government that Hon. Benjamin Wood, a Representative in Congress from the State of New York and a Member of this House, has been engaged in communicating or attempting to communicate important intelligence to the Confederate rebels in arms against the United States: Therefore,

Be it resolved, That the Committee on the Judiciary inquire into the alleged conduct of said Benjamin Wood in the premises, and, to that end, that said committee be authorized to send for persons and papers and to examine witnesses, upon oath or affirmation, and to employ a stenographer at the usual compensation and make report to the House.

1829. On March 23, 1864,[2] Mr. Francis P. Blair, jr., of Missouri, as a question of privilege, presented a resolution which, as amended by the House, was agreed to, as follows:

Resolved, That a select committee of three Members be appointed by the Speaker, with power to send for persons and papers and investigate the charges made by Hon. J. W. McClurg, of Missouri, against F. P. Blair, jr., a Member of the House of Representatives from the First district of Missouri, of violating the laws in the matter of an alleged liquor speculation; and to inquire into the genuineness or falsity of the alleged order for the purchase of liquor, bearing date June 3, 1863.

1830. On January 18, 1865,[1] Mr. Green Clay Smith, of Kentucky, as a question of privilege, presented the following, which was considered and agreed to:

Whereas in a public document dated Lexington, Ky., September, 1864, signed by Brig. Gen. Speed S. Frye and John Mason Brown, colonel Forty-fifth Kentucky Volunteer Infantry, transmitted to the Kentucky legislature by Governor Thomas E. Bramlette, with his message of January 4, 1865, the Hon. Lucien Anderson, a Member of this body, is charged with corruption, bribery, and malfeasance in office: Therefore,

Resolved, That a committee of five Members of this House be appointed by the Speaker to investigate said charge, with power to send for persons and papers.

On March 3 the committee reported that "the charges were not sustained by the proof in the case."

1831. A newspaper article charging that an unnamed member of a certain committee was corrupt in his representative capacity was held to involve a question of privilege.—On February 18, 1859,[4] Mr. Mathias H. Nichols, of Ohio, as a question of privilege, submitted the following:

Whereas in the correspondence of the New York Daily Times, signed "S.," under date of the 15th of February, A. D. 1858, as also in the correspondence of other papers, it is charged that a member of the Committee on Accounts of this House made a bargain to receive money as a consideration for passing certain claims in said committee, and that subsequently the said member demanded the consideration for said service; and whereas it is further alleged that a member of said committee compelled claimants before said committee to agree to give a portion of the bills before said committee in consideration for their allowance by the same: Therefore,

Be it resolved, That a committee of five Members be appointed by the Speaker to investigate said charge or charges; said committee to report before the close of the present session of Congress.

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[1] Second session Thirty-seventh Congress, Journal, p. 841; Globe, p. 2666.

[2] First session Thirty-eighth Congress, Journal, p. 421; Globe, p. 1253.

[3] Second session Thirty-eighth Congress, Journal, pp. 111, 112; Globe, pp. 316, 1411.

[4] Second session Thirty-fifth Congress, Journal, pp. 438, 442, 568; Globe, pp. 1137, 1664.

Mr. Henry C. Burnett, of Kentucky, made the point of order that the resolution as drawn involved no question of privilege.

The Speaker [1] said:

The Chair is of the opinion, taking the preamble and resolution together, that they involve the privileges of the House.

The resolution and preamble were then agreed to.

On February 19 the Speaker appointed as the committee Messrs. Nichols, George Eustis, jr., of Louisiana; William G. Whiteley, of Delaware; and Clark B. Cochrane, of New York.[2]

On February 25, 1859, the committee reported, giving the testimony, and stating that very early in the examination the fact was developed that the person referred to in the resolution was John A. Searing, of New York, chairman of the Committee on Accounts. Thereupon the committee, by unanimous vote, determined to suspend the examination until Mr. Searing could be informed that he was at liberty to attend the examination, and confront and cross-examine the witnesses. Mr. Searing accordingly appeared but did not avail himself of the privilege of cross-examination of the witnesses. The committee recommended the adoption of the following resolution:

Resolved, That, upon a review of all the testimony taken in the matter of the charge against John A. Searing, a Member of this House from the State of New York, and chairman of the Committee on Accounts, the evidence would not warrant a conviction nor subject him to expulsion.

When this resolution was considered on March 3, Mr. William H. Kelsey, of New York, made a point of order against the report on the ground that the committee had no authority to try Mr. Searing, but that, under the parliamentary law, they should either have reported that there was no ground for the charges, or that there was probable cause, and recommended that further proceedings be instituted.

The Speaker said:

The Chair overrules the question of order upon the ground, in the first place, that it was competent for the committee to report such a resolution as they should see proper in reference to the case. Upon the latter point made by the gentleman from New York the Chair would remark that it was decided by a former House, and decided adversely to the view taken by the gentleman.

The resolution was then agreed to, after a motion to lay it on the table had been decided in the negative.

1832. A Member who had been defamed in his reputation as a Representative by a newspaper article presented the case as one of privilege, and the House ordered an investigation.—On January 10, 1871,[3] Mr. James Brooks, of New York, rising to a question of privilege, read to the House an article from a newspaper in which the editor, Hugh J. Hastings, made charges affecting his character as a Representative. Mr. Brooks at the same time submitted a paper purporting to be the affidavit of the said Hastings, wherein the latter had confessed

[1] James L. Orr, of South Carolina, Speaker.

[2] This is an instance of the mover of a resolution appointed chairman of the committee although he did not belong to the majority party in the House.

[3] Third session Forty-first Congress, Journal, pp. 131, 161, 178; Globe, pp. 416, 528, 590.

himself, while under indictment for libel, as a defamer of character. Mr. Brooks asked an investigation by a committee of the House.

A discussion arose as to how far the House would be justified in going in a case where it seemed so evident that the Member had been attacked by a man whose reliability was in question. It was urged that an attack from such a source should not be noticed by the House. Mr. Oliver J. Dickey, of Pennsylvania, proposed the following:

Resolved, That it would be unworthy the dignity of the House and unjust to the character of the gentleman from New York, Mr. Brooks, to found an investigation on charges made by one of such a character as his accuser.

On the other hand, it was urged that definite charges of corruption had been made against Mr. Brooks, and that he was entitled to an investigation. After further debate, on motion of Mr. Horace Maynard, of Tennessee,

Ordered, That the original resolution, together with the various amendments, be referred to a select committee of five Members, with power to send for persons and papers, and with leave to report at any time.

On January 16 a memorial of Mr. Hastings, denying the authenticity of the affidavit and protesting against the jurisdiction of the House in the matter of the controversy between himself and Mr. Brooks, was presented and referred to the select committee.

On January 18, Mr. John A. Bingham, of Ohio, from the select committee, reported a resolution, which was agreed to by the House, that Mr. Brooks was exonerated of the charges by reason of the refusal of said Hastings to testify before the select committee as to the truth of the accusations.

1833. The House has sometimes ordered investigations on the basis of general and more or less vague newspaper charges.—On June 26, 1862,[2] Mr. E. P. Walton, of Vermont, as a question of privilege, submitted the following:

Whereas the publishers of the New York Tribune, on the authority of one of their correspondents, have declared and published that "offers of a pecuniary nature" have been made, apparently for the purpose of obtaining the action of this House improperly, corruptly, and criminally, which charge, if true, involves a breach of the privileges of the House, and if false in respect to any Members of this House or others who are implicated is a breach of the privileges accorded to reporters by the courtesy of the House: Therefore,

Resolved, That the Committee on the Judiciary be instructed forthwith to inquire by whom and on what authority such charge, and any other contained in the article referred to, has been made, and to make thorough investigation as to their truth or falsity and report all the evidence to the House, with their opinion thereon, and such resolutions as to them shall seem meet, and that said committee have power to send for persons and papers and report at any time.

This resolution was agreed to, yeas 102, nays 8.

1834. On December 5, 1878,[2] the House ordered an investigation of a charge made by a Washington newspaper that there had been corruption in regard to the passage of certain District of Columbia legislation, and that a "Vermont Representative," a "Chicago Member," and a "Maryland Member" had received certain amounts of money corruptly.

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[1] Second session Thirty-seventh Congress, Journal p. 941; Globe, p. 2954.

[2] Third session Forty-fifth Congress, Journal, p. 41; Record, pp. 41, 42.

1835. In 1846 the Senate investigated a general newspaper charge of corruption.—On March 12, 1846,[1] the Senate raised a select committee to investigate a general charge of corruption made against a portion of the Senate by a newspaper in Washington. This charge mentioned no individuals by name, but charged a portion of the Senate with having sold out to England in the settlement of the Oregon boundary question.

1836. A committee which had been empowered to investigate charges of corruption on the part of its members recommended that the evidence be transmitted to the Attorney-General.—On January 22, 1903,[2] Mr. George E. Foss, of Illinois, announcing that he was acting on instruction from the Committee on Naval Affairs, presented this resolution, which was agreed to by the House:

Whereas information has come to the Committee on Naval Affairs, through a member of said committee, of an attempt to corruptly influence his action respecting proposed legislation pending before said committee and the House:

Resolved, That the Committee on Naval Affairs, or such subcommittee thereof as said committee may appoint, be, and it is hereby, authorized and directed to fully investigate said matter, and for such purpose it is hereby authorized and empowered to send for persons and papers, to compel the attendance of witnesses, and to administer oaths. Said committee shall have authority to report at anytime, and the expenses incurred hereunder shall be paid out of the contingent fund of the House on vouchers approved by the chairman.

On February 3[3] Mr. Robert W. Tayler, of Ohio, submitted the report, which presented the testimony and the following conclusions:

Your committee has most carefully heard and considered the testimony taken before it, and upon the same has come to the following conclusions:

1. That the charge made by Mr. Lessler that an attempt had been made to corruptly influence his action respecting proposed legislation is sustained by the evidence, such attempt, in the opinon of the committee, having been made by one Philip Doblin, on his own initiative and responsibility, with the idea of making money for himself if he should find Mr. Lessler corruptly approachable.

2. That there is no evidence to sustain the charge of an attempt by Lemuel E. Quigg to corruptly influence a member of the committee on Naval Affairs respecting proposed legislation pending before said committee and the House.

3. That there is no evidence to sustain the charge of an attempt by the Holland Submarine Boat Company or any of its agents to corruptly influence a member of the Committee on Naval Affairs respecting proposed legislation before said committee and the House.

In view of the foregoing, we recommend that the clerk of the committee be directed to certify to the Attorney-General of the United States a copy of the testimony taken at the hearing, with a request that he take such action as the law and the facts warrant.

The report, which was referred to the House Calendar, was not acted on by the House.

1837. The investigation of charges against Stanley Matthews, a Senator from Ohio.

Form of resolution providing for investigation of charges against a Senator.

The Senate requested of the House and received a copy of testimony taken before a House committee and implicating a Senator.

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[1] First session Twenty-ninth Congress, Globe, p. 488.

[2] Second session Fifty-seventh Congress, Journal, p. 149; Record, p. 1070.

[3] House Report No. 3482.

A Senate committee, with authority to take testimony in the recess between two sessions of the same Congress, was yet unable to compel testimony from a recalcitrant witness.

Stanley Matthews, a Senator from Ohio, was sworn and examined before a Senate committee appointed to investigate his conduct.

A Senate committee determined that a witness summoned to testify before it was not entitled to counsel.

On June 5, 1878,[1] in the Senate, Mr. Stanley Matthews, of Ohio, rose to a question of privilege, and having addressed the Senate upon the subject of certain statements made elsewhere, calculated to reflect upon his character and standing as a Member of the Senate, submitted the following resolution; which was considered by unanimous consent and agreed to:

Resolved, That a select committee of seven Senators be appointed to inquire into and consider all things touching the matter stated and referred to by the Senator from Ohio [Mr. Matthews] and the events connected therewith, and particularly what connection, if any, that Senator had with any real or pretended frauds or other wrongs committed in the conduct and returns of the election in the State of Louisiana in 1876, and with any promises of protection or reward, if any, made by anyone to one James E. Anderson or others, in consideration of, or connection with, any official conduct by said Anderson or others, in relation to said election or the returns thereof; and into all the circumstances of any recommendation by the said Senator of the said Anderson for appointment to office; and that said committee have power to send for persons and papers, to employ a clerk and stenographer, and have leave to sit during the recess.

Ordered, That the committee be appointed by the President pro tempore.

The committee appointed were: Messrs. George F. Edmunds, of Vermont; William B. Allison, of Iowa; John J. Ingalls, of Kansas; George F. Hoar, of Massachusetts; David Davis, of Illinois; William P. Whyte, of Maryland, and Charles W. Jones, of Florida.

On June 19, on motion of Mr. Allison:

Resolved, That the select committee appointed under the resolution of the 5th instant to make inquiry concerning the alleged connection of Senator Matthews with matters relative to the late Presidential election in Louisiana, in exercising the power heretofore granted to sit during the recess of Congress, may hold its sessions at such place or places as it shall deem most convenient for the purposes of the investigation.

On December 10, 1878, on motion of Mr. Allison:

Resolved, That the House of Representatives be respectfully requested to transmit to the Senate a copy of the testimony of one James E. Anderson relating to the Hon. Stanley Matthews, a Member of the Senate from the State of Ohio, understood to have been taken before one of the committees of the House of Representatives.

This testimony was duly communicated to the Senate by message from the House, and was referred to the select committee.

On March 1, 1879, Mr. Allison submitted the report of the committee, which was a recital of the proceedings of the committee:

The committee held its first meeting on the 11th June, 1878, and determined, on the 13th of June, to summon James E. Anderson, named in said resolution. Mr. Anderson appeared, but was not

[1] Second session Forty-fifth Congress, Record, p. 4119; Senate Document No. 11, special session Fifty-eighth Congress, pp. 670–691.

examined, for the reason that his presence was requested before a committee of the House, known as the Potter committee, as appears from the following letter addressed to the acting chairman:

HOUSE OF REPRESENTATIVES,
Washington, D. C., June 13, 1878.

MR. Senator Allison, *Chairman, etc.:*

Mrs. Jenks is about to be put on the stand, and we would prefer, if entirely agreeable to the Senate committee, that Mr. Anderson should be present during her examination. This is important to the House committee. At any other time take him.

W. R. MORRISON,
Acting Chairman.

The committee again met on the 21st of June, when Anderson, the witness, again appeared and refused to testify; the circumstances of his refusal are fully set forth in the printed proceedings of the committee herewith reported. Congress having adjourned on the 20th day of June, 1878, the committee had no power to compel the witness, Anderson, to testify. On motion of Mr. Whyte, the committee adjourned to meet again when called by the chairman of the committee, it being then understood that no meeting would be called during the recess of Congress, as the committee had no power to enforce its orders in vacation. The committee again met on the 10th day of December, 1878. The chairman stated that he had received a telegram from James E. Anderson, dated Eureka, Nev., saying that he would now appear before the committee if summoned. On motion of Mr. Edmunds, it was

"Ordered, That there be reported to the Senate the following:

"'Resolved, That the House of Representatives be respectfully requested to transmit to the Senate a copy of the testimony of one James E. Anderson relating to the Hon. Stanley Matthews, a Member of the Senate from the State of Ohio, understood to have been taken before one of the committees of the House of Representatives.'

"Mr. Edmunds submitted a motion that James E. Anderson be reported to the Senate as in contempt of its authority for refusing to testify before this committee, and that the Senate be requested to take the proper proceedings to secure his attendance.

"The motion was not agreed to, there being three ayes: Messrs. Edmunds, Davis, and Whyte. The noes were: Messrs. Allison (chairman), Hoar, and Ingalls. Mr. Jones, absent.

"On motion of Mr. Whyte, the committee adjourned to meet at the call of the chairman"—

It being understood that the committee should await the action of the House on the resolution calling for the testimony of Anderson taken by the House committee, which resolution was reported to the Senate on the 10th of December, 1878, and agreed to. On the 28th day of January, 1879, the House of Representatives transmitted to the Senate the testimony of James E. Anderson in pursuance of the request made by resolution of the Senate heretofore referred to, passed on the 10th day of December 1878. This testimony was on the 28th day of January, 1879, referred to this committee and ordered to be printed. On the 7th February the committee met pursuant to the call of the chairman—

"Present: The chairman (Mr. Allison), Mr. Edmunds, Mr. Hoar, Mr. Davis, and Mr. Whyte"—

When the following proceedings were had:

"On motion of Mr. Edmunds, Senator Matthews was directed to be notified that the committee had received a copy of the testimony of James E. Anderson before a select committee of the House of Representatives, and was ready to hear what he had to say on the subject.

"The chairman having transmitted such notification, Hon. Stanley Matthews appeared before the committee.

Hon. Stanley Matthews was then sworn and examined.

The committee append to their report the records of the committee[1] showing the refusal of Mr. Anderson to testify:

FRIDAY, *June 21, 1878.*

The committee met pursuant to call.

Present: Messrs. Allison (acting chairman), Hoar, Ingalls, Davis, Whyte, and Jones.

Hon. Stanley Matthews was present by invitation.

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[1] Pages 686–691 of Senate Document No. 11.

James E. Anderson, who had been summoned as a witness, appeared.

The ACTING CHAIRMAN. Will you be sworn?

Mr. ANDERSON. I will state to the committee before I take the oath that I desire to be represented here by counsel.

The ACTING CHAIRMAN. You desire to be represented by counsel?

Mr. ANDERSON. I desire to be represented by counsel.

The ACTING CHAIRMAN. A witness!

Mr. ANDERSON. A witness. I desire to be represented by counsel.

Mr. HOAR. Mr. Chairman, I suppose he does not desire to have counsel present before we determine the question whether he shall be sworn.

Mr. ANDERSON. I should like to have the question settled before I am sworn as to whether I can have counsel or not.

Mr. DAVIS. That is a matter we can dispose of hereafter. [To the acting chairman.] You can swear him and tell him we can discuss this matter afterwards. We can not dispose of this question now, probably.

The ACTING CHAIRMAN. Have you arranged for your counsel, if you have counsel?

Mr. ANDERSON. I will by tomorrow.

Mr. INGALLS. Mr. Chairman, I hope there will be no delay about swearing the witness.

Mr. DAVIS. Oh, no, Sir.

Mr. INGALLS. This is a question for the committee to discuss.

The ACTING CHAIRMAN. You will be sworn, Mr. Anderson.

The oath was administered.

The WITNESS. Now, I renew my request.

The ACTING CHAIRMAN. That we shall be obliged to consider.

Mr. DAVIS. With closed doors, of course.

The ACTING CHAIRMAN. I think we had better settle the question now.

The WITNESS. Can you excuse me for ten minutes?

The ACTING CHAIRMAN. No, we can not excuse you just at this moment.

The room was therefore cleared of all but members of the committee. After some time spent in deliberation the doors were reopened.

The ACTING CHAIRMAN. Mr. Anderson, the committee have decided that you are not entitled to counsel.

The WITNESS. I simply desire to say that I have no statement to make and no questions to answer.

Later, after Mr. Anderson had reiterated his request for counsel and had declined to testify otherwise, the following occurred:

The committee room was cleared for deliberation; and after some time spent in consultation, Mr. Matthews was invited to attend, and he accordingly appeared.

The ACTING CHAIRMAN. You have heard, Mr. Matthews, what Mr. Anderson has said. Have you any suggestion to make to the committee in reference to going on without Mr. Anderson's testimony?

Mr. DAVIS. In other words, you know that the committee decided that the case, whatever it was, should be made out, and then you should be put on the stand. You have seen how this ends for the present. Have you any suggestion to make? Until the Senate meets we have no way of compelling his attendance.

Mr. MATTHEWS. I dislike very much to take the responsibility of making any suggestions to the committee on the subject. I am ready here to-day, and shall be at any future time that the convenience of the committee shall fix, for the purpose of assisting the committee and facilitating it in any way within my power in the objects and purposes for which it was originated and authorized.

The only course, other than that of waiting until the committee can have the power of the Senate to compel the attendance of the witness, is to obtain from the committee of the other House the statements which he has already made under oath before it, and which constituted the ground on the basis of which I asked the Senate for the appointment of this committee. In case the committee think that that is sufficient for the purpose of the investigation with which they are charged, and obtain that

testimony, I am ready to go on as if it had been delivered again here. But whether the committee ought to take that course, I think, is a question which the committee ought to decide for themselves. I do not wish to be considered as giving any opinion or advice or expressing any wish in regard to that matter.

The ACTING CHAIRMAN. I think we can now relieve you from attendance, Mr. Matthews.

Mr. Matthews thereupon retired, and the doors were thrown open to the public generally.

The ACTING CHAIRMAN. Mr. Reporter, will you state what took, place a moment ago, when Mr. Matthews was called in?

The stenographer read the statement made by Mr. Matthews.

The ACTING CHAIRMAN. The reporter has stated all that took place. Stand up, Mr. Anderson. [James E. Anderson rose.] The committee have decided that we will require the testimony of Mr. Anderson; and I now wish to ask you, Mr. Anderson, if you are willing to answer such questions as may be propounded to you by the committee or any member of it?

Mr. ANDERSON. I am not.

Q. You still persist?—A. I still persist.

Q. In refusing to answer any question pertaining to the matter before this committee?

Mr. ANDERSON. I do.

Q. And you therefore set the committee at defiance?

Mr. WHYTE. Mr. Chairman, in the absence of the Senate we have no power to punish Mr. Anderson for the contempt in refusing to answer our questions. Under these circumstances I move that this committee adjourn, subject to the call of the chairman.

The motion was agreed to.

1838. The investigation of charges against L. F. Grover, a Senator from Oregon.

Form of resolution for authorizing investigation of charges against a Senator.

Discussion as to the rules which should govern the admission of evidence before a legislative committee of investigation.

On March 9, 1877,[1] in the Senate, Mr. La Fayette Grover, of Oregon, presented the following, which was agreed to:

Resolved, That the thirteen memorials heretofore presented to the Senate by Hon. J. H. Mitchell, purporting to be signed by 369 citizens of the State of Oregon, reciting that it was currently reported and generally believed that the election of L. F. Grover as a Senator of the United States was procured by bribery, corruption, and other unlawful means in the legislature of the State of Oregon, and that the said L. F. Grover did corruptly and fraudulently issue a certificate of election to one E. A. Cronin as a Presidential elector on December 6, 1876, and that the said L. F. Grover did bear false witness before the Senate Committee on Privileges and Elections on or about January 6, 1877, be now referred to the Committee on Privileges and Elections, who shall thoroughly investigate and report upon the foregoing charges, with power to send for persons and papers.

On March 14,[2] Mr. John H. Mitchell, of Oregon, offered the following:

Resolved, That the Committee on Privileges and Elections be authorized to designate a subcommittee of three of its members who shall have authority to sit in the vacation for the purpose of taking testimony and making report to full committee at commencement of next session in pursuance of the resolution of the Senate authorizing an investigation into certain charges preferred against La Fayette Grover, Senator from Oregon; and such subcommittee shall have all the powers to send for persons and papers and administer oaths that the full committee now has.

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[1] Special session of Senate, Forty-fifth Congress, Record, p. 39.

[2] Record, p. 41.

On March 17,[1] the resolution was considered, and Mr. Eli Saulsbury, of Delaware, proposed this amendment:

Strike out all after the word "resolved" and in lieu thereof insert:

That the Committee on Privileges and Elections, to which was referred a resolution of the Senate relating to the election of La Fayette Grover as Senator from the State of Oregon, be, and the said committee is, instructed to appoint the judge of the fourth judicial district of said State a commissioner to take testimony relating to the matters referred to in said resolution, and the said commissioner so appointed shall have power and authority, and it shall be his duty, to issue subpoenas for witnesses as well on behalf of the said La Fayette Grover as against him, and to give due notice of the time and place when and where the testimony will be taken. The testimony so taken shall be forwarded to the said committee, which shall report the same, with their conclusions thereon, at the next regular session of the Senate.

On motion by Mr. Mitchell to amend the amendment by striking out all after the word "instructed" and in lieu thereof inserting:

To appoint from its members a subcommittee of three, who shall take testimony relating to the matters referred to in said resolution and report to the full committee on the first Monday in December next; and for such purpose said subcommittee shall have power to sit in vacation; and if they deem expedient, go to the State of Oregon; and such committee shall have power to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the powers of the general committee to administer oaths and send for persons and papers; and the expenses of such subcommittee, not exceeding $10,000, shall be paid out of the contingent fund of the Senate, upon vouchers to be approved by the chairman of such subcommittee.

After debate, it was determined in the affirmative.

On motion by Mr. Saulsbury to further amend the amendment by adding thereto the following:

And that the said L. F. Grover shall be notified of the sessions of the said subcommittee, with the right to be present at the examination of witnesses.

It was determined in the affirmative.

The amendment of Mr. Saulsbury, as amended, was then agreed to; and,

On the question to agree to the resolution as amended, as follows:

Resolved, That the Committee on Privileges and Elections, to which was referred a resolution of the Senate relating to the election of La Fayette Grover as Senator from the State of Oregon, be, and the said committee is, instructed to appoint from its members a subcommittee of three, who shall take testimony relating to the matters referred to in said resolution, and report to the full committee on the first Monday in December next; and for such purpose such subcommittee shall have power to sit in vacation, and, if they deem expedient, go to the State of Oregon; and such subcommittee shall have power to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the power of the general committee to administer oaths and send for persons and papers; and the expenses of such subcommittee, not exceeding $10,000, shall be paid out of the contingent fund of the Senate upon vouchers to be approved by the chairman of such subcommittee; and that the said L. F. Grover shall be notified of the sessions of the said subcommittee, with the right to be present at the examination of witnesses.

It was determined in the affirmative, yeas 39, nays 8.

On June 15, 1878,[2] the committee submitted a report with a recommendation that the committee be discharged, the evidence not, in their opinion, sustaining the charge. Mr. Eli Saulsbury, of Delaware, in views filed by him as a part of the

[1] Record, pp. 43–46.

[2] Second session Forty-fifth Congress, Senate Report No. 540.

report, concurred with the findings of the committee, but criticised its method of procedure:

The undersigned, as a member of the subcommittee charged with the duty of making the investigations required by the first-mentioned resolution, begs leave respectfully to submit his own conclusions from the evidence taken.

An examination of the testimony will show that the widest latitude was given to the investigation by the subcommittee. Witnesses were not restricted to matters within their own knowledge, but were allowed to testify as to their beliefs and suspicions, unsupported by any facts, and to narrate hearsay evidence of no higher character than the fugitive rumors which are not unfrequently current on the streets of a State capital preceding the election of a United States Senator.

It may be at times impossible for a legislative committee to apply to an investigation with which it is charged the rules which govern the admissibility of evidence in courts of justice, but the undersigned must be allowed to express his conviction that in an investigation into the truth of allegations affecting the personal honor of a Member of the Senate, as well as his right to a seat in the body, no such wide departure should be allowed in the admission of testimony as the evidence in this case will show was permitted. While Senator Grover can have no cause to regret the latitude that was given to the inquiry into matters alleged against him or the regularity of his election, by reason of anything elicited against him or those to whom he owes his election to the Senate, it ought not to be allowed to become a precedent to govern similar investigations in the future.

The undersigned objected at the very commencement of the investigation to the latitude in the examination of witnesses which is usually allowed in investigations by legislative committees, and insisted on an observance, as far as possible, of the rules which obtain in courts of justice in that regard. Had his suggestion been adopted in practice, the testimony in this case would have been compressed into a very narrow compass and would have excluded a large mass of irrelevant testimony taken by the subcommittee.[1]

1839. A Senator, having been indicted by a grand jury, asked and obtained an investigation by a committee of the Senate.

A question as to how far a legislative investigating committee should be governed by the rules of evidence.

A decision by a court that the statute prohibiting a Senator from receiving compensation for procuring an office for another does not apply to a Senator-elect.

On February 1, 1904,[2] in the Senate, Mr. Charles H. Dietrich, of Nebraska, said:

Mr. President, I rise to a question of personal privilege. By a Federal grand jury at Omaha I have recently been indicted for alleged violation of the laws of the United States, and on a trial of the indict-

[1] In 1858 (Election Cases, S. Doc. No. 11, special session 58th Cong., p. 949; 1st sess. 35th Cong., S. Report No. 314, Globe, pp. 2075–2079, 2123, 2163) the Senate considered the case of Henry M. Rice, Senator from Minnesota. May 12, 1858, the credentials of Mr. Rice were presented, and he took his seat in the Senate. On the same day the following resolution was submitted by Mr. Harlan, of Iowa, for consideration: "*Resolved,* That a committee be appointed to investigate the allegation of fraud and extortion made against Henry M. Rice as agent of the Secretary of War in the sale of the Fort Crawford Reservation, by settlers on said reservation, and that said committee have power to send for persons and papers." This resolution was amended so that the Committee on Military Affairs were instructed to make the investigation. That committee reported June 9, 1858, that "after an examination of all the testimony adduced, they do not find that it sustains any allegation which imputes criminality to or arraigns the integrity of Mr. Rice, and finding nothing in the developments of the investigation which, in the opinion of the committee, tend to disqualify him for a seat in the Senate, they herewith submit the record in the case as a part of this report, and ask to be discharged from the further consideration of the subject." The report was unanimously agreed to.

[2] Second session Fifty-eighth Congress, Record, p. 1447.

ments before a Federal court at Omaha was discharged by the Federal judge without the cause being heard upon its merits, upon the ground that my acts were no violation of the Federal law.

Before taking further part in the deliberations of this body I owe a duty to the Senate, whose honor has been assailed, to the State which in part I represent, whose credit has been attacked, and to myself, whose integrity has been impugned. If guilty of the least of these charges, I deserve to be driven from this high place in disgrace and receive the severest penalty of the criminal law. Confident in my innocence, I desire to submit the whole matter to the Senate.

Thereupon Mr. Dietrich submitted a resolution, which was agreed to, as follows:

Resolved, That the President pro tempore shall appoint a committee of five to investigate and report to the Senate all the facts connected with the appointment of Jacob Fisher as postmaster at Hastings, Nebr., and the leasing of the building used at this time for a post-office in that city, and particularly to investigate and report as to the action of Charles H. Dietrich, a Senator from Nebraska, in connection with such appointment and leasing.

The President pro tempore[1] appointed as the committee Messrs. George F. Hoar, of Massachusetts; Orville H. Platt, of Connecticut; John C. Spooner, of Wisconsin; Francis M. Cockrell, of Missouri, and Edmund W. Pettus, of Alabama.

On February 2 the Senate agreed to this resolution, which had been presented on the preceding day by Mr. Hoar:

Resolved, That the special committee appointed to inquire into certain charges affecting the Hon. Charles H. Dietrich, a Senator from the State of Nebraska, be authorized to employ a clerk and stenographer and, by themselves or any subcommittee of their number, to sit during the sessions of the Senate, to send for persons and papers, and to administer oaths.

On April 14[2] Mr. Platt presented the report of the committee, which found that—

Upon full consideration of all of the evidence, the committee is of opinion that Senator Dietrich has not been guilty of any violation of the statutes of the United States or of any corrupt or unworthy conduct relating either to the appointment of Jacob Fisher as postmaster at Hastings, Nebr., or the leasing of the building in question to the United States for the purposes of a post-office.

As to method of procedure the report says:

The committee, with the consent of Senator Dietrich, in order that no possible fact bearing upon the matter might be overlooked, received the statements of all of the witnesses in full, not regarding strictly the rules of evidence in that respect.

It will appear that the committee, with such consent of Senator Dietrich, admitted not only such evidence against him as would have been competent in a court of justice, but also a good deal of hearsay testimony—being all that was brought to their attention—as a possible clew to further information. The committee did not determine how far this proceeding would have been justified for any reason without such consent, even if they had carefully refrained from attaching any weight to it in their final decision; but it, in fact, did not in the least tend to shake or affect the conviction they have reached.

As to the charges against Senator Dietrich the report says:

Senator Dietrich was indicted in the district court of Nebraska in five different cases, afterwards remitted to the circuit court,[3] the record in two of which is printed with the testimony taken by the

[1] Record, p. 1499.

[2] Record, pp. 4800, 4801.

[3] In delivering the opinion of the court, Judge Van Devanter said:

"Section 1781 of the Revised Statutes, under which this action is brought, contains two distinct and separate prohibitions. The first paragraph, under which this indictment is brought, provides that 'every Member of Congress, officer, or agent of the Government' who commits certain acts shall be guilty of a misdemeanor, and provides for certain punishment. The other paragraph provides that

committee in this case, which record, as the committee thinks, fairly presents all the charges against him, so that the printing of the record in the other three cases is unnecessary.

In the first of the cases, the record of which is printed, Senator Dietrich is charged in effect that while a Senator in Congress from the State of Nebraska he took, received, and agreed to receive a bribe from Jacob Fisher for procuring and aiding to procure for said Fisher the office of postmaster at Hastings, Nebr. To this indictment Mr. Dietrich pleaded not guilty, and a jury was impaneled to try the case. After the opening statement of the United States district attorney, in which he admitted that the date of the offenses charged was prior to the taking of the oath of office of Senator by Mr. Dietrich, a verdict of acquittal was directed by Circuit Judge Van Devanter, who held that the statute in question did not apply to a Senator elect, and a verdict of acquittal was accordingly rendered.

In the second case, the record of which is printed, it is charged that Mr. Dietrich, while a Senator in Congress from the State of Nebraska, did hold and enjoy a contract theretofore entered into between himself and the United States for the use and occupation, for the purposes of a United States post-office at Hastings, Nebr., of a lot and building owned by the defendant. In this case a demurrer was entered, argued, and overruled, but subsequently, on the motion of the district attorney, a nolle prosequi was entered, and Senator Dietrich was discharged.

One of the other cases against Senator Dietrich differs from the first, the record of which is printed, only in the manner of charging the same offenses alleged in the first case, and in this case a nolle prosequi was also entered, upon the motion of the district attorney, and Senator Dietrich was discharged.

In the other two cases Senator Dietrich and Mr. Fisher were indicted jointly for a conspiracy to violate section 1781 of the Revised Statutes, the ground of such conspiracy being the alleged agreement between Messrs. Dietrich and Fisher, which was set up as a separate offense in the first case referred to. In these two cases demurrers were entered and sustained, upon the ground that the indictment did not charge a conspiracy, but only separate offenses against Dietrich and Fisher.

So that, eliminating technicalities, the offenses charged against Senator Dietrich were—

"First. That as Senator he received from Fisher either the sum of $1,300 or $500, or the equivalent of the same in property, for procuring for said Fisher the office of postmaster at Hastings; and

"Second. That as Senator he held and enjoyed a contract with the Government."

The statute which Senator Dietrich was alleged to have violated in the first case referred to is section 1781 of the Revised Statutes, as follows:

"Every Member of Congress or any officer or agent of the Government who, directly or indirectly, takes, receives, or agrees to receive from any person for procuring, or aiding to procure, any contract, office, or place from the Government or any department thereof, or from any officer of the United States, for any person whatever, or for giving any such contract, office, or place to any person whomsoever, * * * shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years and fined not more than $10,000. * * * And any Member of Congress or officer convicted of a violation of this section shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Govermment of the United States."

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every Member of Congress, officer, or agent of the Government 'after his election,' etc., shall be liable to the penalty provided for the commission of such acts."

The opinion then holds that a man elected to Congress does not actually become a member of that body until he has qualified and taken the oath at the bar of the House to which he has been elected. The last paragraph, said the court, refers to acts which may be committed by Members of Congress after their qualification or acceptance of duties of their offices.

"The two Houses of Congress under the Constitution," says the court, "are the only judges of whom shall sit as members of their respective bodies. The district attorney has admitted that there was no session of Congress from March 28, the date of the election by the legislature of Senator Dietrich, and December 2, the date of the convening of Congress. Until the latter date there could be no question raised as to his actual membership in the Senate, nor could he qualify before that body until that time. Until then it was not known whether he would be permitted to enter upon his duties as a United States Senator and as the representative of the people of Nebraska before that body.

"Our opinion, therefore, is that this defendant was not a United States Senator at the time of the acts charged in this indictment, within the inhibition of this statute. The jury is instructed to find a verdict of not guilty."

The statute which he was alleged to have violated in the second case is section 3739 of the Revised Statutes, which is here quoted, together with the pertinent sections, 3740 and 3741:

"SEC. 3739. No Member of or Delegate to Congress shall directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States by any officer or person authorized to make contracts on behalf of the United States. Every person who violates this section shall be deemed guilty of a misdemeanor, and shall be fined $3,000. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced on the part of the United States, in consideration of any such contract or agreement, it shall be forthwith repaid; and in case of refusal or delay to repay the same, when demanded by the proper officer of the Department under whose authority such contract or agreement shall have been made or entered into, every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law for the recovery of any such sum of money so advanced.

"SEC. 3740. Nothing contained in the preceding section shall extend, or be construed to extend, to any contract or agreement made or entered into or accepted by any incorporated company where such contract or agreement is made for the general benefit of such incorporation or company, nor to the purchase or sale of bills of exchange or other property by any Member of (or Delegate to) Congress where the same are ready for delivery and payment thereof is made at the time of making or entering into the contract or agreement.

"SEC. 3741. In every such contract or agreement to be made or entered into or accepted by or on behalf of the United States there shall be inserted an express condition that no Member of (or Delegate to) Congress shall be admitted to any share or part of such contract or agreement or to any benefit to arise thereupon."

The committee found no evidence to sustain the charge that the postmaster in question had been appointed for a corrupt consideration.

As to the rental of the building the committee found the transaction proper and not open to criticism.

1840. When testimony elicited by a committee involves a Member, the committee is to report to the House that the Member may be heard and special authority be given to inquire concerning him.—Section XI of Jefferson's Manual provides:

When a committee is charged with an inquiry, if a Member prove to be involved, they can not proceed against him, but must make a special report to the House; whereupon the Member is heard in his place, or at the bar, or a special authority is given to the committee to inquire concerning him. (9 Grey, 523.)

1841. A committee charged with an investigation sometimes adopts rules to govern the examination of witnesses and the use of the testimony by persons implicated.—On March 3, 1838,[1] the select committee appointed to investigate the causes of the death of Jonathan Cilley, of Maine, agreed to the following resolution:

Resolved, That the following interrogatory be put to all the witnesses who shall be examined before this committee:

Please state what you know in regard to the causes which led to the death of the Hon. Jonathan Cilley, late a Member of the House of Representatives, and the circumstances connected therewith; and if present on the field, state further all that transpired, in the order in which it occurred; what were the propositions made for settling the difference; and what was said and responded on each proposition, in the words of the persons speaking.

[1] Second session Twenty-fifth Congress, House Report No. 825, pp. 150, 159–161.

On March 14, 1838, the committee agreed to the following:

The committee having, in reply to the general interrogatory propounded, received written statements from Messrs. Crittenden and Pierce, of the Senate, Messrs. Wise, Bynum, Jones, Menefee, Duncan, Hawes, and Calhoun, of the House of Representatives, and Messrs. Claiborne, Schaumberg, Foltz, Fuller, and Brown, in relation to the causes which led to the death of the Hon. Jonathan Cilley, and the circumstances connected therewith, adopts the following rules for the examination of witnesses:

Resolved, That the clerk shall prepare three files of all the testimony above mentioned; one of which shall be given to Mr. Graves, one to Mr. Wise and the two friends of Mr. Graves, who acted with him on the field, and one to Mr. Jones and the two friends of Mr. Cilley who acted with him on the field, in the confidence that they will be used for the sole purpose of preparing additional interrogatories.

2. The further examination shall be by written interrogatories, prepared and submitted to the committee, and which, if approved, shall be propounded to the witnesses by the chairman, and his answer immediately taken down by the Clerk, or written by the witness, in the presence of the committee.

3. The order of proceeding shall be as follows:

1. The witness being called before the committee, the statement made by him shall be read by the Clerk, if he desire it.

2. The additional interrogatories shall then be proposed.

3. Interrogatories, in conclusion, may then be proposed by the committee.

4. These being answered, the witness shall subscribe his testimony, and his examination be finally closed.

Resolved, That this committee will grant leave to any person who may be implicated to propound interrogatories in the usual mode, and the evidence taken shall be open to his examination for that purpose, in the hands of the clerk.

1842. On January 20, 1839,[1] the select committee appointed to investigate the defalcations in the custom-house at New York, adopted the following:

Resolved, That the Member who shall name or cause a witness to be summoned shall have the right to proceed first with the examination of such witness; and when said Member shall have concluded, the Members, in alphabetical order, shall have the right to examine the witness. No Member having the witness under examination shall be interrupted by a question from another Member, without his consent; and after each has been called for examination in chief, the Members shall again be called alphabetically for cross-examination, until all have concluded.

1843. Charges against a Member having developed during examination by a committee, a resolution directing the committee to report them was offered as of privilege, and agreed to by the House.—On July 21, 1854,[2] Mr. Thomas H. Bayly, of Virginia, submitted, as a question of privilege, the following resolution:

Resolved, That the special committee of which the Hon. Mr. Letcher is chairman be instructed to communicate to this House any communication made to that committee reflecting upon the representative character of T. H. Bayly, a Member of this House, by B. E. Green or others, with a view that the House may take such action as to it may seem proper, the said committee having decided that it was not within their jurisdiction.

The record of debates shows that this was assumed to be a question of privilege, and no point was insisted upon against its consideration, although objection was made that the matter before the committee should not thus be taken up by the House.

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[1] Third session Twenty-fifth Congress, House Report No. 313, p. 316.

[2] First session Thirty-third Congress, Journal, p. 1178: Globe, p. 1835.

The resolution was agreed to, and Mr. Letcher at once communicated the letter of B. E. Green.

This letter, on motion of Mr. Bayly, was referred to a special committee of investigation.

1844. Examination by committees into alleged corrupt practices having implicated Members, the committees reported recommendations without first seeking the order of the House.

The rule of Parliament relating to Members implicated by testimony, discussed but not applied.

On February 19, 1857,[1] Mr. Henry Winter Davis, of Maryland, from the select committee appointed to investigate certain alleged corrupt combinations among Members of Congress, made a report having reference to William A. Gilbert, a Member of the House from the State of New York.

Mr. Galusha A. Grow, of Pennsylvania, objected to the reception of the report on the ground that, as it implicated a Member of the House, it could not be received as a question of privilege. He cited the precedent in the case of the Graves-Cilley duel in support of this contention. There was debate, during which it was urged, on the authority of the parliamentary law, that the committee should have reported to the House that a Member was implicated, so that the House might take action; and that a recommendation for final action and punishment should not be thus presented.

The resolutions with which the report concluded were as follows:

Resolved, That William A. Gilbert, a Member of this House from New York, did agree with F. F. C. Triplett to procure the passage of a resolution or bill through the present Congress for the purchase by Congress of certain copies of the book of the said Triplett on the pension and bounty land laws, in consideration that the said Triplett should allow him to receive a certain sum of money out of the appropriation for the purchase of the book.

Resolved, That William A. Gilbert did cast his vote on the Iowa land bill, depending heretofore before this Congress, for a corrupt consideration consisting of seven square miles of land and some stock given or to be given to him.

Resolved, That William A. Gilbert, a Member of this House from New York, be forthwith expelled from this House.

After the reading of the report and the resolutions, and further debate, the House, by a vote of 168 yeas and 5 nays, received the report.

1845. Method of procedure where testimony before an investigating committee implicates Members of the House.—On February 19, 1857,[2] the select committee[3] appointed to investigate charges that Members of the House, not named, had entered into corrupt combinations made a general report. The report gives the following as its rule of action:

Where testimony was taken tending to implicate any Member of the House, a copy of such testimony should be furnished to such Member, and an opportunity given him to explain or contradict it by

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[1] Third session Thirty-fourth Congress, Journal, p. 475; Globe, pp. 760–772.

[2] Third session Thirty-fourth Congress, House Report No. 243, p. 28.

[3] The members of this committee were Messrs. William H. Kelsey, of New York, James L. Orr, of South Carolina, H. Winter Davis, of Maryland, David Ritchie, of Pennsylvania, and Hiram Warner, of Georgia.

other evidence; or, if the Member desired to do so, by his own statement, under oath or not under oath, as he might think proper. This course was regarded by the committee as more liberal toward the Members whose conduct might be called in question than to pursue the practice in some former cases of merely reading the testimony to them. And every Member, who is in any degree implicated by the testimony taken, was informed that if he desired it the witness or witnesses by whom he was implicated would be recalled by the committee for examination.

1846. The committee investigating charges made by a Member of the House against a member of the press gallery allowed the Member to be represented by counsel.—In the proceedings of the select committee to investigate the charges made by Mr. J. Warren Keifer, of Ohio, on the floor of the House against H. V. Boynton, a member of the press gallery, the committee determined that the examination of witnesses for the prosecution should be conducted by counsel for Mr. Keifer, and that the examination of witnesses for Mr. Boynton be conducted in chief by the committee.[1]

1847. A Member's character being impeached by the statement of another Member before an investigating committee, the committee allowed both Members to be represented by counsel.—On September 11, 1888,[2] the select committee appointed by the House to inquire "whether any Member of the House" had been guilty of improper conduct in relation to certain contracts for the new library met, and Hon. William D. Kelley, of Pennsylvania, who had proposed the resolution of inquiry, appeared, and announced that the Member against whom the resolution was directed was Mr. William G. Stahlnecker.

The committee thereupon granted the privilege to both Mr. Kelley and Mr. Stahlnecker that they should be represented by counsel.

Mr. Kelley was requested to furnish a bill of particulars of the charges against Mr. Stahlnecker, and also to furnish a copy to Mr. Stahlnecker.

1848. A Member implicated by the testimony taken by a committee was permitted to read the testimony, testify himself, and call witnesses.—On May 29, 1856,[3] the select committee of the House appointed to take into consideration the assault upon Senator Charles Sumner, of Massachusetts, by Representative Preston S. Brooks, of South Carolina, were informed by their chairman that he had, in accordance with their order, called on Mr. Lawrence M. Keitt, of South Carolina, a Member implicated by the testimony, and informed him that he should have the opportunity of reading the testimony, of testifying himself, and of calling witnesses that he might see fit to have subpoenaed.

1849. A citizen who considered himself implicated by the investigation of a committee was allowed to insert an explanation in the report.—In 1843[4] the Committee on Indian Affairs allowed a citizen who considered himself implicated by statements contained in a report published as part of the committee's report to the House to submit an explanation, and this was included among the documents printed as part of the report to the House.

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[1] First session Forty-eighth Congress, House Report No. 1112, p. 16.

[2] First session Fiftieth Congress, Report No. 3516, p. 3.

[3] First session Thirty-fourth Congress, journal of the committee, Globe, p. 1367.

[4] House Report No. 271, p. 17, third session Twenty-seventh Congress.

1850. A committee of the House having reported that it had taken testimony which inculpated a Senator, the House directed that it be transmitted to the Senate.—On March 21, 1867,[1] the Committee on Public Expenditures of the House reported that while engaged in the investigation ordered by the House they had taken testimony which apparently inculpated one or more Members of the Senate, and in the opinion of the committee it was proper to report the fact to the House, that such action might be taken as comported with the courtesy due from one House of Congress to the other. The committee therefore recommend the adoption of the following resolution:

Resolved, That the House having been informed by one of its committees that testimony has been brought to the knowledge of said committee, which testimony apparently inculpates one or more Members of the Senate, the House therefore direct that all such testimony be transmitted to the Senate for its information.

The House agreed to the resolution.

1851. Testimony affecting a Senator, when taken by a House committee in open session, need not be under seal when transmitted to the Senate.

A modification of the rule of Parliament in reference to the communication of testimony.

On February 4, 1873,[2] Mr. Luke P. Poland, of Vermont, from the select committee appointed to investigate the Credit Mobilier, reported the following:

Whereas the evidence taken by the select committee of the House appointed December 2, 1872, for the purpose of examining into charges of bribery of Members of this House contains matter affecting Members of the Senate: Therefore,

Resolved, That the Clerk of the House be directed to transmit to the Senate a copy of all evidence thus far reported to the House by said committee, together with a copy of that resolution.

Mr. Poland said that the parliamentary law seemed to require the evidence to be transmitted under seal, but such procedure presupposed the evidence to be taken by the committee without the knowledge of the outside world. But in this case a different rule had been followed, so he proposed the resolution in this form.

The resolution was agreed to.

1852. A committee of the House having taken testimony affecting a Senator, it was ordered that a copy of it be sent to him.—On March 26, 1867,[3] Mr. Charles A. Eldridge, of Wisconsin, offered the following resolution relating to testimony affecting a Senator, and the House agreed to the same:

Resolved, That the Clerk of this House be, and is hereby, instructed to make and certify a copy of the testimony of Davis A. Hull, taken before the Committee on Public Expenditures in its investigation of the New York custom-house frauds, and deliver the same so certified to Senator Patterson, of Tennessee; and said committee is hereby authorized to allow the Clerk the opportunity to make said copy of said testimony.

1853. Testimony taken by the Senate having implicated a Member of the House, the House ordered an investigation, although the testimony had not been transmitted.—On February 22, 1873,[4] Mr. Michael C. Kerr, of

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[1] First session Fortieth Congress, Cong. Globe, p. 253.

[2] Third session Forty-second Congress, Journal, p. 309; Globe, p. 1078.

[3] First session Fortieth Congress, Journal, p. 116; Globe, p. 361.

[4] Third session Forty-second Congress, Journal, p. 466; Globe, p. 1638.

Indiana, presented as a question of privilege a resolution providing for an investigation of certain allegations against a Member of the House in certain testimony taken before the Senate Committee on Privileges and Elections. The resolution as at first presented provided that "said testimony taken before said Senate Committee be referred" to the committee proposed for the investigation; but the debate developed the fact that the testimony had not been transmitted to the House, and the resolution was modified. The Member affected stated that he had asked the opportunity to appear before the committee of the Senate and rebut the charges, but they had denied him this privilege on the ground that be was not under investigation in that committee.

The preamble and resolution as agreed to provided—

Whereas it is alleged, in testimony recently taken before the Committee on Privileges and Elections of the Senate, that Mr. J. Hale Sypher, a Member of this House from the State of Louisiana, in 1870, at and before the general election in that year in said State for Representatives in Congress, and when said Sypher was a candidate for election as a Member of the present House, did unlawfully and corruptly procure to be made false and fraudulent registrations, and did with like intent procure to be cast and counted for himself and others false and fraudulent votes, and did procure gross frauds to be committed in connection with the conduct of said election, in his own interests and in the interests of others; and whereas the honor of this House and duty toward the country require that said charges be fully investigated: Therefore,

Resolved, That the Committee on Elections be directed at once to investigate said several charges, and to that end have authority to send for persons and papers, and that said testimony taken before said Senate committee, as printed, be referred to said Committee on Elections, and that said committee be directed to report its conclusions to the House as soon as practicable.

On March 3,[1] Mr. George W. McCrary, of Iowa, submitted a report stating that in the limited time allowed it had been found impossible to make an investigation, and proposing a resolution discharging the Committee of Elections from the further consideration of the subject, and laying the resolution on the table.

This resolution was agreed to without division, after debate by Mr. Sypher.

1854. Testimony taken before a joint select committee tending to impeach the official characters of a Senator and a Representative, the committee ordered the testimony to be reported to each House.—On January 9, 1872,[2] a report was submitted in the House from the joint select committee to inquire into the condition of the late insurrectionary States in regard to certain testimony tending to impeach the official character of a Senator and Members of the House. This report was signed by the chairman on the part of the Senate and the chairman on the part of the House.

On the same day, January 9, 1872,[3] in the Senate, Mr. John Scott, of Pennsylvania, from the Joint Select Committee to Investigate Alleged Outrages in Southern States, submitted the following report (No. 15):

At a meeting of "the Joint Select Committee to Inquire into the Condition of the late Insurrectionary States, so far as regards the execution of the laws and the safety of the lives and property of the

[1] Journal, p. 560; Globe, pp. 2106, 2108; House Report No. 91; Smith, p. 107; Rowell's Digest, p. 283.

[2] Second session Forty-second Congress, Journal, p. 127; Globe, p. 321.

[3] Second session Forty-second Congress, Senate Report No. 15; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 444; Third session Forty-second Congress, Report No. 512.

citizens of the United States," convened at their room in the Capitol on the 22d of September, 1871, Messrs. Scott, Pool, and Blair were appointed a subcommittee to examine the witnesses then in attendance; which subcommittee organized on the 23d of September, 1871, and examined Edward Wheeler, of Arkansas. On the 25th of September, 1871, said subcommittee examined William G. Whipple, of Arkansas.

The testimony of these witnesses tends to impeach the official character and conduct of a Member of the United States Senate from the State of Arkansas, and also to affect the right of a Member of the House of Representatives from that State to retain his seat in the House. Other evidence of the same character was offered, and one of the gentlemen affected by this testimony claimed the right to bring witnesses before the committee to contradict or explain the same. The committee, however, upon consideration decided that the subject-matter to which said testimony related did not come within the limits of the investigation they were directed to make, and therefore declined to prosecute the inquiry any further, discharging a witness who had been subpoenaed and was then awaiting an examination.

The joint select committee, pursuing what they deemed to be the proper parliamentary course, at a meeting on December 21, 1871, adopted the following resolution:

"Resolved, That the committee report the testimony taken before the committee affecting Senator Clayton and Mr. Edwards, a Representative from Arkansas, to the Senate and House of Representatives, with a recommendation that each House take such action as it may deem proper."

Agreeably to this resolution of said joint select committee, the undersigned, the chairman on the part of the Senate and the chairman on the part of the House of Representatives, beg leave to submit the testimony hereto annexed of Edward Wheeler and William G. Whipple, both of the State of Arkansas, said Wheeler and Whipple having been the only witnesses from that State who were examined by the committee, to the Senate and House of Representatives, respectively, for such action as each House may deem advisable.

JOHN SCOTT,
Chairman on the part of the Senate.
LUKE P. POLAND,
Chairman on the part of the House of Representatives.

The Senate proceeded, by unanimous consent, to consider the report, and Mr. Clayton, having addressed the Senate on the subject thereof, concluded his remarks with the request that a select committee be appointed to investigate the allegations against him therein referred to;

Whereupon Mr. Wright submitted the following resolution; which was considered by unanimous consent, and agreed to:

Resolved, That the report of the committee and the testimony accompanying be referred to a special committee of three, with power to send for persons and papers, to investigate and report upon the charges therein contained against Hon. Powell Clayton, a Member of this body.

June 10, 1872, the committee reported that the investigation was completed, but that the committee were unable at that time to arrange the testimony and report back such parts of it as were relevant; that they held it but the plainest justice to Mr. Clayton that they should make known the general result of their investigation; that they consequently submitted a partial report, reserving the right to submit a final report with the testimony, and recommending that the Senate delay action on the subject until such time; that the charges were not sustained, and that the testimony failed to impeach the Senator's official conduct or character. There was a minority report, which did not enter into the merits of the case, but held that the action of the committee in reporting at that time was premature. February 26, 1873, the committee submitted the evidence, and made a final report, recommending the adoption of a resolution that the charges referred to the committee were not sustained, and that they be discharged from the further consideration of the subject.

There was a minority report holding that the charge made of procuring his seat by the corrupt use of money was sustained by the evidence, and that he also obtained 5 votes, which made his majority, by giving to electors lucrative offices when he was governor, as a consideration for their votes. March 25, 1873, the resolution was agreed to.

1855. The Senate having requested from the House the testimony taken by a certain investigating committee, the House ordered it communicated in secrecy, with the injunction that it be returned.—On February 14, 1872,[1] a message from the Senate in executive session transmitted to the House the following:

Resolved, That the House of Representatives be requested to furnish to the Senate, in executive session, the testimony taken by the committee who investigated the question of attempted bribery in the impeachment trial of Andrew Johnson.

The message having been communicated, Mr. Henry L. Dawes, of Massachusetts, offered the following resolution, which was agreed to:

Resolved, That the Clerk of the House be directed to furnish the Senate, in confidence, the testimony taken by the committee who investigated the question of attempted bribery in the impeachment trial of Andrew Johnson, as requested by its resolution of the 13th of February, 1872, and that the same be communicated to the Senate in secrecy in executive session; and that when no longer required by the Senate it be returned to the House for its safe custody.

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[1] Second session Forty-second Congress, Journal, p. 346; Globe, p. 1033.

Chapter LVII.

INQUIRIES OF THE EXECUTIVE.

1856. Committees are required to report resolutions of inquiry back to the House within one week of the reference.

As to the use of the words "request" and "direct" in resolutions of inquiry addressed to the Executive.

Form and history of section 5 of Rule XXII.

Section 5 of Rule XXII provides:

All resolutions of inquiry addressed to the heads of Executive Departments shall be reported to the House within one week after presentation.

From its earliest days the House has exercised the right to call on the President and heads of Departments for information.[3] On December 12, 1820,[4] a rule was proposed that—

a proposition requesting information from the President of the United States, or directing[5] it to be furnished by the head of either of the Executive Departments or by the Postmaster-General, shall lie on the table one day.

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[1] Resolutions of inquiry in early days taken to the President by a committee. Section 1726 of this volume.

[2] In some cases the President has refused to transmit documents relating to treaties (secs. 1509, 1518, Vol. II) and in others has responded to the inquiry (secs. 1510, 1512, Vol. II).

[3] Second session Fourth Congress, Journal, p. 634; second session Ninth Congress, Journal, pp. 533–536; Annals, pp. 334–459.

[4] Second session Sixteenth Congress, Journal, pp. 67, 70.

[5] The use of the words "request" and "direct" in this form of the rule simply embodied the prior practice of the House. For Cabinet officers the House used the words "be directed to" or "be required to." See instances in 1815. (First session Fourteenth Congress, Journal, pp. 92, 201, 206, 262.) But in resolutions of inquiry to the President the words "be requested" were usually employed, and sometimes the words "if, in his opinion, it will not be inconsistent with the public welfare" were added. (See Journal of first session Fourteenth Congress, pp. 122, 227, 310, etc.; also Mr. Daniel Webster's resolutions, first session Thirteenth Congress, Annals, pp. 150, 170, 302–311.)

The object of this was to cause greater care and deliberation in making demands. This proposition was adopted, and on January 22, 1822,[1] the rule was amended to give them consideration after reports of committees, and providing that the Clerk should cause the same to be delivered. Before this time the House had appointed a committee to present resolutions of inquiry to the President.[2]

The rule of 1820[3] with reference to resolutions of inquiry existed until May 1, 1879, when Mr. Samuel J. Randall, of Pennsylvania, from the Committee on Rules, presented a resolution providing that in the call for resolutions every Monday[4] resolutions of inquiry might be introduced and referred, and that the committee should be privileged to report them at any time. Mr. John H. Baker, of Indiana, proposed an amendment providing that the committee should report on the resolution within one week. With this amendment, the resolution was agreed to. Mr. Randall stated that the new rule was intended to give greater facility to Members who had, under the old arrangement, been forced to seek unanimous consent to get resolutions adopted. The reference to a committee would prevent abuse of the privilege. Mr. Alexander H. Stephens, of Georgia, recalled that when he entered Congress, in 1843, such resolutions were introduced in large numbers and sometimes, without information, the House imposed great labors on the Executive Departments. The reference to committee would obviate that. When the rules were revised in 1880,[5] this rule, which was Rule No. 130 in the old system, became section 1 of Rule XXIV. Section 1 then referred to the call of the States and Territories each Monday for the introduction of bills and resolutions, and when that call was abolished, in 1890,[6] the portion relating to resolutions of inquiry became a new section of Rule XXII, which is the present form.

1857. A resolution of inquiry is not privileged for consideration until it has been referred to a committee, and then only under conditions prescribed by the rules.—On January 3, 1900,[7] Mr. William Sulzer, of New York, offered as a privileged matter a resolution of inquiry relative to certain alleged transactions of the Secretary of the Treasury with certain national banks.

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[1] First session Seventeenth Congress, Journal, p. 174; Annals, p. 756.

[2] See instance January 18, 1819. Second session Fifteenth Congress, Journal, p. 195.

[3] First session Forty-sixth Congress, Journal, p. 224; Record, p. 1018, 1019. As early as 1872 Mr. Luke P. Poland, of Vermont, had proposed a rule that resolutions of inquiry should be referred to committees, with the privilege of reporting at any time.

[4] Under the present rules all bills and resolutions are introduced by laying them on the Clerk's table.

[5] Second session Forty-sixth Congress, Record, p. 206.

[6] First session Fifty-first Congress, House Report No. 23. Resolutions sometimes direct or request that the reply be made at the next session of the same Congress. (First session Nineteenth Congress, Journal, pp. 602, 603, May 19, 1826.) For discussion of the rights of the two Houses in asking information see proceedings of the Senate from March 9 to 26, 1886. (First session Forty-ninth Congress, Record, pp. 2211, 2246, 2291, 2328, 2528, 2615, 2653, 2693, 2737, 2784.) For an instance wherein the House asked information in detail from the President see Mr. Daniel Webster's resolutions in 1813. (First session Thirteenth Congress, Annals, pp. 150, 170, 302–311, 433.)

[7] First session Fifty-sixth Congress, Record, p. 635.

The Speaker [1] said:

This is in no sense a resolution of privilege, but must go to the Speaker, to be referred to the appropriate committee, under Rule XXII.

The Chair calls attention to paragraph 3 of Rule XXII. After referring in paragraph 1 to private resolutions, it says:

"3. All other bills, memorials, and resolutions may in like manner be delivered, indorsed with the names of Members introducing them, to the Speaker, to be by him referred."

The titles, etc., to be indorsed thereon.

Paragraph 5 of Rule XXII provides that "All resolutions of inquiry addressed to the heads of Executive Departments shall be reported to the House within one week after presentation."

The rules are not only distinct and explicit in saying what shall be done with these resolutions of inquiry, but the practice as long and well settled must certainly be known to the gentleman from New York. The rules are so explicit also that no harm can come, as the committee is bound under the rules to report within one week. The Chair therefore rules the matter to be not privileged, and not in order for immediate consideration.

1858. The week's time required to make a resolution of inquiry privileged is seven days, exclusive of either the first or last day.—On July 1, 1902,[2] Mr. William Sulzer, of New York, claiming the floor for a privileged motion moved to discharge the Committee on Military Affairs from the consideration of a resolution which he described as a resolution of inquiry relating to the army transport service.

Mr. John A. T. Hull, of Iowa, made the point of order that the motion was not yet privileged.

The Speaker [1] said:

This resolution was referred to the Committee on Military Affairs June 25. Only six days have elapsed; so it is not yet privileged. * * * In order to make it seven days we would have to count the first and the last days. * * * The rule says one week, if the Chair remembers right. * * * Within one week after the introduction. This is clearly not privileged as yet.

1859. On March 3, 1905,[3] Mr. Willard D. Vandiver, of Missouri, as a privileged question, moved to discharge the Committee on the Judiciary from the further consideration of a resolution of inquiry relating to the so-called armor-plate trust.

Mr. John J. Jenkins, of Wisconsin, having raised a question that the motion was not privileged, the Speaker [4] said:

This resolution seems to have been introduced February 24, and this is the 3d day of March. The week's time required to make a resolution of inquiry privileged is * * * seven days, exclusive of either the first or the last day, but not exclusive of both.

1860. A resolution authorizing a committee to request information has been treated as a resolution of inquiry.—On December 8, 1903,[5] Mr. Jesse Overstreet, of Indiana, from the Committee on the Post-Office and Post-Roads, reported the following resolution:

Resolved, That the Committee on the Post-Office and Post-Roads is hereby authorized to request the Postmaster-General to send to the committee all papers connected with the recent investigation of his Department.

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[1] David B. Henderson, of Iowa, Speaker.

[2] First session Fifty-seventh Congress, Record, p. 7771.

[3] Third session Fifty-eighth Congress, Record, p. 4019.

[4] Joseph G. Cannon, of Illinois, Speaker.

[5] Second session Fifty-eighth Congress, Record, pp. 51–54.

Mr. Irving P. Wanger, of Pennsylvania, proposing to object, the Speaker[1] said:

The Chair will state that on examining the resolution it seems to be a report from the Committee on the Post-Office and Post-Roads of a resolution of inquiry, and, in the opinion of the Chair, does not require unanimous consent. The question therefore is on agreeing to the resolution.

Later, the previous question having in the meantime been ordered, Mr. James D. Richardson, of Tennessee, made the point of order that the resolution was not privileged.

After debate, the Speaker said:

The Chair does not desire to hear further discussion. If the point of order were well taken, it comes too late; and the previous question having been ordered, it is not necessary for the Chair to rule. But the Chair is of opinion at this time that if the point of order had been made in apt time the Chair would have overruled the point of order. The resolution comes in an unusual form, it is true, but the object of the resolution is to obtain information— "the letter killeth, but the spirit giveth life;" and therefore, in the opinion of the Chair, the resolution is in order.

1861. Only resolutions of inquiry addressed to the heads of Executive Departments are privileged.—On January 27, 1891,[2] Mr. Benjamin A. Enloe, of Tennessee, on the ground of its being a question of privilege, submitted a resolution requesting certain information from the Regents of the Smithsonian Institution.

The resolution having been read, the Speaker[3] ruled that it did not present a privileged question, for the reason that under clause 5 of Rule XXII only "resolutions of inquiry addressed to the heads of Executive Departments" were required to be reported to the House within one week after presentation, thus presenting under the practice a privileged question when it was alleged that the rule had not been complied with.

1862. On March 12, 1904,[4] Mr. Frederick H. Gillett, of Massachusetts, from the Committee on Reform in the Civil Service, submitted as privileged a report on the following resolution:

Resolved, That the President of the Civil Service Commission be, and he is hereby, directed to inform the House of Representatives, as follows:

In how many cases the civil-service law and the regulations made thereunder have been suspended, and by whom, since the 4th day of March, 1885, giving, with said information, the dates of all such suspensions, and where such suspensions have operated to put in office individuals who otherwise could not have been appointed, the names of such individuals, and the date of the suspension of said civil-service law and the regulations made thereunder, in each individual case.

The Speaker[1] said:

As the Chair understands, this is not a privileged matter under the rules, as it is not a resolution calling upon the head of a Department, but upon the Civil Service Commission. Does the gentleman from Massachusetts ask its consideration now?

Thereupon, by unanimous consent, the resolution was agreed to.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Second session Fifty-first Congress, Journal, p. 188; Record, p. 1874.

[3] Thomas B. Reed, of Maine, Speaker.

[4] Second session Fifty-eighth Congress, Record, p. 3181.

1863. On February 4, 1904,[1] Mr. Edgar D. Crumpacker, of Indiana, from the Committee on the Census, reported as privileged the following resolution:

Resolved by the House of Representatives, That the Director of the Census be, and he is hereby, directed to inform the House what persons have been selected and employed by him and the dates and periods of time for which such persons have been employed in the Census Office under the provisions of the act of March 3, 1903, which provided as follows, etc.: * * *

And how long such employees have continued under such appointment, and, if such appointments were discontinued, for what reasons they were so discontinued.

The resolution having been read, the Speaker, said:

The Chair desires to say that the Chair is of opinion that this is not a matter of privilege. It is not in the language of the rule addressed to the head of an Executive Department. The Chair merely wants to call the attention of the gentleman to the fact. Is there objection?

There being no objection, the resolution was, by unanimous consent, considered.

1864. The privilege of resolutions of inquiry applies to those addressed to the President of the United States.—On January 29, 1906,[3] Mr. Oscar W. Gillespie, of Texas, claiming the floor for a privileged question, moved to discharge the Committee on Interstate and Foreign Commerce from consideration of the following resolution of inquiry, which had been referred to that committee more than one week previously:

Resolved, That the President of the United States be, and he is hereby, requested to report to the House of Representatives, for its information, all the facts within the knowledge of the Interstate Commerce Commission which shows or tends to show that there exists at this time, or heretofore within the last twelve months has existed, a combination or arrangement between the Pennsylvania Railroad Company, the Pennsylvania Company, the Norfolk and Western Railway Company, the Baltimore and Ohio Railroad Company, the Philadelphia, Baltimore and Washington Railroad Company, the Northern Central Railway Company, and the Chesapeake and Ohio Railway Company, or any two or more of said railroad companies, in violation of the act passed July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies," or acts amendatory thereof.

The motion was agreed to, and then the resolution, being before the House, was agreed to after it had been amended on motion of Mr. Sereno E. Payne, of New York, by the insertion of the words—

if not incompatible with the public interests.

Mr. John Dalzell, of Pennsylvania, having moved to reconsider, a question arose as to the form of the resolution, Mr. Dalzell saying:

Mr. Speaker, the President is not the head of a Department within the meaning of that rule. But, in the second place, if that information ought to be had by reason of an inquiry addressed to the Interstate Commerce Commission, and it is sought to evade the rule because that is not an Executive Department, then this resolution can not be made privileged by addressing it to the President of the United States.

The Speaker[2] said:

The Chair does not know that he ought to rule on a subject not before the House, but if before the House the Chair would be prepared to rule; and perhaps by unanimous consent the Chair may be indulged in an informal expression of opinion, which he might not possibly be bound by, as to whether

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[1] Second session Fifty-eighth Congress. Record, p. 1643.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] First session a Fifty-ninth Congress, Record, pp. 1701, 1702.

the President is the head of the Executive Departments. Now, it seems to the Chair, under a fair construction of this rule, that the President is the head not only of one but all the Executive Departments. The Chair only intimates what he would hold as at present advised if the question were before the House.

The motion to reconsider was laid on the table, yeas 122, nays 93.[1]

1865. A committee not having reported a resolution of inquiry within the time fixed by the rule, the House may reach the resolution only by a motion to discharge the committee from its consideration. On June 29, 1886,[2] Mr. John M. Glover, of Missouri, as a privileged question, moved that the Committee on Expenditures in the Treasury Department be discharged from the consideration of a resolution of inquiry relating to alleged frauds in the revenue, and that the resolution be put on its passage.

The Speaker[3] said:

The gentleman may move to discharge the committee from the further consideration of the resolution, but that is the extent of his motion. * * * When the committee is discharged then the resolution is before the House, but the question of consideration can be raised against it by one Member.

Mr. Glover having made the proper motion was proceeding to debate, when he was called to order by Mr. Nathaniel J. Hammond, of Georgia.

The Speaker said:

There is nothing before the House except the simple motion to discharge the committee. The merits of the resolution pending before the committee are not before the House for discussion.

The motion to discharge the committee was disagreed to.

Mr. Glover then moved that the committee be directed to report the resolution within a given time.

The Speaker said:

That is not a privileged motion. The privileged motion is to discharge the committee.

Mr. John A. Anderson, of Kansas, made the point of order that, the resolution not having been reported within the time prescribed by the rule, the committee having custody of the same was thereby discharged from the consideration of it.

The Speaker overruled the point of order, and held that the committee could only be discharged by motion, which the House had just refused to do.

1866. A resolution of inquiry not being reported back within one week, a motion to discharge the committee from the consideration of it presents a privileged question.—On April 25, 1882,[4] Mr. William E. Robinson, of New York, moved, as a matter of privilege, to discharge the Committee on Foreign Affairs from the consideration of a resolution relating to alleged imprisonment of American citizens abroad, which had been referred to the committee more than a week previous.

Mr. John A. Anderson, of Iowa, made the point of order that the motion did not present a question of privilege.

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[1] On December 26, 1832, after several days of debate, the House agreed to a resolution calling on the President for a list of appointments of Members of Congress to offices. (Journal, 2d sess., 22d Cong., pp. 80, 97; Debates, pp. 901–911.)

[2] First session Forty-ninth Congress, Journal, p. 2036; Record, pp. 6283, 6284.

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

[4] First session Forty-seventh Congress, Journal, p. 1124; Record, p. 3275.

The Speaker[1] ruled:

The resolution, from the further consideration of which it is sought to discharge the Committee on Foreign Affairs, is a resolution of inquiry, and originally introduced as such and referred to that committee. Upon being reported back to the House it was recommitted to the Committee on Foreign Affairs with certain instructions. The Chair holds, in the first place, that the resolution, upon being recommitted to the committee, holds the same relation to the committee and the same right under the rules of the House to be considered by the committee and reported back in the same time as if it had been an original resolution of inquiry referred to them at the time of its recommitment. Under the last clause of paragraph 1 of Rule XXIV[2] the committees of the House are required to report resolutions of inquiry directed to heads of Executive Departments back within one week from the time of their reference. This being so, the question now before us is, Is it a question of privilege to ask to discharge the Committee on Foreign Affairs from the further consideration of the resolution of inquiry as recommitted?

The Chair holds that this is a matter affecting the order of the business of the House. There may be perfectly good, wise, and valid reasons why the committee have not reported back the resolution, but the Chair is inclined to hold that the House may control the matter, and after the time has expired for reporting the resolution back the House has a right, as a matter of privilege, to call upon the committee to report it back or to discharge the committee from its further consideration. The Chair therefore holds that the resolution presented by the gentleman from New York, in so far as it seeks to discharge the Committee on Foreign Affairs from further consideration of the resolution of inquiry, is a matter of privilege, and therefore overrules the point of order.

1867. On April 28, 1886,[3] Mr. W. P. Taulbee, of Kentucky, claiming the floor for a privileged motion, moved that the Committee on Reform of the Civil Service be discharged from the further consideration of a resolution of inquiry as to certain alleged practices in the Treasury Department, which had been referred to the committee more than a week previous.

The Speaker[4] held the motion to be out of order, but stated that a motion to instruct the committee to report the resolution within a given time would be in order.

1868. On February 10, 1891,[5] Mr. Benjamin A. Enloe, of Tennessee, called attention of the House that a resolution of inquiry concerning the execution of the law relating to the National Geological Park, which had been referred to the Committee on Expenditures in the Treasury Department, had not been reported within the time required by the rules, and offered as privileged a motion to discharge the committee from the consideration of the resolution.

Mr. Joseph G. Cannon, of Illinois, having made the point of order that no question of privilege was involved, the Speaker[6] ruled that this was a privileged question, but not a question of privilege. The gentleman from Tennessee was entitled to have the question decided whether or not the committee should be discharged. That, however, was a question of procedure, to be decided without debate. The question of the priority of business was not debatable.[7]

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[1] J. Warren Keifer, of Ohio, Speaker.

[2] Now section 5 of Rule XXII. (See see. 1856 of this chapter.)

[3] First session Forty-ninth Congress, Journal, p. 1420; Record, pp. 3929, 3930.

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

[5] Second session Fifty-first Congress, Record, pp. 2456, 2457.

[6] Thomas B. Reed, of Maine, Speaker.

[7] See Rule XXV. Section 3061 of Volume IV of this work.

1869. On March 18, 1892,[1] Mr. Allen R. Bushnell, of Wisconsin, as a privileged question, moved to discharge the Committee on Rivers and Harbors from the consideration of a resolution of inquiry requesting of the Secretary of War and Attorney-General information relating to alleged injuries to the navigation of the upper Mississippi River. This resolution had not been reported within the time prescribed by the rule.

Mr. John Lind, of Minnesota, made the point of order that the motion was not privileged because the resolution was erroneously referred to the Committee on Rivers and Harbors, and that committee had no jurisdiction of the subject.

The Speaker[2] overruled the point of order, holding that the resolution might have been properly referred to either the Committee on Rivers and Harbors or the Committee on Interstate and Foreign Commerce.

1870. On July 15, 1892,[3] Mr. Benjamin A. Enloe, of Tennessee, moved, as a privileged motion, to discharge the Committee on the Post-Office and Post-Roads from the consideration of a resolution of inquiry requesting the Postmaster-General to transmit certain information to the House, the resolution having been referred to the committee more than a week previous.

Mr. Christopher A. Bergen, of New Jersey, and Air. Albert J. Hopkins, of Illinois, submitted the point of order that the motion was not privileged.

The Speaker[2] overruled the point of order on the ground that, it being the duty of the Committee on the Post-Office and Post-Roads to report the resolution within one week after its reference, on its failure to so report it a motion to discharge the committee was privileged. The Speaker also held that the duty to report within one week carried with it the right to report at any time during that period, and, if delayed, the right to report at any time thereafter, and consequently the right of consideration when reported.

1871. At the expiration of a week a motion to discharge a committee from the consideration of a resolution of inquiry is privileged, although the resolution may have been delayed in reaching the committee.—On September 22, 1893[4] Mr. Eugene F. Loud, of California, as a privileged motion, moved that the Committee on the Judiciary be discharged from the consideration of a resolution of inquiry requesting information from the Attorney-General as to the enforcement of the "Chinese-exclusion act."

Mr. Loud alleged, as a ground for his motion, that the resolution had been presented and referred to the Committee on the Judiciary one week ago.

Mr. William C. Oates, of Alabama, submitted the point that the resolution had not been before the committee, and that the motion of Mr. Loud was, therefore, not in order.

It appeared that the resolution was introduced and referred to the committee one week before, but was not delivered to the committee until four days thereafter.

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[1] First session Fifty-second Congress, Journal, p. 107; Record, p. 2192.

[2] Charles F. Crisp, of Georgia, Speaker.

[3] First session Fifty-second Congress, Journal, p. 296; Record, p. 6218.

[4] First session Fifty-third Congress, Journal, pp. 106, 107.

The Speaker[1] overruled the point made by Mr. Oates and held that, pursuant to clause 4 of Rule XXII, resolutions of inquiry are required to be reported within one week[2] from their presentation to the House, regardless of the time when they may be actually delivered to the committee, and that the motion of Mr. Loud was, therefore, privileged.

1872. A resolution of inquiry, to enjoy its privilege, should call for facts rather than opinions and should not require an investigation.—On December 19, 1905,[3] Mr. Webster E. Brown, of Wisconsin, from the Committee on Mines and Mining, reported back from that committee this resolution, with a favorable recommendation:

Resolved, That the Secretary of the Interior be, and he is hereby, requested to furnish to Congress a report on the progress of the investigation of the black sands of the Pacific slope, authority for which was included in that section of the sundry civil act approved March 3, 1905, which provided for the preparation of the report on the mineral resources of the United States, and for his opinion as to whether or not this investigation should be continued.

A question arose as to whether or not this resolution was privileged as a resolution of inquiry, whereupon the Speaker[4] held:

The Chair thinks the first part of the resolution privileged. The latter part is not privileged, and that destroys the privilege of the whole resolution.

1873. On January 18, 1906,[5] Mr. Oscar W. Gillespie, of Texas, claimed the floor for a privileged motion in order to move to discharge the Committee on Interstate and Foreign Commerce from the further consideration of the following resolution, which had been referred to that committee more than a week previously:

Resolved, That the Attorney-General of the United States be, and he is hereby, requested to forthwith report to the House of Representatives, for its information, whether there exists at this time, or heretofore within the last twelve months there has existed, a combination or arrangement between the Pennsylvania Railroad Company, the Pennsylvania Company, the Norfolk and Western Railway Company, the Baltimore and Ohio Railroad Company, the Philadelphia, Baltimore and Washington Railroad Company, and the Northern Central Railway Company, and the Chesapeake and Ohio Railway Company, or any two or more of said railroad companies, in violation of the act passed July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies," or acts amendatory thereof; and the said Attorney-General is also requested to report to this House all the facts upon which he bases his conclusion.

Mr. Sereno E. Payne, of New York, made the point of order that the resolution was not privileged, as it asked for an opinion of the Attorney-General as well as for facts.

After debate, the Speaker[4] said:

The House undoubtedly has power to call for facts. And under the rule, where a resolution privileged within the meaning of the rule is referred to a committee and is not reported within a certain time, it is in order to move to discharge the committee and bring the resolution before the House for consideration. But that rule applies to a resolution calling for facts and information. Now, the query

[1] Charles F. Crisp, of Georgia, Speaker.

[2] In the rules of the Fifty-third Congress this section was numbered 4, instead of 5, as at present.

[3] First session Fifty-ninth Congress, Record, pp. 591–593.

[4] Joseph G. Cannon, of Illinois, Speaker.

[5] First session Fifty-eighth Congress, Record, p. 1240.

the Chair puts to the gentleman is, Does not the concluding lines in these words, "and the facts upon which he bases his conclusion," show that what is practically asked for is the conclusion or opinion of the Attorney-General or the head of the Department of Justice, and does not that destroy, under the rule, the privileged character of the resolution? * * * In reading the resolution without the last line the Chair might perhaps have a doubt as to whether it were a resolution of inquiry asking for facts or one asking for an opinion. Now, the Chair is perfectly clear that, under the precedents, if the resolution is to be made privileged, it must be a resolution of inquiry as to facts existing—something in esse. It seems to the Chair that a resolution asking an opinion from the head of a Department would not be privileged. While it is in the power, the Chair apprehends, for the House by resolution to ask an opinion of the head of a Department, it occurs to the Chair that such a resolution would not be privileged and would not come within the rule that is now invoked. But whatever the ruling of the Chair might be, were it not for the concluding line or lines of the resolution it is perfectly patent to the Chair that what is desired by the resolution is not the facts alone, if at all, but the conclusion or opinion of the Attorney-General. Therefore the Chair sustains the point of order.

1874. On February 13, 1906,[1] Mr. Oscar W. Gillespie, of Texas, moved to discharge the Committee on the Post-Office and Post-Roads from the consideration of the following resolution of inquiry, which had been referred to that committee more than one week previously:

Resolved, That the Postmaster-General be, and he is hereby, requested to furnish the House, at his earliest convenience, a comparative statement showing the cost to the Government for the transportation of the mails per ton per mile by the railroads and the cost of transporting express matter per ton per mile by the railroads.

Mr. Sereno E. Payne, of New York, made the point of order that the resolution called for an investigation by the Post-Office Department.

In the course of the debate and at its conclusion the Speaker[2] said:

The Chair notices that this resolution provides that the Postmaster-General be requested to furnish the House, at his earliest convenience, a comparative statement showing the cost to the Government for the transportation of mails per ton per mile by the railroads and the cost of transporting express matter per ton per mile by the railroads. The doubt in the mind of the Chair is that this calls for information touching a matter that is not at all under the Postmaster-General, so far as express matter is concerned; and therefore it would seem that if the resolution were to be adopted that it would set on foot an investigation in the Post-Office Department.

It seems to the Chair—and the Chair suggests to the gentleman that the language goes further—that he furnish the House at his earliest convenience a comparative statement showing the cost for transporting mails and the cost of transporting express matter. Now, it might be assumed that if he does not have the information he will so report; but it will also be assumed that he will be required to enter into an inquiry.

It seems to the Chair that the resolution, requesting the Postmaster-General to report the cost to the Government of transporting the mails per ton per mile by the railroads, if it stopped there, would be a privileged resolution under the rule; but when it adds "and the cost of transporting express matter per ton per mile by the railroads" it does not cover a question of privilege under the rule, and it is only the question of privilege that is to be considered. The gentleman arises in his place and makes his motion to discharge the Committee on the Post-Office and Post-Roads from further consideration of this resolution because, a week having elapsed since it was referred to that committee, it has not reported the same back. In other words, the rule enables the gentleman, if he has the proper case under the rule, to halt the consideration of all other resolutions that are not privileged and the ordinary business of the House, and to halt the House in the consideration of business upon the Calendars from the various committees, and dispose of this resolution by virtue of this rule. Now, if the motion does not prevail

[1] First session Fifty-ninth Congress, Record, pp. 2494, 2495.

[2] Joseph G. Cannon, of Illinois, Speaker.

and it is not a question of privilege, the resolution remains with the Committee on the Post-Office and Post-Roads for disposition under the rules of the House, the same as other business.

Now, the uniform ruling of the Chair in former Congresses and in this Congress has been by construction not to enlarge the matter of privilege in these cases. It does seem, following the precedents for the orderly transaction of business in the House, that the construction holding the resolution privileged should be strict, and in the opinion of the Chair the latter clause of the resolution is not privileged and vitiates the resolution as a question of privilege. Therefore the Chair sustains the point of order.[1]

1875. A resolution of inquiry is usually simple rather than concurrent in form.—On March 28, 1902,[2] Mr. Charles F. Cochran, of Missouri, moved to discharge the Committee on Rivers and Harbors from the consideration of the following resolution:

Resolved by the House of Representatives (the Senate concurring), That the Secretary of War is hereby instructed to send to the House of Representatives information as to the condition of river improvements heretofore constructed on the Missouri River at a point south of St. Joseph, Mo., whether said improvements are incomplete and, on account of their incomplete condition, in danger of destruction, and the sum necessary to complete said improvements and prevent their destruction by the encroachments of the current.

The committee having been discharged, the resolution was so amended as to convert it into a simple resolution, and as amended the resolution was agreed to.

1876. Joint resolutions are not required for calling for information from the Executive Departments.—On February 3, 1899,[3] Mr. Jacob H. Bromwell, of Ohio, presented and the House agreed to a resolution requesting the President to return to the House the joint resolution (H. Res. 298) calling for information from the Secretary of State concerning certain outrages perpetrated upon American citizens in China. Mr. Bromwell explained that the President had called attention to the fact that the resolution was joint in form and if signed by the President might be considered a precedent that the House alone had not the right to call for such information.

On February 4 the joint resolution was returned by the President and was by the House laid on the table.

Mr. Bromwell then offered a simple resolution of the House calling for the information, and the same was agreed to.

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[1] On April 15, 1898 (second session Fifty-fifth Congress, Record, pp. 3908, 3909), Mr. William H. Fleming, of Georgia, as a privileged motion, presented a resolution discharging the Committee on Naval Affairs from the consideration of the following resolution, which had been presented more than a week before:

"*Resolved,* That the Secretary of the Navy is hereby directed to inform the House of Representatives if the Senate printed Document No. 207, Fifty-fifth Congress, second session, contains all the evidence embraced in the report of the naval court of inquiry upon the destruction of the U. S. battle ship *Maine* in Havana Harbor, February 15, 1898, now of file in the Navy Department; and if any portion of said evidence has been omitted in said printed document the Secretary of the Navy is hereby directed to transmit to the House of Representatives a copy of such omitted evidence."

Mr. Walter Evans, of Kentucky, made the point of order that the resolution to discharge the committee did not present a question of privilege. It was urged that the direction to the Secretary of the Navy contained in the latter part of the resolution was not privileged, and that this destroyed the privileged character of the resolution.

The Speaker (Thomas B. Reed, of Maine) sustained the point of order.

[2] First session Fifty-seventh Congress, Journal, p. 535; Record, p. 3365.

[3] Third session Fifty-fifth Congress, Record, pp. 1438, 1452, 1453.

1877. The privilege of a resolution of inquiry may be destroyed by a preamble, although the matter therein recited may be germane to the subject of inquiry.—On March 3, 1907 [legislative day of March 2],[1] Mr. Choice B. Randell, of Texas, proposed to call up as a privileged resolution of inquiry a resolution as follows:

Whereas it is currently reported that negotiations have been entered into by the executive department of the United States, and under its direction, with the Government of the German Empire affecting the commerce between Germany and the United States and the tariffs and regulations on and concerning the same, thereby changing the conditions of trade between these countries and affecting the revenues of this Government received from import duties without the action of Congress: Therefore, be it

Resolved, That the President of the United States is hereby requested, if not incompatible with the public interest, to direct the Secretary of State to report to him for the information of the House, etc.

Mr. James E. Watson, of Indiana, made the point of order that the preamble destroyed the privilege.

The Speaker[2] held:

It has been frequently held that a preamble to a resolution of inquiry that makes an alleged statement of fact destroys the privilege, although the balance of the resolution might be privileged. That has been frequently held by many Speakers and was ruled by the present Speaker at the last session of Congress on a resolution presented by the gentleman from New York [Mr. Cockran]. Clearly this is not privileged, and the Chair sustains the point of order.

1878. On June 28, 1906,[2] Mr. W. Bourke Cockran, of New York, as a privileged motion, proposed to discharge the Committee on the Post-Office and Post-Roads from consideration of the following resolution:

Whereas at a court of general sessions of the peace in and for the county of New York, the same being a court of record of the State of New York, one Norman Hapgood was on the 31st day of October, 1905, indicted by a grand jury on a charge of libel, for that he had written and published of and concerning one Joseph M. Deuel, then and now a judge of the court of special sessions in the said city and county of New York, the following words, to wit: "He is part owner and one of the editors of a paper of which the occupation is printing scandal about people who are not cowardly enough to pay for silence;" and

Whereas the said Norman Hapgood on the 3lst day of October, 1905, was arraigned upon the said indictment before the said court and entered a plea of not guilty thereto; and

Whereas the said indictment, having been duly transferred from the said court of general sessions of the peace in and for the city and county of New York to the supreme court of the State of New York, came on for trial on the 15th day of January, 1906, in said court, before the Hon. James Fitzgerald, a justice thereof, and a jury; and the said Norman Hapgood having admitted that he had written and published the matter charged in said indictment to be libelous, justified it on the ground that the same was true, and the jury after hearing evidence rendered its verdict that he was not guilty of libel; and

Whereas it appeared from the uncontradicted evidence given on said trial that the paper of which the said Joseph M. Deuel was part owner and one of the editors, the characterization of which as "a paper of which the occupation is printing scandal about people who are not cowardly enough to pay for silence" by the said Hapgood was charged in said evidence to be a libel, is a weekly publication entitled, called, and known as "Town Topics;" and

Whereas the said verdict of not guilty and the judgment of aquittal entered thereon in favor of said Hapgood is a judicial declaration by a court of competent jurisdiction that the description of Town Topics charged in said indictment to be libelous is in fact true: Now, therefore, be it

Resolved, That the Postmaster-General be, and he is hereby, requested to inform the House of Representatives whether said paper, periodical, or publication entitled, called, and known as "Town

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[1] Second session Fifty-ninth Congress, Record, p. 4664.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] First session Fifty-ninth Congress, Record, pp. 9541–9543.

Topics," so adjudged by a competent court to be "a paper of which the occupation is printing scandal about people who are not cowardly enough to pay for silence," is admitted now to the use of the mails, and whether its said occupation of extorting money by blackmail is in any way facilitated, promoted, or assisted by this Government through the operation of its Post-Office Department.

Mr. Jesse Overstreet, of Indiana, made the point of order that the motion was not privileged.

After debate the Speaker [1] ruled:

The only question presented to the Chair under the point of order is whether this motion is a privileged motion under the rules of the House. The motion is to discharge the Committee on Post-Offices and Post-Roads from the consideration of the resolution which has been read. After seven days the motion is privileged, providing the resolution has nothing in it which destroys that privilege.

Now, this resolution is coupled with the preamble, which recites that there was an indictment in a State court for libel, recites that the defendant justified, recites that there was a trial, recites that the defendant was acquitted, and then in the recitation in the last whereas sets forth matter which does not reflect upon the party whom the State of New York alleged had been libeled in very complimentary terms; in fact, to the contrary. The resolution refers to the preamble and certain matters alleged in the preamble, none of which are matters that are privileged under the rules of the House.

A resolution calling for information from the Department upon a question of fact is privileged, and if this resolution alone covered such information it would be privileged. The Chair has no doubt that the preamble destroys the privilege that otherwise would be contained in the resolution, and therefore the Chair sustains the point of order.

Mr. Cockran then asked:

Would it be in order, Mr. Speaker, to move to strike out the preamble and allow the resolution to stand?

The Speaker replied:

That would bring the House to a vote on that very question, and this is a matter not before the House. It was introduced and went to the committee. This is a motion to bring it before the House, and the privilege being destroyed by nonprivileged matter, the Chair sustains the point of order, which of course, if the ruling of the Chair is correct, prevents the House obtaining possession of the resolution in this way.

1879. Resolutions of inquiry are delivered under direction of the Clerk.—On January 22, 1822,[2] a rule was adopted that resolutions of inquiry, passed by the House, should be delivered under direction of the Clerk. Heretofore such resolutions addressed to the President had been delivered by a committee especially appointed in each case. Resolutions directed to heads of Departments were probably sent by the Clerk, no mention of method being made.

1880. The House decided early in its history that the secretaries of the President's Cabinet should not be called to give information personally on the floor of the House.—On November 13, 1792,[3] the following resolution was proposed:

Resolved, That the Secretary of the Treasury and the Secretary of War be notified that this House intend, on Wednesday next, to take into consideration the report of the committee appointed to inquire

[1] Joseph G. Cannon, of Illinois, Speaker.

[2] First session Seventeenth Congress, Journal, p. 174; Annals, p. 756.

[3] Second session Second Congress, Journal, p. 619 (Gales & Seaton ed.); Annals, pp. 679–683. It appears that the Secretary of War desired to appear before the House. See letter of General Knox, Annals, p. 685.

into the causes of the failure of the late expedition under General St. Clair, to the end that they may attend the House, and furnish such information as may be conducive to the due investigation of the matters stated in the said report.

Mr. Hugh Williamson, of North Carolina, moved to strike out the portion respecting the attendance of the Secretaries. This motion was supported by Mr. James Madison, of Virginia, who thought the introduction of the Secretaries on the floor of the House contrary to the practice of the House and the spirit of the Government.[1] He favored written information.

Messrs. Fisher Ames and Elbridge Gerry, of Massachusetts, favored the proposition of the resolution.

The House agreed to the amendment, and then negatived the resolution as amended.

1881. Members of the President's Cabinet appear before committees of the House and give testimony.—Cabinet officers frequently appear before committees of the House. Thus, on February 3, 1837,[2] Hon. Levi Woodbury, Secretary of the Treasury, appeared in obedience to a summons, before the committee appointed to investigate the Executive Departments, and gave his testimony. Also, on February 13, Hon. John Forsyth, Secretary of State, appeared and testified before the same committee.

1882. On February 13, 1839,[3] Levi Woodbury, Secretary of the Treasury, appeared before the select committee appointed to investigate the defalcations in the New York custom-house, and was sworn as a witness, and testified.

1883. On January 16, 1861,[4] the chairman of the select committee on seizure of forts, arsenals, etc., by direction of the committee, addressed the Secretary of the Navy requesting him to attend the committee and give testimony. The chairman concluded as follows: "Please state whether a formal subpoena will be required."

The Secretary attended without the subpoena.

1884. In 1842 the House vigorously asserted and President Tyler as vigorously denied the right of the House to all papers and information in possession of the Executive relating to subjects over which the jurisdiction of the House extended.—On June 3, 1842,[5] the Speaker laid before the House a letter from the Secretary of War in answer to a call of the House, of the 18th of May, for information as to the affairs of the Cherokee Indians and as to frauds upon them, stating that, as negotiations were pending with the Indians for the settlement of their claims and all other matters of difference between them and the Government, it was believed to be inconsistent with the public interest to disclose the information called for by the House; and that, as regarded the frauds referred to, the evidence being ex parte, and not under oath, it would be

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[1] Cabinet officers often appear before committees of the House.

[2] House Report No. 194, second session Twenty-fourth Congress, Journal of the Committee, pp. 75,104.

[3] Third session Twenty-fifth Congress, House Report No. 313, p. 579.

[4] Second session Thirty-sixth Congress, House Report No. 91, p. 28.

[5] Second session Twenty-seventh Congress, Journal, pp. 913–915; Globe, pp. 576, 579.

unjust to the parties implicated, and would defeat the ends of justice to promulgate the papers called for.[1]

On the succeeding day this communication was referred to the Committee on Indian Affairs.

On July 24,[2] Mr. James Cooper, of Pennsylvania, from this committee,[3] made a report.

The report of the committee recommended the adoption of the following resolutions:

Resolved, That the House of Representatives has the right to demand from the Executive such information as may be in his possession relating to subjects of the deliberations of the House and within the sphere of its legitimate powers.

Resolved, That the reports and facts called for by the House of Representatives, by its resolution of the 18th ultimo, related to subjects of its deliberations and were within the sphere of its legitimate powers, and should have been communicated; Therefore,

Resolved, That the President of the United States be requested to cause to be communicated to this House "the several reports lately made to the Department" of War by Lieutenant-Colonel Hitchcock relative to the affairs of the Cherokee Indians, together with all information communicated by him concerning the frauds he was charged to investigate; also all facts in the possession of the Executive, "from any source, relating to the subject."

On August 13, after a debate extending over several days,[4] the first resolution was amended by adding after "Executive" the words "or heads of Departments," and as amended was agreed to, yeas 140, nays 8. The second resolution was agreed to, yeas 94, nays 64, and the third was also agreed to, yeas 83, nays 60.

The committee in their report[5] took the ground that the House of Representatives had a right to all the information in the possession of the Executive, when such information related to subjects over which the jurisdiction of the House extended. This was one of the incidental powers of the House, like the power to punish for contempts. The committee denied that the relations with the Indian tribes were the same as those with foreign nations, and therefore denied the exclusive jurisdiction of the Executive and Senate over treaties or agreements with the Indians. The committee concluded by deeming it conclusive of the question that in the fifty years of the history of the Government there was no single precedent to justify the refusal to communicate the information required.[6]

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[1] This resolution of inquiry was as follows: "That the Secretary of War be required to communicate to this House the several reports lately made to the Department by Lieutenant-Colonel Hitchcock relative to the affairs of the Cherokee Indians, together with all information communicated by him concerning the frauds which he was charged to investigate; also all facts in the possession of the Department, from any source, relating to the subject. (Journal, pp. 831, 832.)

[2] Journal, p. 1183; Globe, p. 810.

[3] This committee consisted of Messrs. James Cooper, of Pennsylvania; Robert L. Caruthers, of Tennessee; Thomas C. Chittenden, of New York; Augustus R. Sollers, of Maryland; William Butler, of South Carolina; Harvey M. Watterson, of Tennessee; William A. Harris, of Virginia; John B. Weller, of Ohio, and John C. Edwards, of Missouri.

[4] Journal, pp. 1284–1289; Globe, pp. 888, 889. The Globe does not report the debates on these resolutions.

[5] House Report No. 960, second session Twenty-seventh Congress.

[6] For authorities in support of this position the report cites Jefferson's Memoirs, vol. 4, p. 464, the Journal of the House of Representatives, 1793, 1797, p. 499, and debates in the House of Commons, on motion of Lord Limerick, to appoint a committee to inquire into the conduct of affairs at home and abroad for the last twenty years, Debates in the Commons, 1741–42, vol. 13.

1885. On December 30, 1842,[1] Mr. James Cooper, of Pennsylvania, from the Committee on Indian Affairs, reported the following resolution which seems to have been agreed to by the House:

Whereas a resolution calling on the President of the United States "to cause to be communicated to this House the several reports lately made to the Department of War by Lieutenant-Colonel Hitchcock relative to the affairs of the Cherokee Indians, together with all information communicated by him concerning the frauds he was charged to investigate; also all facts in possession of the Executive from any source relating to the subject," was adopted by this House on the 13th day of August last; and whereas the information received by the said resolution has not been communicated, nor any reason assigned for the delay; Therefore,

Resolved, That the President be requested to communicate to this House when the information called for by the aforesaid resolution may be expected.

On February 1 President Tyler responded to this resolution. He communicated the papers called for, but at the same time he dissented from any doctrine that might imply the right of the House of Representatives to demand from the Executive or the heads of Departments all papers without regard to the discretion of those officers:

If, by the assertion of this claim [says the President], of right to call on the Executive for all the information in its possession relating to any subject of deliberation of the House and within the sphere of its legitimate powers, it is intended to assert, also, that the Executive is bound to comply with such call, without the authority to exercise any discretion on its part in reference to the nature of the information required, or to the interests of the country or of individuals to be affected by such compliance, then do I feel bound, in the discharge of the high duty imposed upon me, "to preserve, protect, and defend the Constitution of the United States," to declare, in the most respectful manner, my entire dissent from such a proposition. The instrument from which the several Departments of the Government derive their authority makes each independent of the other in the discharge of their respective functions. The injunction of the Constitution that the President "shall take care that the laws be faithfully executed," necessarily confers an authority, commensurate with the obligation imposed, to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective, these inquiries must often be confidential. They may result in the collection of truth or of falsehood; or they may be incomplete, and may require further prosecution. To maintain that the President can exercise no discretion after the time in which the matters thus collected shall be promulgated, or in respect to the character of the information obtained, would deprive him at once of the means of performing one of the most salutary duties of his office. An inquiry might be arrested at its first stage, and the officers whose conduct demanded investigation may be enabled to elude or defeat it. To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive.

Nor can it be a sound position that all papers, documents, and information of every description, which may happen by any means to come into the possession of the President or of the heads of Departments, must necessarily be subject to the call of the House of Representatives, merely because they relate to a subject of the deliberations of the House, although that subject may be within the sphere of its legitimate powers. It can not be that the only test is whether the information relates to a legitimate subject of deliberation. The Executive Departments and the citizens of this country have their rights and duties, as well as the House of Representatives; and the maxim that the rights of one person or body are to be so exercised as not to impair those of others is applicable in its fullest extent to this question. Impertinence or malignity may seek to make the executive department the means of incalculable and irremediable injury to innocent parties by throwing into them libels most foul and atrocious. Shall there be no discretionary authority permitted to refuse to become the instruments of such malevolence?

And although information comes through a proper channel to an executive officer, it may often be of a character to forbid its being made public. The officer charged with a confidential inquiry, and who

[1] Third session Twenty-seventh Congress, Journal, pp. 117, 296, 465; Globe, p. 102.

reports its result under the pledge of confidence which his appointment implies, ought not to be exposed individually to the resentment of those whose conduct may be impugned by the information be collects. The knowledge that such is to be the consequence will inevitably prevent the performance of duties of that character, and thus the Government will be deprived of an important means of investigating the conduct of its agents.

It is certainly no new doctrine in the halls of judicature or of legislation that certain communications and papers are privileged, and that the general authority to compel testimony must give way in certain cases to the paramount rights of individuals or of the Government. Thus, no man can be compelled to accuse himself, to answer any question that tends to render him infamous, or to produce his own private papers on any occasion. The communication of a client to his counsel and the admissions made at the confessional in the course of religious discipline are privileged communications. In the courts of that country from which we derive our great principles of individual liberty and the rules of evidence, it is well settled, and the doctrine has been fully recognized in this country, that a minister of the Crown or the head of a department can not be compelled to produce any papers, or to disclose any transactions relating to the executive functions of the Government which he declares are confidential, or such as the public interest requires should not be divulged; and the persons who have been the channels of communication to officers of the State are in like manner protected from the disclosure of their names. Other instances of privileged communications might be enumerated, if it were deemed necessary. These principles are as applicable to evidence sought by a legislature as to that required by a court.

The practice of the Government since its foundation has sanctioned the principle that there must necessarily be a discretionary authority in reference to the nature of the information called for by either House of Congress.

The authority was claimed and exercised by General Washington in 1796. In 1825 President Monroe declined compliance with a resolution of the House of Representatives calling for the correspondence between the Executive Departments of this Government and the officers of the United States Navy and others, at or near the ports of South America on the Pacific Ocean. In a communication made by the Secretary of War in 1832 to the Committee of the House on the Public Lands, by direction of President Jackson, he denies the obligation of the Executive to furnish the information called for and maintains the authority of the President to exercise a sound discretion in complying with calls of that description by the House of Representatives or its committees. Without multiplying other instances, it is not deemed improper to refer to the refusal of the President at the last session of the present Congress to comply with the resolutions of the House of Representatives calling for the names of the Members of Congress who had applied for offices. As no further notice was taken in any form of this refusal it would seem to be a fair inference that the House itself admitted that there were cases in which the President had a discretionary authority in respect to the transmission of information in the possession of any of the Executive Departments.

Apprehensive that silence under the claim supposed to be set up in the resolutions of the House of Representatives under consideration might be construed as an acquiescence in its soundness, I have deemed it due to the great importance of the subject to state my views that a compliance in part with the resolution may not be deemed a surrender of a necessary authority of the Executive.

President Tyler's message was referred to the Committee on Indian Affairs, and on February 25, this committee, submitted to the House a report[1] which combats the argument of the President:

It is undoubtedly true [says this report, after a review of the origin and circumstances of the controversy] to a certain extent, that the Constitution, from which the several Departments of the Government derive their power, had made each of them independent of the other in the discharge of their several functions. But what are the functions which are exercised independently of each other by the several Departments of the Government? The President exercises the office or function of Commander in Chief

[1] House Report No. 271, third session Twenty-seventh Congress. The committee making this report consisted of Messrs. James Cooper, of Pennsylvania; Thomas C. Chittenden, of New York; William Butler, of South Carolina; Abraham Rencher, of North Carolina; Joseph L. White, of Indiana; Harvey M. Watterson, of Tennessee: John B. Weller, of Ohio; John C. Edwards, of Missouri; and William A. Harris, of Virginia.

of the Army independently of Congress; his power to grant reprieves and pardons for offenses against the United States is exercised independently of Congress; he has the power, by and with the advice and consent of the Senate, to make treaties independently of the House of Representatives; he has the power to nominate, and, by and with the advice and consent of the Senate, to appoint ambassadors, ministers, consuls, and judges of the Supreme Court, independently of the House of Representatives, etc. But what has all this to do with the right of the House to institute inquiries and investigate abuses? It is a function of the House of Representatives to investigate abuses—sometimes for the purpose of legislating to prevent their recurrence—sometimes for the purpose of punishing the offenders; but in either case its power to examine witnesses, to compel the production of papers, to exercise all the powers of a judicial tribunal in the investigation of like offenses subject to certain well-established rules has never been doubted, and is as clearly implied in the Constitution as the right of the President "to inquire into the manner in which all public agents perform the duties assigned to them by law."

The House of Representatives has the sole power of impeachment. The President himself, in the discharge of his most independent functions, is subject to the exercise of this power—a power which implies the right of inquiry on the part of the House to the fullest and most unlimited extent. The committee need not say that the right of inquiry without the right to produce evidence would be nugatory. They will presently look further into this subject, but before proceeding to do so they will remark that the exercise of this right does not in any wise abridge the independent discharge of the Executive functions. In the exercise of the right, claimed by the House in its resolutions, to demand from the Executive such information as may be in his possession relative to subjects of its deliberations and within the sphere of its legitimate power, is not, as the President alleges, "equivalent to the denial" of a right of inquiry by him into the same matter. The exercise of this right by the House is not in design and can not be in effect "to arrest inquiry by the Executive and enable officers whose conduct demands investigation to elude and defeat it."

The report goes on to say that the Executive has limited powers of inquiry, its commissions not having the power to compel the testimony of witnesses, and then continues:

But the power of the House to pursue an investigation of this kind is as ample as that of any other tribunal. All the means to enforce the attendance of witnesses, the power to issue commissions to take the testimony of those who are absent, as well as to procure all the necessary instruments of evidence relative to any subject of inquiry in which it may be engaged, is possessed by the House in as much plentitude as by the judicial tribunals of the country. We shall show hereafter that the House has the right to compel the production of evidence which, for reasons of state policy, may be withheld from the courts.

The committee next take up the paragraph of the message which denies the right of the House to demand documents and papers of every description that may relate to the subject of its deliberations, and continues:

This is principally but a reiteration of the assertion of the President that the resolution adopted by the House of Representatives declaratory of its rights is too broad and would invest it with powers not conferred upon it by the Constitution and which, if carried into practice, would invade the rights of the Executive. The latter part of this proposition has already been fully disproved. It has been shown that the exercise of the right to demand from the Executive and heads of departments such papers or copies of papers, or other information, as may be in their possession is no invasion of the rights of the Executive, impairs none of its just powers, nor suspends any of its functions.

But is the resolution adopted by the House more comprehensive than a fair construction of the Constitution warrants? The resolution asserts that the "House has a right to demand from the Executive and heads of departments such information as may be in their possession relating to subjects of the deliberations of the House and within the sphere of its legitimate powers."

The question involved in this resolution is: Does the House of Representatives possess the right to investigate abuses?—a right virtually denied to the House is the Executive doctrines prevail. For the right to investigate abuses without full power to procure information and evidence would present the anomaly of the existence of a right without the means of enforcing it.

By the Constitution of the United States the President, Vice-President, and all civil officers of the Government are liable to impeachment for treason, bribery, or other high crimes and misdemeanors, and the sole power to impeach is vested in the House of Representatives. If the House possess the power to impeach it must likewise possess all the incidents of that power—tee power to compel the attendance of witnesses and the production of all such papers as may be considered necessary to prove the charges on which the impeachment is founded. If it did not the power of impeachment conferred on it by the Constitution would be nugatory. It could not exercise it with effect. But is the power of the House to compel the production of papers or the attendance of witnesses limited to proceedings in cases of impeachment? Has the House of Representatives no power to inquire into offenses not impeachable? Does not the power to impeach for great offenses involve the power to inquire into all offenses? It necessarily does so. In its character of grand inquest of the nation it possesses this right and in this character the House acts, whether it be engaged in investigation of some petty fraud committed by some subordinate officer of the Government or the impeachment of the President for high crimes and misdemeanors. This right to demand information belongs to its character—is one of its attributes, not merely an accidental right which it acquires when it takes upon itself the duty of impeachment. It is not a right which it derives from the act of proceeding to investigate a particular kind of offense and which it loses when it is engaged in the investigation of another or smaller offense. It is a permanent right inherent in it and not an incident of some peculiar function.

The power of the House to institute inquiries and investigate abuses has been exercised by it from the beginning of the Government to the present day. Such inquiries and investigations have at various times been made in every department of the Government and every branch of the public service, civil and military, and the power of the House to inquire into all official abuses and misconduct and into the management of public affairs at home and abroad, as far as the knowledge of the committee extends, has never been denied or questioned until now. Let this power to investigate the abuses which may exist in the several departments of the Government be surrendered by the House and there will be no check upon extravagance; the responsibility of public officers will be at an end; profligate and corrupt agents, unawed by the fear of exposure, will riot in the spoils of a plundered treasury, whilst Congress will have lost all power to bring them to account or to protect the public interest against their rapacity.

By claiming for the House "the right to demand from the Executive and heads of departments such information as may be in their possession relating to subjects of the deliberation of the House and within the sphere of its legitimate powers," the committee do not mean to assert that there may not be at some times information and papers in their possession which should not be made public. Such there no doubt are; but the House has the right to inspect them, and it, and not the Executive, is to be the judge of the propriety of making them public. The President has all along assumed in his message that the publication of all information and papers is a necessary consequence of their communication to the House. In this he is mistaken. It does not follow that all information communicated to the House must be made public. Confidential communications are almost daily made by the Executive to the Senate and secrecy is always observed in regard to them as long as the public interest requires it. There is nothing in the constitution of the House to prevent it from doing the same thing. Information transmitted to it by the Executive, on his suggestion that it is of confidential character, may be referred to a committee under the charge of secrecy until an examination of it can be made, when, if the committee concur in opinion with the Executive, its publication will be dispensed with. This is the true parliamentary course. It furnishes at once a security against secret abuses and the irresponsibility of the public officers and agents which would follow the denial of the right of the House to demand information, and at the same time protect the state against the discovery of facts important for the time to be concealed. In the present case on the suggestion of the President, the report and other papers were referred to the committee under at least an implied injunction of secrecy, and if the committee had concurred with the President in opinion nothing would have been easier than to have returned them to the Executive department, their contents remaining unknown excepting to the committee. Thus it will be seen that the resolution protested against by the President requires nothing from the Executive which can ever prove detrimental to the interest of the State, unless it be presumed that those interests would be more safe in his keeping than in that of the House—a presumption which finds no warrant in the Constitution and as little in the executive history of the Government.

Taking up the President's contention in regard to privileged communications which involve the paramount rights of individuals, in regard to the right of the citizen to refuse to incriminate himself, and to the privilege of ministers of the Crown in England, the report proceeds:

The general rule of law is that no one will be permitted to withhold any communication which is important as evidence, however secret and confidential the nature of that communication may have been. There are, however, some instances where the courts exclude particular evidence on the ground of public policy, because greater mischief and inconvenience would result to the State from the reception of it than would overbalance the injury which individuals might sustain by its exclusion. The interests of individuals are made to give way to the paramount interest of the community. Thus a witness is not allowed to reveal facts in a court of justice the disclosure of which might be injurious to the State; and of course the same rule prevails in relation to papers the contents of which would have a like tendency. The communication of evidence to a jury is a promulgation of it to the country, and the law so regards it, and it is so in fact. Hence the rule which excludes evidence the disclosure of which would be detrimental to the interests of the State. But this rule is only applicable to the judicial, and not to parliamentary tribunals; and the error of the President consists in not having observed the distinction.

The reason of the rule which excludes certain evidence is founded on the fact that its reception by the courts is equivalent to a publication, which principles of public policy forbid in particular cases. The reason of this rule, however, does not extend to parliamentary tribunals, which may conduct their investigations in secret, without divulging any evidence which may be prejudicial to the State. The practice of conducting investigations by secret committees has constantly prevailed in the British House of Commons ever since the Revolution of 1688, and perhaps from an earlier period; and the committee are aware of no instance in which evidence has been excluded in pursuance of the above rule. There is no reason for its observance in such cases, because there is no necessity for the publication of the evidence which may be delivered before such a tribunal. Thus it appears there exists no rule which would exclude any evidence from the House or a committee of the House, which are as competent to guard the interests of the State, and have as high motives for doing so as the Executive can have. On the other hand, it has already been shown that to withhold such evidence at the mere discretion of the Executive would be in effect to strip the House of the right to institute inquiries and investigate abuses. The consequence of this everyone foresees. Public officers and agents will become irresponsible, peculations and abuses of every kind will be perpetrated with impunity, and fraud and corruption will walk abroad unrebuked in open day. Such would be the practical operation of the rule laid down by the President; but this rule, it had been shown, is applicable only to judicial and not to legislative investigations.

It is certainly a sound rule of law that a witness is not bound to answer questions when, by doing so, he would criminate himself; nor is he under any obligation to produce his private papers when they would have a similar tendency. But in what manner does this rule conflict with the resolutions of the House asserting its right to call upon the Executive and heads of Departments for such information as may be in their possession relating to subjects of its deliberations? The information referred to in the resolution is the official information spread upon the records of the Departments or contained in their archives or on their files. This information is not the private property of the Executive or heads of Departments; nor is there any rule of law which would exclude it from being given in evidence in the impeachment of the President or any of the heads of Departments or other persons. It is not privileged in the sense spoken of by the President. All the information in the possession of the Executive and of the Departments is subject to the demands of the courts, legally made, for purposes of evidence, except when it is of such a character as would be prejudicial to the State. The President himself is subject to the process of the court to compel the attendance of witnesses. He is liable to the writ of subpoena ad testificandum; and in the trial of Aaron Burr it was decided he was liable to be served with a subpoena duces tecum. It was intimated, however, by the court that he would not be bound to produce confidential communications or papers, the disclosure of which would be prejudicial to the public safety. This rule of the courts, which excludes evidence on the ground of State policy, the committee have already shown is applicable to judicial and not parliamentary proceedings. This distinction should be constantly borne in mind. Forgetfulness of it is believed to be a principal cause of the errors into which the President has fallen.

The report goes on to discuss and deny the citation of the President in regard to the Crown ministers of England, and having done this, takes up the language of the resolution which declares the right of the House and says:

This, it will be remarked, does not include any assertion of right on the part of the House to demand from the Executive the information in his possession relating to negotiations with foreign governments or appointments to office. By the Constitution the power of making treaties is vested in the President and Senate. The House has no participation in the treaty-making power, nor in that of appointment to office; and the resolution, only asserting the right of the House to demand information relative to subjects over which its power extends, will be found not to conflict in the slightest degree with the cases cited. On the other hand, a majority of these cases will be found not only to admit as broad, but a broader right than the resolution asserts. But although the terms of the resolution do not assert the right of the House to demand from the Executive information of negotiations and appointments to office, the committee do not intend to disclaim its right. It will be time enough to settle this question when it shall arise.

The committee next goes on to discuss the precedents cited by the President, and to argue that they do not sustain the contention which he makes. During this discussion the committee say:

But if the Constitution did not by the clearest implications confer upon the House the right to demand from the Executive and heads of Departments the information and papers in their possession, the uninterrupted exercise of this right, acquiesced in and admitted as it has been for almost half a century, would give it the force and sanction of a customary law. The history of the Government from its foundation to the present day, as far as the committee have been able to discover, does not furnish an instance, except that already referred to, where the Executive has refused to communicate the information required by either House of Congress, unless the discretion to do so was conferred upon him by the resolution containing the demand. Whenever the resolution has been positive and imperative in its terms there has always been a compliance. It has, however, been the usual, perhaps the almost universal practice of both Houses of Congress, in demanding information from the President, to invest him with the discretion of communicating it or not, as he should judge proper. There is often a convenience in doing so. But if, by virtue of his office or constitutional functions, he possesses this discretion, why has it always been deemed necessary to invest him with it by special grant? It is plain, from what has been the practice in such cases, that both the President and Congress have concurred in regarding this discretion as belonging to the latter. If it does not, both branches of Congress have been practicing a continued usurpation upon the Executive for a period of more than fifty years; and, what is singular, the Executive has acquiesced in it during all the time without complaint and probably without having discovered it. It was left for the sharper scrutiny of the present Chief Magistrate to discover, and to his more intrepid firmness to resist, this usurpation.

The report of the committee recommends no action of the House in regard to this matter.

1886. The House having asserted its right to direct the heads of the Executive Departments to furnish information, the Secretary of War returned an answer to a portion of the inquiry, declining to respond to the remainder.—On December 2, 1861,[1] the House agreed to the following resolution:

Resolved, That the Secretary of War be requested, if not incompatible with the public interest, to report to the House whether any, and, if any, what, measures have been taken to ascertain who is responsible for the disastrous movement of our troops at Balls Bluff.

[1] Second session Thirty-seventh Congress, Journal, p. 10.

The Secretary of War having replied that a compliance with the resolution would, in the opinion of the general in chief, be injurious to the public service, on January 6, 1862,[1] Mr. Roscoe Conkling, of New York, submitted the following:

Resolved, That the said answer is not responsive nor satisfactory to the House, and that the Secretary be directed to return a further answer.

In the debate on this resolution it was urged, on the one hand, that the management of the armies belonged to the executive department of the Government, and that an investigation into failures belonged rather to the military tribunals than to the House. On the other hand, it was urged that as the Congress raised the armies it had a right to inquire as to their management. It was also urged that the House had a right to direct the heads of Executive Departments to furnish information and that this right, exercised also by the Parliament of Great Britain, had been recognized by a rule of the House adopted in 1820.[2]

The House agreed to the resolution—yeas 80, nays 54.

On January 10, 1862,[3] a communication was received from the Secretary of War, in response to the resolution, acknowledging the receipt of the resolution, and saying:

In reply, I have respectfully to state that "measures have been taken to ascertain who is responsible for the disastrous movement of our troops at Balls Bluff," but that it is not deemed compatible with the public interest to make known those measures at the present time.

This communication was referred to the Joint Select Committee on the conduct of the War.

1887. President Jackson declined to furnish to the Senate a copy of a paper purporting to have been read by him to the heads of the Executive Departments.—On December 11, 1833,[4] after considerable debate as to the propriety of the proceeding, the Senate agreed to a resolution requesting the President of the United States to communicate to the Senate "a copy of the paper which had been published, and which purports to have been read by him to the heads of the Executive Departments, dated the 18th day of September last, relating to the removal of the deposits of the public money from the Bank of the United States and its offices." On December 12 President Jackson responded in a message denying the constitutional right of the Senate to make such an inquiry, and declining to send the paper in question.

1888. On request, President Johnson furnished to the House the minutes of a meeting of the Cabinet.—On July 8, 1867,[5] the House passed a resolution asking the President if certain publications relating to action of the President and Cabinet were authorized and accurate, and that he be requested to furnish to the House the full minutes of the meeting. On July 20 the President (Mr. Johnson) sent a message stating that the publication was made by proper authority, and transmitting the desired documents.

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[1] Journal, pp. 134–137; Globe, pp. 191–198.

[2] Rule 53 at this time had this language: "A proposition requesting information from the President of the United States, or directing it to be furnished by the head of either of the Executive Department or by the Postmaster-General," etc. This rule dated from December 13, 1820.

[3] Journal, p. 162; Globe, p. 274.

[4] First session Twenty-third Congress, Debates, pp. 30–37.

[5] First session Fortieth Congress, Journal, pp. 171, 249; Globe, p. 515.

1889. President Grant declined to answer an inquiry of the House as to whether or not he had performed any executive acts at a distance from the seat of Government.—On April 3, 1876,[1] on motion of Mr. J. C. S. Blackburn, of Kentucky, and under suspension of the rules, the House agreed to the following:

Resolved, That the President of the United States be requested to inform this House, if, in his opinion, it is not incompatible with the public interest, whether since the 4th day of March, 1869, any executive offices, acts, or duties, and, if any, what, have been performed at a distance from the seat of government established by law, and for how long a period at any one time, and in what part of the United States; also whether any public necessity existed for such performance, and, if so, of what character, and how far the performances of such executive offices, acts, or duties at such distance from the seat of government established by law was in compliance with the act of Congress of the 16th day of July, 1790.

On May 4,[2] the President (Mr. Grant) replied in a message, declining to make any specific and detailed answer, saying:

I have never hesitated and shall not hesitate to communicate to Congress, and to either branch thereof, all the information which the Constitution makes it the duty of the President to give, or which my judgment may suggest to me or a request from either House may indicate to me will be useful in the discharge of the appropriate duties confided to them. I fail, however, to find in the Constitution of the United States the authority given to the House of Representatives (one branch of the Congress in which is vested the legislative power of the Government) to require of the Executive, an independent branch of the Government, coordinate with the Senate and House of Representatives, an account of his discharge of his appropriate and purely executive offices, acts, and duties, either as to when, where, or how performed.

What the House of Representatives may require as a right in its demand upon the Executive for information is limited to what is necessary for the proper discharge of its powers of legislation or impeachment. The inquiry in the resolution of the House as to where executive acts have within the last seven years been performed and at what distance from any particular spot, or for how long a period at any one time, etc., does not necessarily belong to the province of legislation. It does not profess to be asked for that object.

If this information be sought through an inquiry of the President as to his executive acts in view or in aid of the power of impeachment vested in the House, it is asked in derogation of an inherent natural right, recognized in this country by a constitutional guarantee which protects every citizen, the President as well as the humblest in the land, from being made a witness against himself.

1890. The President having failed to respond to a resolution of inquiry, the House respectfully reminded him of the fact.—On December 3, 1866,[3] the House asked a second time of the President for information, respectfully reminding him of the first application.

1891. The head of a Department having declined to respond to an inquiry of the House, a demand for a further answer was entertained as a matter of privilege.—On January 6, 1862,[4] Mr. Roscoe Conkling, of New York, submitted as a question of privilege, the following:

Whereas on the second day of the session, this House adopted a resolution, of which the following is a copy:

Resolved, That the Secretary of War be requested, if not incompatible with the public interest, to

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[1] First session Forty-fourth Congress, Journal, p. 724; Record, p. 2158.

[2] Journal, pp. 916, 917; Record, p. 2999.

[3] Second session Thirty-ninth Congress, Journal, p. 11.

[4] Second session Thirty-seventh Congress, Journal, p. 134; Globe, p. 191.

report to this House whether any, and if any, what measures have been taken to ascertain who is responsible for the disastrous movement of our troops at Ball's Bluff.

And whereas, on the 16th of December, the Secretary of War returned an answer whereof the following is a copy:

WAR DEPARTMENT, *December 12, 1861.*

SIR: I have the honor to acknowledge the receipt of a resolution of the House of Representatives calling for certain information with regard to the disastrous movement of our troops at Ball's Bluff, and to transmit to you a report of the Adjutant-General of the United States Army, from which you will perceive that a compliance with the resolution, at this time, would, in the opinion of the general-in-chief, be injurious to the public service.

Very respectfully,

SIMON CAMERON, *Secretary of War.*

Hon. G. A. GROW,
Speaker of the House of Representatives.

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, December 11, 1861.

SIR: In compliance with your instructions, I have the honor to report, in reference to the resolution of the honorable the House of Representatives, received the 3d instant, that (here quotes the resolution), that the general-in-chief of the Army is of opinion an inquiry on the subject of the resolution would, at this time, be injurious to the public service. The resolution is herewith respectfully returned.

Respectfully submitted.

L. THOMAS, *Adjutant-General.*

Hon. SECRETARY OF WAR, *Washington.*

Therefore,

Resolved, That the said answer is not responsive nor satisfactory to the House, and that the Secretary be directed to return a further answer.

Mr. William A. Richardson, of Illinois, having raised a question as to whether or not the resolution involved a question of privilege, the Speaker[1] submitted the question to the House, and the House decided to entertain the resolution as a question of privilege.

1892. A demand that the head of an Executive Department transmit a more complete reply to a resolution of inquiry may not be presented as a matter of privilege.—On February 12, 1847,[2] Mr. George Rathbun, of New York, claiming the floor for a question of privilege, stated that the Secretary of the Treasury had made to the House an inadequate reply to its call for information concerning the secret inspectors of customs, and offered this resolution:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to report forthwith to this House the names of all persons who now are, or have been since the 4th day of March, 1845, secret agents or inspectors of customs.

Mr. George C. Dromgoole, of Virginia, objected to the introduction of the resolution on the ground that it did not involve a question of privilege.

The Speaker[1] said that, having read the report made in answer to the resolution calling on the Secretary of the Treasury, the Chair was constrained to decide that the resolution was not a question of privilege. The Chair did not intend to rule that the House could not call for the names at any time. All that the Chair decided was

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[1] Galusha A. Grow, of Pennsylvania, Speaker.

[2] Second session Twenty-ninth Congress, Journal, p. 333; Globe, p. 400.

[3] John W. Davis, of Indiana, Speaker.

that this resolution was not, in the parliamentary sense, a question of privilege, because the Secretary did not seem to have acted in derogation of the order or dignity of the House.

Mr. Rathbun having appealed, the appeal was laid on the table.

1893. A proposition to investigate whether or not the head of an Executive Department had failed or declined to respond to an inquiry of the House was held not to be a matter of privilege.—On January 25, 1847,[1] Mr. Garrett Davis, of Kentucky, offered the following resolution as a question of privilege:

Resolved, That a select committee of five be raised to inquire whether the Secretary of the Treasury has failed or refused to furnish to this House any information called for by it of him; and also to inquire into the cause of such failure or refusal; and that said committee have power to send for persons and papers, and report to this House.

The Speaker[2] decided that the subject-matter of the resolution did not involve the privilege of the House, and was not therefore a question of privilege.

Mr. Davis having appealed, the decision of the Chair was sustained.

1894. In 1886 the refusal of the Attorney-General to transmit certain papers called for by the Senate led to a discussion of prerogatives and a declaration by the Senate.—In 1886,[3] there was a prolonged consideration in the Senate of the relations of the Senate and the Executive, caused by the declination of the Attorney-General to transmit to the Senate certain documents concerning the administration of the office of the district attorney of the southern district of Alabama.

The Senate had called for "all documents and papers that have been filed in the Department of Justice since the 1st day of January, 1885, in relation to the management and conduct of the office of district attorney of the United States of the southern district of Alabama." The papers which the Attorney-General refused to transmit were those having "exclusive reference to the suspension by the President of George M. Duskin, the late incumbent," and he stated that "it was not considered that the public interest would be promoted by a compliance" with the request of the Senate.

On February 18 Mr. George F. Edmunds, of Vermont, from the Committee on the Judiciary, made an exhaustive report on the obligations of the Executive to transmit to Congress documents called for, and concluding with a resolution condemnatory of the Executive for this refusal. The minority of the committee presented views in opposition to this proposed action.

The report included the following:

The important question, then, is whether it is within the constitutional competence of either House of Congress to have access to the official papers and documents in the various public offices of the United States created by laws enacted by themselves. It may be fully admitted that except in respect of the Department of the Treasury there is no statute which commands the head of any Depart-

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[1] Second session Twenty-ninth Congress, Journal, p. 229; Globe, pp. 252–254.

[2] John W. Davis, of Indiana, Speaker.

[3] First session Forty-ninth Congress, Record, pp. 1584, 1893, 1902, 2211, 2784–2814; Senate Report No. 135.

ment to transmit to either House of Congress on its demand any information whatever concerning the administration of his Department, but the committee believes it to be clear that from the very nature of the powers entrusted by the Constitution to the two Houses of Congress it is a necessary incident that either House must have at all times the right to know all that officially exists or takes place in any of the Departments of the Government.

So perfectly was this proposition understood before and at the time of the formation of the Constitution that the Continental Congress, before the adoption of the present Constitution, in establishing a department of foreign affairs and providing for a principal officer thereof, thought it fit to enact that all books, records, and other papers in that office should be open to the inspection of any Member of Congress, provided that no copy should be taken of matters of secret nature without special leave of Congress. It was not thought necessary to enact that the Congress itself should be entitled to the production and inspection of such papers, for that right was supposed to exist in the very nature of things, and when, under the Constitution, the department came to be created, although the provision that each individual Member of Congress should have access to the papers was omitted (evidently for reasons that can now be quite well understood), it was not thought necessary that an affirmative provision should be inserted, giving to the Houses of Congress the right to know the contents of the public papers and records in the public offices of the country whose laws and whose offices they were to assist in creating.

It is believed that there is no instance of civilized governments having bodies representative of the people or of States in which the right and the power of those representative bodies to obtain in one form or another complete information as to every paper and transaction in any of the executive departments thereof does not exist, even though such papers might relate to what is ordinarily an executive function, if that function impinged upon any duty or function of the representative bodies.

A qualification of this general right may under our Constitution exist in case of calls by the House of Representatives for papers relating to treaties, etc., under consideration and not yet disposed of by the President and Senate.

The committee feels authorized to state, after a somewhat careful research, that within the foregoing limits there is scarcely in the history of this Government until now any instance of a refusal by a head of a Department, or even of the President himself, to communicate official facts and information, as distinguished from private and unofficial papers, motions, views, reasons, and opinions, to either House of Congress when unconditionally demanded. Indeed, the early Journals of the Senate show great numbers of instances of directions to the heads of Departments, as of course, to furnish papers and reports upon all sorts of affairs, both legislative and executive.

The instances of requests to the President and commands to the heads of Departments by each House of Congress from those days until now for papers and information on every conceivable subject of public affairs are almost innumerable, for it appears to have been thought by all the Presidents who have carried on the Government now for almost a century that, even in respect of requests to them, an independent and coordinate branch of the Government, they were under a constitutional duty and obligation to furnish to either House the papers called for, unless, as has happened in very rare instances, when the request was coupled with an appeal to the discretion of the President in respect of the danger of publicity, to send the papers if, in his judgment, it should not be incompatible with the public welfare.

Even in times of the highest party excitement and stress, as in 1826 and 1844, it did not seem to occur to the Chief Executive of the United States that it was possible that any official facts or information existing, either in the Departments created by law or within his own possession, could, save as before stated, be withheld from either of the Houses of Congress, although such facts or information sometimes involved very intricate and delicate matters of foreign affairs as well as sometimes the history and conduct of officers connected with the administration of affairs.

The Senate, on February 18, agreed to this resolution:

Resolved, That it is, under these circumstances, the duty of the Senate to refuse its advice and consent to proposed removals of officers the documents and papers in reference to the supposed official or personal misconduct of whom are withheld by the Executive or any head of a Department when deemed necessary by the Senate and called for in considering the matter.

The President,[1] on March 1, transmitted a message in which he said:

While, therefore, I am constrained to deny the right of the Senate to the papers and documents described, so far as the right to the same is based upon the claim that they are in any view of the subject official, I am also led unequivocally to dispute the right of the Senate, by the aid of any documents whatever, or in any way save through the judicial process of trial on impeachment, to review or reverse the acts of the Executive in the suspension, during the recess of the Senate, of Federal officials.

I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that "the executive power shall be vested in a President of the United States of America," and that "he shall take care that the laws be faithfully executed."

The Senate belongs to the legislative branch of the Government. When the Constitution by express provision superadded to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duty, and in itself a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions.

In the first Congress which assembled after the adoption of the Constitution, comprising many who aided in its preparation, a legislative construction was given to that instrument in which the independence of the Executive in the matter of removals from office was fully sustained.

As to the law of 1867, Mr. Cleveland said:

The first enactment of this description was passed under a stress of partisanship and political bitterness which culminated in the President's impeachment.

This law provided that the Federal officers to which it applied could only be suspended during the recess of the Senate when shown by evidence satisfactory to the President to be guilty of misconduct in office, or crime, or when incapable or disqualified to perform their duties, and that within twenty days after the next meeting of the Senate it should be the duty of the President "to report to the Senate such suspension, with the evidence and reasons for his action in the case."

This statute, passed in 1867, when Congress was overwhelmingly and bitterly opposed politically to the President, may be regarded as an indication that even then it was thought necessary by a Congress determined upon the subjugation of the Executive to legislative will to furnish itself a law for that purpose, instead of attempting to reach the object intended by an invocation of any pretended constitutional right.

* * * * * * *

The requests and demands which by the score have for nearly three months been presented to the different Departments of the Government, whatever may be their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands.

From March 9 to March 26 the Senate debated the issue involved, and concluded with a condemnation of the action of the Attorney-General as—

in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof.

1895. It has been considered proper to use the word "request" in asking for information from the President and "direct" in addressing the heads of Departments.—On January 21, 1837,[2] the select committee

[1] Grover Cleveland, President.

[2] House Report No. 194, second session, Twenty-fourth Congress, journal of the committee, pp. 4, 6, 7.

appointed to investigate the Executive Departments of the Government, was considering a resolution calling for information, in terms as follows:

Resolved, That the President of the United States and the heads of the several Executive Departments be required to furnish this committee with a list or lists of all officers, etc.

Mr. Dutee J. Pearce, of Rhode Island, moved to amend the resolution so that it would read "requested" as to the call upon the President and "directed" as to the call upon heads of departments.

This amendment was agreed to, yeas 7, nays 1.

1896. Resolutions of inquiry addressed to the President have usually contained the clause "if not incompatible with the public interest," especially when on the subject of diplomatic affairs.

In some instances the House has made its inquiries of the President without condition, and has even made the inquiry imperative.

On January 16, 1807,[1] Mr. John Randolph, of Virginia, offered this resolution:

Resolved, That the President of the United States be, and he hereby is, requested to lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any power in amity with the United States; together with the measures which the Executive has pursue for suppressing or defeating the same.

Question arose as to the propriety of the resolution, and reference was made to similar resolutions passed in 1797[2] and 1798.[3]

The resolution was agreed to, yeas 109, nays 14, and yeas 67, nays 52, a separate vote having been taken on the latter portion of the resolution, "together with the measures which the Executive has pursued" etc., the words "and proposes to take" having been stricken out on motion of Mr. Randolph.

Mr. John Randolph and Mr. Lloyd were appointed a committee to present the resolution to the President, and on January 19 Mr. Randolph reported that the President signified that he would

cause the information requested to be laid before the House.

On January 22, the President[4] communicated the information to the House.

1897. On February 27, 1856,[5] the House agreed to the following resolution:

Resolved, That the President be requested to communicate to this House so much of the correspondence between the Government of the United States and that of Great Britain touching the Clayton-Bulwer convention, not heretofore communicated, as be shall deem not incompatible with the public interest.

On April 9, President Pierce transmitted the information called for.

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[1] Second session Ninth Congress, Journal, pp. 533–536, 545 (Gales & Seaton ed.); Annals, pp. 334–359.

[2] January 2, 1797, Journal second session, Fourth Congress, p. 634 (Gales & Seaton ed.)

[3] April 2, 1798.

[4] Thomas Jefferson, President.

[5] First session Thirty-fourth Congress, Journal, pp. 609, 802; Globe, pp. 521, 841.

1898. On March 30, 1798,[1] Mr. John Allen, of Connecticut, proposed this resolution:

Resolved, That the President of the United States be requested to communicate to this House the dispatches from the envoys extraordinary from the United States to the French Republic, mentioned in his message of the 19 instant, or such parts thereof as consideration of public safety and interest, in his opinion, may permit.

Discussion arose as to the last clause of the resolution, objection being made that it proposed to transfer to the President a right which the House itself should exercise of determining what it was proper to publish in consideration of the public interest. This case differed from that when papers relating to the British treaty were called for, since this was a subject within the constitutional authority of the House. The House, without division, struck out the objectionable clause, and the resolution was agreed to in this form, yeas 65, nays 27:

Resolved, That the President of the United States be requested to communicate to this House the instructions to, and dispatches from, the envoys extraordinary from the United States to the French Republic, mentioned in his message of the 19th ultimo.

Ordered, That Mr. Allen and Mr. Hanna be appointed a committee to present the foregoing resolution to the President of the United States.

The same day Mr. Allen reported that the committee had performed that service, and that the President signified to them that he would take the subject into his consideration, and do thereon what it should appear to him the public safety required.

On April 3[2] the President[3] transmitted, "in compliance with the request of the House of Representatives," the papers mentioned in the resolution, "omitting only some names and a few expressions descriptive of the persons." The President then said:

I request that they may be considered in confidence until the members of Congress are fully possessed of their contents, and shall have had opportunity to deliberate on the consequences of their publication; after which time I submit them to your wisdom.

The House then proceeded to consider the papers in secret session.

1899. On June 1, 1868,[4] the House agreed to a resolution "directing" the President to send to the House certain information in regard to the return of John C. Breckinridge to the United States. Mr. James G. Blaine, of Maine, called attention to the fact that the usual word was "requested," but the resolution was passed in the original form.

1900. On December 17, 1821,[5] Mr. Ezekiel Whitman, of Maine, proposed the following resolution:

Resolved, That the President of the United States be requested to cause to be laid before this House such information as he may think proper to communicate in relation to any misunderstanding which may have existed between Andrew Jackson, as governor of the Floridas, and Elijius Fromentin, as judge of the court therein; and also in relation to any delay or omission on the part of the officers under his

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[1] Second session Fifth Congress, Journal, pp. 248, 249 (Gales & Seaton ed.); Annals, pp. 1357–1371.

[2] Journal, p. 252.

[3] John Adams.

[4] Second session Fortieth Congress, Journal, pp. 99, 785, 786; Globe, p. 2756.

[5] First session Seventeenth Congress, Journal, pp. 65, 108, 109, 198; Annals, pp. 558–559, 610–620, 826.

Catholic majesty to surrender to the officers and commissioners of the United States, duly authorized to receive the same, any of the archives and documents which relate directly to the property and sovereignty in and over the said Floridas, etc.

On motion of Mr. Lewis Williams, of North Carolina, the words "thin proper to communicate" were stricken out and in their place was inserted the word "possess."

Also, on January 2, this amendment was added at the end of the resolution:

And also such part of the correspondence as it may be consistent with the public interest to disclose, and which has not heretofore been communicated, which may have taken place between the Executive and the said Andrew Jackson touching the proceedings of the latter during his continuance as governor of said Territory.

Considerable debate was occasioned as to the propriety of the resolution, but it was agreed to.

On January 29 President Monroe responded to the request, saying in his message:

Being always desirous to communicate Congress or to either House all the information in the possession of the Executive respecting any important interest of our Union which may be communicated without real injury to our constituents, and which can rarely happen except in negotiations pending with foreign powers, and deeming it more consistent with the principles of our Government in cases submitted to my discretion, as in the present instance, to hazard error by the freedom of the communication rather than by withholding any portion of information belonging to the subject, I have thought proper to communicate every document comprised within this call.

1901. On December 31, 1849,[1] Mr. Abraham W. Venable, of North Carolina, offered the following:

Resolved, That the President of the United States be requested to communicate to this House, as early as he conveniently can whether, since the last session of Congress, any person has been by him appointed either a civil or military governor of California or New Mexico. If any military or civil governor has been appointed, their names and their compensation. If a military and civil governor has been united in one person, whether any additional compensation has been given for said duties, and the amount of the same, etc. (The resolution continues in other paragraphs relating to the same subject.)

A suggestion was made by Mr. Henry W. Hilliard, of Alabama, that the words "if not incompatible with the public interest," be inserted after the word "House," where it first occurs.

Mr. Venable declined to accept the modification. He said he believed that this clause was usually inserted in resolutions calling for information relating to foreign relations, and not necessarily in other calls. He intended no discourtesy to the President, but wanted the information.

Mr. Hilliard then moved to insert the clause, but the House decided the motion in the negative without division.

The resolution was then agreed to.

On January 21, 1850, the President transmitted the information called for.

1902. A discussion in the Senate as to its powers in calling for papers from the President.

The clause, "if not, in his judgment, incompatible with the public

[1] First session Thirty-first Congress, Journal, pp. 207, 208, 379; Globe, p. 90.

interest," is generally used by the Senate in resolutions of inquiry directed to the President.

On January 28, 1904,[1] in the Senate, in open session, Mr. Charles A. Culberson, of Texas, called up for consideration the following resolution:

Resolved, That the President be requested to inform the Senate whether all the correspondence and notes between the Department of State and the legation of the United States at Bogota, and between either of these and the Government of Colombia for the construction of an isthmian canal since June twenty-eighth, nineteen hundred and two, and all the correspondence and notes between the United States and any of its officials or representatives or the Government of Panama concerning the separation of Panama from Colombia, have been sent to the Senate, and, if not, that he be requested to send the remaining correspondence and notes to the Senate in executive session.

To this Mr. Shelby M. Cullom, of Illinois, proposed to add the following amendment:

if not, in his judgment, incompatible with the public interest.

An extended debate arose as to the powers of the Senate to call on the Executive for papers, with an abundant citation of precedents. Mr. Cullom said that so far as he had examined the qualifying clause which he had proposed was first inserted in a resolution of inquiry by Mr. Daniel Webster, when a Senator.

After debate it was agreed that a vote should be taken on the resolution on the next day.

On January 29, 1904,[2] the debate was concluded, and the question being taken on the amendment proposed by Mr. Cullom, there were yeas 39, nays 20; so the amendment was agreed to.

Then, after certain other amendments verbal in nature had been agreed to, the resolution was agreed to by the Senate.

1903. On March 11, 1905,[3] in the Senate, the following resolution, offered by Mr. Henry M. Teller, of Colorado, was considered:

Resolved, That the President is hereby requested, if, in his opinion, not incompatible with the public interest, to send to the Senate, for use in executive sessions, copies of the instructions given to Commodore Dillingham and Minister Dawson, or either of them, regarding Dominican affairs, and copies of all correspondence and telegrams relating to Dominican affairs, or relating to any proposed agreement, protocol, or treaty between the United States and Santo Domingo, from July 1, 1904, to the lst of March, 1905.

The consideration of this resolution caused a debate of some length, which extended into the next day's session, as to its propriety, with a review of precedents.

The resolution was finally referred to the Committee on Foreign Relations.

1904. Discussion in the Senate as to the practice of requiring information from the heads of Departments and requesting it of the President.— On December 6, 1906,[4] the Senate was considering this resolution:

Resolved, That the President be requested to communicate to the Senate, if not incompatible with the public interests, full information bearing upon the recent order dismissing from the military service of the United States three companies of the Twenty-fifth Regiment of Infantry, United States troops (colored).

when Mr. John C. Spooner, of Wisconsin, said:

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[1] Second session Fifty-eighth Congress, Record, pp. 1303–1324.

[2] Record, pp. 1361–1365.

[3] Special session of the Senate, Fifty-ninth Congress.

[4] Second session Fifty-ninth Congress, Record, pp. 97–106.

Mr. President, I am opposed to the resolution offered by the Senator from Pennsylvania. My opposition to it is based entirely upon the form of it. This resolution does not, so far as the subject-matter goes, fall within the clam of inquiries which the Senate has ever been accustomed to address to the President. It implies on its face, Mr. President, a doubt here which I think does not exist; as to whether the Senate is of right entitled to all the facts relating to the discharge of the three named companies or not. Always the Senate, in passing resolutions of inquiry addressed to Cabinet officers, except the Secretary of State, make them in form of direction, not request. It rarely has happened that a request has been addressed to any Cabinet officer where foreign relations were involved. Where such a resolution has been adopted it has been addressed to the President, with the qualification that he is requested to furnish the information only so far as, in his judgment, the transmission of it is compatible with the public interest.

There are reasons for that, Mr. President. The State Department stands upon an entirely different basis as to the Congress from the other Departments. The conduct of our foreign relations is vested by the Constitution in the President. It would not be admissible at all that either House should have the power to force from the Secretary of State information connected with the negotiation of treaties, communications from foreign governments, and a variety of matters which, if made public, would result in very great harm in our foreign relations—matters so far within the control of the President that it has always been the practice, and it always will be the practice, to recognize the fact that there is of necessity information which it may not be compatible with the public interest should be transmitted to Congress—to the Senate or to the House.

There are other cases, not especially confined, Mr. President, to the State Department, or to foreign relations, where the President would be at liberty obviously to decline to transmit information to Congress or to either House of Congress. Of course, in time of war, the President being Commander in Chief of the Army and Navy, could not, and the War Department or the Navy Department could not, be required by either House to transmit plans of campaign or orders issued as to the destination of ships, or anything relating to the strategy of war, the public knowledge of which getting to the enemy would defeat the Government and its plans and enure to the benefit of an enemy.

There are still other cases. The Department of Justice would not be expected to transmit to either House the result of its investigations upon which some one had been indicted, and lay bare to the defendant the case of the Government. The confidential investigations in various departments of the Government should be, and have always been, treated by both Houses as confidential, and the President is entirely at liberty to permit by the Cabinet officer to whom the inquiry is addressed as much or as little information regarding them as he might see fit. I have no doubt the President would transmit everything upon this subject. My objection is to the form of the resolution. I think we ought to maintain the uniform practice upon the subject. I do not think, as to a matter upon which the Senate clearly has a right to be fully advised, it should depart from the usual form of directing the transmission by the Secretary of War or the Secretary of the Navy or the Secretary of the Interior, to adopt a resolution of request of the President, bearing upon its face a recognition of the fact that he is at liberty to withhold the information or to transmit such part of it as he shall see fit.

Mr. President, in time of peace as to matters relating to the organization and the administration of the Army there can be no secrecy. It is purely domestic public business, as to which the Congress has a right to know. I should be very much disappointed if in a matter of this kind the Senate should address the inquiry to the President, coupled, as it must be, with the suggestion that we doubt our right to the information. I think it is a bad precedent to establish. In such matters I think we ought to maintain the practice which, so far as I remember, hitherto has been unbroken. Therefore I am opposed to the form of the resolution of the Senator from Pennsylvania. I am in favor of the form of the resolution of the Senator from Ohio.

On the other hand, various Senators expressed the opinion that, in accordance with the precedents of the Senate, it would be perfectly proper to ask the information of the President. Mr. Henry M. Teller, of Colorado, said:

I had occasion some time ago to consult the precedents running back forty or fifty years, and I have a very distinct recollection of a number of cases where Presidents have declined to communicate information both to the House and to the Senate.

I do not think there is any impropriety in our asking the President in a courteous, proper manner to communicate information to the Senate. I am under the impression, Mr. President, that the better practice would be to ask the Secretary of War, the Secretary of the Treasury, or the Secretary of the Navy, whoever it might be that had the matter under control, without annoying the President and adding to his work. But, so far as I am concerned, I am willing to vote for a resolution asking the President for information, or I am willing to vote for a resolution asking the Secretary of War for information; but I do not think we ought to ask them both. It seems to me we ought to confine ourselves to one or the other. I simply express my preference for the method of asking the Secretary of War, instead of asking the President.

The Senate agreed to the resolution without changing it in respect to suggestions of Mr. Spooner.

1905. Discussion of the status of the Department of State in relation to resolutions of inquiry.—On January 23, 1906,[1] in the Senate, Mr. John C. Spooner, of Wisconsin, said in the course of a speech on the prerogatives of the President in relation to foreign affairs:

The act creating the Department of State, in 1789, was an exception to the acts creating the other Departments of the Government. I will not stop to refer to the language of it or to any of the discussions in regard to it, but it is a Department that is not required to make any reports to Congress. It is a Department which from the beginning the Senate has never assumed the right to director control, except as to clearly define matters relating to duty imposed by statute and not connected with the conduct of our foreign relations.

We direct all the other heads of Departments to transmit to the Senate designated papers or information. We do not address directions to the Secretary of State, nor do we direct requests, even, to the Secretary of State. We direct requests to the real head of that Department, the President of the United States, and, as a matter of courtesy, we add the qualifying words, "if in his judgment not incompatible with the public interest."[2]

1906. The Postmaster-General having responded to an inquiry in a manner considered disrespectful, the Senate referred the matter to the President, whereat an explanation was forthcoming.—On March 1, 1839,[3] the Senate agreed to the following resolution:

Resolved, That the letter of the Postmaster-General to the President of the Senate, stating that the only reason why he had not sent an answer to a previous resolution was because it was not ready is considered by the Senate as disrespectful to this body.

Resolved, That said letter, with the resolution to which it purported to be an answer, be laid before the President of the United States for such action as he may deem proper.

The same day a message from the President transmitted a letter of explanation from the Postmaster-General.

1907. The Senate returned to the Secretary of the Navy an impertinent document transmitted in response to an inquiry.—On March 3, 1865,[4] the Senate considered and examined, as a question of privilege, the act of the Secretary of the Navy in sending to the Senate, in answer to an inquiry, a document

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[1] First session Fifty-ninth Congress, Record, p. 1420.

[2] The statutes provide that the Secretary of War (R. S., secs. 227–229), of the Treasury (R. S., secs. 257–264), the Attorney-General (R. S., secs. 384, 385), the Postmaster-General (R. S., sec. 413), the Secretary of the Navy (R. S., sec. 429), the Secretary of the Interior (R. S., sec. 445), shall make certain specified reports; but nowhere does there appear legislation requiring them to transmit documents or information in response to inquiries of either House.

[3] Third session Twenty-fifth Congress, Globe, p. 220.

[4] Second session Thirty-eighth Congress, Globe, pp. 1346, 1361.

which did not relate to the inquiry, but which embodied a reply by the Assistant Secretary to some remarks made in relation to him by a Senator. After investigation by the Judiciary Committee, the Senate decided that the document should not have been communicated, and directed that it be returned to the Secretary of the Navy.

1908. A subordinate officer of the Government, to whom the House has directed a resolution of inquiry, may respond directly or through his superior.—On January 5, 1863,[1] the House by resolution asked of the Secretary of State certain information relating to the relations of the United States with the Government in New Granada. On January 16 a response was received, not from the Secretary of State, but from the President.

1909. On January 30, 1863,[2] the House "directed" the General in Chief of the Army to inform the House as to paroles of certain confederate officers. On February 9 the inquiry was responded to by the Secretary of War.

1910. In 1868[3] frequent instances occurred wherein the House called directly on the General of the Army for information, and in turn the General of the Army transmitted his communications directly to the House.

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[1] Third session Thirty-seventh Congress, Journal, pp. 134, 196.

[2] Third session Thirty-seventh Congress, Journal, pp. 298, 354.

[3] Second session Fortieth Congress, Journal, pp. 503, 505, 650, 678.

Chapter LXIII.

NATURE OF IMPEACHMENT.

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

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

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[1] Discussion as to right to demand jury trial. See. 2313 of this volume.

Impeachment in relation to the courts. See. 2314 of this volume.

A Senator is not a "civil officer." Secs. 2316, 2318 of this volume.

Argument that the power is remedial rather than punitive. Sec. 2510 of this volume.

May a civil officer be impeached for offenses committed prior to his term of office? See. 2510 of this volume.

As to the impeachment of territorial judges (secs. 2486, 2493) and officers removable by the Executive (secs. 2501, 2515).

Is impeachment justified by ascertainment of probable cause? Sec. 2498.

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

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

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

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

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

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

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

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

Impeachment and ordinary legislative investigations contrasted. Sec. 1700.

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

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

2003. Cases of impeachment are excluded by the Constitution from the offenses for which the President may grant reprieves and pardons.—

The Constitution in Article II, section 2, provides:

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

2004. The English precedents indicate that jury trial has not been permitted in impeachment cases.

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

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

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

2005. Under the parliamentary law an impeachment is not discontinued by the dissolution of Parliament.—In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some, of the principles and practices of England" on the subject of impeachments:

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

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

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

On June 19, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the counsel for the respondent asked for a postponement of the trial until some time in the next November.

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

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

Mr. Manager Scott Lord said:

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

I will say further, Mr. President and Senators, that the question which is presented by the Senator has not been fully considered by the managers; it has not been very much discussed by them, but it has been sufficiently discussed to enable us to see that there is this difference of opinion. I think myself that when the question is fully discussed by the managers they will come to a conclusion on the subject unanimously; but perhaps one differing with me might think we should come unanimously to a different conclusion from that which entertain. I will say for myself that I have no doubt of the power of this court to sit as a court of impeachment after the adjournment of the Congress.

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

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

Soon after,[1] while an order was pending providing that the trial should proceed on July 6, Mr. Oliver P. Morton, of Indiana, proposed to add thereto as an amendment the following:

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

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

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

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

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

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

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

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

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[1] Senate Journal, pp. 957, 959.

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

So it was

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

The reasons actuating the Senate in coming to this decision do not appear from Senate proceedings, as the debates were in secret; but in a verbal report made to the House of Representatives by the Chairman of the Managers, Mr. Scott Lord, of New York, this statement appears: [1]

The plan of the managers on the part of the House has been this: To induce the Senate, as a court of impeachment, to allow Congress to adjourn and then sit as a court to carry on the case. But there are two reasons against that which render it conclusive that the Senate will not do so. The first is that many Senators doubt the power of the Senate to sit as a court of impeachment after the adjournment of Congress. The second, and the really practicable reason, is that it will be found impossible to keep a quorum of the court together after the adjournment of Congress.

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

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

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

On May 4, 1876,[2] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore announced that the Senate had adopted the following:

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

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

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

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

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

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[1] Record, p. 3871.

[2] First session Forty-fourth Congress, Senate Journal, p. 928; record of trial, p. 27.

As to the first question, may a private citizen be impeached, Mr. Montgomery Blair, of counsel for the respondent, said: [1]

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

And Mr. Manager Scott Lord, speaking for the House of Representatives, said: [2]

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

Mr. Matt H. Carpenter, of counsel for the respondent, after an exhaustive discussion of authorities, said: [3]

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

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

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

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

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[1] Record of trial, p. 28.

[2] Page 34.

[3] Pages 39–42.

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

Mr. Montgomery Blair, of counsel for the respondent, began the argument with review of the nature of impeachment in America and England, and continued: [1]

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

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

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

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

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

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

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

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

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[1] Page 29.

Mr. Blair next cited opinions of the framers of the Constitution, and the comments of Judge Story, saying: [1]

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

Mr. Matt R. Carpenter held that there were two theories in regard to impeachment—one that the proceeding was so broad that private persons might fall within its reach, as in England, and the other that impeachment "was only a proceeding to remove an unworthy public officer." And he declared that one of these theories must be accepted, and that there was no middle ground. He then proceeded at length to cite authorities [2] to show that a private citizen might not be impeached, and then said: [3]

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

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

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

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

Section 3 of article 1 provides:

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

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

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

I may assume therefore that the purpose for which the power of impeachment was incorporated in the Constitution will be observed by this court, in exercising the jurisdiction which the Constitu-

[1] Pages 30, 31.

[2] Pages 38, 39.

[3] Page 40.

tion confers. And upon this subject the debates in the convention are not only satisfactory, but absolutely conclusive.

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

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

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

Mr. Jeremiah S. Black, also of counsel for the respondent, said: [1]

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

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

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

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

But then the reductio ad absurdum is furnished to their argument when they read on that the President, the Vice-President, and all other civil officers of the United States shall be removed upon conviction. The single sentence uttered by Governor Johnstone in the North Carolina convention puts this in a light so perfectly clear that it would be throwing words away to talk about it. How can a man be removed from office who holds no office? How turn him out if he is not in? The object and purpose of impeachment was removal—removal, mind you, not for a day, not for an hour, not a removal which might be rendered nugatory the next moment by his reappointment or reelection, but a permanent removal. You find an officer misbehaving himself, and you get hold of him while

[1] Page 71.

he is still in the possession of power. When you get your grasp upon him, you hurl him down, and give him such a pernicious fall that he can never rise again.

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

On the other hand, the managers for the House of Representatives maintained, with careful citation of authorities, that impeachment was intended to reach a public officer while in office or after he had left office. Mr. Manager Scott Lord said: [1]

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

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

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

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

Messrs. Managers George A. Jenks and George F. Hoar examined the English precedents and the history of the Constitution at length, the latter summarizing his conclusions [2] thus:

The history of the steps by which these constitutional provisions found their place, the few authorities which can be found on the subject, the narrower argument drawn from the language of the Constitution and the broader argument drawn from a consideration of the great public object to be accomplished all point the same way and bring us irresistibly to the conclusion that the power of the Senate of the

[1] Page 34.

[2] Page 57.

United States over all grades of public official national wrongdoers, a power conferred for the highest reasons of state and on fullest deliberation, to interpose by its judgment a perpetual barrier against the return to power of great political offenders, does not depend upon the consent of the culprit, does not depend upon the accidental circumstance that the evidence of the crime is not discovered until after the official term has expired or toward the close of that term, but is a perpetual power, hanging over the guilty officer during his whole subsequent life, restricted in its exercise only by the discretion of the Senate itself and the necessity of the concurrence of both branches, the requirement of a two-thirds' vote for conviction, and the constitutional limitation of the punishment

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

Mr. Aaron A. Sargent, a Senator from California, asked if Members of the Senate who had in times past been civil officers of the United States were, in Mr. Hoar's view, liable to impeachment. Mr. Hoar replied: [1]

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

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

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

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

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[1] Page 60.

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

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

(3) As to the third branch of the inquiry, assuming that an ex-officer may not be impeached, whether or not a resignation after proceedings begin confers immunity, there was not very extended debate. Mr. Manager Scott Lord said,[1]

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

After citing authorities, he continued—[2]

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

And after citing other authorities:

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

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

[1] Page 35.

[2] Page 36.

opportunity to establish his innocence, or the House of Representatives to establish his guilt, is in furtherance of justice. To deny jurisdiction under these circumstances would be in furtherance of injustice.

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

Mr. Carpenter, of counsel for respondent, argued,[1] on the other hand:

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

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

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

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

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

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

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

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

Mr. Carpenter replied:[2]

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

[1] Page 42.

[2] Page 43.

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

Mr. Carpenter also said,[1] after citing authorities:

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

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

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

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

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

Mr. Manager Jenks replied[2] to Mr. Carpenter:

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

[1] Page 44.

[2] Page 48.

rule, if the defendant have not brought himself within the exception, still exists, and the court will not recognize the fractions of a day.

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

The Senate debated the question from the 15th to the 29th of May.[1] The debates were behind closed doors and were not reported.

On May 16[2] the following questions were submitted by Senators for consideration:

By Mr. Oliver P. Morton, of Indiana:

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

By Mr. Justin S. Morrill, of Vermont:

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

By Mr. John Sherman, of Ohio, on May 25:[3]

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

On May 29[4] the Presiding Officer announced that the proposition pending was that offered by Mr. Morton on the 16th instant. Thereupon Mr. Morton modified his proposition to read as follows:

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

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

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

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

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

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

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[1] Senate Journal, pp. 932–947; Record of trial, pp. 72–76.

[2] Senate Journal, p. 933; Record of trial, p. 73.

[3] Senate Journal, p. 939; Record of trial, p. 74.

[4] Senate Journal, pp. 942–947; Record of trial, p. 76.

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

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

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

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

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

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

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

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

In the final arguments Messrs. Montgomery Blair [1] and Matthew H. Carpenter [2] also argued this question.

2008. Reference to discussions as to what are impeachable offenses.— In the course of the arguments during the impeachment trial of Andrew Johnson, President of the United States, the question, "What are impeachable offenses?" was discussed at length and learnedly. Mr. Manager Benjamin F. Butler, of Massachusetts, argued [3] learnedly in favor of this definition:

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

Mr. Butler also appended to his argument [4] an exhaustive brief on the "law of impeachable crimes and misdemeanors," prepared by Mr. William Lawrence, of Ohio.[5] This view was also supported by Mr. Manager John A. Logan, of Illinois.[6] Of the Senators who filed written opinions, Mr. Charles Sumner, of Massachusetts, argued at length that political offenses were impeachable offenses.[7] So also argued Mr. Richard Yates, of Illinois.[8]

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[1] Record of trial, pp. 287–289.

[2] Pp. 330–334.

[3] Second session Fortieth Congress, Globe, Supplement, p. 29.

[4] Pages 41–50.

[5] Globe, p. 1559.

[6] Pages 252–254.

[7] Pages 464–466.

[8] Page 487.

Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, argued, on the other hand, that impeachable offenses could only be offenses against the laws of the United States.[1] Mr. Thomas A. R. Nelson, of Tennessee, also of President's counsel, argued in the same line,[2] and Mr. William M. Evarts, of New York, also of counsel for the President, argued at length against the definition given by Mr. Manager Butler.[3] Of the Senators who filed written opinions on the case, this view was sustained by Mr. Garrett Davis, of Kentucky.[4]

2009. Argument that the phrase "high crimes and misdemeanors" is a "term of art," of fixed meaning in English parliamentary law, and transplanted to the Constitution in unchangeable significance.—On February 22, 1905,[5] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

I. WHAT ARE IMPEACHABLE "HIGH CRIMES AND MISDEMEANORS," AS DEFINED IN ARTICLE 11, SECTION 4, OF THE CONSTITUTION OF THE UNITED STATES?

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

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

II. PROVISIONS BORROWED FROM THE ENGLISH CONSTITUTION.

Mr. Bayard said in his argument in Blount's trial (Wharton's St. Tr., 264): "On this subject, the Convention proceeded in the same manner it is manifest they did in many other cases. They considered the object of their legislation as a known thing, having a previous definite existence. Thus existing,

[1] Page 134.

[2] Pages 293, 294.

[3] Pages 343, 344.

[4] Pages 439, 440.

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

their work was solely to mold it into a suitable shape. They have given it to us, not as a thing of their creation, but merely of their modification. And therefore I shall insist that it remains as at common law, with the variance only of the positive provisions of the Constitution. * * * That law was familiar to all those who framed the Constitution. Its institutions furnished the principles of jurisprudence in most of the States. It was the only common language intelligible to the members of the Convention."

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

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

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

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

"As these words are copied by our Constitution from the British constitutional and parliamentary law, they are, so far as applicable to our institutions and condition, to be interpreted not by English municipal law but by the lex parliamentaria. * * * Whatever 'crimes and misdemeanors' were

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

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

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

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

When in the case of Murray *v.* The Hoboken Land Co. (18 How., 272) it became necessary for the Supreme Court to construe the formula "due process of law," as embodied in the fifth amendment, Mr. Justice Curtis, speaking for the court, said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta. Lord Coke, in his commentary on those words (2 Inst., 50), says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United State northwest of the river Ohio, used the words."

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

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

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

The last phrase is specially suggestive of the fact that if Congress could, by subsequent legislation, "define or limit by law that which the Constitution defines," the Senate sitting as a court of impeachment could be entirely deprived by such legislation of the power to determine what were impeachable high crimes and misdemeanors as defined by the fathers in 1787. In other words, if Congress can add to or subtract from the constitutional definition in any particular, it can destroy it altogether. In the great case of Marbury *v.* Madison (1 Cranch, 137) the first in which an act of Congress was ever declared unconstitutional, the question of questions was this: Does the fact that the Constitution itself has defined the original jurisdiction of the Supreme Court prohibit Congress from enlarging such original jurisdiction by subsequent legislation? The solemn answer was that the attempt of Congress to do so was void. Why? Because the dividing line between the original and appellate jurisdiction having been drawn by the Constitution itself, it is immovable by legislation. In the words of the great Chief Justice: "If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance." Thus it follows that any act of Congress which attempts to change the constitutional definition of impeachable high crimes and misdemeanors, by adding to the list some offense unknown to the parliamentary law of England as it existed in 1787, is simply void and of no effect.

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

Argument that an impeachment trial is a criminal proceeding.

On February 25, 1905,[1] in the Senate, sitting for the impeachment of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in final argument, said:

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

Said the managers in their brief:

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

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

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

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

The statement of the honorable managers in their brief—

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

is contradicted by the judicial history of every case of impeachment of a judge in Great Britain and the United States.

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

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

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

The articles against Pickering read:

"Being then judge of the district court in and for the district of New Hampshire, did appear on the bench of the said court for the purpose of administering justice in a state of total intoxication, pro

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

duced by the free and intemperate use of inebriating liquors, and did then and there frequently in a most profane and indecent manner"—

That is, on the bench, while administering justice—

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

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

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

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

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

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

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

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

I insist that for the first time in this case is it even suggested by constitutional lawyers that that

term permits the impeachment of a judge simply because he has been tried and convicted in a court of a State for a crime against the statutes of a State, or because in his private life he has been impure or improvident, or because of any other shortcomings or failures exhibited in his career except those which relate to the administration of justice in the court over which he presides.

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

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

2011. Argument of Mr. Manager Perkins that a judge may be impeached for personal misconduct.—On February 24, 1905,[1] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager James B. Perkins, of New York, in concluding argument, said in relation to the articles charging nonresidents in the district:

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

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

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

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

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

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

2012. Argument of Mr. Anthony Higgins, counsel, that impeachable offenses by a judge are confined to acts done on the bench in discharge of his duties.—On February 24, 1905,[1] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, said in final argument:

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

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

This was in respect of the judges.

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

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

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

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

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

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

Mr. Mason said:

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

* * * * * *

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

Mr. Madison replied:

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

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

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

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

"ARTICLE V.

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

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

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

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

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

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

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

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

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

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

On February 22, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said,

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

had been prepared by another, covered many questions relating to impeachments,, the following being among them:

The only pertinent definitions of the term "high crimes and misdemeanors," as contained in Article II, section 4, of the Federal Constitution, must be drawn (1) from the law of Parliament as it existed in 1787; (2) from the contemporaneous expositions of that law embodied in the constitutions of the several States. In order to present anything like an adequate statement of the English law of impeachment as it existed at the time in question, some account must be given of the process of growth through which it had passed prior to that time. The history of that growth is divided into two epochs, easily distinguishable from each other. The first begins with the proceedings against the Lords Latimer and Neville, which took place in the Good Parliament in the fiftieth of Edward 111 (1376). These proceedings are regarded by the constitutional historians as the earliest instances of a trial by lords upon a definite accusation made by the Commons. (Hallam, M. A., Vol. III, p. 56; Stubbs, Const. Hist., Vol. II, p. 431.) Not until early in the reign of Edward III was Parliament definitely and finally divided into two houses that deliberated apart; not until near the dose of that reign did the Commons, as the grand jury of the whole realm, attempt to present persons accused of grave offenses against the State to the Lords for trial. At the outset, the new method of accusation was rivaled by what were known as "appeals," which have been thus defined: "It was the regular course for private persons, even persons who were not members of Parliament, to bring accusations of a criminal nature in Parliament, upon which proceedings were had." (Stephen, Hist. of the Criminal Law of England, Vol. 1, 151.)

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

VII. IMPEACHMENTS IN ENGLAND: SECOND EPOCH.

With the revival of the powers of Parliament in the reign of James 1, impeachment was resumed as a weapon of constitutional warfare. From that time its modern history, with which this discussion is concerned, really begins. The first impeachment case to occur during the second epoch was that of Sir Giles Mompesson in 1621, the last that of Lord Melville in 1805. Including the first and last the total is 54. [Here follows the list.]

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

As illustrations, reference may be made to the case of Portland, Halifax, and Somers, three Whig peers impeached of high treason by a Tory House of Commons for their share in promoting the Spanish

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

The earliest of the accusations which have been made against English judges have been for the crime of bribery, the crime for which Lord Bacon was impeached by the Commons in 1621. The changes against Bacon particularly set forth instances of judicial corruption by the acceptance of bribes, and in his "confession and submission "he said: "I do plainly and ingeniously confess that I am guilty of corruption, and do renounce all defense." (State Trials, Vol. 11, 1106.) Such cases, though rare, had occurred before Bacon's time. In the words of Sir 1. F. Stephen, Coke "gives two instances in which judges were punished for taking bribes, namely, Sir William Thorpe, in 1351, who took sums amounting in all to £90 for not awarding an exigent against five persons at Lincoln assizes, and certain commissioners (probably special commissioners) of over and terminer, who were fined 1,000 marks each for taking a bribe of £4. I have elsewhere referred to the impeachment of the Chancellor Michael de la Pole, by Cavendish, the fishmonger, for taking a bribe of £40, 3 yards of scarlet cloth, and a quantity of fish, in the time of Richard II. * * *

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

IX. IMPEACHMENT OF SIR ROBERT BERKLEY AND OTHER JUDGES.

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

The following are a fair sample of the special charges: "4. That he, the said Robert Berkley, then being one of the justices of the king's bench, and having taken an oath for the due administration of justice, according to the laws and statutes of the realm, to His Majesty's liege people, on or about the

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

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

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

XI. PROCEEDING AGAINST LORD CHIEF JUSTICE KEELING.

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

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

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

XII. REMOVAL BY ADDRESS PROVIDED BY THE ACT OF SETTLEMENT.

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

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

In the light of that statement it will be easier to understand the full purport of that section of the Act of Settlement which provides "that after the said limitations shall take effect as aforesaid, judges" commissions be made quandiu se bene gesserint, and their salaries ascertained and established; but upon the address of both Houses of Parliament it maybe lawful to remove them." Thus, for seventy-five years prior to the severance of the political tie which bound the English colonies in America to the parent State, the twofold method for the removal of English judges was clearly defined and perfectly understood on both sides of the Atlantic. The twofold method embraced (1) the removal by impeach-

ment for all acts constituting "high crimes and misdemeanors," a term then clearly defined in English parliamentary law; (2) the removal by address for all lesser acts of personal misconduct not embraced within that term. That such was the general and accepted view on this side of the Atlantic in 1776 of the English parliamentary law on impeachment and address will be put beyond all question by the following references to the several State constitutions in which that law reappeared.

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

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

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

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

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

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

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

On February 22, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

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

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

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

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

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

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

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

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

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

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

The same comments are applicable to the charges made in articles 4 and 5 as to the use by the respondent of a certain car belonging to a certain railroad, "the said railroad company being at the time in the possession of a receiver appointed by said Charles Swayne, judge as aforesaid, on the petition of creditors." Even if it could be established that the circumstances attending such a transaction would warrant removal by address, no advance would be made toward the conclusion that such acts constitute an impeachable high crime and misdemeanor as defined in English parliamentary law, because the further allegation that "the said Charles Swayne, acting as judge, allowed the credit claimed by the said receiver for and on account of the said expenditure as part of the necessary expenses of operating said road" falls far short of the English and American rule as to the evil or wicked intent which must accompany a judgment or opinion delivered on the bench in order to render it impeachable. Nothing is better settled than the fact that a judge is not impeachable even for a judgment, order, or opinion rendered contrary to law unless it is alleged and proved that it was rendered with an evil, wicked, or malicious intent. Justice Berkley was impeached not simply because he decided in favor of ship money, but because he "traitorously and wickedly endeavored to subvert the fundamental laws" of the realm thereby. Chief Justice Scroggs was impeached not simply for imposing "fines upon persons convicted of misdemeanors in said court," but because he imposed them "for the further accomplishing of his said traitorous and wicked purposes."

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

fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States."

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

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

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

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

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

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

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

On February 23, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Manager Henry W. Palmer, of Pennsylvania, filed, by permission the following brief:

A BRIEF OF AUTHORITIES ON THE LAWS OF IMPEACHMENT.

The purpose of this brief is to show—

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

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

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

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

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

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

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

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

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

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

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

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

Said Mr. Bayard, in Blount's trial:

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

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

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

These abuses were not guarded against in our Constitution by limiting, defining, or reducing impeachable crimes, since the same necessity existed here as in England for the remedy of impeach

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

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

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

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

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

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

[Story on the Constitution, p. 583.]

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

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

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

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

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

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

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

[Rawls on the Constitution, p. 210.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

it does not follow that the acts made crimes were not the subject of impeachment before the adoption of the Constitution.

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

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

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

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

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

2016. Argument of Mr. Manager Clayton that a judge may be impeached for misbehavior not necessarily connected with his judicial functions.—On February 24, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne. Mr. Manager Henry D. Clayton, of Alabama, said in final argument:

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

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

In the present case the House of Representatives has charged this judge with crimes and misdemeanors, and also contends that he has forfeited his tenure of office because he has not conformed to the good behavior required by Article III, section 3. upon which his right to hold office is predicated. The judge is entitled to hold his office during good behavior, but not otherwise. The provision of the Constitution conversely stated would be that he shall not hold office after having been guilty of mis-

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

behavior. If I understand the contention of the counsel for the respondent here, they insist that high crimes and crimes and misdemeanors and the words "the judges both of the Supreme and inferior courts shall hold their offices during good behavior" are limited or restricted to such acts as may be committed by a judge in his purely judicial capacity. In other words, however serious the crime, the misdemeanor, or misbehavior of tie judge may be, if it can be said to be extrajudicial he can not be impeached. To illustrate this contention, the judge may have committed murder or burglary and be confined under a sentence in a penitentiary for any period of time, however long, but because he has not committed the murder or burglary in his capacity as judge he can not be impeached. That contention, carried out logically, might lead to the very defeat of the performance of the function confided to the judicial branch of the Government.

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

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

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

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

Again, on page 586, this statement:

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

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

Again, on page 591, this statement:

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

In Rawle on The Constitution, page 201, in speaking of the court of

impeachment, it is said:

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

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

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

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

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

Any civil officer can be impeached. The President of the United States can be impeached. The removal from office can be had in respect to any officer under the Government, and it would be

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

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

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

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

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

The extract referred to is as follows:

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

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

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

"The Constitution provides that—

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

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

"In 1803 Pickering, a district judge of the United States, was convicted on impeachment for his

official action in surrendering to the claimant, without requiring the statutory bond, a vessel libeled by the United States, for refusing to allow an appeal from this order, and for drunkenness and profane language on the bench.

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

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

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

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

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

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

2017. Review of impeachments in Congress to show that judges have been impeached only for acts of judgment performed on the bench, as contradistinguished from personal acts performed while in office.—On February 22, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

Seven impeachment trials have taken place under the machinery provided for that purpose by the Constitution of the United States: That of William Blount (1798), that of John Pickering (1803), that of Samuel Chase (1804), that of James H. Peck (1830), that of West H. Humphreys (1862), that of Andrew Johnson (1868), and that of William W. Belknap (1876). Three of the foregoing were political impeachments and four judicial, as those terms are understood in English parliamentary law. The articles presented by the House of Representatives against the four judges—Pickering, Chase, Peck, and Humphreys—illustrate in the most emphatic manner possible that the popular branch of Congress has

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

heretofore always perfectly understood the meaning of the term "high crimes and misdemeanors," as applied to the misconduct for which a judge may be impeached. When placed side by side with the English precedents on that subject heretofore examined they agree in every particular. The House of Representatives, in the only four cases of the kind ever tried, limited its accusations, with the greatest strictness, to the acts of judgment performed by the judge on the bench, as contradistinguished from personal acts performed by the judge while in office, which might have been the ground of removal by address.

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

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

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

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

The impeachment of Judge West E. Humphreys was begun and concluded during the civil war. He was tried and condemned in his absence and without a hearing. While such an anomalous proceed-

ing can have but little weight as a precedent, what it does contain of matter relevant to a judicial impeachment supports the contention made herein. The first charge contained in the articles presented against Judge Humphreys was that he was guilty of treason, in that he "then being district judge of the United States, as aforesaid, did then and there, to wit, within said State, unlawfully and in conjunction with other persons, organize armed rebellion against the United States and levy war against them." When the allegations incident to the accusation of treason are subtracted from the articles, all that remains is a charge of judicial misconduct upon the part of Judge Humphreys while sitting in a court of the Confederate States.

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

2018. Review of the deliberation of the Constitutional Convention as bearing on the use of the words "high crimes and misdemeanors."—On February 22, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief which was signed by them as counsel but which as they said had been prepared by another, covered many questions relating to impeachments, the following being among them.

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

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

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

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

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

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

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

Mr. Dickinson moved, as an amendment to Article XI, section 2, after the words "good behavior," the words "Provided that they may be removed by the Executive on the application by the Senate and

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

House of Representatives." (The words of the act of settlement are, "but upon the address of both Houses of Parliament it maybe lawful to remove them.") Mr. Gerry seconded the motion. Mr. Gouverneur Morris thought it a contradiction, in terms, to say that the judges should hold their offices during good behavior, and yet be removable without a trial. Besides, it was fundamently wrong to subject judges to so arbitrary an authority.

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

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

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

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

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

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

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

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

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

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

On February 22, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support to their plea of jurisdiction as to the first seven of the articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

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

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

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

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

that it was the expressly declared purpose of the framers so to restrict it within narrow limits perfectly understood at the time. In the first place, the proposition to adopt removal by address was rejected with only one dissent; in the second, the proposal to adopt such a comprehensive term as "maladministration. was rejected and the limited phrase in question substituted. The declaration was clearly made at the time that there must be no undue weakening of the independence of the Federal judiciary. The necessity for such a precaution was soon justified by events.

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

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

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

On February 23, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Marlin E. Olmsted, of Pennsylvania, in final argument, said:

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

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

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

I have shown, Mr. President, that men have formerly argued that only indictable offenses are subjects for impeachment; that as there were no common-law offenses against the United States there can be no impeachment except for crimes declared and defined by act of Congress. But now, in the 48-page brief served upon us last evening, bearing the names of the honorable counsel for respondent,

[1] Third session Fifty-eighth Congress, Record, pp. 3182–3194.

but the authorship of which they distinctly disavowed—and I now know the reason why—we find the astounding doctrine that no man can be impeached for any offense declared by Congress. Therefore no officer can be impeached, no matter what he does, unless we can find that in England some judge had been impeached for the same specific offense prior to the adoption of our Constitution, which borrowed something from the mother country in this matter.

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

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

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

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

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

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

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

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

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

And again (p. 601):

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

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

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

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

"The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from

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

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

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

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

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

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

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

JURISDICTION OF FIRST SEVEN ARTICLES.

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

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

The Century Dictionary gives this definition:

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

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

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

Such is manifestly the intention of the Constitution. That instrument says "during good behavior." It does not, as some of the State constitutions do, add the words "in office." It says "high crimes

and misdemeanors," but it does not add "in office." In the brief of respondent's honorable counsel the authorship of which they disavow, they tell us, and it is entirely true, that at one stage of its formation the provision read "misdemeanors against the State." But as the words "against the State" were stricken out they argue that it must be construed as if they had been left in.

JUDGE HUMPHREY'S CASE.

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

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

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

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

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

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

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

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

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

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

BLOUNT'S CASE.

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

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

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

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

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

Argument that a judge may be impeached for misbehavior generally.

On February 25, 1905,[1] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager David A. De Armond, of Missouri, in final argument, said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2022. Opinion of Attorney-General Felix Grundy that Territorial judges are not civil officers of the United States within the meaning of the impeachment clause of the Constitution.—On February 4, 1839,[1] as perti-

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

nent to the consideration of a pending bill to amend the law establishing the Territorial government of Wisconsin, Mr. Isaac H. Bronson, of New York, chairman of the Committee on Territories, presented to the House a letter of the Attorney-General of the United States, Hon. Felix Grundy, giving an opinion on the subject of the removal of Territorial judges by impeachment:

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

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

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

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

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

The only remaining inquiry is as to the liability of Territorial judges to impeachment under the Constitution. The fourth section of the second article of the Constitution is in these words: "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment and conviction of treason, bribery, or other high crimes and misdemeanors."

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

2023. Reference to a summary of provisions of State constitutions relating to impeachment and removal by address.—On February 22, 1905,[1] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Messrs. John M. Thurston and Anthony Higgins, of counsel for respondent, filed as part of an argument on a plea as to jurisdiction a summary of provisions in the constitutions of the various States at various periods of their existence. It appears in full in the Congressional Record of that date.

2024. The question of reimbursement of respondent for his expenses in an impeachment trial.—On February 28, 1905.[2] in the Senate, the President

[1] Third session Fifty-eighth Congress, Record, pp. 3035–3041.

[2] Third session Fifty-eighth Congress, Record, p. 3601.

pro tempore laid before the Senate the following communication from the counsel of Judge Charles Swayne; which was referred to the Committee on the Judiciary:

To the President pro tempore of the United States Senate:

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

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

ANTHONY HIGGINS.
JOHN M. THURSTON.

WASHINGTON, *February 27, 1905.*

The joint resolution [1] appropriating for the expenses of the Senate in the trial made no provision for granting this request.

[1] 33 Stat. L., p. 1280.

Chapter LXIV.

FUNCTION OF THE HOUSE IN IMPEACHMENT.

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

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

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

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

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

[4] See also other sections relating to the managers:

Choice on appointment of. Sections 2300, 2306, 2323, 2345, 2350, 2368, 2388, 2417, 2448, 2475.

Held not to be a committee. Section 2420.

Sometimes endowed with power to compel testimony and even make investigations. Sections 1685, 2419, 2423.

Conduct and privileges of, during a trial. Sections 2144–2154.

Announced on entering Senate Chamber to attend trial. Section 2427.

Required to rise and address the Chair before speaking. Section 2146.

As to making of motions by. Sections 2136, 2144, 2147, 2189.

Rule as to questions and colloquies. Section 2154.

May object to witnesses answering questions asked by Senators. Sections 2182–2186.

May argue on questions put on propositions offered by Senators. Sections 2148, 2188.

May not move to amend a proposition offered by a Senator. Section 2147.

The claim that they should have the closing of all arguments. Section 2136.

They protest against delays during the trial of the President. Section 21,50.

Are admonished not to delay. Section 2151.

Decline in the Pickering case to discuss a matter from a third party. Section 2334.

As to reports in relation to trial. Sections 2338, 2423, 2468.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On December 23, 1830,[1] this resolution was agreed to by the House:

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

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

On December 24[2] Mr. Kensey Johns, Jr., of Delaware, moved to reconsider the vote whereby the resolution was agreed to, and the consideration of this motion was postponed to December 27.

On December 27,[3] after consideration, the motion to reconsider was laid on the table.

On January 3, 1831,[4] Mr. Johns moved that the House proceed to the consideration of the motion to reconsider,[5] and Mr. Johns's motion was agreed to, yeas 117, nays 58.

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

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

The question recurring on agreeing to the original resolution of December 23, after debate, on January 4[6] the question was put "that the House do, on reconsideration, agree to pass the same," and it was decided in the negative, yeas 69, nays 118.

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

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

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

On January 30, 1892[7] Mr. William C. Oates, of Alabama, from the Committee on the Judiciary, reported the following preamble and resolution, which were agreed to:

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

Whereas, the Committee on the Judiciary, under the authority of said House, investigated the alleged official misconduct in office of the said judge and took a considerable volume of testimony thereon

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[1] Second session Twenty-first Congress, Journal, pp. 97, 99.

[2] Journal, p. 101.

[3] Journal, p. 105.

[4] Journal, pp. 131–133.

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

[6] Journal, pp. 139,140.

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

both against said judge and for him, he being present in person or by his counsel whenever and wherever the said testimony was taken; and

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

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

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

And for the purpose of making the investigation hereby ordered the said Committee on the Judiciary may adopt and use as legal evidence the testimony taken as aforesaid during the Fifty-first, Congress in the case of Judge Boarman, and may take and consider any additional and explanatory evidence of a legal character which may be offered either for or against the said judge; and in respect to this investigation the said committee is hereby authorized and empowered to send for persons and papers, administer oaths, take testimony, and to employ a clerk and stenographer, if necessary; to send a subcommittee whenever and wherever deemed necessary to take testimony for the use of said committee, and the said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary; that the Sergeant-at-Arms by himself or deputy shall serve the process of said committee and subcommittee and execute its orders and shall attend the sittings of the same as ordered and directed thereby, and the expenses of said investigation shall be paid out of the contingent fund of the House.

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

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

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

On June 25, 1906,[2] the Speaker under the rule presented a petition, as follows, which was referred to the Committee on the Judiciary:

Petition of Francis C. Mahon, of New Orleans, La., preferring charges against Charles Parlance, district judge of the eastern district of the United States court of Louisiana.[3]

2031. When managers of an impeachment are elected by ballot, a majority is required for the choice of each.—On December 5, 1804,[4] the House having decided that seven managers should be appointed by ballot to conduct the impeachment of Judge Samuel Chase, the ballot was taken, and the following Members appeared to be duly elected by a majority of the votes of the whole House, as six of the said managers, to wit: Mr. John Randolph, Mr. Rodney, Mr. Nicholson, Mr. Early, Mr. Boyle, and Mr. Nelson.

The House proceeded to a second ballot for another manager, when the ballots being examined it appeared that no Member had a majority of the votes of the

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

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

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

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

whole House, but that the highest number of votes was given in favor of Mr. George Washington Campbell.

The Speaker[1] decided that it being provided by a standing rule and order of the House that in case of any second ballot of the House in which the number required to compose a committee should not be elected by a majority of the votes given on the second ballot, a plurality of votes shall prevail, and therefore that in his opinion the said George Washington Campbell was duly elected the seventh manager.

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

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

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

2032. A Member appointed one of the managers of an impeachment may be excused by the House.—On January 25, 1805,[2] the House excused Mr. Roger Nelson, of Maryland, from serving as one of the managers appointed to conduct the impeachment against Judge Samuel Chase.

2033. The House gives leave to its managers to examine Members as witnesses in an impeachment trial, and leave to its Members to attend for that purpose.—On April 28, 1876,[3] Mr. Scott Lord, of New York, offered this resolution, which was agreed to:

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

2034. A resolution empowering managers of an impeachment to take the testimony of Members was presented as a question of privilege.—On April 28, 1876,[4] Mr. Scott Lord, of New York, presented as a question of privilege, and as required by the rule of parliamentary law, the following resolution, which was agreed to without debate:

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

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

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

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

[2] Second session Eighth Congress, Journal, p. 105 (Gales and Seaton, ed.).

[3] First session Forty-fourth Congress, Journal, p. 880.

[4] First session Forty-fourth Congress, Record, p. 2818.

On February 17, 1905,[1] in the Senate Sitting for the impeachment trial of Judge Charles Swayne, the managers attended, with the exception of Mr. Manager David H. Smith, of Kentucky.

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

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

2036. On February 20, 1905,[2] the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

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

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

2037. The House thanked its managers for their services in the Swayne impeachment trial.—On March 3, 1905[3] Mr. Swager Sherley, of Kentucky, by unanimous consent, offered this resolution, which was agreed to by the House:

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

2038. Forms of subpoena and compulsory process issued by House committee to produce persons and papers for Blount impeachment.—In the proceedings for the impeachment of William Blount in 1797–8, the managers of the House of Representatives issued a subpoena in the following form:[4]

To John Rogers, resident in the Cherokee Nation:

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

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

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

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

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

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

You are hereby required, in pursuance of the powers vested in us, the said committee, by the resolutions and orders aforesaid, that, laying aside all manner of business and excuses whatsoever, you be and appear forthwith, in your proper person, before us, the said committee, at the statehouse, in

[1] Third session Fifty-eighth Congress, Record, p. 2776.

[2] Third session Fifty-eighth Congress, Record, p. 2899.

[3] Third session Fifty-eighth Congress, Record, p. 3988.

[4] Fifth Congress, Annals, p. 2330.

the city of Philadelphia, to be examined touching the premises, and to testify your knowledge therein: And that you bring with you all such papers and documents touching the same as may be in your hands and possession; and herein fail not, at your peril.

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

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

2039. In the proceedings for the impeachment of William Blount, in 1797–8, the managers for the House of Representatives issued orders of arrest in form as follows: [1]

UNITED STATES, to Wit:

To Capt. William Eaton.

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

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

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

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

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

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

UNITED STATES, to Wit:

To Major Thomas Lewis.

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

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

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

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

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

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

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[1] Fifth Congress, Annals, p. 2324.

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

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

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

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

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

To Capt. William Eaton.

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

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

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

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

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

I am, Sir, your most obedient servant,

S. SITGREAVES, *Chairman of the Committee.*

PHILADELPHIA, *July 9,1797.*

2040. Form of discharge issued to a witness before the House committee which investigated the impeachment charges against William Blount.—In the proceedings for the impeachment of William Blount, in 1797–8, the managers of the House of Representatives issued a discharge to a witness in form as follows: [2]

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

[2] Fifth Congress, Annals, p. 2328.

United States as a witness on a trial of the said impeachment, has been, and hereby is, discharged by the said committee from any further attendance upon them.

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

By order of the committee.

S. SITGREAVES, *Chairman.*

2041. Form of subscription of witness to testimony and attestation thereof in examination preliminary to the Peck trial.—The Journal [1] of the Judiciary Committee, which in 1830 examined the charges against James H. Peck, judge of the United States court for the district of Missouri, shows that each witness subscribed to his testimony, which bore this further endorsement:

Sworn and subscribed before the Judiciary Committee on the—March, 1830.

Attest:

JAMES BUCHANAN, *Chairman.*

The same form is found in later investigations.

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

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

On March 23, 1868,[2] the House was considering the proposed replication to the answer of President Johnson to the articles of impeachment presented against him in the Senate by the House. This answer had been transmitted to the House from the Senate by message.

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

The Speaker [3] said:

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

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

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

2043. During the Johnson trial the House considered matters pertinent thereto under suspension of the rules.—On March 16, 1868,[4] while proceedings for the impeachment of President Johnson were going on, the House, by suspension of the rules, considered and agreed to the following:

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

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[1] First session Twenty-first Congress, House Report, No. 325.

[2] Second session Fortieth Congress, Globe, pp. 2073, 2079, 2080.

[3] Schuyler Colfax, of Indiana, Speaker.

[4] Second session Fortieth Congress, Journal, pp. 530–532; Globe, pp. 1905, 1906.

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

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

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

On June 17, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, moved "that this cause be now continued until some convenient day in the month of November."

Mr. Manager Scott Lord said:

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

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

On the same day[2] Mr. Manager Lord made a verbal report to the House of Representatives, and then, on behalf of the managers, proposed this resolution:

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

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

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

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

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

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

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

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

The Senate denied the application for a postponement.

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[1] First session Forty-fourth Congress, Senate Journal, p. 953; Record of Trial, pp. 171, 172.

[2] House Journal, pp. 1116, 1117; Record, pp. 3871–3874.

2045. A proposition to impeach a civil officer of the United States is presented as a question of constitutional privilege.—On January 10, 1843,[1] Mr. John M. Botts, of Virginia, as a privileged subject, submitted the following:

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

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

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

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

The Speaker[2] decided that as by the Constitution it was a privilege of the House of Representatives to institute proceedings against the President, he considered that the present was a privileged proceeding and should take precedence of all other proceedings.

The record of debates gives the Speaker's explanation for his ruling. He said that since the present Speaker had been in the chair there had been no case of this kind before the House, and only two cases since the beginning of the Government. The first was that of Chief Justice Chase,[3] in which no question like the one now raised was presented. That case was then considered and acted upon by the House as a privileged question. Mr. Randolph rose in his seat, and, without any resolution or specific charges, after some remarks on the conduct of Judge Chase, moved for a committee to take into consideration the propriety of impeaching him. The matter went on day after day, and by the universal acquiescence of the House took preference of all other business as a privileged question. In addition to this the Chair considered this a high constitutional question, paramount to all others, without reference to the rules of the House.[4]

2046. On January 7, 1867,[1] Mr. James M. Ashley, of Ohio, as a question of privilege, submitted the following:

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

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

In that he has corruptly used the appointing power;

In that he has corruptly used the pardoning power;

In that he has corruptly used the veto power;

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

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[1] Third session Twenty-seventh Congress, Journal, p. 159; Globe, p. 145.

[2] John White, of Kentucky, Speaker.

[3] See section 2342 of this volume.

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

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

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

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

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

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

The Speaker [1] ruled that it was privileged, saying that in the Twenty-seventh Congress, by the then Speaker, it was decided, on the point raised by Horace Everett, of Vermont, that it was a question of privilege.[2]

2047. On December 2, 1884,[3] Mr. John F. Follett, of Ohio, submitted as a matter of privilege the following:

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

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

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

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

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

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

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

After debate the Speaker [4] said:

The present occupant of the chair decided during the last session of Congress that a mere proposition to investigate the conduct of a public officer, without proposing to impeach him, was not a matter of privilege under the rules of the House or under the Constitution of the United States; and the Chair has seen no reason to change that opinion. But the gentleman from Ohio (Mr. Keifer) is mistaken in his statement that the resolution now offered does not contain a proposition for impeachment. The

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[1] Schuyler Colfax, of Indiana, Speaker.

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

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

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

resolution begins with an impeachment of this officer; and all that follows is a mere specification under the general charge made, together with a direction to a committee to make the investigation usual in such cases. The proceeding corresponds precisely with that adopted in the Twenty-seventh Congress, when an attempt was made to impeach the then President, John Tyler, and adopted afterwards in the Thirty-ninth Congress, when Mr. Ashley, then a Member from Ohio, rose in his place on the floor, made charges against the then President, Andrew Johnson, and asked for an investigation. * * * It is admitted that the resolution now offered does contain a proposition to impeach a public officer who is impeachable under the Constitution; but it is insisted that it does not present a matter of privilege under the Constitution or rules of the House, because, in the first place, it contains other matter; that is to say, it directs the committee to take certain evidence in the case which it is claimed is not pertinent to the charges made.

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

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

2048. On December 10, 1895,[1] Mr. William E. Barrett, of Massachusetts, presented as a question of privilege the following:

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

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

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

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

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

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

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[1] First session Fifty-fourth Congress, Journal, p. 37; Record, p. 115.

During the debate the precedents of February 4 and December 2, 1884,[1] were cited. The Speaker,[2] in ruling, said:

It seems to the Chair that there is a great distinction between the two cases. The Chair has examined the decision of the Speaker of the House made on the 2d day of December, 1884, and sees no reason why he should not adopt that opinion. The Chair therefore overrules the point of order.[3]

2049. Although a report as to an impeachment be laid on the table, the right to move again an impeachment in the same case is not precluded.— On December 6, 1867,[4] the House was considering the report of the Judiciary Committee recommending the impeachment of Andrew Johnson.

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

The Speaker[5] said:

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

2050. A mere proposition to investigate the conduct of a civil officer is not presented as a matter of constitutional privilege, even though impeachment may be contemplated as a possibility.—On February 4, 1884,[6] Mr. William M. Springer, of Illinois, presented the following resolution, claiming it to be a question of privilege:

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

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

In sustaining the point of order the Speaker[7] said:

The Chair will state that, having looked at the memorial, he finds that it does contain charges against a judge of the United States court in the Territory of New Mexico. Upon that the gentleman from Illinois offers a resolution that the memorial and charges be referred to the Committee on the Judiciary for investigation. The question is made that this is not a matter of privilege. * * * If a Member on the floor should prefer articles of impeachment against a public officer the Chair has no

[1] See sections 146 and 148.

[2] Thomas B. Reed, of Maine, Speaker.

[3] For a similar instance wherein Mr. Speaker Colfax held that a proposition to impeach Charles Francis Adams, minister to England, was privileged, see Globe, first session Fortieth Congress, pp. 778, 779.

[4] Second session Fortieth Congress, Globe, p. 65.

[5] Schuyler Colfax, of Indiana, Speaker.

[6] First session Forty-eighth Congress, Journal, p. 495; Record, p. 871.

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

doubt that it would be a privileged matter under the Constitution, because the House possesses the power of impeachment. But this is not a resolution proposing to impeach anyone. It simply instructs the Committee on the Judiciary to inquire into the truth or falsity of certain charges made against a public officer in a memorial which has been presented. The inquiry may result in an impeachment or it may not.

2051. A resolution directly proposing impeachment is privileged; but the same is not true of one proposing investigation with a view to impeachment.—On December 2, 1867,[1] Mr. William E. Robinson, of New York, claiming the floor for a question of privilege, offered the following resolution:

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

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

The Speaker[2] said:

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

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

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

The Speaker said:

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

The resolution was referred to the Committee on Foreign Affairs.

2052. On November 21, 1867,[1] Mr. William E. Robinson, of New York, as a question of privilege, submitted the following resolution:

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

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

The resolution having been read, the Speaker[4] said:

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

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[1] Second session Fortieth Congress, Journal, p. 9; Globe, p. 4.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] First session Fortieth Congress, Journal, p. 256; Globe, p. 778.

[4] Schuyler Colfax, of Indiana, Speaker.

2053. Impeachment is a question of constitutional privilege which may be presented at any time irrespective of previous action of the House.— On March 3, 1879,[1] the regular order of business was the report of the Committee on Expenditures in the State Department proposing articles of impeachment against George F. Seward, late consul-general at Shanghai, China, and now minister plenipotentiary to China.

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

The Speaker[2] overruled the point of order on the ground that the subject referred to the Committee on the Judiciary was the answer of the said Seward in response to the order of the House requiring him to show cause why he should not be declared in contempt of the House, and also on the further ground that the question of impeachment was one of constitutional privilege which could be raised or presented at any time by any Member of the House.

2054. A resolution for discontinuing impeachment proceedings, but not respectful to the House, was ruled not to be privileged.—On May 18, 1868[3] Mr. Alexander H. Jones, of North Carolina, offered as involving a question of privilege, the following:

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

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

Mr. Elihu Washburne, of Illinois, having objected, the Speaker[4] held:

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

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[1] Third session Forty-fifth Congress, Journal, p. 621; Record, pp. 2347, 2348.

[2] Samuel J. Randall, of Pennsylvania, Speaker.

[3] Second session Fortieth Congress, Globe, p. 2259.

[4] Schuyler Colfax, of Indiana, Speaker.

Chapter LXV.

FUNCTION OF THE SENATE IN IMPEACHMENT.

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

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

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

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

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

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

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

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

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

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

Objections of Senators to evidence. Section 2268.

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

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

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

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

2056. Under the parliamentary law the Lords are the judges and may not impeach or join in the accusation.

The Lords may not, under the parliamentary law, proceed by impeachment against a Commoner, except on complaint of the Commons.

Provisions of parliamentary law as to trial by impeachment of a Commoner for a capital offense.

In Chapter LIII, of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Jurisdiction. The Lords can not impeach any to themselves, nor join in the accusation, because they are the judges. (Seld. Judic. in Parl., 12, 63.) Nor can they proceed against a Commoner but on complaint of the Commons. (Ib., 84.) The Lords may not, by the law, try a Commoner for a capital offense, on the information of the King or a private person, because the accused is entitled to a trial by his peers generally; but on accusation by the House of Commons they may proceed against the delinquent, of whatsoever degree and whatsoever be the nature of the offense; for there they do not assume to themselves trial at common law. The Commons are then instead of a jury, and the judgment is given on their demand, which is instead of a verdict. So the Lords do only judge, but not try the delinquent. (Ib., 6, 7.) But Wooddeson denies that a Commoner can now be charged capitally before the Lords, even by the Commons, and cites Fitzharris's case, 1681, impeached for high treason, where the lords remitted the prosecution to the inferior court. (8 Grey's Deb., 325–327; 2 Wooddeson, 576, 601; 3 Seld., 1604, 1610, 1618, 1619, 1641; 4 Blackst., 25; 9 Seld., 1656; 73 Seld., 1604–1618.)

2057. In 1868, after mature consideration, the Senate decided that it sat for impeachment trials as the Senate and not as a court.

An anxiety lest the Chief Justice might have a vote seems to have led the Senate to drop the words "high court of impeachment" from its rules.

The Senate, as a Senate and not as a court, adopted rules for the Johnson trial; but on the insistence of the Chief Justice adopted them when organized for the trial.

In the Johnson trial the articles of impeachment were presented before the Chief Justice had taken his seat, although he had filed his written dissent from such procedure.

Written dissent of the Chief Justice from views taken by the Senate as to its constitutional functions in an impeachment trial.

Enunciation of Mr. Senator Sumner's theory that the Senate was not a court and the Senators were not constrained by the obligations of judges in an impeachment trial.

On February 29, 1868,[1] the Senate, in its legislative capacity and before its organization for impeachment proceedings, began the consideration of a series of

[1] Second session Fortieth Congress, Senate Journal, p. 236; Globe, p. 1515.

rules reported [1] by a select committee composed of Messrs. Jacob M. Howard, of Michigan; Lyman Trumbull, of Illinois; Roscoe Conkling, of New York; George F. Edmunds, of Vermont; Oliver P. Morton, of Indiana; Stephen C. Pomeroy, of Kansas, and Reverdy Johnson, of Maryland. The caption of this report was "Rules of Procedure and Practice in the Senate when Sitting as a High Court of Impeachment." At the outset of the discussion [2] Mr. Thomas A. Hendricks, of Indiana, made the objection that the rules not only proposed the method for organizing the Senate into a court, but also proposed regulations for the court itself. He conceived that it was not proper for the Senate as such to adopt rules to control the action of the court upon any question whatever that might become material during the trial.

During the discussion of the rules themselves, Mr. Oliver P. Morton, of Indiana, acting upon suggestions received since he had concurred in the report, called attention [3] to the use of the words "high court of impeachment" in Rules III and IV as submitted:

> They both used language which may, perhaps, lead to trouble, and give rise to a different theory in regard to the character of the body that is to try this impeachment. It is provided that the Senate shall resolve itself into a high court of impeachment. Is there any authority in the Constitution for that, or is there any propriety in it? Is not this impeachment to be tried simply by the Senate of the United States? While the Senate is engaged in the trial, does it lose the character of the Senate and become a court? If we shall allow ourselves to contemplate that idea, may it not lead to consequences that we do not desire, and to difficulties? The Constitution seems to contemplate that this impeachment shall be tried by the Senate. It says: "The Senate shall have the sole power to try all impeachments;" and "when sitting"—that is, the Senate, when sitting—"for that purpose they shall be on oath or affirmation." That is all that is required, that the Senate, when sitting for that purpose, shall be on oath or affirmation. But we are here proposing to resolve ourselves into another character; we are to cease to be a Senate and become a court. If we follow out that theory, there maybe many little consequences attaching to it before we get done with it that we do not anticipate. Why not preserve the simple idea that this impeachment is to be tried by the Senate of the United States as the Senate and nothing else? What use have we got for the phraseology "resolving itself into a high court of impeachment?" I object to the use of the word "high," in that connection, anyhow. But the argument made by my colleague suggests that the theory which we thus seem to recognize may involve other consequences that we do not now contemplate; and although I assented to these rules, and would regret now to find fault, yet it occurs to me, from the suggestion made and from looking at the Constitution itself, that this impeachment, after all, is to be tried simply by the Senate of the United States.

Debate at once arose [4] and there was a citation of precedents to show that in former impeachment trials the words "high court of impeachment" had been used, although Mr. Conkling argued that these words had been used rather by the Secretary in recording the proceedings than by the Senate itself.

Mr. Orris S. Ferry, of Connecticut, moved to strike out the word "high," and announced that if that should be agreed to, he would propose further amendments with the object of removing the idea that the Senate was in such proceedings a distinct court.

Mr. Ferry's motion was disagreed to,[5] yeas 16, nays 21.

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[1] Senate Report No. 59.

[2] Globe, pp. 1520, 1521.

[3] Globe, p. 1521.

[4] Globe, pp. 1521–1526.

[5] Senate Journal, p. 237; Globe, p. 1526.

The question was not settled by this vote, however, but recurred again and again. On March 2[1] Mr. Hendricks proposed an additional rule, as follows:

When the Senate sits as a high court of impeachment in a case in which the Chief Justice must preside, such of the foregoing rules as apply to the trial shall be considered and adopted by the court before they shall have force.

In support of his motion Mr. Hendricks argued:

I am not able to see that there ought to be a doubt on this question. If the Chief Justice must preside when the Senate shall try the case, he ought to preside when the Senate decides how it will try the case, what forms of proceeding shall be observed, what rights shall be secured to counsel, what rights shall be reserved to Senators. Many of these rules are exceedingly important.

* * * If the Constitution provides that the Chief Justice must preside here, and that this must be a court with the Chief Justice as the presiding officer when the trial takes place, ought we not to decide how the case shall be tried when he is in his seat? In a case where the Chief Justice must preside, is it proper that the Senate, in his absence, when the Vice-President or President pro tempore is occupying the chair, who may succeed in case the impeachment is successful—is it right with that organization of the Senate to prescribe the rules which shall govern the court which the Constitution itself provides for?

* * * These rules, among other things, confer upon the Chief Justice presiding the power to decide certain questions, questions of the admissibility of evidence. These may be very important. It is conferring upon him a power which he would not possess in the absence of the rule. Now, that is a power which he is to exercise in the court, which we confer upon him when not organized into the court and not under oath.

In reply Mr. Timothy O. Howe, of Wisconsin, suggested that the Chief Justice would have no vote in adopting the rules, and as to his decisions on the admissibility of evidence, he said:

We confer that power upon him in pursuance of the authority of the Senate to make rules for its government in any particular in which the Senate may be called upon to act, as the Constitution says we may. Now, in any possible contingency, if we have the authority at any time to confer the power mentioned in the seventh rule upon the presiding officer, does it make any possible difference whether we do it to-day or to-morrow, whether we do it when the Chief Justice is here or when he is absent. If I could see that it did, I might hesitate upon the point; but as the same identical individuals are to do the thing whenever it is done, I can not for my life see what difference it can make whether it is done on one day or another.

The amendment proposed by Mr. Hendricks was disagreed to without division.

Immediately thereafter[2] Rule XXIV was read, prescribing forms for subpoenas of witnesses and of the summons to the person impeached. In these forms occurred the words "Senate of the United States, sitting as a high court of impeachment." Mr. Conkling moved to strike out the words "sitting as a high court of impeachment" wherever they occurred.

This motion was agreed to without very extended debate, Mr. Conkling stating that if his amendment should be adopted it would restore the forms to what they were in the trials of 1804, 1830, and 1862. Mr. Edmunds explained that the words objected to had been introduced to get a form applicable to all conditions, whether the Chief Justice, a Vice-President, or a President pro tempore should preside.

Mr. Conkling's motion was agreed to, yeas 23, nays 12. This was not, however, regarded as very significant on the question as to the nature of the court. Mr.

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[1] Senate Journal, p. 244; Globe, pp. 1589, 1590.

[2] Senate Journal, p. 246; Globe, pp. 1591, 1592.

John Sherman, of Ohio, who voted for the motion, but championed the idea that the words high court should be retained as descriptive of the body, said that he did not consider it necessary, in summoning a witness, to inform him that the Senate was sitting as a high court of impeachment.

But on Rule XXV Mr. Conkling brought the question to issue [1] by moving an amendment which struck out the word "court."

Mr. Sherman said:

That this Senate is a court when it proceeds to try a case I think it does not need any very long speech to prove. We examine witnesses; we convict or acquit; we try a case; we are sworn; and if there is any element of a trial or any idea of a court that does not enter into our organization I do not know what it can be.

Mr. Conkling said:

The Constitution says that the Senate shall have the sole power to try all impeachments. It does not say that the Senate shall become a court ex officio; it does not say that there shall be a high court for the trial of impeachment, to be composed of the Senate and of the Chief Justice sitting ex officio. It says nothing of that kind, but simply that the Senate shall try all impeachments. Why not leave it there? If it is a court we do not destroy that character by omitting these superfluities from our rules. If it is not a court we do not clothe it with the ermine or the attributes of a court by putting in the rules that it is so.

Then why not take the thing precisely as we find it?

Mr. Edmunds said:

It is a matter of some regret to me and to those of us who differed from my friend from New York in committee, where we thought we had settled the matter, that he is not willing to take the decision of the Senate on Saturday, when we were pretty full, upon this very question, instead of bringing it up again now, after we have gone through with this whole thing. Of course he is perfectly justified in doing so if he thinks the importance of it demands that course on his part; but I am a little afraid that his fear of the canal board in his State being turned into a court has led him to be a little touchy on this subject.

On Saturday, it will be remembered, this very question was debated at great length, not an unnecessary length, but every gentleman expressed his views who chose to do so, and gave his reasons for them, and the precedents were referred to; and then upon the yeas and nays on the question of striking out the word "high" (in connection with which it was expressly stated by the Senator from Connecticut that if he succeeded in that he should follow it by the other motions which would leave the description of the body to be simply "the Senate," because it would be easier to get an affirmative vote upon striking out a word, which was, of course, a mere matter of form, than it would upon the whole) the proposition was voted down, and voted down upon a reference to the precedents.

I hold in my hand the Globe, showing those proceedings; and the first was the trial of Blount, in 1798, in which—I ask the attention of the Senator from New York to it—the formal resolution—not the entry of the Secretary, but the resolution of the Senate as offered and adopted—was "resolved, that at the next opening of the court of impeachment the president" shall do so and so. Then, when we come to the trial of Chase, which was referred to also in some parts of the proceedings, the expression "court of impeachment" appears only to be the entry of the Secretary, but in other parts of the proceedings it appears to be the judgment of the Senate itself. Then, when we come to the trial of Peck, on the question of the Senate's taking upon itself a judicial capacity, the formal resolution offered on the part of the committee appointed by the Senate to report rules in that case was:

"Resolved, That at 12 o'clock tomorrow the Senate will resolve itself into a court of impeachment."

So that we find ourselves from the beginning, in 1798, down to this time—and the case of Humphreys in 1862 is just the same—having adopted this phraseology as describing the Senate, when it was

[1] Senate Journal, p. 246; Globe, pp. 1593–1594. There is a discrepancy between the Journal and Globe, but the debate shows that the Globe must be correct.

exercising this function, as sitting as a court, saying nothing now about the word "high." Then where is the use, after all the discussion we have had on this point and one decision of it in the face of these uniform precedents from the beginning to this time, of turning our faces back and oversetting the whole theory upon which these rules go?

Mr. Ferry said:

Whether the Senate, sitting for the trial of impeachments, be a court or not in ordinary language, whether that term as ordinarily used may properly enough be applied to it is one thing. Whether the Constitution calls it a court and designates it as a court is another thing. If that tribunal be a court according to the Constitution, I would like to have Senators who desire to retain this phraseology point out to me a statute on the face of the earth designating the presiding officer of the court in which a presiding officer has not somewhat more functions than Senators seem to be willing to attribute to the presiding officer of this court of impeachment. And I feel thus because I wish to preserve simply to the Senate—not in relation to this particular case; I care nothing about it in this particular case one way or the other—but to preserve to the Senate, and the Members of the Senate only, their constitutional functions without interference from outside. As I suggested before, it is not worth while for me to go over the argument again, because, using this language in the rules which we are prescribing, we ourselves prejudge the question and estop ourselves. As it seems to me, by declaring that the Constitution makes this tribunal a court in the legal, constitutional signification of the term. we estop ourselves from claiming that none other than a Senator is a member of that court.[1]

To this Mr. Edmunds retorted:

I ask him if he does not know that the House of Lords in England from time immemorial has always been called the high court of Parliament; and if he does not know that in proceedings in impeachment in that court the lord chancellor or lord high steward, the president of the court, has no vote unless he be a member of that court by being a peer, by the constant practice and frequent decision of that body?

Mr. Conkling's motion was then agreed to—yeas 16, nays 13.

Then the rules were generally amended, on motion of Mr. Ferry, in such a way as to remove the word "court" or "high court of impeachment" wherever occurring,[2] and were agreed to.

On March 4[3] the Senate met, and the President pro tempore laid before them the following communication:

To the Senate of the United States:

Inasmuch as the sole power to try impeachments is vested by the Constitution in the Senate, and it is made the duty of the Chief Justice to preside when the President is on trial, I take the liberty of submitting, very respectfully, some observations in respect to the proper mode of proceeding upon the impeachment which has been preferred by the House of Representatives against the President now in office.

That when the Senate sits for the trial of in impeachment it sits as a court seems unquestionable.

That for the trial of an impeachment of the President, this court must be constituted of the Members of the Senate, with the Chief Justice presiding, seems equally unquestionable.

The Federalist is regarded as the highest contemporary authority on the construction of the Constitution; and in the sixty-fourth number the functions of the Senate "sitting in their judicial capacity as a court for the trial of impeachments" are examined.

In a paragraph explaining the reasons for not uniting "the Supreme Court with the Senate in the formation of the court of impeachments" it is observed that "to a certain extent the benefits of that

[1] The discussion as to whether the Chief Justice would have a vote in the proceedings had already taken place (Globe, pp. 1585–1588) and had suggested the allied question of the nature of the Senate in this function.

[2] Senate Journal, p. 248; Globe, p. 1602.

[3] Senate Journal, pp. 798–800; Globe, p. 1644.

union will be obtained from making the Chief Justice of the Supreme Court the president of the court of impeachments, as is proposed in the plan of the convention, while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was, perhaps, the prudent mean."

This authority seems to leave no doubt upon either of the propositions just stated. And the statement of them will serve to introduce the question upon which I think it my duty to state the result of my reflections to the Senate, namely, at what period, in the case of an impeachment of the President, should the court of impeachment be organized under oath as directed by the Constitution?

It will readily suggest itself to anyone who reflects upon the abilities and the learning in the law which distinguish so many Senators that besides the reason assigned in the Federalist there must have been still another for the provision requiring the Chief Justice to preside in the court of impeachment. Under the Constitution, in case of a vacancy in the office of President, the Vice President Succeeds; and it was doubtless thought prudent and befitting that the next in succession should not preside in a proceeding through which a vacancy might be created.

It is not doubted that the Senate, while sitting in its ordinary capacity, must necessarily receive from the House of Representatives some notice of its intention to impeach the President at its bar; but it does not seem to me an unwarranted opinion, in view of this constitutional provision, that the organization of the Senate as a court of impeachment, under the Constitution, should precede the actual announcement of the impeachment on the part of the House.

And it may perhaps be thought a still less unwarranted opinion that articles of impeachment should only be presented to a court of impeachment; that no summons or other process should issue except from the organized court, and that rules for the government of the proceedings of such a court should be framed only by the court itself.

I have found myself unable to come to any other conclusions than these. I can assign no reason for requiring the Senate to organize as a court under any other than its ordinary presiding officer for the later proceedings upon an impeachment of the President which does not seem to me to apply equally to the earlier.

I am informed that the Senate has proceeded upon other views; and it is not my purpose to contest what its superior wisdom may have directed.

All good citizens will fervently pray that no occasion may ever arise when the grave proceedings now in progress will be cited as a precedent; but it is not impossible that such an occasion may come.

Inasmuch, therefore, as the Constitution has charged the Chief Justice with an important function in the trial of an impeachment of the President, it has seemed to me fitting and obligatory, where he is unable to concur in the views of the Senate concerning matters essential to the trial, that his respectful dissent should appear.

S. P. CHASE,
Chief Justice of the United States.

WASHINGTON, *March 4, 1868.*

This letter was referred to the select committee of which Mr. Howard was chairman.

Soon thereafter the managers presented themselves with the articles of impeachment, and delivered them to the Senate, the President pro tempore presiding.[1]

Then,[2] after the intervention of legislative business, the Senate agreed to the necessary resolutions for notifying the House of Representatives and the Chief Justice that on the following day "the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States," etc.

A resolution providing that a printed copy of the rules be furnished to the House of Representatives was agreed to, although Mr. Charles R. Buckalew, of Pennsylvania, objected that this should not be done until after the court had been organized and had determined on rules.

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[1] Senate Journal, pp. 800–807; Globe, pp. 1647–1649.

[2] Globe, pp. 1657–1658; Senate Journal, pp. 807, 808.

On March 6,[1] after the organization for the trial of the articles of impeachment, the Chief Justice said, before putting the question on a resolution notifying the House of Representatives of the organization:

The Chair feels it his duty to submit a question to the Senate relative to the rules of proceeding. In the judgment of the Chief Justice the Senate is now organized as a distinct body from the Senate sitting in its legislative capacity. It performs a distinct function; the members are under a different oath; and the presiding officer is not the President pro tempore of the Senate, but the Chief Justice of the United States. Under these circumstances, the Chair conceives that rules adopted by the Senate in its legislative capacity are not rules for the government of the Senate sitting for the trial of an impeachment unless they be also adopted by that body. In this judgment of the Chair, if it be an erroneous one, he desires to be corrected by the judgment of the court, or of the Senate sitting for the trial of the impeachment of the President, which in his judgment are synonymous terms, and therefore, if he may be permitted to do so, he will take the sense of the Senate upon this question, whether the rules adopted on the 2d of March, a copy of which is now lying before him, shall be considered the rules of proceeding in this body. ["Question!"] Senators, you who think that the rules of proceeding adopted on the 2d of March should be considered as the rules of proceeding of this body will say "ay;" contrary opinion, "no." [The Senators having answered.] The ayes have it by the sound. The rules will be considered as the rules of proceeding in this body.

The journal of the Senate, in referring to proceedings in the trial, also refrains from the use of the words "high court of impeachment."[2]

The Chief Justice, however, in opening the daily sittings, directed the Sergeant-at-Arms to "open the court by proclamation."[3]

The answer of the President was also addressed to the "Senate of the United States, sitting as a court of impeachment."[4]

On June 3, 1868,[5] after the trial of the President had been concluded, Mr. Charles Sumner, of Massachusetts, presented to the Senate the following resolutions declaring the constitutional responsibility of Senators for their votes on impeachment:

Whereas a pretension has been put forth to the effect that the vote of a Senator on an impeachment is so far different in character from his vote on any other question that the people have no right to criticise or consider it; and whereas such pretension, if not discountenanced, is calculated to impair that freedom of judgment which belongs to the people on all that is done by their Representatives: Therefore, in order to remove all doubts on this question and to declare the constitutional right of the people in cases of impeachment—

1. *Resolved,* That, even assuming that the Senate is a court in the exercise of judicial power, Senators can not claim that their votes are exempt from the judgment of the people; that the Supreme Court, when it has undertaken to act on questions essentially political in character, has not escaped this judgment; that the decisions of this high tribunal in support of slavery have been openly condemned; that the memorable utterance known as the Dred Scott decision was indignantly denounced and repudiated, while the Chief Justice who pronounced it became a mark for censure and rebuke; and that plainly the votes of Senators on an impeachment can not enjoy an immunity from popular judgment which has been denied to the Supreme Court, with Taney as Chief Justice.

2. *Resolved,* That the Senate is not at any time a court invested with judicial power, but that it is always a Senate with specific functions, declared by the Constitution; that according to express words, the judicial power of the United States is vested in one Supreme Court and such inferior courts as

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[1] Senate Journal, p. 811; Globe, p. 1701.

[2] Senate Journal, pp. 272, 276, etc.

[3] Globe Supplement, pp. 11, 28.

[4] Senate Journal, p. 829; Globe Supplement, p. 12.

[5] Senate Journal, p. 448; Globe, p. 2790.

Congress may from time to time ordain and establish," while it is further provided that "the Senate shall have the sole power to try all impeachments," thus positively making a distinction between the judicial power and the power to try impeachments; that the Senate on an impeachment does not exercise any portion of the judicial power, but another and different power, exclusively delegated to the Senate, having for its sole object removal from office and disqualification therefor; that, by the terms of the Constitution, there may be, after conviction on impeachment, a further trial and punishment "according to law," thus making a discrimination between a proceeding by impeachment and a proceeding "according to law;" that the proceeding by impeachment is not "according to law," and is not attended by legal punishment, but is of an opposite character, and from beginning to end political, being instituted by a political body, on account of political offenses, being conducted before another political body having political power only, and ending in a judgment which is political only; and therefore the vote of a Senator on impeachment, though different in form, is not different in responsibility from his vote on any other political question; nor can any Senator on such an occasion claim immunity from that just accountability which the Representative at all times owes to his constituents.

3. *Resolved,* That Senators in all that they do are under the constant obligation of an oath, binding them to the strictest rectitude; that on an impeachment they take a further oath, according to the requirement of the Constitution, which says, "Senators, when sitting to try impeachment, shall be on oath or affirmation;" that this simple requirement was never intended to change the character of the Senate as a political body and can not have any such operation; and therefore, Senators, whether before or after the supplementary oath, are equally responsible to the people for their votes, it being the constitutional right of the people at all times to sit in judgment on their Representatives.

It does not appear that this resolution was ever acted on.

2058. During the Johnson trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.—In the course of the arguments during the impeachment trial of Andrew Johnson, President of the United States, the question as to whether or not the Senate sitting for the trial had the attributes of a court was discussed at length. Mr. Manager Benjamin F. Butler, of Massachusetts, argued [1] that it did not. Of the Senators who filed written opinions, Mr. Charles Sumner, of Massachusetts, sustained at length the view that impeachment was a political and not a judicial proceeding.[2]

Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, argued that the Senate was a court,[3] and Mr. Thomas A. R. Nelson, of Tennessee, also of counsel for the President, took the same view, arguing at length,[4] as did Mr. William S. Groesbeck, of Ohio, also of counsel for the President.[5] Mr. William M. Evarts, of counsel for the President, argued from both English and American precedents, that the Senate sat as a court.[6] Of the Senators who filed written opinions in the case, this view was sustained by Mr. Garrett Davis, of Kentucky.[7]

2059. The Senate, by majority vote, assumed jurisdiction to try the Belknap impeachment, although protest was made that a two-thirds vote was required.—On June 6, 1876,[8] in the Senate, sitting for the impeachment trial

[1] Second session Fortieth Congress, Globe Supplement, p. 30.

[2] Pages 463, 464.

[3] Page 134.

[4] Pages 290, 291.

[5] Pages 310, 311.

[6] Pages 340, 341.

[7] Pages 438, 439.

[8] First session Forty-fourth Congress, Senate Journal, p. 948; Record of trial, pp. 162–164.

of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, presented the following:

Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Here in court comes the said William W. Belknap and moves the court now here to vacate the order entered of record in this cause setting aside and holding as naught the plea of him, said Belknap, by him first above in this cause pleaded, for the reason that said order was not passed with the concurrence of two-thirds of the Senators present and voting upon the question of adopting and passing said order, as appears by the record in this cause.

WILLIAM W. BELKNAP.
J. S. BLACK,
MONTGOMERY BLAIR,
MATT. H. CARPENTER,
Of Counsel.

The plea referred to was that the Senate had no jurisdiction to try the case, since Mr. Belknap had resigned before the impeachment was made.

At the previous sitting, on June 1, Mr. Carpenter had said: [1]

Speaking for myself only (not having consulted with my colleagues), I maintain that upon the whole record the order is void, for the reason that it was not concurred in by two-thirds of the Senators present and voting. Suppose a case in the Supreme Court, where only a majority of the judges need concur in the judgment; and suppose the record to show that only four judges concurred in the judgment while five dissented, but the minority directed the clerk to enter the judgment or order as the act of the court, and he should do so and certify it as such under the seal of the court. It is manifest, I think, that such judgment, if the dissent of the majority appeared of record, would be absolutely void, and would be so declared by any court where the judgment should come in question collaterally. I think this judgment is in the same category.

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That we can raise these questions on a final hearing, is clear, because it can not be maintained that any question upon which conviction depends can be eliminated from such final determination by the action of less than the constitutional majority of two-thirds. Otherwise a mere majority of the Senate might defeat the constitutional provision.

In these cases of impeachment, if a mere majority can settle the question of jurisdiction, so a mere majority, by overruling a demurrer to the articles, can determine that the acts alleged to have been done or omitted by the respondent constitute in law a high crime or misdemeanor within the meaning of the Constitution; leaving the final judgment to rest only upon questions of fact or at the final hearing, none of these questions having been disposed of, some master tactician might first move a resolution declaring that the respondent had done or omitted the acts charged, and if sustained by a mere majority, might claim that the facts were settled, and that the final judgment must rest upon the question of law whether such facts amounted to a high crime or misdemeanor.

In briefer and plainer terms, no conviction can take place under this provision of the Constitution, unless two-thirds of the Senators concur in regard to every element necessary to conviction, and first and conspicuous among these, must be the question of jurisdiction.

Mr. Manager Scott Lord had said: [2]

On the point which the counsel has suggested, practically that a two-thirds vote is necessary on the question of jurisdiction, that Senators who voted that this court had not jurisdiction must therefore on the final vote, when the question is put, "Did this defendant take $1,500 on a given occasion and for such a purpose?" say "Not guilty," because of their views in regard to jurisdiction—on this point I say we shall be prepared to show that there is nothing whatever in the suggestion; in fact, that

[1] Record of trial, pp. 159, 161.

[2] Pages 159, 160.

the whole practice of courts of impeachment has been in contravention of it; that the Constitution itself prevents any such possibility. Therefore when this question is raised in some proper form we shall desire to be heard upon it.

Mr. Allen G. Thurman, a Senator from Ohio, said: [1]

That question can be argued on the motion submitted by the counsel for the respondent. I suppose it can be argued at almost any time or in any way. In my judgment it never can be decided until we come to the final decision, but it can be argued on the motion submitted; although I think it is pretty clear, for reasons that I am not at liberty to state now, that it can not be decided on any such motion as that submitted by the counsel.

And Mr. Black, of counsel for the respondent, concurred:

I will say now that, so far as I can see, the statement of the law upon this point as made by the Senator from Ohio [Mr. Thurman] is what meets with my view. I have not had time to consult with the other counsel in the case and do not know how they feel about it; but I think, whatever may be done with this motion or whenever it may be argued, it can not really be directly decided until the final determination of the case, and that we ought to have, therefore, the privilege of arguing the point at any time. It is a question that arises and will arise at every step of this case as we go on.

Mr. William Pinkney Whyte, a Senator from Maryland, proposed this order:

Ordered, That the Senate sitting as a court of impeachment adjourn until tomorrow at one o'clock p.m., when argument shall be heard upon the motion offered by the counsel for the respondent.

The order was disagreed to, yeas 18, nays 23.

On June 16 [2] Mr. Black, of counsel for the respondent, presented the following paper:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

And now, to wit, this 16th day of June, 1876, the said William W. Belknap comes into court, and being called upon to plead further to the said articles of impeachment, doth most humbly and with profoundest respect represent and show to this honorable court that on the 17th day of April last past he did plead to the said articles of impeachment, and in his said plea did allege that at the time when the House of Representatives of the United States ordered the said impeachment, and at the time when the said articles of impeachment were exhibited at the bar of the Senate against him, the said Belknap, he, the said Belknap, was and ever thereafter had been not a public officer of the United States, but a private citizen of the United States and of the State of Iowa; and that the plea aforesaid and all the matters and things therein contained were by him, said Belknap, fully verified by proofs, namely, by admissions of the said House of Representatives before said court; and the said Belknap further represents and shows to the court here that the truth and sufficiency of the plea pleaded by him as aforesaid were thereupon debated by the managers of the said House of Representatives and the counsel of this respondent, and thereupon submitted to this court for its determination and judgment thereon; and that such proceedings were thereupon bad in this court on that behalf in this cause; that afterwards, to wit, on the 29th day of May last past, the members of this court, to wit, the Senators of the United States sitting as a court of impeachment as aforesaid, did severally deliver their several judgments, opinions, and votes on the truth and sufficiency in law of the said plea, when and whereby it was made duly to appear that only thirty-seven Senators concurred in pronouncing said plea insufficient or untrue; whereas twenty-nine Senators sitting in said court, by their opinions and votes, affirmed and declared their opinion to be that said plea was sufficient in law and true in point of law; so that the said Belknap in fact saith that, on the day and year last aforesaid, twenty-nine Senators sitting in said court declared therein that the said Belknap having ceased to be a public officer of the United States by reason of his resignation of the office of Secretary of War of the United States before proceedings in impeachment

[1] Page 163.

[2] Senate Journal, pp. 952, 955, 959; Record of Trial, pp. 169–173.

were commenced against him by the House of Representatives of the United States, the Senate cannot take jurisdiction of this cause; and that seven Senators did not vote upon said question, and only thirty-seven Senators, by their votes, declared their opinion to be that the Senate could take jurisdiction of said cause. And afterwards thirty-seven Senators sitting in said court, and no more, concurred in a resolution declaring that "in the opinion of the Senate William W. Belknap is amenable to trial on impeachment for acts done as Secretary of War, notwithstanding his resignation of said office," and that twenty-nine of said Senators sitting in said court, by their votes, affirmed and declared their opinion to be to the contrary thereof. And afterwards, on the day and year last aforesaid, it was proposed in said court that the President pro tempore of the said Senate should declare the judgment of the said Senate, sitting as aforesaid, to be that said plea of said respondent should be held for naught, and a vote was taken upon said proposition; and, as said vote showed, two-thirds of the said Senators present did not concur therein; but, on the contrary thereof, only thirty-six Senators did concur therein, and twenty-seven Senators then and there present, and voting on said proposition, did by their votes dissent from and vote against said proposition. All of which appears more fully and at large upon the record of this court in this cause, to which record he, said Belknap, prays leave to refer.

Therefore the said Belknap, referring to the Constitution of the United States, article 1, section 3, clause 6, which provides that "no person shall be convicted without the concurrence of two-thirds of the members present," (meaning on trial on impeachment,) avers that his said plea has not been overruled or held for naught by the Senate sitting as aforesaid, no such judgment having been concurred in by two-thirds of the Senators sitting in said court and voting thereon; but, on the contrary thereof, as the vote aforesaid fully shows, the said plea of the said respondent was sustained, and its truth in fact and sufficiency in law duly affirmed by the said Senate sitting as aforesaid, more than one-third of the Senators of said Senate, sitting as aforesaid, having by their votes so declared, to wit, twenty-seven Senators as aforesaid, and said twenty-seven Senators having by their votes declared and affirmed their opinion to be that said plea of said respondent was true in fact and was sufficient in law to prevent the Senate sitting as aforesaid from taking further cognizance of said articles of impeachment.

Wherefore the respondent avers that he has already been substantially acquitted by the Senate sitting as aforesaid; and that he, the said respondent, is not bound further to answer said articles of impeachment; the said order requiring this respondent to answer over not having been made with the concurrence of two-thirds of the said Senators sitting as aforesaid and voting upon the question of the passage of said order; and said order having been passed with the concurrence only of less than two-thirds of the said Senators sitting as aforesaid, and voting on the question of making and passing said order, the said order ought not to have been entered of record as an order of said court of impeachment in this cause; and said order appearing upon the whole record of said cause to be null and void as an order of said court.

And the said respondent prays the court now here, as he has before formally moved said court, to vacate said order; and the said respondent hereby prays said court that be may be hence dismissed.

WILLIAM W. BELKNAP.
MATT. H. CARPENTER,
J. S. BLACK,
MONTGOMERY BLAIR,
Of Counsel for said Respondent.

The Senate thereupon adopted the following order, the first clause being agreed to by a vote of yeas 26, nays 24, and the second by a vote of yeas 21, nays 16.

Ordered, That the paper presented by the defendant on the 16th instant be filed in this cause; and the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty.

This question was discussed somewhat at length during the final arguments in this case, Messrs. Montgomery Blair,[1] J. S. Black,[2] and Matt. H. Carpenter,[3] sus-

[1] Record of Trial, p. 287.

[2] Page 315.

[3] Pages 333, 334.

taining the contention already made by them, and Messrs. Managers William P. Lynde [1] and Scott Lord,[2] taking the opposing view.

The question had also been discussed briefly on July 6,[3] when the managers began to introduce testimony, Mr. Black having proposed the following:

The counsel for the accused object to the evidence now offered and to all evidence to support the opening of the managers, on the ground that there can be no legal conviction, the Senate having already determined the material and necessary fact that the defendant is not, and was not when impeached, a civil officer of the United States.

The question being submitted:

Shall the objection of counsel for the respondent be sustained?

it was decided in the negative without division.

2060. The Senate, in 1868, when certain States were without representation, declined to question its competency to try an impeachment case.— On February 29, 1868,[4] the Senate was proceeding to the consideration of rules of procedure for impeachments, the occasion being the proposed impeachment of Andrew Johnson, President of the United States, when Mr. Garrett Davis, of Kentucky, moved to recommit the rules with instructions as follows:

That the committee report as a substitute for the rules just read the following:

"That the Constitution of the United States having appointed the Senate to be the court to try all impeachments, and having provided that the Senate shall be composed of two Senators from each State, and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Texas, Louisiana, and Florida having each chosen two Senators, and those Senators not having been admitted to their seats in the Senate, while they continue to be excluded the Senate can not be formed into a constitutional and valid court of impeachment for the trial of articles of impeachment preferred against Andrew Johnson, President of the United States."

Mr. Davis argued elaborately in favor of his motion, saying in the course of his remarks:

The motion that I make is based upon the idea that while the present Members of the Senate exclude ten States from representation in the body the Senators representing the remaining States, which are not excluded, have no right to form a court of impeachment, and can not do so until the ten States whose Senators have been excluded are admitted as Senators. I think myself that the motion is properly made at this time to the Senate, not to the court of impeachment. Whether the Senate will form itself into a court of impeachment or not is a Senatorial question. It is not a question for the court of impeachment to decide. It does not come before the court of impeachment at all, according to my judgment of the matter. The Senate must be in such condition as to numbers and representation from all the States that it has the constitutional power to resolve itself into a court of impeachment. Whether it be in that condition or not is a question not for the court to decide, but for the Senate, before it resolves itself into a court of impeachment to decide. It seems to me that that is the correct position in relation to that point. Being of that opinion, I will proceed at no great length with my remarks.

If the ten excluded States had never been in the rebellion, if they were now represented upon the floor of the Senate, could the Senate or could the two Houses of Congress exclude from representation in both Houses ten other States; and having excluded ten other States, could the remaining Senators from twenty-seven instead of thirty-seven States resolve themselves into a court of impeachment for the trial of the President? I presume that no Senator will answer that question in the affirmative. If that is conceded, to my mind it concedes the whole principle and the whole proposition, and I will proceed to assign one or two reasons why I believe so.

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[1] Pages 295, 296.

[2] Pages 335, 336.

[3] Senate Journal, p. 961; Record of Trial, pp. 180, 181.

[4] Second session Fortieth Congress, Senate Journal, pp. 236, 237; Globe, pp. 1516–1520.

Any State that was in rebellion, after the rebellion was suppressed and after the State submitted itself to the Constitution and laws and authorities of the United States, which fact was admitted by her representation in the Senate or in the House, was as much in the Union as though that State had never been in the rebellion. I will take the State of Virginia. The State of Virginia has had a representative in the Senate since the suppression of the rebellion and since the time when there was a single arm raised against the authority of the United States; that Senator has served two sessions here since the rebellion was entirely suppressed; he was recognized by the Senate as a representative of the State of Virginia, and the Senate in taking that course toward him admitted that State to be in the Union as a State with all the rights and privileges which she would be entitled to under the Constitution as if she had never been in the rebellion at all. In the case of Luther v. Borden that principle is decided, and I will read a passage from it. The honorable Senator from Indiana [Mr. Morton] and the honorable Senator from Oregon [Mr. Williams] and all the Senators who support the Congressional policy of reconstruction seem to rely upon that case as their principal authority, at least the principal experiment of their authority. I will read one paragraph from that decision:

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority."

There is the plain principle. It is in conformity to the principle of the law of post limine, too; it is in conformity to our Constitution. It is a declaration of the principle of the Constitution in these few and simple words, that when Congress has admitted Senators and Representatives from a State both the existence and authority of the government under which they were appointed and its republican form have been recognized by the proper constitutional authority.

Sir, it seems to me that this decision settles the question as to Virginia and as to Tennessee. The Senators, or at least a Senator from Tennessee and Senators from Virginia, and Representatives from both States, have been admitted by Congress to their seats in both Houses. That, this decision says, is a recognition by the proper constitutional authority of the governments under which those Senators and Representatives were appointed and of the republican form of the governments under which they were appointed.

Mr. Oliver P. Morton, of Indiana, replied, saying, in the course of his remarks:

The Constitution requires no other Senate for the trial of an impeachment than what is required for any other purpose. The same Senate that can pass a bill can sit in the trial of an impeachment. The Senator can find no difference in the Constitution. There is nothing in the Constitution that says there shall be two Senators here from every State; it says that to convict on impeachment shall require the votes of two-thirds of the Members present—that is what it says.

But, Mr. President, the Senator from Kentucky ignores one fact in his argument, which I think is of some importance in the consideration of this question; that is to say, he ignores the fact that there has been a rebellion. He treats the ten States which now have no representatives on this floor as being illegally and improperly excluded without cause. He omits any recognition of the fact that there has been a rebellion, that the people of those States have been in arms against the Government of the United States. He omits to mention the fact that they withdrew their Senators from this Chamber for a treasonable purpose, and that they engaged in hostility against the Government of the United States. These facts are material in the consideration of this question.

He says that every State in this Union is entitled to two Senators upon this floor. I controvert that proposition entirely. If the people of a State have destroyed their State government, if they have no legal State government that is authorized to elect Senators, I ask how they can have Senators upon this floor? If we regard these ten States as States in this Union, still the fact remains that they destroyed their loyal State governments, and they have no State governments that are legal and are recognized by the Government of the United States, and therefore they have no means under the Constitution of putting Senators upon this floor.

But, Mr. President, I do not think it worth while to undertake to follow the Senator in his argument. As I remarked before, I regard his presence here as a protest against his whole argument.

Mr. James A. Bayard, of Delaware, opposed the motion of Mr. Davis, but solely on the ground that the subject was not one for the decision of the Senate, but was for the court of impeachment to decide.

The motion to recommit was decided in the negative, yeas 2, nays 39.

On March 23, 1868,[1] after the Senate had organized for the trial of the President, after the articles of impeachment had been presented but before the reply had been made, Mr. Davis presented the following:

Mr. Davis, a Member of the Senate and of the Court of Impeachment, from the State of Kentucky, moves the court to make this order:

The Constitution having vested the Senate with the sole power to try the articles of impeachment of the President of the United States preferred by the House of Representatives, and having also declared that "the Senate of the United States shall be composed of two Senators from each State chosen by the legislatures thereof," and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Louisiana, and Texas having, each by its legislature, chosen two Senators who have been and continue to be excluded by the Senate from their seats, respectively, without any judgment by the Senate against them personally and individually on the points of their elections, returns, and qualifications, it is

Ordered, That a court of impeachment for the trial of the President can not be legally and constitutionally formed while the Senators from the States aforesaid are thus excluded from the Senate; and this case is continued until the Senators from these States are permitted to take their seats in the Senate, subject to all constitutional exceptions to their elections, returns, and qualifications severally.

The question on agreeing to the order was taken without debate, and there appeared, yeas 2, nays 29. So the order was not agreed to.

2061. The doctrine of disqualifying personal interest as applied to a Senator sitting in an impeachment trial.

In 1868 the President pro tempore of the Senate voted on the final question at the Johnson trial, although a conviction would have made him the successor.

A Senator related to President Johnson by family ties voted on the final question of the impeachment without challenge.

A question as to the time when the competency of a Senator to sit in an impeachment trial should be challenged for disqualifying personal interest.

On March 5, 1868,1 while the Senate was organizing for the trial of Andrew Johnson, President of the United States, and after the Chief Justice had taken the chair, the administration of the oath to Senators proceeded until the name of Mr. Benjamin F. Wade, of Ohio, was called. As Mr. Wade arose from his seat and advanced to take the oath Mr. Thomas A. Hendricks, of Indiana, a Senator, entered an objection:

The Senator just called is the Presiding Officer of this body, and under the Constitution and laws will become the President of the United States should the proceeding of impeachment, now to be tried, be sustained. The Constitution providing that in such a case the possible successor cannot even preside in the body during the trial, I submit for the consideration of the Presiding Officer and of the Senate the question whether, being a Senator, representing a State, it is competent for him, notwithstanding that, to take the oath and become thereby a part of the court? I submit that upon two grounds, first, the ground that the Constitution does not allow him to preside during these deliberations because of his

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[1] Senate Yournal, pp. 828, 1829; Globe Supplement, p. 12.

[2] Second session Fortieth Congress, Senate Journal, p. 809; Globe, pp. 1671–1680, 1699, 1700.

possible succession, and, second, the parliamentary or legal ground that he is interested, in view of his possible connection with the office, in the result of the proceedings, he is not competent to sit as a member of the court.

An extended debate at once arose. Mr. John Sherman, of Ohio, urged that this tribunal was not to be tested by the ordinary rules of civil law. The State of Ohio had a right to send two Senators, and the Constitution gave them each a vote. Mr. Jacob M. Howard, of Michigan, made the point that Mr. Wade might not necessarily be President pro tempore at the end of the trial, and hence was not necessarily personally interested. Messrs. Lot M. Morrill, of Maine, and George H. William, of Oregon, urged that the question was premature, since the party interested to make the objection was not present, and no Senator should make it, and that the Senate should be organized before the question should be raised.

In the course of the debate Mr. Oliver P. Morton, of Indiana, said:

Mr. President, if it should now be determined that the Senator from Ohio shall not be sworn it would be an error, a blunder of which the accused would have just right to complain when he should come here. If a judge is interested in a case before him, or if a juror is interested in the result of the issue which he is called upon to try, it is an objection that the parties to the case have the right to waive; and they have always had that right under any system of practice that I have known anything about.

As was suggested by the Senator from Maine [Mr. Morrill] and the Senator from Oregon [Mr. Williams], it is not an objection to be made by 96 fellow juror, by another member of the court, or by anybody except the parties to the case; and if we now, in the absence of the accused, say that the Senator from Ohio shall not be sworn, the President when he comes here to stand his trial will have a, right to say "A Senator has been excluded that I would willingly accept; I have confidence in his integrity; I have confidence in his character and in his judgment, and I am willing to waive the question of interest; who had the right to make it in my absence?" The Senator from Indiana, my colleague, and the Senator from Kentucky have no right to make the question unless they should do it in the character of counsel for the accused, a character they do not maintain.

Mr. President, I desire to say one thing further, that this objection made here, in my judgment, proceeds upon a wrong theory. It is that we are now about putting off the character of the Senate of the United States and taking upon ourselves a new character; that we are about ceasing to be a Senate to become a court. Sir, I reject that idea entirely. This is the Senate when sworn, this will be the Senate when sitting upon the trial, and can have no other character. The idea that we are to become a court, invested with a new character, and possibly having new constituents, I reject as being in violation of the Constitution itself. What does that say? It says that "the Senate shall have the sole power to try all impeachments." The Senate shall have the sole power to try; it is the Senate that is to try; not a high court of impeachment-a phrase that is sometimes used—that is to be organized, to be created by the process through which we axe now going; but, sir, it is simply the Senate of the United States. The Senate "when sitting for that purpose shall be on oath or affirmation." That does not change our character. We do not on account of this oath or affirmation cease to be a Senate, undergo a transformation, and become a high court of impeachment; but the Constitution simply provides that the Senate, while as a Senate, trying this case shall be under oath or affirmation. It is an exceptional obligation. The duty of trying an impeachment is an exceptional duty, just as is the ratification of a treaty; but it is still simply the Senate performing that duty."When the President of the United States is tried the Chief Justice shall preside." Preside where? In some high court of impeachment, to be created by the transformation of an oath? No, sir. He is to preside in the Senate of the United States, and over the Senate; and that is all there is of it."And no person shall be convicted without the concurrence of two-thirds of the Members present." Two-thirds of the Members of the Senate.

Mr. President, if I am right in this view, it settles the whole question. The Senator from Ohio is a Member of the Senate. My colleague has argued this question as if we were about now to organize a new body, a court, and that the Senator from Ohio is not competent to become a member of that court. That is his theory. The theory is false. This impeachment is to be tried by the Senate, and he is already a Member of the Senate, and he has a constitutional right to sit here, and we have no power to

take it from him. As to how far he shall participate, as to what part he shall take in our proceedings, as has been correctly said, that is a question for him to decide in his own mind. But, air, he is already a Member of this body; he is here; he has his rights already conferred upon him as a Member of this body, and he has a constitutional right to take part in the performance of this business, as of any other business, whether the ratification of a treaty or the confirmation of an appointment or the passage of a bill, which may be devolved on this body by the Constitution of the United States. Because he has been elected President pro tempore of the Senate does that take from him any of his rights as a Senator? Those rights existed before, and he can not be robbed of them by any act of this Senate.

But, sir, aside from this question, which goes to the main argument, this entire action is premature. There is nobody here to make this challenge, even if it could be made legitimately. The Senators making it do not represent anybody but themselves. The accused might not want it made. He might, perhaps, prefer the Senator from Ohio to any other Member of this body to try his case. It is always the right of the defendant in a criminal proceeding and of the parties in a civil action to waive the interest that a juror or a member of the court may have in the case.

Mr. Reverdy Johnson, of Maryland, said:

While I am up, permit me to say a few words in reply to the honorable Member from Indiana [Mr. Morton]. He tells us it is for the President of the United States—applying his remarks to the case which is to be and is before us—himself to make the objection, and that he may waive it. With all due deference to the honorable Member, that is an entire misapprehension of the question. The question involved in the inquiry is, what is the court to try the President? It is not to be such a tribunal as he chooses to try him. It is a question in which the people of the United States are interested, in which the country is interested; and by no conduct of the President, by no waiver of his, can he constitute this court in any other way than the way which the Constitution contemplates; that is to say, a court having all the qualities which the Constitution intends.

The honorable Member tells us that we are still a Senate and not a court, and that we can not be anything but a Senate and can not at any time become a court. Why, sir, the honorable Member is not treading in the footsteps of his fathers. The Constitution was adopted in 1789. There have been four or five cases of impeachment, and in every case the Senate has decided to resolve itself into a court, and the proceedings have been conducted before it as a court and not as a Senate. To be sure, these component elements of which the court is composed are Senators, but that is a mere descriptio personarum. They are members of the court because they are Senators, but not the less members of a court. The Constitution contemplated their assuming both capacities. As a Senate of the United States they-have no judicial authority whatever; their powers are altogether legislative; they are to constitute and do constitute only a portion of the legislative department of the Government; but the Constitution for wise purposes says that in the contingency of an impeachment of a President of the United States or any other officer falling within the clause authorizing an impeachment they are to become, as 1 understand, a court. So have all our predecessors ruled in every case; and who were they? In the celebrated case of the impeachment against Mr. Chase, who was one of the associate justices of the Supreme Court of the United States, there were men in the Senate at that time whose superiors have not been found since, nor at any time before, and they adopted the idea and acted upon the idea that the Senate in the trial of that impeachment acted as a court and not as a Senate.

I submit, therefore, that the honorable Member from Indiana [Mr. Morton] is altogether mistaken in supposing that we axe not a court. But look at the power which we are to have. We are to pronounce judgment of guilty or not guilty; we are to answer upon our oaths whether the party impeached is guilty or not guilty of the articles of impeachment laid to his charge, and having pronounced him guilty or not guilty, we are then to award judgment. Who ever heard of the Senate of the United States in its legislative capacity awarding a judgment.

But besides that, why is it, Mr. Chief Justice, that you are called to preside over the court, or the Senate when acting as a court to try an impeachment? It is because it is a court. You have no legislative capacity; your functions axe to construe the laws in cases coming before you; and the very fact that upon the trial of an impeachment of the President of the United States the Vice-President is to be laid aside, and the ordinary Presiding Officer, if the Vice President himself does not exist, and you are to preside, shows that it is a court of the highest character, demanding the wisdom and the learning of the Chief Justice of the United States.

The honorable Member says, and other Members have said, that a question of interest or no interest is not involved in an inquiry of this description. Does the honorable Member mean to say that if the honorable Member from Ohio had a bill before the Senate awarding to him a sum of money upon the ground that it was due to him by the United States he could vote upon the question of the passage of the bill? Why not if the honorable Member from Indiana is right? He is a Senator. If he is right that the Constitution intends that each State shall have two votes upon every question coming before the body, then in the case supposed the honorable Member from Ohio would have a right to vote himself, and by his own vote to place money in his own possession. Who ever heard that that was a right that could be accorded anywhere?

Mr. President, courts have gone so far as to say that a judgment pronounced by a judge in a court of which he was the constitutional officer in a case in which he had a direct interest, was absolutely void upon general principles; not void because of any statutory regulation on this subject, but void upon the general ground that no man shall be a judge in his own case. Does it make any difference what may be the character of the interest? If the honorable Member from Ohio was the sole party under the Constitution to try this impeachment, could he try it? Would not everybody say it is a casus omissus? There can be no trial as long as he continues to be the sole Member of the court, because he has a direct and immediate interest in the result; because the judgment would be absolutely void as against the general principle founded in the nature of man, that no man should be permitted to adjudge a question in which he has a direct interest.

Mr. John Sherman, of Ohio, said:

Mr. President, I certainly do not appear here to represent my colleague on this question, but I represent the State of Ohio, which is entitled to two Senators on this floor. The Constitution declares that each Senator shall have a vote, and the Constitution further declares that each Senator shall take an oath in cases of impeachment. The right of my colleague to take the oath, his duty to take it, is as clear in my mind as any question that ever was presented to me as a Senator of the United States. The Constitution makes it plainly his duty to take the oath. He is a Senator, bound to take the oath, according to my reading of the Constitution; and every precedent that has been cited, and every precedent that has been referred to, bears out this construction. If after he has taken the oath as a Member of the Senate of the United States, for the purposes of this trial, anybody objects to his right to vote on any question that may be presented to this court or to the Senate hereafter, the objection can then be made and discussed; but his right in the preliminary stages to take the oath, and his duty to take it, is made plain by the Constitution itself. If hereafter, when the impeachment progresses, his right to vote on any question is challenged the question may be discussed and decided.

The case cited by my honorable friend from Maryland is directly in point. Mr. Stockton came here with a certificate from the State of New Jersey in due form; he presented it, and was sworn into office. Did anybody object to his being sworn? At the game time other papers were presented to the Senate challenging his right to be sworn, saying that the legislature of New Jersey had never elected Mr. Stockton; but because of that did anybody object to the oath being administered to Mr. Stockton? No one; although his right to take the oath was challenged, and a protest signed by a very large number of the members of the New Jersey legislature against his right to the seat, was presented. He was sworn in and took his seat here by our side, and voted and exercised the rights of a Senator. When the question of the legality of his own election came up, the Senate decided that he was not legally elected, and the question referred to arose upon his right to vote in that particular case. The question was whether he could vote, being interested in the subject matter. The Senator from Massachusetts made the objection, and offered a resolution that he had not a right to vote in the particular case; and after debate that was decided in the affirmative, although by a very close vote. My own conviction then was and is yet that Mr. Stockton, as a Senator from the State of New Jersey, had a right to vote in his own case, although it might not be a proper exercise of the right.

So, sir, this question has been decided two or three times in the House of Representatives. In the celebrated New Jersey case, where a certificate of election was presented by certain Members from the State of New Jersey and they were excluded, public history has pronounced their exclusion to have been an unjustifiable wrong upon the great seal of the State of New Jersey. I believe that action is now generally admitted and conceded to have been wrong. Those men presented their credentials in the regular form, and they had the right to be sworn. So in many other cases where the right of persons

to hold office is in dispute, those who have the prima facie right are sworn into office, and then the right is examined and finally settled. I had a matter presented to me once in which I was personally interested, and where I was sworn into office. I was directly and personally interested; but I took the oath of office, and I discharged my duties as a Member of the House of Representatives; and when the question came up whether I should vote on the election of a particular officer, I being a candidate for the office, I refused to vote. But it was my refusal which prevented my vote from being received. If I had chosen to vote, I had the right as a Member from the State of Ohio, even for myself. I have no doubt whatever of that. It is the right of the State; it is the right of the people; it is the right of representation. The power of the State and the power of the people must be exercised through their Senators and through their Representatives.

In the particular case here I do not suppose, I do not know at least, whether the question will ever arise. My colleague is required to take this oath as a Member of the Senate of the United States. You have no right to assume, nor have Senators the right to assume, that he will vote on questions which may affect his interest. That is a matter for him to decide; but the right of the State to be represented here on this trial of an impeachment is clear enough. Whether he will exercise the right, or whether he will waive it, is for him to determine. You have no right to assume that he will exercise the right or power to vote for himself where he is directly interested in the result.

It seems to me, therefore, that no Senator here has a right to challenge the voice of the State of Ohio, and the right of the State of Ohio to have two votes here is unquestionable unless when the question is raised in due form it shall be decided against my colleague. In the preliminary stages, when we are organizing this court, he ought to be sworn, and then if he is to be excluded by interest, unfitness, or any other reason, the question may be determined when raised hereafter; but no Senator has the right now to challenge his authority to appear here and be sworn as a Senator of the State of Ohio. His exclusion must come either by his own voluntary act, proceeding on what he deems to be just and right according to general principles, or it must be by the act of the Senate upon an objection made by the person accused in the trial of the impeachment. It seems to me that is clear and therefore I object to any waiver of the matter. I think my colleague has a right to present himself and be sworn precisely as I and other Senators have been sworn. Then let him decide for himself whether, in a case in which his interest is so deeply affected, he will vote on any question involved in the impeachment. If he decides to vote, when his vote is presented, then, not the Senator from Indiana, but the accused may make the objection, and we shall decide the question as a Senate or as a court, for I consider the terms convertible; we shall then decide the question of his right to vote.

Sir, several things have been introduced into this debate that I think ought not to have been introduced. The precise character of this tribunal, whether it is a court or a Senate, has nothing to do at present with this question. The only question before us is whether Benjamin F. Wade, acknowledged to be a Senator from the State of Ohio, has a right to present himself and take the oath prescribed by the Constitution and the laws in cases of impeachment. He is not the Vice-President; he is not excluded by the terms of the Constitution. He is the presiding officer of the Senate, holding that office at our will. You have no right to take away from him the power to take the oath of office and that to decide for himself as to whether, under all the circumstances, he ought to participate in this trial.

Mr. James A. Bayard, of Delaware, said:

Mr. President, I incline to the opinion that the objection made by the honorable Senator from Maine [Mr. Morrill] to the motion of the honorable Senator from Indiana [Mr. Hendricks], and also that made by the honorable Senator from Oregon [Mr. Williams], is correct. I can not see how a Senator is to object to another Senator being sworn in, although I think there may be some doubt raised on the question for this reason: The Constitution provides that in a case where the President of the United States is tried under an impeachment the Chief Justice of the United States, not the Vice-President, shall preside; and though that was intended originally to look to the Vice-President alone, yet if another person, from the death of the Vice-President, or from his absence or his acting as President, stands in precisely the same relation to the office of President under the law and the Constitution, whether he be a Senator or not, ought not the principle equally to apply?

It certainly excludes the Vice-President from being a member of the court. Does it not equally exclude the presiding officer of the Senate? It does not make him, being a Senator, less a Senator of the United States in his legislative capacity; but the clause of the Constitution prevents and is intended

to prevent the influence of the man who would profit as the necessary result of the judgment of guilty in the case. It supposes that he can not be or may not be sufficiently impartial to sit as a judge in that case or to preside in the court trying it. That is the object, as I suppose.

But, sir, there is great force in the objection that that point must come by plea or motion, if you please, from the party accused; and I should not have thought for a moment of embarking in this discussion had it not been for the renewal by the honorable Senator from Indiana [Mr. Morton] of the endeavor to disprove the idea that the Senate must be organized into a court for the purpose of a judicial trial. Now, sir, whether it is to be a high court of impeachment or a court of impeachment, or to be called by the technical name court, is, in my judgment, immaterial; but the honorable Senator's argument did not touch the Constitution. The Senate is to constitute the court; the Senate is to try. Is there nothing in the provisions of that article which gives the judicial authority—for it is not legislative, it is judicial authority conferred, a judicial authority in special cases—is there nothing in that article which, of necessity, makes the body a judicial tribunal whenever it assumes these functions, and not a legislative body? Otherwise, how comes the presiding officer who now fills the chair to be in the seat which he occupies? When the Constitution says that the Senate shall have the sole authority to try impeachments is it necessary that it should say that the Senate shall be a court for the purpose of trying impeachments if every clause of the Constitution shows that it must be a judicial tribunal and must be a court, or else the language is meaningless which is applied to its organization? The members of the body are to be sworn specially in the particular case as between the accused and the impeachers. Is not that the action of a court? They are to try an individual in a criminal prosecution. Is not that judicial action? Is not the entire judicial power of the United States vested in the Supreme Court and the inferior courts, with that exception, by the very terms of the Constitution?

But, further, the body is to give judgment, to pronounce judgment, a judgment of removal from office always as the result of conviction; and if they please to carry it still further, they may pronounce judgment of disqualification from hereafter holding any office. Do not these terms of necessity constitute a court?

Mr. Charles Sumner, of Massachusetts, dissented from the view that the Chief Justice was made the presiding officer because the Vice-President would be an interested party, and argued from the literature contemporaneous with the Constitution that the Vice-President was expected to perform the duties of the President while the trial was going on. As to the question of personal interest, Mr. Sumner said:

There were other remarks made by Senators over the way to which I might reply. There was one that fell from my learned friend, the Senator from Maryland, in which he alluded to myself. He represented me as having cited many authorities from the House of Lords tending to show in the case of Mr. Stockton that this person at the time was not entitled to vote on the question of his seat. The Senator does not remember that debate, I think, as well as I do. The point which I tried to present to the Senate, and which, I believe, was affirmed by a vote of the body, was simply this: That a man can not sit as a judge in his own cue. That was all, at least so far as I recollect, and I submitted that Mr. Stockton at that time was a judge undertaking to sit in his own case. Pray, sir, what is the pertinency of this citation? Is it applicable at all to the Senator from Ohio? Is his case under consideration? Is he impeached at the bar of the Senate? Is he in anyway called in question? Is he to answer for himself? Not at all. How, then, does the principle of law, that no man shall sit as a judge in his own case, apply to him? How does the action of the Senate in the case of Mr. Stockton apply to him? Not at all. The two ewes are as wide as the poles asunder. One has nothing to do with the other.

Something has been said of the "interest" of the Senator from Ohio on the present occasion. "Interest." This is the word used. We are reminded that in a certain event the Senator may become President, and that on this account he is under peculiar temptations which may swerve him from justice. The Senator from Maryland went so far as to remind us of the large salary to which he might succeed, not less than $25,000 a year, and thus added a pecuniary temptation to the other disturbing forces. Is not all this very technical? Does it not forget the character of this great proceeding? Sir, we are a Senate and not a court of nisi prius. This is not a case of assault and battery, but a trial involving the destinies of this

Republic. I doubt if the question of "interest" is properly raised. I speak with all respect for others; but I submit that it is inapplicable. It does not belong here. Every Senator has his vote to be given on his conscience. If there be any "interest" to sway him, it must be that of justice and the safety of the country.

On March 6,[1] Mr. Hendricks, after discussing the various questions raised, withdrew his objection, saying:

But, Mr. President, I find that some Senators, among them the Senator from Delaware [Mr. Bayard], who agree with me upon this question on the merits, are of the opinion that the question ought more properly to be raised when the court shall be fully organized, when the party accused is here to answer. I do not believe that he can waive a question that goes to the organization of the body; I believe it is a question for the body itself. But upon that I find some difference of opinion; and when I find that difference of opinion among those who agree with me upon the merits, upon the main point, whether he shall participate in the proceedings and judgment who may be benefited by it—while I find some Senators, who agree with me upon that question, disagreeing with me upon the question whether it ought to be raised now or when the Senator from Ohio proposes to cast a material vote in the proceedings, I choose to yield my judgment—my judgment, not at all upon the merits; my judgment not at all upon the propriety and the duty of the Senate to decide upon its own organization; but I yield as to the time when the question shall be made in deference to the opinion of others; and for myself, sir, I withdraw the question which I presented for the consideration of the President of this body and of the Senate yesterday.

The oath was then administered to Mr. Wade.

It appears from the Journal of the proceedings of the trial that Mr. Wade did not vote on any record vote until at the close of the trial, on May 16,[2] when his name is recorded on a question relative to the order of passing judgment on the several articles of impeachment. Thereafter he voted both on incidental questions and on the question of guilty or not guilty.

It appeared from the debate on the question as to Mr. Wade that another Senator was related to President Johnson,[3] but no objection was made to him on the ground of affinity, nor did any Senator urge that this should be considered an objection.[4] This Senator was Mr. David T. Patterson, of Tennessee, and he was son-in-law of the respondent. Mr. Patterson participated in the trial throughout, and on May 16[5] voted "not guilty" on the main question.

2062. Reference to a discussion as to the right to challenge the competency of a Senator to sit in an impeachment trial.—The right to challenge a Member of the Senate sitting for the trial of an impeachment case was discussed[6] at length by Mr. Manager Benjamin F. Butler during the impeachment of President Andrew Johnson.

2063. A quorum of the Senate sitting for an impeachment trial is a quorum of the Senate itself and not merely a quorum of the Senators sworn. for the trial.—On February 23, 1905,[7] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. William B. Allison, of Iowa, asked

[1] Senate Journal, p. 811; Globe, p. 1700.

[2] Senate Journal, p. 942.

[3] Mr. David T. Patterson, a Senator from Tennessee, was son-in-law of the respondent.

[4] Speech of Mr. Howard. Globe, p. 1671.

[5] Globe, p. 411.

[6] Second session Fortieth Congress, Globe Supplement, pp. 30, 31.

[7] Third session Fifty-eighth Congress, Record, pp. 3175, 3176.

for a call of the Senate and there appeared forty-two Senators, and, the Presiding Officer,[1] said:

Upon the call of the Senate, forty-two Senators have answered to their names, A quorum of the Senate sitting in the impeachment trial is not present.

Then, on motion of Mr. Knute Nelson, of Minnesota, the Sergeant-at-Arms was directed to send for absentees.

Later the Presiding Officer said:

A quorum of Senators who have been sworn in the impeachment trial is present—forty-three Senators.

The proceedings under the call were then dispensed with, and the Presiding Officer put the pending question on the admissibility of certain testimony.

There appeared yeas 10, nays 34—a total of 44 Senators responding, and the Presiding Officer announced that the evidence was not admitted.

Mr. Henry M. Teller, a Senator from Colorado, raised a question as to whether or not forty-four Senators constituted a quorum.

The Presiding Officer said:

Forty-three Senators make a quorum of the Senators who have been sworn in the impeachment trial.

Later Mr. Teller again raised the question:

Mr. President, I have been under the impression for a good many years that a majority of this body—in this instance forty-six Senators—made a quorum. I was somewhat surprised to find that a majority of the Senators sworn are held to be a quorum. I am not aware myself of any provision of the Constitution that allows this body to do business with less than a majority. You could not pass here a ten-dollar pension bill without a majority. Is it possible that less than a quorum can exercise the most important function that has been placed on the Senate by the Constitution? In my judgment, there is no court here present tonight. I raise that question.

The Presiding Officer said:

The Presiding Officer is of opinion that the point of order is well taken. He will state in this connection, however, that it has not been observed in proceedings of the Senate hitherto.

Thereupon further proceedings were taken to secure a quorum, and the Presiding Officer announced:

On the call of the Senate forty-six Senators have answered to their names. A quorum is present.

The Presiding Officer thinks it becomes the duty of the Presiding Officer again to submit to the Senate the question with regard to the admission of evidence offered by counsel for respondent, which was submitted when a quorum of the Senate was not present, but when a quorum of the Senators sworn in the impeachment trial was present.

A little later the Presiding Officer said:

A short time ago the Presiding Officer stated that he thought in this trial there had been a call of the Senate and that business had been conducted when there was less than a quorum of the Senate. He finds upon examination that he was mistaken, and that on the two occasions when the roll call was had to determine the existence of a quorum there was on each occasion a quorum of the Senate present.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

2064. An attempt of the House to investigate alleged corruption in connection with the votes of Senators during the Johnson trial was the subject of discussion and investigation in the Senate.—On May 21, 1868,[1] in the Senate sitting in legislative session, but at the time when the impeachment trial of Andrew Johnson, President of the United States, was pending, Mr. John B. Henderson, a Senator from Missouri, rising to a question of privilege, said:

On Saturday last after a vote had been taken in the court of impeachment on the eleventh article, and the Members of the House had retired to their own Chamber, one of the managers offered and the House adopted the following resolution:

"Whereas information has come to the managers which seems to them to furnish probable cause to believe that improper or corrupt means have been used to influence the determination of the Senate upon the articles of impeachment exhibited to the Senate by the House of Representatives against the President of the United States: Therefore,

"Be it resolved, That for the further and more efficient prosecution of the impeachment of the President the managers be directed and instructed to summon and examine witnesses under oath, to send for persons and papers, to employ a Stenographer, and to appoint subcommittees to take testimony, the expenses thereof to be paid from the contingent fund of the House."

It was advocated by its mover, one of the managers, on the ground that base and corrupt motives had determined the judgment of the Senate; and another one of the managers being asked during a debate on Monday last in the House if he would have Senators perjure themselves, replied that "perjury would not hurt them much."

On Tuesday, the 19th instant, I received the following notice from the managers:

"FORTIETH CONGRESS UNITED STATES,

"HOUSE OF REPRESENTATIVES,

"Washington, D. C., May 19, 1868.

SIR: A question has arisen in the course of our investigation wherein your testimony will tend to instruct the House of Representatives and aid its inquiry.

"Will you do the committee of managers the courtesy to attend at the earliest possible moment at the Judiciary Committee room of the House, where they are in waiting to receive you?

By direction of the managers.

"Your obedient servant,

"B. D. WHITNEY, *Clerk.*

"HON. J. B. HENDERSON."

To which I replied as follows—the reply not being delivered, however, till the next morning:

"WASHINGTON CITY, *May, 1868.*

"GENTLEMEN: Yours of this date is received. You say 'a question has arisen in the course of our investigations wherein your (my) testimony will tend to instruct the House of Representatives and aid its inquiry,' and thereupon you request my early attendance before the managers as a witness.

"This request, I take it, is intended to answer the purposes of a subpoena, and is issued under authority of a resolution adopted by the House on Saturday last in the following words, to wit:

"I have already read the resolution.

"A prosecution by impeachment against the President is set on foot, and now, when the evidence and arguments have been fully submitted and the Senate as a court is deliberating on its judgment, a second prosecution is instituted against the Senate itself. Whatever may be the purpose of this inquisition—and I use the word in no offensive sense—it is, in my judgment, not only a direct insult to the body of which I am a member, but a proceeding of most dangerous tendency in the future. A large part of our proceedings has been conducted in secret, the managers, counsel, and reporters being excluded. If a member of the court can now, before the rendition of judgment, be withdrawn from consultation and subjected to the inquisition of the prosecutors, that inquisition may reach to all proceedings, and thus

[1] Second session Fortieth Congress, Senate Journal, p. 416; Globe, pp. 2548–2558.

subvert the dignity and independence of the Senate. If it be to purge corruption from the Senate, the Senate is the proper body to guard and protect its own honor.

"Personally, I have no objection to appearing and testifying before you to all matters within my knowledge on the subject of impeachment. And were I to refuse, I know a new shower of calumny, base and grievous enough already, would certainly be poured upon me. But in my judgment this proceeding rises above personal considerations. It concerns public justice and effects the character, honor, and dignity of the Senate.

"I am engaged to appear before another committee of your body to-day, and on the meeting of the Senate to-morrow I shall submit this question for its consideration and be governed accordingly.

"Yours, respectfully,

"J. B. HENDERSON.

"To the managers of impeachment on the part of the House of Representatives."

Mr. Henderson urged that the resolution under which the summons had issued contained a direct insult to the Senate, and that the summons was an invasion of the privileges of the Senate.

Mr. Henderson also presented another letter received later from the managers:

WASHINGTON, D.C., *May 20, 1868.*

SIR: The managers have the honor to acknowledge your communication of 19th instant in answer to their request, which was not intended to serve the purpose of a subpoena, but as a courteous intimation to you that you could aid them in the investigation with which they have been charged.

If it bad occurred to them to speculate upon the topic, they would have supposed you might do them the justice to believe that they would have asked no question indecorous or improper, certainly not as to anything which occurred in the secret sessions of the Senate. They were not aware at the time they sent their note to you that the Senate was in session for "deliberation on its judgment" or otherwise, and they also believed that if they so far transgressed the limits of propriety as to make any inquiry which you deemed improper you would certainly have the efficient remedy of declining to answer.

Accepting the theory of your note, that you are a judge, they do not perceive on that account any objection to your answering as to matters pertinent in a further prosecution of the respondent on trial before the Senate for other and different offenses, because it is well known among lawyers that in both civil and criminal trials the presiding judge may be, and when occasion requires is, sworn as a witness in the very case then pending.

Jurors, in like manner, are called from their seats and sworn during the trial; and either, during the adjournment of the court, might legally and properly be called before a grand jury to give evidence on which to find an indictment against the prisoner at the bar for other and different offenses.

They bring these considerations to your notice in order that, seeing the theory upon which they have acted, you will acquit them of any discourtesy either personal to yourself or to the honorable Senate. Without indicating any opinion upon the question whether a Senator is liable to examination as a witness before a committee of the House, they desire to add that they did not intend to assert such claim in their communication to you of 19th instant. They had no purpose other than to avail themselves of your knowledge of facts, if agreeable to you, to give them the benefit of your knowledge, to aid them in pursuit of justice and right.

By direction of the managers.

Your obedient servant,

B. D. WHITNEY, *Clerk.*

Hon. J. B. HENDERSON.

In the course of the debate arising over the presentation made by Mr. Henderson, Mr. Timothy 0. Howe, of Wisconsin, asked for the consideration of a resolution presented on a previous day by Mr. Garrett Davis, of Kentucky:

Whereas it is represented that some persons have been and are engaged in violating the rights and privileges of the Senate by the use of threats, intimidation, and other unlawful and improper means toward its Members to constrain them in their consideration, action, and judgment in the matter of the

articles of impeachment against the President of the United States now pending before the Senate as a court of impeachment; therefore be it

Resolved, That a committee of three, to be appointed by the Chair, do proceed to inquire into the facts of such imputed threats, intimidation, and other unlawful means aforesaid, and the names of the persons, if any, using, or that have used, them; and that said committee have power to send for persons and papers, to take evidence, employ a stenographer, and report the facts to the Senate.

To this Mr. Edmund G. Ross, of Kansas, proposed an amendment adding:

And that said committee be authorized to request the managers on the part of the House to furnish said committee a transcript of all the testimony that has been or may be taken by them in the case of the impeachment of the President.

After debate the further consideration of the subject was postponed.

On May 27 [1] the consideration of the resolution was resumed, when Mr. Davis was permitted to withdraw the resolution and submit it in the following modified form:

Resolved, That a committee of five be appointed by the Chair to inquire into and report the facts in relation to any threats, intimidation, or other improper influences that were used or offered to be used, directly or indirectly, to control or influence the consideration or decision of the Senate or any Senator in the matter of the impeachment of the President of the United States lately pending before the Senate as a court of impeachment. Also, to inquire into and report the facts in relation to any overture or offer of an improper character to any person by or in the name of any Senator or other person in connection with said impeachment trial, and the names of any persons connected with said transactions or any of them. Said committee to have power to send for persons and papers, to summon witnesses, to take their evidence, and employ a stenographer, and to report as early as practicable.

Mr. Ross thereupon proposed an amendment in the nature of a substitute:

That a committee be appointed by the President of the Senate, to be composed of five Senators, whose duty it shall be to inquire whether improper or corrupt means have been used, or attempted to be used, to influence the votes of the Members of the Senate in the trial of the impeachment of the President; and that the said committee be authorized and empowered to send for persons and papers, and to do all things that in their judgment may be necessary for the furtherance of the object of the resolution.

The amendment was agreed to, after debate, and then the resolution as amended was agreed to.

2065. Title by which the Chief Justice is addressed while presiding at an impeachment trial.—In the course of the impeachment trial of Andrew Johnson, the Chief Justice, who was the Presiding Officer, was variously addressed as "Mr. President" and "Mr. Chief Justice." Mr. Manager Butler, in opening the case for the House of Representatives, used the former designation, while Mr. Benjamin R. Curtis, of counsel for the President, in his opening used the latter title. Mr. Thaddeus Stevens, of Pennsylvania, one of the managers, in his closing argument, addressed the Presiding Officer as "Mr. Chief Justice." This was the title used by Mr. William M. Evarts and other counsel for the President. In general the managers preferred the title "Mr. President," Messrs. Managers Benjamin F. Butler and John A. Bingham using it almost if not quite invariably. The Chief Justice in ruling usually said, "The Chief Justice thinks," etc., but sometimes said, "The Chair thinks." In the Journal and Record of Debates [2] the words "Chief Justice" are invariably used. The Senators used some one and some the other designation in addressing the Chair.

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[1] Senate Journal, p. 423; Globe, pp. 2598–2599.

[2] Second session Fortieth Congress, Globe Supplement, pp. 65, 123, 166, 168, 320, 337, 379, 410–414.

2066. Forms for addressing the Vice-President or President pro tempore while presiding at an impeachment trial.—In the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [1] of the Senate presided. The managers and counsel for the respondent, in addressing the Senate sitting for the trial, used the form "Mr. President and Senators." [2]

In the impeachment of William Blount, the Vice-President (Thomas Jefferson, of Virginia) presided, and we find this form of address, "Mr. President." [3]

2067. During the Johnson trial Chief Justice Chase gave a casting vote on incidental questions, and the Senate declined to declare his incapacity to vote.—On March 31, 1868,[4] during the impeachment trial of Andrew Johnson, President of the United States, a motion was made that the Senate retire for consultation, and there appeared on the vote. yeas 25, nays 25.

The Chief Justice thereupon said:

The Chief Justice votes in the affirmative. The Senate will retire for conference.

The Senate having retired, Mr. Charles Sumner, of Massachusetts, offered the following proposition as an amendment to the pending question:

That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any question during the trial, and he can pronounce decision only as the organ of the Senate, with its assent.

This was disagreed to, yeas 22, nays 26.

Later Mr. Sumner proposed the following:

Resolved, That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any question during the trial.

This was objected to as not relating to the subject for consideration of which the Senate had retired, and was not considered.

On April 1 Mr. Sumner offered the following:

It appearing from the reading of the Journal of yesterday that on a question where the Senate were equally divided the Chief Justice, presiding on the trial of the President, gave a casting vote, it is hereby declared that in the judgment of the Senate such vote was without authority under the Constitution of the United States.

This was rejected without debate, yeas 21, nays 27.

On April 2, 1868,[5] the question was taken as a motion that the Senate sitting for the impeachment trial adjourn, and there appeared yeas 22, nays 22. Thereupon the Chief Justice said "The Chief Justice votes in the affirmative," and so adjournment was voted.

2068. Discussion of the propriety of arbitrary abridgment by the Senate of the time of an impeachment trial.—On February 21, 1905,[6] in the

[1] T. W. Ferry, of Michigan, President pro tempore.

[2] See Record of trial, pp. 272, 287, 295, etc., First session Forty-fourth Congress.

[3] See Annals of Fifth Congress, Vol. II, p. 2278.

[4] Second session Fortieth Congress, Senate Journal, p. 868; Globe Supplement, pp. 62, 63.

[5] Senate Journal, p. 878; Globe Supplement, p. 92.

[6] Third session Fifty-eighth Congress, Record, p. 2974.

Senate sitting in legislative session, Mr. Eugene Hale, a Senator from Maine, offered this resolution:

Resolved, That all proceedings in the impeachment trial now before the Senate sitting as a court shall be terminated on Saturday, February 25 next, and a final vote shall be taken on the afternoon of that day at 4 o'clock.

Later, on the same day, in the Senate sitting for the impeachment trial, Mr. Hale introduced the same resolution, for action at a future time.

On February 22,[1] in the Senate in legislative session, Mr. Hale withdrew the resolution and submitted the following:

Ordered, That all proceedings before the Senate sitting in the trial of the impeachment against Charles Swayne, judge of the United States in and for the northern district of Florida, shall terminate on Saturday, February 25 next, and, in pursuance of this order, all testimony upon either side shall be closed on Friday, the 24th day of February next, and the Senate shall commence its session sitting for the trial of said impeachment proceedings at 12 o'clock meridian on said Saturday, the 25th day of February next; and, without any other motion or proceeding intervening, the counsel for the defense shall have until 2 o'clock of said day to present the case of the defendant, said time to be apportioned or divided as said counsel may determine; the managers on the part of the House of Representatives shall have, to present the case against said Charles Swayne, the time from 2 o'clock until 4 o'clock of said day, said time to be apportioned or divided as the managers may determine; at 4 o'clock, without further motion or proceeding intervening, the final vote shall be taken upon said impeachment proceedings.

In support of this resolution, Mr. Hale cited the backward condition of the legislative business.

Mr. Augustus O. Bacon, of Georgia, said in reply:

Mr. President, I quite agree with the Senator from Maine that the legislative business before this Senate is of extreme importance, but I do not think that anything is of more importance than that the Senate shall give such direction to any measures which it may deem necessary for expedition of the impeachment trial as will not bring into discredit and disrepute the very high and important function which we are now performing. In trying the impeachment presented by the House we are complying with the requirements of the Constitution, through which alone the purity and integrity of the public service can be guarded and secured.

The suggestion which I desire to make in this connection, in order that a wrong impression may not go abroad, is that everything which looks to expedition of the impeachment trial should, so fax as necessary and practicable, be in the nature of additional time given by the Senate to this work in the interval which now remains at our command, and that it should not be directed to the arbitrary abridgment of the necessary presentation of this case by the House of Representatives, performing, as it does, a high constitutional function in bringing and presenting to the Senate its case. If we desire that the impeachment trial shall close by Saturday, then the proper course is to give more time to it each day, so that the managers on the part of the House and the counsel for the respondent may have before them full time in which to fully present their respective cases to the Senate. We all know that this session must end at noon on the 4th of March, and that we are limited in time by law; and the objection which I make to the suggestion of the Senator is not to his effort that we may by proper expedition in the disposition of the impeachment matter have sufficient time for the proper discharge of the important duties of another kind which devolve upon us. My objection is to the method proposed. I prefer that instead of that the direction should be given to this matter which will impose upon us, if it need be, additional labor by providing for additional time to be devoted to the trial each day, and that it be not disposed of by the suggestion of an arbitrary abridgment in the opportunity of the House of Representatives to present its case here, and of the time for the proper consideration by ourselves as to how this important matter shall be determined, and what final disposition shall be given to it.

[1] Record, pp. 3020, 3021.

Mr. William M. Stewart, of Nevada, said:

Mr. President, I should like to make one suggestion in regard to this matter. It is suggested that the Constitution restrains the Senate, and that to comply with the provisions of the Constitution no limitation should be put upon time. We have a constitutional right to trial by jury, we have a constitutional right to have cases beard by the courts, and the courts exercise in pursuance of that a reasonable discretion as to the time to be used. The Supreme Court of the United States have rules in regard to the time to be used in cases to be argued there, and in criminal proceedings the courts put a reasonable limit to the time to be allowed for argument. They have to facilitate a trial in order to comply with the Constitution at all.

This brought from Aft. John C. Spooner, of Wisconsin, this question:

Has the Senator ever known a court before which there was a criminal case to fix a limit of time within which limit testimony for the defense should be presented?

The matter went over.

Chapter LXVI.

PROCEDURE OF THE SENATE IN IMPEACHMENT.

2069. Unless otherwise ordered, the Senate, sitting for an impeachment trial, begins its proceedings at 12 m. daily.

The Presiding Officer of the Senate announces the hour for sitting in an impeachment trial and the Presiding Officer on the trial directs proclamation to be made and the trial to proceed.

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[1] As to administration of the oath, see, also, Blount's trial (sec. 2303 of this volume), Peck's (secs. 2369, 2375), Humphreys's (sec. 2389), Johnson's (sec. 2422), Belknap's (sec. 2450), Swayne's (sec. 2477).

[2] See, also, sections 2065–2067, 2082–2089.

The president pro tempore presides during absence of the Vice-President. Sections 2309, 2337, 2394.

Medium for putting questions to witnesses and motions to the Senate. Section 2176.

Rulings of, as to evidence. Sections 2193, 2195, 2208.

Does not decide as to attachment of witnesses. Section 2152.

Calls counsel to order for improper utterances. Sections 2140, 2169.

Calls respondent to order. Section 2349.

Admonishes managers and counsel not to delay. Section 2151.

[3] A majority vote only is required on incidental questions. Section 2059.

As to the vote of the Chief Justice when presiding. Sections 2057, 2067.

Debate as to admission of evidence. Sections 2196–2202.

[4] Parliamentary law, as to. Section 2027.

Constitution requires two-thirds vote. Section 2055.

Debate on the question. Section 2094.

Where a plea of guilty might be entered. Section 2127.

Process of judgment in various cases: Blount's (sec. 2318), Pickering's (secs. 2339, 2340), Chase's (sec. 2363), Humphreys's (secs. 2396), Johnson's (secs. 2437–2440), Belknap's (sec. 2466), Swayne's (sec. 2485).

[5] The rules continue from Congress to Congress. Section 2372. Adoption of, at various times. Sections 2389, 2314.

An adjournment of the Senate sitting for an impeachment trial does not operate as an adjournment of the Senate.

Immediately upon the adjournment of the Senate sitting for an impeachment trial the ordinary business is resumed.

Present form and history of Rule XII of the Senate sitting for impeachment trials.

Rule XII of the "rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

> The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m., and when the hour for such thing [sitting?] shall arrive, the Presiding Officer of the Senate shall so announce, and thereupon the Presiding Officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

This rule was first drafted by the committee appointed in 18681 to revise the rules preparatory to the trial of President Johnson. In the House, on March 2, the original form was modified by eliminating the words "high court of impeachment" wherever found and substituting the words "the trial." The form adopted in 1868 is identical with the present form, except that the word "thing" appears instead of "sitting.'"

2070. At 12.30 p. m. of the day appointed for an impeachment trial the Senate suspends ordinary business and the Secretary notifies the House of Representatives that the Senate is ready to proceed.

Present form and history of Rule XI of the Senate sitting for impeachments.

Rule XI of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

> At 12.30 o'clock afternoon of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ____ ____, in the Senate Chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

This is the form reported and agreed to in the revision of 1868.[3] It was formed by uniting portions of rules 11 and 12, which had been framed in 1805[4] at the time of the trial of Judge Chase.

2071. The hour of meeting of the Senate sitting for an impeachment trial being fixed, a motion to adjourn to a different hour is not in order.— On March 30, 1868,[5] in the Senate, sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. John Sherman moved an adjournment.

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[1] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, pp. 1534, 1602.

[2] Apparently a misprint.

[3] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1534.

[4] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[5] Second session Fortieth Congress, Globe Supplement, p. 53.

Mr. Charles Sumner, of Massachusetts, suggested that the adjournment be to 10 o'clock on the morrow.

The Chief Justice[1] said:

The hour of meeting is fixed by the rule, and the motion of the Senator from Massachusetts is not in order.

2072. In the Johnson trial the Chief Justice held that the motion to adjourn took precedence of a motion to fix the day to which the Senate should adjourn.—On April 3, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. George F. Edmunds, of Vermont, moved that the Senate adjourn.

Mr. William Pitt Fessenden, of Maine, moved that when the court should adjourn, it adjourn to meet on Monday next.

Mr. Edmunds made the point of order that the motion to adjourn took precedence.

The Chief Justice[1] said:

The Chair is of opinion that the motion to adjourn takes precedence of every other motion if it is not withdrawn.

2073. In the Senate sitting for an impeachment trial no debate is in order pending a question of adjournment.—On Saturday, April 4, 1868,[3] in the Senate, sitting for the impeachment trial of Andrew Johnson, President of the United States, a motion was made that when the Senate, sitting as a court of impeachment, should adjourn, it should be to meet on Thursday, April 9.

Debate having arisen, the Chief Justice[1] said:

The Chief Justice is of opinion that, pending the question of adjournment, no debate is in order from any quarter. It is a question exclusively for the Senate. Senators, you who are in favor of the adjournment of the Senate sitting as a court of impeachment until Thursday next will, as your names are called, answer "yea;" those of the contrary opinion, "nay."

And there appeared yeas 37, nays 10. So the motion was agreed to.

2074. The motion to adjourn to a certain time has been admitted in the Senate sitting for an impeachment trial.—On June 1, 1876,[4] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George G. Wright, a Senator from Iowa, proposed this inquiry:

Mr. President, I wish to inquire whether it would be in order now to move to adjourn to a day certain, or whether the order should be properly that when the Senate sitting as a court of impeachment adjourns, it be to a definite time?

The President pro tempore[5] said:

It would be in order to move to adjourn to a certain time.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Fortieth Congress, Globe Supplement, pp. 110, 111.

[3] Second session Fortieth Congress, Globe Supplement, p. 121.

[4] First session Forty-fourth Congress, Record of trial, p. 161.

[5] T. W. Ferry, of Michigan, President pro tempore

2075. The Senate sits for an impeachment trial with open doors, but may deliberate on its decisions in secret.

Present form and history of Rule XIX of the Senate sitting in impeachment trials.

Rule XIX of the "Rules of procedure and practice for the Senate when sitting in impeachment trials," is as follows:

> At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

The first clause of this rule is in the form adopted in 1805,[1] for the trial of judge Chase. The second clause, setting forth a contingency in which the doors may be closed, was added in the revision of 1868,[2] preparatory to the trial of President Johnson.

On July 31, 1876,[3] when the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, was about to proceed to judgment, Mr. Hannibal Hamlin, a Senator from Maine, proposed to amend the rule by striking off the qualifying clause, so that the proceedings should be held in open session. But the Senate by a vote of yeas 23, nays 32, declined to consider the proposition.

2076. If the Senate fail to sit in an impeachment trial on the day or hour fixed, it may fix a time for resuming the trial.

Present form and history of Rule XXV of the Senate sitting for impeachment trials.

Rule XXV of the "rules of procedure and practice for the Senate when sitting in impeachment trials," is as follows:

> If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

This rule was adopted in 1868,[4] preparatory to the proceedings for the trial of President Johnson.

2077. An order for postponement of an impeachment trial was held in order after the organization of the Senate for the trial.—On March 23, 1868,[5] in the Senate as organized for the trial of President Johnson, the Chief Justice of the United States presiding, Mr. Garrett Davis, a member of the Senate from Kentucky, proposed a preamble and order, reciting that the seats of Senators from several States were vacant, and declaring that the trial should be postponed until the Senators from those States should be permitted to take their seats.

Mr. Timothy O. Howe, of Wisconsin, a Senator, objected that the proposition was not in order.

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[1] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[2] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 814: Globe, p. 1568.

[3] First session Forty-fourth Congress, Record of trial, p. 341.

[4] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 252: Globe, p. 1503.

[5] Second session Fortieth Congress. Globe supplement, p. 12.

The Chief Justice,[1] said:

The motion comes before the Senate in the shape of an order submitted by a Member of the Senate and of the court of impeachment. The twenty-third rule requires that "all the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of rule seven." The seventh rule requires the Presiding Officer of the Senate to "submit to the Senate, without a division, all questions of evidence and incidental questions; but the same shall on the demand of one-fifth of the Members present, be decided by yeas and nays." By amendment this rule has been applied to orders and decisions proposed by a Member of the Senate under the twenty-third rule. The Chair rules therefore that the motion of the Senator from Kentucky is in order.

Thereupon the proposition was entertained.

2078. When informed that managers are to present articles of impeachment, the Senate, by rule, requires its Secretary to inform the House of its readiness to receive the managers.

Present form and history of Senate Rule I as to impeachments.

Rule I, of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," [2] is as follows:

Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to such notice.

This rule, with two immaterial verbal changes, is in the form adopted for the trial of Judge Chase in 1804.[3] It merely put in form of a permanent rule the practice followed in the trials of Senator Blount and Judge Pickering. In 1868,[4] for the trial of Andrew Johnson, President of the United States, the rule received slight verbal changes, and was adopted in the form above, except the last two words, which read "said notice," instead of "such notice."

2079. Articles of impeachment being presented, the Senate is required by its rule to proceed to prompt consideration thereof.

Before consideration of articles of impeachment, the Presiding Officer is required by rule to administer the oath to the Senators present, and later to others as they may appear.

The Senate, in its rules, has refrained from prescribing an oath for the Chief Justice when he presides at an impeachment trial.

The Senate is required by rule to continue in session from day to day, Sundays excepted, during impeachment trials, unless otherwise ordered.

In 1868 the Senate eliminated from its rules all mention of itself as a "high court of impeachment."

Present form and history of Rule III of the Senate for impeachment cases.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] See Senate Manual, p. 171.

[3] Senate Journal, pages 509, 510, second session Eighth Congress.

[4] Second session Fortieth Congress, Journal, pp. 248, 811; Globe, p. 1521; Senate Report No. 59.

Rule III, of the "Rules of procedure and practice of the Senate when sitting on impeachment trials," is as follows:

Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation or, sooner if ordered by the Senate, proceed to the consideration of such articles, and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same.

This rule, which formulated the practice of previous trials, dates from 1868,[1] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a series of rules for the proceedings incident to the impeachment of President Johnson. This rule was reported in form as follows:

III. Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if so ordered by the Senate, resolve itself into a high court of impeachment for proceeding thereon. A quorum of the Senate shall constitute a quorum of the court, and it shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the court) until final judgment shall be rendered, and so much longer as it may, in its judgment, be needful. Immediately upon the Senate resolving itself into such high court of impeachment the Secretary of the Senate shall administer to the Presiding Officer (unless he shall be the Chief Justice) the oath required by the Constitution of the United States in such cases, and in the form hereinafter prescribed, and thereupon the Presiding Officer shall administer such oath to the Members of the Senate then present, and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same.

The wording of this language, with its references to the "high court of impeachment" and the quorum thereof, gave rise to a discussion[2] as to the constitutional status of the Senate in such procedure; and resulted in amendment[3] striking out those words, and bringing the rule in this respect to its present form. Another question arose over a proposition to strike out the words providing for administering the oath to the Presiding Officer. Mr. Charles R. Buckalew, of Pennsylvania, said:

I think the Presiding Officer of the court of impeachment should be under oath, but it should be an oath different from that taken by the Members who try the case. In the rule, as reported to us, it was contemplated that the same oath should be administered to him that was administered to the Members of the Senate. I believe in former impeachment trials the Presiding Officer was sworn. There may be some difficulty about our prescribing an oath for the Presiding Officer. I think it very clear that by an act of Congress the form of an oath to be taken by the Presiding Officer might be provided, and that it would be binding. It seems an anomaly that we should have a Presiding Officer sitting here and not under any legal obligation or any moral obligation such as in oath would impose. I agree that the amendment already made excepting him from the operation of the general form of oath provided for Members of the Senate is eminently just and proper; and his exception becomes indispensable after the decision which has been made by the Senate on several occasions, withdrawing him altogether from any interference with our proceedings except on questions of order. I suppose, Mr. President, we have the same power to prescribe an oath for the Presiding Officer of the Senate that we have to prescribe an oath for the Members of the Senate, if, indeed, there be any authority to bind him by such an obligation.

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[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Globe, p. 1521 et seq.

[3] Globe, pp. 1602, 1603.

Mr. Stephen C. Pomeroy, of Kansas, said:

The Chief Justice of the United States is under oath. When he entered upon the discharge of his functions as Chief Justice, he took an oath to discharge all the duties that were incumbent upon him as such officer; and this duty is placed upon him by the Constitution of the United States, and was embraced in his oath to discharge his duties as Chief Justice of the United States; and any further oath than that I think would be unnecessary.

* * * I beg leave to say to the Senator from Pennsylvania that the reason why Senators have to be sworn, in addition to their usual oath as Senators, is that it is provided for by the Constitution, which says that "When sitting for that purpose they shall be on oath or affirmation;" and goes on, "When the President of the United States is tried, the Chief Justice shall preside," but it does not say that the Chief Justice shall be sworn. In the same sentence in which the Constitution provides that the Senate shall be sworn when sitting to try an impeachment, it says that the Chief Justice shall preside, and, of course, in the absence of any requirement of a special oath, we are to understand that he is sworn to the discharge of his duties, and this duty among the rest, when he took his oath of office. I believe that is all the oath required of him.

The amendment was agreed to, bringing the latter portion of the rule into the form now existing.

2080. Form of oath to be administered to Senators sitting in impeachment trials.

The Senate declined to require that the Chief Justice be sworn when about to preside at an impeachment trial.

Present form and history of Senate Rule XXIV as to impeachments.

Rule XXIV of the "Rules of procedure and practice of the Senate when sitting in impeachment trials" provides:

FORM OF OATH TO BE ADMINISTERED TO THE MEMBERS OF THE SENATE SITTING IN THE TRIAL OF IMPEACHMENTS.

"I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of ——— ———, now pending, I will do impartial justice according to the Constitution and laws: So help me God."

This is the form agreed to in 1868.[1]

As originally reported the form of oath for Members of the Senate had this heading:

Form of oath to be administered to the Presiding Officer and Members of the Senate.

Mr. Charles D. Drake, of Missouri, raised the point[2] that the Constitution did not require the Presiding Officer to be sworn, but only the Senators. Some discussion arose over this question. Mr. Charles R. Buckalew, of Pennsylvania, thought the Presiding Officer should be sworn.

Mr. Stephen C. Pomeroy, of Kansas, said that the Chief Justice was already sworn to perform his duties, and this was part of his duties as Chief Justice.

The Senate, without division, agreed to an amendment striking out the words "Presiding Officer and" from the heading.

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[1] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

[2] Globe, p. 1603.

2081. In 1876 the Senate doubted its authority to empower its Presiding Officer to administer to Senators the oath required for an impeachment trial.

In the Belknap trial the oath to Senators was administered by the Chief Justice until by law authority was conferred on the Presiding Officer of the Senate.

On April 5, 1876,[1] in the Senate pending proceedings for the impeachment of William W. Belknap, Secretary of War, Mr. George F. Edmunds, of Vermont, said:

I wish to ask the attention of the Senate to a matter which I, after consultation with as many Senators as I could find, think it necessary to bring to the notice of the Senate respecting the matter of the impeachment to-day. The third rule of the Senate in regard to impeachments provides that on this day at one o'clock—

"The Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present, and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same."

But on examination we are unable to find any statute of the United States which authorizes the President of the Senate or the Presiding Officer to administer this oath. It stands upon the rule alone. The language of the statute about the authority of the Presiding Officer is that, when Senators appear to take their seats upon an election to this body, the Presiding Officer shall swear them in, and any Senator may administer a similar oath to the Vice-President, the President of the Senate, when he appears; and there the statute stops except in respect of witnesses who are by law to be sworn by the President of the Senate.

In this state of difficulty and in the very grave doubt, at least, that in the minds of all the gentlemen whom I have been able to consult there is about this being a constitutional compliance with that requirement which obliges us to be under oath (which, of course, implies a legal and binding oath), we have thought it best for this occasion, until provision can be made by law, to submit to the Senate a proposition that the Chief Justice of the United States be invited to attend at one o'clock to-day to administer these oaths, there being no question about his authority to do so. Therefore, Mr. President, I ask unanimous consent that this portion of Rule 3 which I have read, respecting the administration of the oath by the Presiding Officer, shall be suspended for this day; and if that be unanimously agreed to, as of course it requires unanimous consent to suspend this rule, I shall then offer an order which will accomplish the next step in the matter.

In accordance with this suggestion the rule was suspended, and the order referred to by Mr. Edmunds was submitted and agreed to.

To remedy this difficulty a bill was prepared, passed both Houses, and was approved by the President on April 18, 1876.[2] This empowers the Presiding Officer of the Senate for the time being to administer all oaths or affirmations that are or may be required by the Constitution or by law to be taken by any Senator, officer of the Senate, witness, or other person, in respect to any matter within the jurisdiction of the Senate. Also the Secretary and Chief Clerk of the Senate are respectively empowered to administer any oath or affirmation required by law, or by the rules or orders of the Senate to be taken by any officer of the Senate, or by any witness produced before it.

In accordance with this law the President pro tempore, on April 27,[3] administered the oath required of Senators sitting for impeachment trials, to Mr. Bainbridge Wadleigh, of New Hampshire.

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[1] First session Forty-fourth Congress, Senate Journal, p. 394; Record. p. 2212.

[2] 19 Stat. L., p. 34.

[3] Senate Journal, p. 915; Record of trial, p. 8.

2082. When the President of the United States is impeached the Chief Justice of the Supreme Court presides.

When the Chief Justice is to preside at an impeachment trial the Presiding Officer of the Senate is required by rule to give him notice of time and place and request his attendance.

The Senate by rule have implied that the Chief Justice attends and presides only after the articles of impeachment have been presented.

In 1868 the Senate eliminated from its rules all mention of itself as a "high court of impeachment."

Present form and history of Rule IV of the Senate sitting for impeachment trials.

Rule IV of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," provides:

> When the President of the United States or the Vice-President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

The discussion of the constitutional status of the Senate in impeachment proceedings, incident to the adoption of rules in 1868, resulted in the present form of the rule. The committee having the subject of rules under consideration at that time, reported [1] it as a new rule in form as follows:

> IV. The Presiding Officer of the Senate shall be the presiding officer of the high court of impeachment, except when the President of the United States, or the Vice-President of the United States upon whom the powers and duties of the office of President shall have devolved, shall be impeached, in which case the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside, notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the organization of the high court of impeachment as aforesaid, with a request to attend, and he shall preside over said court until its final adjournment.

On March 2,[2] after the debate as to the use of the words "high court of impeachment," amendments were offered by Mr. Orris S. Ferry, of Connecticut, and agreed to, which brought the rule to its present form. The debate on this rule showed the understanding to be that the Chief Justice should not be notified to attend and preside until after the articles of impeachment had been presented.

2083. In impeachments the Presiding Officer of the Senate is empowered by rule to make and issue, by himself or by the Secretary, authorized orders, writs, precepts, and regulations.

Present form and history of Rule V of the Senate sitting for impeachment trials.

Rule V of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," provides:

> The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

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[1] Second session Fortieth Congress, Senate Reports, p. 59.

[2] Senate Journal, p. 812 Globe. pp. 1602. 1603.

This rule dates from 1868, when it was reported [1] in nearly its present form by the committee having in charge the rules to be adopted in view of the impeachment of President Johnson. It was changed to its present form by substituting the word "Senate" for "Court" in two places, in accordance with conclusions arrived at after discussion as to the constitutional status of the Senate.[2]

2084. The preparations in the Senate Chamber for an impeachment trial are directed by the Presiding Officer of the Senate.

During an impeachment trial the Presiding Officer on the trial directs all forms not otherwise specially provided for.

The Presiding Officer on an impeachment trial may make preliminary rulings on questions of evidence and incidental questions or may submit such questions to the Senate at once.

The preliminary rulings of the Presiding Officer on an impeachment trial stand as the judgments of the Senate, unless some Senator requires a vote.

On questions of evidence and incidental questions arising during an impeachment trial the voting is without division unless the yeas and nays are demanded by one-fifth.

Discussion of the propriety of the Presiding Officer on an impeachment making a preliminary decision on questions of evidence.

Discussions of the functions of the Chief Justice in decisions as to evidence in an impeachment trial.

In the Johnson trial Chief Justice Chase held that the managers might not appeal from a decision of the Presiding Officer as to evidence.

Present form and history of Rule VII of the Senate sitting for impeachment trials.

Rule VII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," is as follows:

> The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the Members present, when the same shall be taken.

The first sentence of the rule is the substance of Rule VII, adopted in 1805,[3] at the time of the trial of Judge Chase. In 1868, at the time of the proceedings for the impeachment of President Johnson, the committee of which Mr. Jacob M. Howard, of Michigan, was chairman, reported [4] it in substantially its present form. In the first draft the word "court" was generally used instead of "Senate;" but in

[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Senate Journal, pp. 230, 812; Globe, pp. 1526, 1602.

[3] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[4] Second session Fortieth Congress, Senate Report No. 59.

accordance with a general principle established at that time that phraseology was changed.[1] Also the draft reported from the committee did not contain the last sentence of the present form.

On March 2,[2] while the report was under debate, Mr. Charles D. Drake, of Missouri, moved to strike out these words:

> And the Presiding Officer of the court may rule all questions of evidence and incidental questions, which rulings shall stand as the judgment of the court, unless some member of the court shall ask that a formal vote be taken thereon, in which case it shall be submitted to the court for decision; or he may, at his option, in the first instance, submit any such question to a vote of the members of the court,

and insert in lieu thereof:

> The Presiding Officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions, but the same shall, on the demand of one-fifth of the Members present, be decided by yeas and nays.

The words to be inserted were suggested by Mr. Jacob M. Howard, of Michigan.

A long debate resulted on this motion.

Mr. Drake explained his reasons:

> The Constitution simply, says that when the President of the United States is tried the Chief Justice shall preside. In that position he has just exactly the same powers and functions that the Vice-President would have in any other case of impeachment, and no more. Now, sir, any man in the country, whether a lawyer or not, may, in the course of events, come to fill the position of Vice-President of the United States. Suppose that a man who had never been a lawyer, never made law his study, and did not know anything at all about the complex rules of evidence in the courts of justice were to be elevated to the Vice-Presidency, and the Senate should consist, as it does now, of a large majority of those who have made the law their study during a large portion of their lives, and he should be set up in the chair as the Presiding Officer of that body to decide questions of law. I will venture to say that the Senate would regard it as quite preposterous.
>
> Now, sir, why should we set the Chief Justice there to decide these questions? We can not do it, in my opinion, without a violation of the spirit of the Constitution, which does not entitle him to any more prerogatives as the Presiding Officer of the court than the Vice-President would have in other cases.
>
> But, sir, there is a very grave objection to this. Even taking the distinguished Chief Justice of the United States, so justly distinguished for his great mind and his great knowledge of the law, it is not proper, it is not judicious, it is not for the purposes of justice expedient that the Senate, sitting as a court of impeachment, should ever be brought to the point of overruling a decision made by the Chief Justice of the United States sitting in the chair as the Presiding Officer of the court. It is not proper that the judgment of the Senate upon questions of law, which it must ultimately decide, if a single Senator demands its decision, should be warped, or if not warped, in any degree affected by the previous announcement of an opinion upon that question by so high a judicial officer as the Chief Justice.
>
> Sir, it might be that, on some future occasion, when a President of the United States should be impeached again, the Chief Justice might be a very strong opponent of his, or a very strong advocate of his, and that his decisions might be influenced one way or the other by the personal considerations or the political considerations which bound him to the President or made him the President's opponent. Under these circumstances, it is not wise or judicious, in my opinion, that we should lay down a rule, not only for this trial but for all other trials, which might bring the Chief Justice, sitting as our Presiding Officer, in continual conflict with the Senate. Let the Senate decide its own questions of law. Let it not, by simple acquiescence, put the Chief Justice there to decide these questions of law. Let them come up to the work themselves and pronounce their own decision, without the necessity of appealing from his decision, and being brought into antagonism with him.

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[1] Globe, pp. 1602, 1603; Journal, pp. 247, 248, 812.

[2] Senate Journal, pp. 247, 248; Globe, pp. 1595–1602.

Mr. John Sherman, of Ohio, opposed this view on the ground that the trial would be unnecessarily prolonged were the preliminary decision taken from the Presiding Officer. That was the function of every presiding officer, and he considered that "a departure from the ordinary customs and courtesies extended to presiding officers, especially in a case where the Presiding Officer was made so by the Constitution of the United States," would be a very remarkable circumstance.

Mr. George H. Williams, of Oregon, argued elaborately in the same line:

I say that the Senators alone do not constitute a perfect Senate, but the Vice-President of the United States is a part of the Senate, and has certain functions to perform as a part of the Senate, and his right to vote as an officer of the Senate is recognized under certain circumstances. When the Senators are equally divided, he has a right to vote, for the language is:

"The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided."

That is, unless the Senators be equally divided he shall have no vote; but, if they are equally divided, then he is to have a vote. Certainly he could have no vote under any circumstances unless he did, for certain purposes at any rate, constitute a part of the Senate. Then the Constitution provides that—

"The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice-President or when he shall exercise the office of President of the United States."

Then it says:

"The Senate shall have the sole power to try all impeachments."

Does that mean solely and exclusively; that the Senators shall have the sole power to try all impeachments; or does it mean that the Senate as an organized body, constituted under the provisions of the Constitution, shall try an impeachment? I say that it means that the Senate, with the Vice-President of the United States presiding, and the Constitution contemplates that he is to participate in the trial of every impeachment, except where the President of the United States is upon trial.

"When sitting for that purpose they shall be on oath or affirmation."

Does that mean that the Senators alone shall be upon oath or affirmation, or does it mean that the Senate, that all the constituent Members of the Senate who participate in the trial, shall be upon oath or affirmation?

"When the President of the United States is tried, the Chief Justice shall preside."

Now, sir, I understand the Constitution to make the Chief Justice of the United States a part of the Senate when it is engaged in trying an impeachment against the President of the United States. I do not undertake to say that he possesses the power to vote like a Senator; I will not make that declaration at this time; but he is a part of the Senate, and I maintain that the Senate, by its rules, may confer upon him such powers as it sees proper in the proceedings of the trial. He is not to be treated, when the Constitution requires him to come here and preside over this body, as a stranger and an interloper, because, under the Constitution, he has as much right to be here as any Member of this body. It is as much his duty to be here as it is the duty of any Member of this body to be here; and if he is here under the Constitution, he is here for certain purposes and must necessarily possess the powers of a presiding officer. Why should there be evinced a kind of jealousy, as it seems to me, on the part of the Senate, lest if the Chief Justice comes in here be may assume to exercise powers which do not belong to him? Are we to assume that position, and hence refuse to give to him those rights and powers and privileges which the Constitution contemplates he should have?

It seems to me that there is a perfect propriety, when the Constitution compels him to come here and preside upon the trial of the President, in allowing him, in the first instance, to decide in that court as he would in the other court where he presides as Chief Justice.

Mr. Thomas A. Hendricks, of Indiana, while not holding that the Chief Justice might vote, considered it eminently proper that he should exercise a preliminary decision:

In the first place, he is an eminent judge, because of his position. Is he not competent, in all probability, to correctly and safely decide the questions that are likely to arise during the progress of

the trial? In his office as Chief Justice he participates in the greatest decisions that are made in any court in the world, and as a judge of one of the circuits he presides over the controversies incident to life and property. Shall he not be heard to express in the first place for the Senate a judgment, and if not agreeable, the Senate shall say it is not agreeable? What harm can come of it? It brings the question directly before the body, promptly, conveniently, safely, prudently, in my opinion.

But if he is not to participate that far, to say the least of it, in the business of the body, why has the Constitution been so careful to have him here? Certainly for the purpose merely of presiding and seeing that good order is preserved in the body the Constitution would not be so careful that he should preside. Some power, it is presumed, is to be exercised by him. The Constitution presumes that and what power? To decide questions as they arise in the progress of the case, as questions ordinarily are decided, though subject, of course, to the superior will of the Senate.

Mr. Roscoe Conkling, of New York, who took the view advanced by Mr. Drake, cited precedents:

We may gain information at this point from the practice and precedents under the British constitution. "The House of Lords," called at times "the court of the King in Parliament," was, like the Senate, an entirety; an ascertained, defined body. There was a presiding officer at all times, and his existence and ministration was derived from the constitution as much as from our Constitution proceeds the existence of a presiding officer here. This presiding officer was sometimes a member of the House of Lords—taken from the body to preside in it, as our Presiding Officer for several sessions has been taken from the Members of the Senate. Sometimes the presiding officer in the Lords was made a member of the body contemporaneously with his installment as presiding officer—not having been a peer before, he was ennobled at the time and thus became a member. Sometimes not being a peer, and therefore not a member of the Lords, he presided without a peerage being conferred, and thus he was presiding officer, with all the prerogatives appurtenant to the presiding chair, but still was not a member of the body. By turning to the powers accorded to the Lord Chancellor as presiding officer, and to the duties and prerogatives of the lord high steward of England in the trial of impeachments, we may be able to measure the force of the expression, "When the President of the United States is tried, the Chief Justice shall preside." A distinction has been made between the right to vote and to decide of the lord high steward between a trial before the Lords in Parliament—that is to say before the House of Lords at large and a trial before a commission of the peers. It has been insisted that the lord steward never participated in the decision if the trial was before a chosen number of the peers, but that he did take part in judgment and decision when the trial was before the House of Lords in full. Lord Campbell, in his Lives of the Chancellors, refers to this distinction; so does May in his Law of Parliament. But the journal of the House of Lords affords no reason to believe that such a difference of practice in the two tribunals was observed. On the contrary, the question whether the lord steward had or had not a vote or a voice in giving judgment seems to have hinged entirely upon his being merely a presiding officer or being also a member of the House of Lords itself. In virtue of his place as presiding officer he seems in no case to have participated in voting or determining the cause. His right and power and designation to preside seems never to have been supposed to carry with it any permission or obligation to join in deciding questions submitted to the tribunal. In many instances the lord high steward did vote, however, in trials of impeachment, but always in virtue of his being a member of the House, independent of the fact that he was also its presiding officer.

To substantiate this I refer, first, to the cause of the Earl of Ferrers, brought to the bar in 1760. The cause is reported at length by Sir Michael Foster, one of the judges of the court of king's bench. The earl having been convicted, the House propounded to the judges two questions, one of which went to the power of the presiding officer and of the House without the presiding officer. The judges answered the questions after deliberation, in writing, and the reasoning appears in Foster's Crown Law at page 138 and onward. I read from page 143. Having discussed some matters incident to a trial of a peer before a commission of peers he proceeds:

"But in a trial of a peer in full Parliament, or, to speak with legal precision, before the King in Parliament, of a capital offense, whether upon impeachment or indictment, the case is quite otherwise. Every peer present at the trial (and every temporal peer hath a right to be present in every part of the proceeding) voteth upon every question of law and fact, and the question is carried by the major

vote, the high steward himself voting merely as a peer and member of that court in common with the rest of the peers, and in no other right,

"It hath indeed been usual, and very expedient it is in point of order and regularity, and for the solemnity of the proceeding, to appoint an officer for presiding during the time of the trial and until judgment, and to give him the style and title of steward of England. But this maketh no sort of alteration in the constitution of the court. It is the same court founded in immemorial usage, in the law and custom of Parliament, whether such appointment be made or not.

"It acteth in its judicial capacity in every order made touching the time and place of the trial, the postponing the trial from time to time upon petition according to the nature and circumstance of the case, the allowance or nonallowance of counsel to the prisoner, and other matters relative to the trial, and all this before an high steward hath been appointed: and so little was it apprehended in some cases which I shall mention presently, that the existence of the court depended on the appointment of an high steward, that the court itself directed in what manner and by what form of words he should be appointed. It hath likewise received and recorded the prisoner's confession, which amounteth to a conviction, before the appointment of an high steward, and hath allowed to prisoners the benefit of acts of general pardon, where they appeared entitled to it, as well without the appointment of an high steward as after his commission dissolved."

On the next page, referring to the case of the Earl of Danby, he states certain proceedings between the two Houses of Parliament, and remarks—

"That the Lords' committees said 'The High Steward is but Speaker pro tempore, and giveth his vote as well as the other Lords.'"

And upon this appears the following entry:

"In the Commons' Journal of the 15th of May it standeth thus: Their lordships farther declared to the committee that a Lord High Steward was made hac vice only, that notwithstanding the making of a Lord High Steward the court remained the same and was not thereby altered, but still remained the court of peers in Parliament; that the Lord High Steward was but as a speaker or chairman for the more orderly proceeding at the trials."

This the Commons wished entered on the Lords' Journal.

On page 147, speaking of the law as laid down by the Lords, Sir Michael says:

"The letter of the resolution, it is admitted, goeth no farther, but this is easily accounted for. A proceeding by impeachment was the subject-matter of the conference, and the Commons had no pretense to interpose any other. But what say the Lords? The High Steward is but as a speaker or chairman pro tempore for the more orderly proceeding at the trials; the appointment of him doth not alter the nature of the court, which still remaineth the court of the peers in Parliament. From these premises they draw the conclusion I have mentioned. Are not these premises equally true in the case of a proceeding upon indictment? They undoubtedly are."

This case and the authorities referred to in stating it seem to make it clear that the immemorial understanding in England has been that the officer whose duty it is to preside at trials of impeachment has definite functions, convenient and conducive to order, and the dispatch of business, and that the duty to vote or to decide is not among his duties or his powers. The fact of his presiding or of his being authorized or commissioned to preside, according to these cases, carries with it no right to act as a trier or a member. The same doctrine will be found in Sharswood's Blackstone, at pages 261 and 262 of the second volume. Lord Campbell, in the third volume of his Lives of the Chancellors, page 557, refers to the case of Lord Dellamere, tried in 1686 for complicity with Monmouth. Jeffries was Lord High Steward and seems to have conducted himself with all the brutality to have been expected of him. He began by a harangue to the culprit, urging him, in the presence of the king, to confess. Dellamere interposed to inquire if he was to be one of his judges, to which the Lord High Steward replied, "No, my Lord; I am judge of the court, but I am none of your triers." This trial was not before the House of Lords, but before a commission of peers, and in so far it is not a literal precedent. Here are other cases of antiquity and of note, more or less instructive, cases in which the presiding officer voted, not apparently sui juris, but by reason of his peerage.

In the trial of Lord Lovat, impeached by the Commons for high treason in 1746:

"The Lord High Steward, by a list, called every peer by his name, beginning with the lowest baron, and asked them, "If Simon, Lord Lovat, was guilty of the high treason whereof he stands impeached or not guilty?"

"And thereupon every Lord, standing up uncovered, answered: 'Guilty, upon my honor,'[1] laying his right hand upon his breast.

Which done, the Lord High Steward, standing uncovered at the chair, as he did when he put the question to the other Lords, declared his opinion to the same effect and in the same manner." (27 Lords' Journals, p. 76.)

In the trial of the Earl of Oxford and of Earl Mortimer, impeached in 1717:

"The Lord High Steward stated the question before agreed on, and asked every Lord present severally, 'Whether content or not content?'

"And they all answering in the affirmative, as did the Lord High Steward declare his opinion also:

"The Lord High Steward declared that Robert, Earl of Oxford and Earl Mortimer, was, by the unanimous vote of all the Lords present, acquitted of the articles of impeachment exhibited against him by the House of Commons for high treason and other high crimes and misdemeanors, and of all things therein contained." * * * "And then the Lord High Steward stood up uncovered; and, declaring 'that there was nothing more to be done by virtue of the present commission,' broke the staff and pronounced the commission of Lord High Steward dissolved." (20 Lords' Journals, p. 525.)

The same form was observed in the case of Earls Derwentwater et al, impeached for high treason, in 1715.

In Viscount Melville's trial on an impeachment, in 1806, according to the Journal of the House of Lords—

"The Lord Chancellor having asked every Lord present, beginning with the junior baron, 'What says your lordship on this first article?' and the Lords having severally answered thereto, and the Lord Chancellor having declared his opinion also, the said several other questions were in like manner stated, and each Lord was severally asked in manner aforesaid touching the same. And the Lords 'having severally answered to the same, and the Lord Chancellor having declared his opinion also on each of the said questions, the Lord Chancellor declared that the answer of a majority of the Lords to each of the said questions, respectively, was 'not guilty.'"

Here are cases decided by the Lords without the vote or voice of the presiding officer—cases in which there was a presiding officer with every right as such, but without any participation in the decisions made.

In the case of Lord Chancellor Bacon, in 1621—

"The House (of Lords) being resumed, and the Lord Chief Justice returned to his place, it was put to the question whether the Lord Viscount St. Albans (Lord Chancellor) shall be suspended from all his titles of nobility during his life or no? and it was agreed per plures that he should not be suspended thereof." (40 Lords' Journals, p. 302.)

In Sacheverell's case, impeached in 1709—

"Then his lordship put the question, beginning at the junior baron first, as follows: 'Is Doctor Henry Sacheverell guilty of high crimes and misdemeanors, charged upon him by the impeachment of the House of Commons?'

"And having asked every Lord present, and they having declared guilty or not guilty,

"His lordship having cast up the votes, declared him guilty." (Ibid.)

In the case of the Earl of Macclesfield, in 1725—

"It was agreed that the question to be put to each Lord, severally, shall be, 'Is Thomas, Earl of Macclesfield, guilty of high crimes and misdemeanors charged on him by the impeachment of the House of Commons, or not guilty?'

"And every Lord present shall declare his opinion, 'guilty or not guilty, upon his honor', laying his right hand upon his breast.

"When the Lord Chief Justice, Speaker of this House, directed the Gentleman Usher of the Black Rod to bring thither the Earl of Macclesfield, who, after low obeisances made, kneeled until the said Lord Chief Justice acquainted him he might rise. (Judgment pronounced. Record of mode of obtaining the votes of the Lords on each resolution is, 'The question was put thereupon; and it was resolved in the affirmative.'") (Ibid.)

Mr. President, there may be arguments on this point which these precedents do not answer, but, it seems to me, they confront the view presented by the Senator from Oregon. The Lord Chancellor and the Lord High Steward of England, by the British constitution, were invested with the prerogatives

and powers of presiding officers. Their attributes were more potential, their sway was greater, the examples of their supremacy were more copious, than the genius of our Constitution would tolerate, And if we ascertain the full measure in the less liberal days of British monarchy of what a presiding officer might do, surrounded by peers and commissioned by the King, we shall not fall short at least of the intention of those who adopted the language to which the Senator referred. The framers of our Constitution were profoundly learned in the practice and the meaning of British law, and the word "preside," when used by them, may well be supposed not to have been selected to convey a greater meaning than had been attached to it in the great struggles of privilege and power from which they had derived the philosophy of government.

The amendment proposed by Mr. Drake was agreed to, yeas 21, nays 7.

On March 31, 1868,[1] at the outset of the trial, on the objection of Mr. Henry Stanbery, counsel for the President, to certain testimony, the Chief Justice ruled that the testimony was competent.

Mr. Charles D. Drake, of Missouri, a Senator, at once objected that the question of the competency of evidence should be determined by the Senate and not by the Presiding Officer.

The Chief Justice[2] thereupon said:

The Chief Justice states to the Senate that in his judgment it is his duty to decide upon questions of evidence in the first instance, and that if any Senator desires that the question shall then be submitted to the Senate it is his duty to submit it. So far as he is aware that has been the usual course of practice in trials of persons impeached in the House of Lords and in the Senate of the United States.

Thereupon Mr. Manager Benjamin F. Butler, seconded by Messrs. John A. Bingham and George S. Boutwell, urged on behalf of the House of Representatives, (*a*) that the Chief Justice might not make such preliminary decision, and (*b*) that such decision having been made by the Chief Justice the managers as well as any Senator might call for a decision of the Senate. In presenting their views the managers quoted at length from English precedents.

The Chief Justice, stating his position more fully, said:

The Chief Justice will state the rule which he conceives to be applicable once more. In this body he is the Presiding Officer; he is so in virtue of his high office under the Constitution. He is Chief Justice of the United States, and therefore, when the President of the United States is tried by the Senate, it is his duty to preside in that body; and, as he understands, he is therefore the President of the Senate sitting as a court of impeachment. The rule of the Senate which applies to this question is the seventh rule, which declares that "the Presiding Officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions." He is not required by that rule so to submit those questions in the first instance; but for the dispatch of business, as is usual in the Supreme Court, he expresses his opinion in the first instance. If the Senate, who constitute the court, or any Member of it, desires the opinion of the Senate to be taken, it is his duty then to ask for the opinion of the court.

Mr. Manager Butler having asked whether the right to ask the opinion of the Senate would extend to a manager, the Chief Justice replied:

The Chief Justice thinks not. It must be by the action of the court or a member of it.

The Senate having retired for consultation, Mr. John B. Henderson, of Missouri, proposed an amendment to Rule VII which in effect struck out all after the first sentence of the present draft of the rule and inserted what is now the

[1] Second session Fortieth Congress, Globe Supplement, pp. 59–63; Senate Journal, pp. 867–870.

[2] Salmon P. Chase, of Ohio, Chief Justice.

second sentence. This amendment was agreed to, yeas 31, nays 19, after the Senate had by a vote of yeas 20, nays 30, disagreed to the following declaration proposed by Mr. Drake:

It is the judgment of the Senate that under the Constitution the Chief Justice presiding over the Senate in the pending trial has no privilege of ruling questions of law arising thereon, but that all such questions should be submitted to a decision by the Senate alone.

The last sentence of the rule relating to method of voting was not included by the above proceedings, and on April 1, 1868,[1] when a vote was about to be taken on a question of evidence, Mr. Drake insisted that, under Rule XXIII, and in the absence of a provision in Rule VII, the vote should be taken by yeas and nays.

But the Chief Justice decided:

Upon the question of order raised by the Senator from Missouri, the Chair is of opinion that he may submit this question to the Senate without having the yeas and nays taken, unless the yeas and nays are demanded by one-fifth of the Members present.

On April 2, 1868,[2] Mr. Drake proposed the following addition to the rule:

Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the Members present or requested by the Presiding Officer, when the same shall be taken.

When the proposition came up for action on the next day, on motion of Mr. George F. Edmunds, of Vermont, the words "or requested by the Presiding Officer" were stricken out, and then the amendment as amended was agreed to without division.

Thus the rule attained its present form.

2085. The Presiding Officer during an impeachment trial sometimes rules preliminarily on evidence and cautions or interrogates witnesses.— In the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore[3] of the Senate presided. On questions arising over the admissibility of testimony he usually submitted the questions directly to the Senate for decision, without expressing a preliminary judgment.[4] In five instances, on questions wherein the principles had already been passed on by the Senate, he ruled.[5] In two cases he ruled on questions not already determined by the Senate, but announced that if counsel requested he would submit the matter.[6]

2086. On February 13, 1805,[7] in the high court of impeachment, during the trial of the case of the United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, John Basset, was testifying, when the following occurred:

THE WITNESS. The court considered me a good juror, and I was sworn accordingly. After the trial had been gone through, the jury retired to their room. I informed the jury that I thought we should have the book read through.

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[1] Globe Supplement, p. 70.

[2] Journal, pp. 874, 878; Globe Supplement, pp. 77, 92.

[3] T. W. Ferry, of Michigan, President pro tempore.

[4] First session Forty-fourth Congress, Record of Trial, pp. 189, 192, 195, 205, 208, 219, etc.

[5] Pages 192, 211, 221, 222, 224.

[6] Pages 236, 256.

[7] Second session Eighth Congress, Annals, p. 222.

The President [1] here stopped the witness, and informed him that it was useless waste of time to relate what took place in the room of the jury.

The witness, however, continuing the statement he had previously begun, the President desired him to go on, if it were necessary for the purpose of connecting the testimony he had to give; but to pass over what occurred among the jury as briefly as possible.

2087. On April 1, 1868 [2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, while Mr. Manager Butler was examining a witness, the Chief Justice,[3] who was presiding, interposed and asked a question of the witness.

Also again, on April 2,[4] the Chief Justice interrogated William E. Chandler, a witness.

2088. An instance wherein a President pro tempore presiding at an impeachment trial declined to entertain an appeal from his decision on a point of order.

Rigid enforcement of the rule that decisions of the Senate sitting for an impeachment trial shall be without debate.

On June 26, 1862,[5] in the high court of impeachment, during the trial of the cause of the United States *v.* West H. Humphreys, a question arose as to the form in which the court should pronounce judgment, and debate was going on, when Mr. Garrett Davis, of Kentucky, was called to order by Mr. Benjamin F. Wade, of Ohio, who insisted that the rule that "all decisions shall be had by ayes and noes and without debate," should be enforced.

The President pro tempore [6] said:

The rule is very explicit, leaves no room for doubt that these questions are to be decided without debate.[7]

Mr. Davis then proposed an appeal from the decision.

The President pro tempore declined to entertain the appeal.

The President pro tempore did not explain this decision, but when Mr. John P. Hale, of New Hampshire, questioned it, Mr. O. H. Browning, of Illinois, said:

I think an appeal can not be taken from the judgment of the presiding officer of a court.

2089. The Senate elected a presiding o1ficer for the Swayne trial, and gave him the powers of the President of the Senate for signing orders, writs, etc.—On January 24, 1905,[8] the President pro tempore (William P. Frye, of Maine) in the Senate sitting in legislative session, requested that he be relieved of the duty of presiding at the impeachment trial of Judge Charles Swayne. Thereupon the Senate chose Mr. Orville H. Platt, of Connecticut, as presiding officer for the trial.

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[1] Aaron Burr, of New York, Vice-President and President of the Senate.

[2] Second session Forty-first Congress, Globe Supplement, p. 72.

[3] Salmon P. Chase, of Ohio, Chief Justice.

[4] Globe Supplement, p. 89.

[5] Second session Thirty-seventh Congress, Globe, p. 2953.

[6] Solomon Foote, of Vermont, President pro tempore.

[7] See Rule XIV as framed for trial of Judge Chase. The language of the entire rule suggests a question as to this interpretation. The present Rule XXIII modifies this rule materially.

[8] Third session Fifty-eighth Congress, Record, pp. 1289, 1291.

On the same day Mr. John C. Spooner, of Wisconsin, chairman of the Committee on Rules, made a statement as follows:

Mr. President, the rules of the Senate governing the sessions of the Senate when it is sitting in the trial of impeachments seems to draw a distinction between the Presiding Officer of the Senate and the presiding officer on the trial. Rule V provides:

"The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide."

The forms of summonses and subpoenas are all signed by the Presiding Officer of the Senate. In order to remove all possible question as to who shall sign the mandates of the Senate, including subpoenas, I offer the regulation which I send to the desk. * * *

The Constitution invests each House with the power, without limit, to make its own rules of procedure. Under the Constitution the function of trying impeachment cases devolves upon the Senate, and the provision of the Constitution must be construed as authorizing the Senate to make the rules which it may deem necessary for the proper discharge of all of the duties and functions devolved upon it by the Constitution. The Senate has, I think, within its power and with perfect propriety under the circumstances, appointed a Senator to preside, using the language of the rule to be, "the presiding officer on the trial." That clearly vests in him the functions, as I think, of passing upon the admissibility of evidence and upon the various questions which may arise in the course of the trial.

This question is one which must be determined at once, for a summons is to be issued to Judge Swayne to appear, and it is important, of course, that there shall be no doubt that the officer signing the summons has the power to do so.

Mr. Spooner offered the following resolution, which was agreed to by the Senate:

Resolved, That the presiding officer on the trial of the impeachment of Charles Swayne, judge of the United States in and for the northern district of Florida, be, and is hereby, authorized to sign all orders, mandates, writs, and precepts authorized by the rules of procedure and practice in the Senate when sitting on impeachment trials and by the Senate.

2090. The Secretary of the Senate records proceedings in impeachments as he records legislative proceedings.

The proceedings of an impeachment trial are reported like the legislative proceedings.

Present form and history of Rule XIII of the Senate sitting for impeachments.

Rule XIII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

This rule was framed in 1868,[1] preparatory to the impeachment of President Johnson.

2091. In an impeachment trial all preliminary or interlocutory questions and all motions are argued not over an hour on a side.

The Senate, by order, may extend the time for the argument of motions and interlocutory questions in impeachment trials.

In arguing interlocutory questions in impeachment trials the opening and closing belong to the side making the motion or objection.

[1] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.

The Senate declined to sanction unlimited argument on interlocutory questions in impeachment trials.

The rule limiting the time of arguments on interlocutory questions in impeachment trials does not limit the number of persons speaking.

Present form and history of Rule XX of the Senate sitting for the trial of an impeachment.

Rule XX of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

> All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

This rule dates from 1868, when the rules were revised preparatory to the trial of President Johnson. The committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported [1] the rule in this form:

> XX. All preliminary or interlocutory questions and all motions shall be argued by one person only on each side, and for not exceeding one hour on each side, unless the court shall, by order, extend the time.

This rule was debated at great length and amended to its present form on March 2.[2] It was first objected by Mr. Charles D. Drake, of Missouri, that there should be a provision giving the opening and closing to the one making the motion or objection, and also dividing the time. Mr. Roscoe Conkling, however, answered this satisfactorily by saying that the committee had considered the question, and concluded that the provisions would be unnecessary, since it was habitual for the counsel making the motion or raising the objection to yield after taking a portion of his time, and then conclude after his opponent. The committee conceived that this would be the practice under this rule.

Mr. Frederick T. Frelinghuysen, of New Jersey, moved an amendment striking out the provision limiting the argument to one person on each side, which was agreed to without division. A motion by Mr. Frelinghuysen to change the time limit from one to two hours was disagreed to, yeas 20, nays 24, and a third amendment proposed by him, to add at the end the words "before the argument commences," was disagreed to—yeas 10, nays 33.

Mr. James W. Grimes, of Iowa, proposed to strike out the rule altogether, as contrary to the Senate's practice of unlimited debate, and as an innovation on the practice of all preceding impeachment trials. It was argued that interlocutory questions might be of the greatest importance, and that the argument thus limited might be one on which the result hinged. On the other hand, it was urged that impeachment trials, notably in England, were often prolonged, and that the Senate should provide against this at the outset. The motion to strike out was disagreed to—yeas 19, nays 23.

So the rule was left in its present form.

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[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Senate Journal, pp. 241, 242, 814; Globe, pp. 1568–1580.

2092. On April 1, 1868,[1] during the trial of President Johnson, a question arose, and the Chief Justice [2] said:

Senators, the Chair will state the question to the Senate. The twentieth rule provides that—

"All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time."

The twenty-first rule provides:

"The case on each side shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives."

On looking at these two rules together, the Chief Justice was under the impression that it was intended by the twentieth rule to limit the time, and not limit the persons; whereas, by the twenty-first rule, it was intended to limit the number of persons and leave the time unlimited; and he has acted upon that construction. He will now, with the leave of the Senate, submit to them the question: Does the twentieth rule limit the time without respect to the number of persons? Upon that question the Chair will take the sense of the Senate.

The question being put, it was decided in the affirmative nem. con.

The Chief Justice then said:

The Senate decides that the limitation of one hour has reference to the whole number of persons to speak on each side, and not to each person severally; and will apply the rule as thus construed.

2093. On April 27, 1876,[3] during the proceedings in the trial of W. W. Belknap, late Secretary of War, the counsel for the respondent moved a postponement of the further hearing of the case until the first Monday of the next December, and for the discussion of this motion Mr. Matt H. Carpenter, of counsel for the respondent, asked that the Senate make an order temporarily modifying the rule, so as to admit of two hours on a side. This request was granted by the Senate by a vote of yeas 48, nays 13, an order to that effect being offered and acted on at the same sitting.

2094. In impeachment trials all orders and decisions of the Senate, with certain specified exceptions, are by the yeas and nays.

During impeachment trials in the Senate the yeas and nays on adjournment are procured by one-fifth and not by rule.

The orders and decisions of the Senate in impeachment cases are without debate, unless in secret session.

Debate in secret session of the Senate sitting on impeachment trials is limited by rule.

On the decision of the final question in an impeachment case, debate in secret session of the Senate is limited to fifteen minutes to each Senator.

Present form and history of Rule XXIII of the Senate sitting for impeachment trials.

Rule XXIII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" provides:

All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question,

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[1] Globe Supplement, p. 70.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] First session Forty-fourth Congress, Senate Journal, p. 921; Record of trial, p. 10,

and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment.

This rule dates from 1868,[1] when a committee reported a revision in preparation for the trial of President Johnson. The rule was debated on March 2[2] and was amended in matters of detail, so it stood practically in its present form as far as the last sentence, which had not at that time been added.

On March 13,[3] in the Senate as organized for the trial, Mr. Roscoe Conkling, of New York, arose and said:

To correct a clerical error in the rules or a mistake of the types which has introduced a repugnance into the rules, I offer the following resolution by direction of the committee which reported the rules:

"*Ordered,* That the twenty-third rule, respecting proceedings on trial of impeachments, be amended by inserting after the word 'debate' the words 'subject, however, to the operation of rule seven.'"

If thus amended the rule will read:

"All orders and decisions shall be made and had by yeas and nays, which shall be entered on the record and without debate, subject, however, to the operation of rule seven, except when the doors shall be closed, etc."

The whole object is to commit to the Presiding Officer the option to submit a question without the call of the yeas and nays, unless they be demanded. That was the intention originally, but the qualifying words were dropped out in the print.

The order was agreed to without division.

The last sentence of the rule, "the fifteen minutes herein allowed," etc., was added on March 7, 1868, on motion of Mr. Charles Drake, of Missouri, immediately before the Senate proceeded to pronounce judgment in the case of President Johnson.[4]

On July 31, 1876,[5] when the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, was about to proceed to judgment, Mr. Hannibal Hamlin, a Senator from Maine, proposed an amendment which would have stricken out the words "except when the doors shall be closed for deliberation." This amendment was proposed in connection with one to Rule XIX, which would have abolished secret sessions in impeachment trials. The Senate, by a vote of yeas 23, nays 32, declined to consider either amendment.

2095. In the Senate, sitting for impeachment trials, the doors may be closed for consultation on motion put and carried.—On February 16, 1905,[6] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, a question arose as to the admissibility of certain evidence, and Mr. Joseph W. Bailey, a Senator from Texas, moved that the doors be closed for deliberation, or, in case the motion should be otherwise, that the Senate retire to its conference chamber.

A question arose as to the interpretation of the rule, and the Presiding Officer said:

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[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Senate Journal, pp. 243, 244, 814; Globe, pp. 1588. 1589, 1602.

[3] Senate Journal, pp. 824, 825, Globe Supplement, p. 6.

[4] Senate Journal, p. 937; Globe Supplement, p. 408.

[5] First session Forty-fourth Congress, Record of trial, p. 341.

[6] Third session Fifty-eighth Congress, Record, p. 2720.

The rule is as follows:

"All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate."

The Presiding Officer is of the opinion that the consent of the Senate applies to the time during which a Senator may speak upon a question, and not to the question whether the Senate may proceed in the Senate Chamber as a court without closing the doors.

Mr. Bailey thereupon asked unanimous consent that the doors be closed. There being objection, he made a motion.

The Presiding Officer said:

The Presiding Officer will submit the motion to the Senate. Will the Senate order the doors to be closed for the purpose of deliberating upon the question?

There appeared yeas 53, nays 18. So the doors were closed.

2096. Secret sessions of the Senate to discuss incidental questions arising during an impeachment trial.—On May 14, 1876,[1] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, the doors were closed and the galleries cleared, while deliberation was going on as to the question of the jurisdiction of the Senate to try a civil officer who had resigned and whose resignation had been accepted. And the Senate continued to deliberate with closed doors until the decision of the question, on May 29.

2097. On July 19, 1876,[2] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, it was ordered that the floor and galleries be cleared, and that the doors be closed. The session thereupon was held in secret, while determination was reached as to certain propositions relating to the time of beginning the taking of testimony, to the filing of a paper presented by counsel for respondent, and to the propriety of continuing the trial at a time when the House of Representatives was not in session.

2098. On the final question whether an impeachment is sustained, the yeas and nays are taken on each article separately.

If an impeachment is not sustained by a two-thirds vote on any article a judgment of acquittal shall be entered.

If the respondent be convicted by a two-thirds vote on any article of impeachment the Senate shall pronounce judgment.

A certified copy of the judgment in an impeachment case is deposited with the Secretary of State.

Discussion as to whether or not the Chief Justice, presiding at an impeachment trial, is entitled to vote.

The reasons for eliminating from the Senate rules for impeachment trials the words "high court."

Present form and history of Rule XXII of the Senate sitting for impeachment trials.

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[1] First session Forty-fourth Congress, Senate Journal, pp. 933–947; Record of trial, pp. 72–77.

[2] First session Forty-fourth Congress, Journal of Senate, p. 954; Record of trial, p. 172.

Rule XXII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the Members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the Members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

This rule was framed in 1868,[1] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a revision of the rules in view of the approaching trial of President Johnson. As reported the rule was as follows:

XXII. If the impeachment shall not be sustained by the votes of two-thirds of the Members of said high court of impeachment present and voting a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted by the votes of two-thirds of the Members of such court present the court, by its Presiding Officer, shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

On motion of Mr. Frederick T. Frelinghuysen, of New Jersey, and without division, an amendment was inserted[2] at the beginning, in the following words:

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately and;

Then Mr. Lot M. Morrill, of Maine, proposed an amendment[3] so changing the first clause of the rule that it would read:

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately, and if the impeachment shall not be sustained by the votes of two-thirds of the Senators present a judgment of acquittal shall be entered.

This proposition, by substituting the words "Senators" for "high court of impeachment," brought up the question as to whether or not the Chief Justice would have a vote. Mr. John Sherman, of Ohio, said:

Now, if a Presiding Officer is elected by the Senate, either on account of the sickness or absence or inability of the Vice-President to preside, he would undoubtedly have a right to vote. The Presiding Officer would undoubtedly have a right to vote, because he is not only a Senator having a personal right to his seat as a Senator, but he is a representative of a State, and that State would have a right to vote; and his mere election as Presiding Officer would not disfranchise him from voting.

Under these circumstances, when the President is to be tried, the Constitution declares, the Senate still having the sole power to try all impeachments, that the Chief Justice shall preside over that tribunal. What does that mean? That he shall be here simply as a figurehead? No, sir. In every case where a man is made the presiding officer of any tribunal, of any convention, of any political body, it necessarily implies the right to vote, unless that implication is excluded by the instrument itself. There is no doubt whatever but that the Vice-President of the United States could vote every day in our proceedings but for one thing; and that is, that the Constitution carefully excludes him from the right to vote except in case of a tie. But who doubts that but for that single clause of the Constitution which declares that the Vice-President of the United States shall not vote except in case of a tie he could do it? Suppose the clause read "the Vice-President of the United States shall be President of the Senate;" suppose it stopped there; would not the Vice-President have a right to vote? The very implication drawn from

[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Senate Journal, p. 243; Globe, p. 1585.

[3] Senate Journal, p. 243; Globe, pp. 1585–1587.

the fact that he is the Presiding Officer of the Senate would give him a vote; but it goes on and says, "but shall have no vote unless they be equally divided." The very fact that this language was used to exclude him from the right to vote shows that in the absence of that language he would have the right to vote.

And, sir, when the Chief Justice is substituted in the place of the Presiding Officer of this body, without any exclusion from the right to vote, without any exception made as against him, he is made a member of this court, to participate in the proceedings of this court; and it does seem to me, in the absence of all other precedents of exclusion or constitutional provision, he would have a right to vote. I do not know that the Chief Justice would take the same view of it or desire to vote, but it does seem to me that the Constitution, by substituting this high officer here as the Presiding Officer of this body, did not intend to make him a mere instrument or medium to put a question to the body, but intended to make him a part of the tribunal or court to try the case.

Mr. Howard, of Michigan, said:

The amendment of the Senator from Maine adopts, in effect, the language of the Constitution itself, as I understand it; and so far I think it entirely proper to be adopted. I must, however, now and at all times, so far as I can see my way, repel the idea that the Chief Justice is a member of the so-called court of impeachment, or has any right to vote during the deliberations of that court, or upon any question arising during the trial. I do not propose to go into it further now, although I see the gravity of the question, and have for some time been entirely sensible of it.

I will say, however, before I take my seat, that if we regard the analogies presented to us in the constitutional history of England, the same result which I claim to be the truth here will be arrived at. The House of Lords sit as a high court of impeachment. They are presided over when thus sitting either by the Lord Chancellor or the Lord High Steward; and the precedents are numerous and clear that the Lord Chancellor, although thus presiding, or the Lord Steward thus presiding, has no vote in the House of Lords in virtue of his presidency of the body; but if he be a peer he has, in right of his peerage, the right to vote; but it is put upon that ground, and that ground only. As president of the body he has no right even to decide questions where the body is equally divided.

Mr. Roscoe Conkling, of New York, referred to the important question raised and suggested that, to avoid that question, the amendment be modified so as to read "members present" "instead of "Senators present." That would be the very Language of the Constitution.

Mr. Morrill finally yielded to that request and the modified amendment was agreed to without division.

A little later the Senate recurred to Rule VII again, and after discussion of the powers of the Chief Justice in presiding, determined upon such amendment of that and other rules as to eliminate the words "high court of impeachment" wherever they occurred, the object evidently being to remove all idea that the Chief Justice had any other function than to preside.[1] In fact, the Chief Justice did vote on an occasion when the vote of the Senate was a tie,[2] on March 31, but did not vote in the final judgment.[3]

Mr. Peter G. Van Winkle, of West Virginia, then proposed[4] an amendment to the second clause so it should read as follows:

But if the person accused in such articles of impeachment shall be convicted by the votes of two-thirds of the members of such court present, the court shall proceed to ascertain what judgment shall be rendered in the case, which judgment, being rendered, shall be pronounced by the Presiding Officer, etc.

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[1] See Proceedings on Rule VII and on functions of the Senate sitting for the trial. Section 2094 of this volume.

[2] Senate Journal, pp. 868, 869.

[3] Senate Journal, pp. 939–951.

[4] Senate Journal, p. 243; Globe, p. 1587.

This was in view of the fact that the Constitution does not say that the punishment shall necessarily extend to disqualification to hold office. Mr. George F. Edmunds, of Vermont, suggested that the same result could be attained by striking out the words "of such court" and "by its Presiding Officer." Mr. VanWinkle accepted the amendment, which was agreed to without division.

Mr. George H. Williams, of Oregon, next proposed to insert after the words "impeachment shall not" the words "upon any of the articles be presented," and after the word "convicted" the words "upon any of said articles." [1]

The object of this amendment was to make it certain that a conviction on one article, as on one count of an indictment, should be sufficient for judgment, after the analogy of the criminal law. The amendment was agreed to without division.

So the rule received its present form.

2099. In 1804 the Senate, sitting as a high court of impeachment, considered and adopted rules for the trial.—On December 10, 1804,[2] the stSenate, sitting as a high court of impeachment, took into consideration the report of the committee appointed on November 30 to prepare and report proper rules of proceedings, to be observed by the Senate in cases of impeachments.

This report consisted of a series of rules, prescribing forms and methods of procedure. On this day the high court agreed to a portion of the rules, and then postponed the consideration of the remainder.

On December 24 the high court resumed consideration of the report, and agreed to the remaining portion.

In the meanwhile, on December 14, action had been taken in accordance with the rules agreed to on December 10.

2100. Where the special rules for impeachment trials are silent, the general rules of the Senate are regarded as applicable.

At the Johnson trial the Chief Justice felt constrained to submit to the Senate for decision a question of order affecting the organization.

At the Johnson trial the Chief Justice ruled that one point of order might not be made while another was pending.

The Chief Justice ruled in the Johnson trial that debate must be confined to the pending question.

Rule XXIII, prohibiting debate in open Senate sitting for an impeachment trial, was held by the Chief Justice not to apply to a question arising during organization.

Instance of an appeal from the decision of the Chief Justice on a question of order arising during the Johnson trial.

In the Johnson trial the Chief Justice ruled that a proposed rule or order should lie over for one day.

On March 6, 1868,[3] while the Senate was organizing for the trial of Andrew Johnson, President of the United States, after the Chief Justice had taken the chair as presiding officer, and while the oath was being administered to the Senators, an

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[1] Senate Journal, p. 243 , Globe, pp. 1587, 1588.

[2] Second session, Eighth Congress, Senate Impeachment Journal pp. 510, 511.

[3] Second session Fortieth Congress, Senate Journal, pp. 810, 811; Globe, pp. 1696, 1697, 1698, 1700.

objection was made to the competency of Mr. Benjamin F. Wade, of Ohio, to take the oath.

Discussion having arisen, Mr. Jacob M. Howard, of Michigan, submitted a question of order.

The Chief Justice [1] said:

The Senator from Connecticut is called to order. The Senator from Michigan has submitted a point of order for the consideration of the body. During the proceedings for the organization of the Senate for the trial of an impeachment of the President the Chair regards the general rules of the Senate as applicable and that the Senate must determine for itself every question which arises, unless the Chair is permitted to determine it. In a case of this sort affecting so nearly the organization of this body the Chair feels himself constrained to submit the question of order to the Senate. Will the Senator from Michigan state his point of order in writing?

While the point of order raised by Mr. Howard was being reduced to writing at the desk, Mr. James Dixon, of Connecticut, submitted as a point of order whether a question of order such as was pending could be raised.

The Chief Justice said: [2]

A point of order is already pending, and a second point of order can not be made until that is disposed of.

Mr. Howard's question was then submitted in writing, as follows:

That the objection raised to administering the oath to Mr. Wade is out of order, and that the motion of the Senator from Maryland, to postpone the administering of the oath to Mr. Wade until other Senators are sworn, is also out of order under the rules adopted by the Senate on the 2d of March, instant, and under the Constitution of the United States.

The Chief Justice announced that this question was open to debate.

Mr. Dixon having proceeded in debate, was discussing the competency of Mr. Wade to participate in the trial, when Mr. John Sherman, of Ohio, called him to order for not confining himself to the question under consideration.

Thereupon the Chief Justice held:

The Senator from Ohio makes the point of order that the Senator from Connecticut, in discussing the pending question of order, must confine himself strictly to that question, and not discuss the main question before the Senate. In that point of order the Chair conceives that the Senator from Ohio is correct, and that the Senator from Connecticut must confine himself strictly to the discussion of the point of order before the House.

Mr. Dixon having proceeded, was again called to order by Mr. Howard, who objected that no debate was in order under Rule XXIII of "the rules of procedure and practice in the Senate when sitting on impeachment trials." This rule he quoted as follows:

All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, except when the doors shall be closed for deliberation, and in that case no Member shall speak, etc.

The Chief Justice overruled the point of order, saying:

The twenty-third rule is a rule for the proceeding of the Senate when organized for the trial of an impeachment. It is not yet organized; and in the opinion of the Chair the twenty-third rule does not apply at present.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Globe, p. 1697.

Mr. Charles D. Drake, of Missouri, having appealed, the Chief Justice put the question:

As many Senators as are of opinion that the decision of the Chair shall stand as the judgment of the Senate will, when their names are called, answer "yea;" as many as are of the contrary opinion will answer "nay."

And there were yeas 24, nays 20; so the decision of the Chief Justice was sustained.

2101. On April 11, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, the Chief Justice,[2] in ruling on a question of order said:

The Chief Justice in conducting the business of the court adopts for his general guidance the rules of the Senate sitting in legislative session as far as they are applicable. That is the ground of his decision.

2102. On April 14, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Charles Sumner, of Massachusetts, proposed the following:

Ordered, In answer to the motion of the managers, that under the rule limiting the argument to two on a side unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager.

Objection being made to the immediate consideration of the order, and Mr. Sumner having demanded its consideration, the Chief Justice [1] said:

The Chief Justice stated on Saturday that in conducting the business of the court he applied, as far as they were applicable, the general rules of the Senate. This has been done upon several occasions, and when objection has been made orders have been laid over to the next day for consideration.

2103. In the Johnson trial the Chief Justice admitted a motion to lay a pending proposition on the table.—On April 13, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, an order relating to the final arguments in the trial, was under consideration.

Mr. George H. Williams, of Oregon, moved that the resolution lie on the table.

Mr. Charles D. Drake, of Missouri, said:

I raise a question of order, Mr. President, that in this Senate sitting for the trial of an impeachment there is no authority for moving to lay any proposition on the table. We must come to a direct vote, I think, one way or the other.

The Chief Justice [1] said:

The Chief Justice can not undertake to limit the Senate in respect to its mode of disposing of a question; and as the Senator from Oregon [Mr. Williams] announced his purpose to test the sense of the Senate in regard to whether they will alter the rule at all the Chief Justice conceives his motion to be in order.

2104. Instance wherein a Senator sitting in an impeachment trial was excused from voting on an incidental question.—On May 15, 1876,[5] in the

[1] Second session Fortieth Congress, Globe Supplement, p. 147.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] Second session Fortieth Congress, Senate Journal, p. 896; Globe Supplement, p. 174.

[4] Second session Fortieth Congress, Globe Supplement, p. 162.

[5] First session Fortieth Congress, Senate Journal, p. 933; Record of trial, pp. 72, 73.

Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question arose as to the sufficiency of the pleadings. After the arguments had been concluded, but before the Senate had rendered a decision, Mr. James L. Alcorn, a Senator from Mississippi, attended and took the oath prescribed for Senators sitting in impeachment trials.

Having taken the oath, Mr. Alcorn rose and stated that he had been unavoidably absent from the sessions of the Senate sitting for the trial of impeachment heretofore held, and for that reason he asked to be excused from voting upon the question now under consideration presented by the pleadings.

Thereupon Mr. John Sherman moved that Mr. Alcorn, for the reasons stated, be excused from voting on the question as presented by the pleadings and now before the Senate.

The motion was agreed to.

2105. Instances of a call for a quorum in the Senate sitting for an impeachment trial.

The Presiding Officer of the Senate sitting in an impeachment trial directed the counting of the Senate to ascertain the presence of a quorum.

On April 22, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, during the argument of Mr. Manager George S. Boutwell, the attendance after a recess was so scanty that Mr. John Sherman, of Ohio, moved a call of the Senate under the then existing Rule 16 of the Senate. The motion was carried and the roll was called.

2106. On May 4, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Aaron A. Sargent, of California, commented on the fact that less than a quorum were present, and moved a call of the Senate.

And thereupon the roll was called.

2107. On June 16, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, of Vermont, suggested that there was no quorum present, and asked the President pro tempore to ascertain.

The President pro tempore [4] said:

The Secretary will count the Senate.

The Chief Clerk having counted the Senators present, the President pro tempore announced that the Senators present did not constitute a quorum.

Thereupon, on motion of Mr. Edmunds, the Sergeant-at-Arms was directed to request the attendance of absentees.

This having failed to secure sufficient attendance, the Senate thereupon adjourned.

2108. Instances of temporary suspensions of the sitting of the Senate in an impeachment trial.—On July 10, 1876,[5] in the Senate sitting for the

[1] Second session Fortieth Congress, Senate Journal, p. 921; Globe Supplement, p. 274.

[2] First session Forty-fourth Congress, Record of trial, p. 31.

[3] First session Forty-fourth Congress, Senate Journal, p. 952; Record of trial, p. 171.

[4] T. W. Ferry, of Michigan, President pro tempore.

[5] First session Forty-fourth Congress, Record of trial, p. 230.

impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [1] said:

The Chair is informed that there is a message to be submitted from the House of Representatives. If there be no objection the proceedings of the trial will be temporarily suspended for that purpose.

A message was received from the House of Representatives.

After which, the President pro tempore said:

The Senate resumes its session sitting for the trial of the impeachment.

Later another message was received in the same way.[2]

2109. On July 19, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. William Windom, a Senator from Minnesota, asked that the proceedings might be suspended in order that he might make a report from the committee of conference on the sundry civil bill.

The President pro tempore [4] said:

If there be no objection proceedings will be suspended for that purpose.

After some time spent in legislative session, the Senate resumed the trial of the impeachment of William W. Belknap.

2110. Admission to the Senate galleries during the Johnson trial was regulated by tickets.

The Senators occupied their usual seats during the Johnson trial.

On March 4, 1868,[5] Mr. Henry B. Anthony, of Rhode Island, during the proceedings preliminary to the trial of President Andrew Johnson, proposed the following:

Ordered, That during the trial of the impeachment now pending no person besides those who now have the privilege of the floor shall be admitted to the galleries, or to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be issued by the Sergeant-at-Arms. Such tickets shall be numbered, and shall be good only for the day on which they are dated. The number of tickets issued shall not exceed the number of persons who can be comfortably seated in the galleries, leaving the steps and passages entirely free. The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and tickets of admission thereto shall be issued to the foreign legations. Four tickets shall be issued to each Senator, 2 tickets to each Member of the House of Representatives, 2 tickets to the Chief Justice and to each justice of the Supreme Court of the United States, 2 tickets to the chief justice and to each justice of the supreme court of the District of Columbia, and 2 tickets to the chief justice and to each judge of the Court of Claims. Sixty tickets shall be issued by the Presiding Officer to the reporters for the press, and the remaining tickets shall be distributed under his direction.

The Sergeant-at-Arms, under the direction of the Presiding Officer of the Senate, shall carry out these regulations, and, with the approbation of the Committee on Contingent Expenses, shall be authorized to employ such additional force as may be necessary for the preservation of order.

On March 6 [6] this proposition was referred to the select committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, and which had in charge the forms of procedure and arrangements for the trial.

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[1] T. W. Ferry, of Michigan, President pro tempore.

[2] Record of trial, p. 234.

[3] First session Forty-fourth Congress, Record of trial, p. 282.

[4] T. W. Ferry, of Michigan, President pro tempore.

[5] Second session Fortieth Congress, Senate Journal, pp. 258, 259; Globe, p. 1649.

[6] Senate Journal, p. 277; Globe, pp. 1701, 1702.

On March 10[1] Mr. Howard reported the order with amendment. There was considerable debate as to the propriety of making any rule, the argument being that the public should not be excluded. On the other hand it was urged that order and decorum during the trial were of great importance, and that there should be arrangements which would secure an audience disposed to preserve order.

Another question that was discussed at length was the provision for seating Senators. At the Humphries trial the Senators had occupied benches placed at the right and left of the presiding officer. Senators who had sat during those proceedings objected to such arrangement as uncomfortable and also as inconvenient because of difficulty in hearing. It was pointed out that the attendance of Members of the House was not likely to be large, as already in the preliminary proceedings not over fifty had attended at any one time. Finally, on motion of Mr. Anthony, an amendment was agreed to providing that the Senators should occupy their usual seats during the trial. The order as amended was agreed to as follows:

That during the trial of the impeachment now pending no persons besides those who have the privilege of the floor and clerks of the standing committees of the Senate shall be admitted to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be issued by the Sergeant-at-Arms.

The number of tickets shall not exceed 1,000.

Tickets shall be numbered and dated, and be good only for the day on which they are dated.

The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and 40 tickets of admission thereto shall be issued to the Baron Gerolt for the foreign legations.

Four tickets shall be issued to each Senator, 4 tickets each to the Chief Justice of the United States and the Speaker of the House of Representatives, 2 tickets to each Member of the House of Representatives, 2 tickets each to the associate justices of the Supreme Court of the United States, 2 tickets each to the chief justice and associate justices of the supreme court of the District of Columbia, 2 tickets to the chief justice and each judge of the Court of Claims, 2 tickets to each Cabinet officer, 2 tickets to the General commanding the Army, 20 tickets to the Private Secretary of the President of the United States, for the use of the President, and 60 tickets shall be issued by the President pro tempore of the Senate to the reporters of the press. The residue of the tickets to be issued shall be distributed among the Members of the Senate in proportion to the representation of their respective States in the House of Representatives, and the seats now occupied by the Senators shall be reserved for them.

On March 24,[2] during the trial, Mr. John Sherman, of Ohio, proposed the following:

Ordered, That after to-morrow the order of the 15th of March ultimo, relative to admission to the gallery, be suspended until further order, and that the Sergeant-at-Arms of the Senate shall take special care that order shall be observed in the galleries during the trial of the impeachment now pending, and he is hereby authorized to arrest and bring before the Senate any person who violates the orders of the Senate, and he shall take effective measures to secure admission to the diplomatic gallery, the ladies' gallery, and the reporters' gallery to those only who are entitled to admission thereto under the rules.

On April 2[3] the resolution was debated briefly. Mr. Sherman intimated that the audiences had not been very orderly, and that the people who would attend with open galleries would do as well.

On April 4[4] the proposition was debated, principally as to the conduct of the

[1] Senate Journal, p. 288; Globe, pp. 1775–1782.

[2] Senate Journal, p. 336; Globe, p. 2078.

[3] Senate Journal, p. 364; Globe, p. 2233.

[4] Senate Journal, p. 366; Globe, pp. 2237, 2238.

audiences, but was not acted on and apparently did not come before the Senate again.

On May 5[1] a proposition to give seats in the gallery to the members of the United States Medical Association was discouraged in debate, and did not come to a vote, it being urged that they could seek admission by tickets in the usual way.

2111. According to the best considered practice, the Senate sitting for an impeachment trial does not obtain the use of Senate archives without an order made in legislative session.—On April 4, 1868,[2] in the Senate sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of the production of testimony on behalf of the House of Representatives, asked that the Executive Journal of the Senate for a certain date might be produced, and he asked that the Senate direct its production.

Mr. John Sherman, of Ohio, a Senator, moved that the Journal be furnished.

The motion was agreed to.

2112. On April 15, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, moved for an order on the proper officer of the Senate to furnish a statement of the dates of the beginning and end of each session of the Senate.

The Chief Justice[4] said:

> The Chief Justice is of opinion that that is an application which can only be addressed to the Senate in legislative session. If the court desire it, he will vacate the chair in order that the President pro tempore may take it.

Very soon thereafter, on motion of Mr. Reverdy Johnson, of Maryland, "the Senate sitting for the trial of the President upon articles of impeachment adjourned to 12 o'clock m. to-morrow."

Thereupon the President pro tempore resumed the Chair, and in the course of legislative business, on motion of Mr. Johnson, it was:

> *Ordered,* That the Secretary of the Senate be directed to furnish to the counsel for the President a statement of the beginning and end of each executive and legislative session from 1789 to 1868.

2113. During the trial of President Johnson the Senate voted to receive resolutions of a State constitutional convention on the subject of the impeachment.—On March 25, 1868,[5] while proceedings for the impeachment of President Johnson were going on before the Senate, the President pro tempore[6] laid before the Senate resolutions adopted by the constitutional convention of North Carolina, returning thanks for the vigilance with which the House and Senate had proceeded in the matter of impeachment.

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[1] Globe, p. 2362.

[2] Second session Fortieth Congress, Globe Supplement, p. 119.

[3] Second session Fortieth Congress, Senate Journal, pp. 383, 901; Globe Supplement, p. 194.

[4] Salmon P. Chase, of Ohio, Chief Justice.

[5] Second session Fortieth Congress, Senate Journal, p. 337; Globe, p. 2084.

[6] Benj. F. Wade, of Ohio, President pro tempore.

Mr. Willard Saulsbury, of Delaware, said:

I object, Mr. President, to the reception of that paper, and for this reason: It purports to be addressed to the Senate of the United States, and the Members of the Senate of the United States compose the court of impeachment, and any communication addressed to the Members of that court upon the pending subject is improper to be entertained by the Senate, the Senate composing that court, as being an attempt to exercise an influence upon the minds of the judges.

The President pro tempore put the question on the reception of the resolutions, and the Senate voted to receive them.

The resolutions were then laid on the table.

2114. In the Swayne trial a Senator who had not heard the evidence was excused from voting on the question of guilt.—On February 27, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, as the vote was about to be taken on the first article, Mr. P. C. Knox, of Pennsylvania, said:

Mr. President, having been prevented by illness from attending the sessions of the Senate sitting in this impeachment trial at which the testimony was produced, and also having been prevented by the effects of the illness from reading the testimony, I ask that the Senate may excuse me from voting upon this and all subsequent roll calls taken to ascertain the judgment of the Senate upon the charges against the respondent.

The Presiding Officer said:

Senators, you have heard the request of the Senator from Pennsylvania [Mr. Knox]. Those who would excuse him from voting will say "aye;" opposed, "no." [Putting the question.] The "ayes" have it. The Senator from Pennsylvania is excused.

2115. The expenses of the Senate in the Swayne trial was defrayed from the Treasury.—On January 24, 1905.[1] the Senate, in legislative session, agreed to this resolution:

Resolved, etc., That there be appropriated from any money in the Treasury not otherwise appropriated the sum of $40,000, or so much thereof as may be necessary, to defray the expenses of the Senate in the impeachment trial of Charles Swayne.

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[1] Third session Fifty-eighth Congress, Senate Record, p. 3468.

[2] Third session Fifty-eighth Congress, Record, p. 1289; 33 Stat. L., p. 1280.

Chapter LXVII.

CONDUCT OF IMPEACHMENT TRIALS.[1]

2116. Under the parliamentary law, if the party impeached at the bar of the Lords do not appear, proclamations are issued giving him a day to appear.

Provisions for rectification of an error in the process to secure attendance of respondent impeached by the Commons.

The party impeached at the bar of the Lords not appearing, his goods may be arrested and they may proceed.

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[1] Other procedure illustrated by the conduct of the several trials relates to the following subjects:

Delivery of the impeachment at the bar of the Senate. Sections 2296, 2320, 2343, 2367, 2385, 2412, 2413, 2445, 2446, 2505 of this volume.

Drawing of articles. Sections 2297, 2299, 2300, 2323, 2343, 2344, 2368, 2387, 2412, 2415, 2416, 2418, 2444, 2448, 2472, 2506, 2514.

Form of articles in the following cases: Blount's (see. 2302), Pickering's (see. 2328), Chase's (sec. 2346), Peck's (see. 2370), Humphrey's (sec. 2390), Johnson's (sec. 2420), Belknap's (sec. 2449), Swayne (sec. 2476).

Organization for trial. Section 2328, 2349.

As to postponement of trial. Sections 2044, 2353, 2425, 2426, 2430, 2456.

Questions by Senators during testimony. Sections 2176–2183.

[2] Issuance of writ of summons. Sections 2304, 2307, 2322, 2329, 2347, 2391, 2423, 2451, 2479.

[3] Appearance and answer. Sections 2307–2310, 2332, 2333, 2349, 2351, 2371, 2374, 2392, 2393, 2424, 2428, 2431, 2452, 2453, 2461, 2480, 2481.

The replication. Sections 2311, 2352, 2375, 2431, 2432, 2454, 2482.

Managers file a brief on respondent's plea to jurisdiction. Section 2015.

[4] Presentation of articles in the Senate. Sections 2301, 2325, 2328, 2346, 2370, 2390, 2420, 2449, 2473, 2476.

As to presentation of before the Chief Justice takes his seat as presiding officer. Section 2057.

Precedent in Blount's case. Section 2295.

[5] See also Sections 2312, 2326, 2355, 2378, 2433, 2434, 2456, 2458, 2464, 2465, 2484.

As to admission of evidence during final arguments. Section 2166.

In Chapter LIII of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments:

Process. If the party do not appear, proclamations are to be issued giving him a day to appear. On their return they are strictly examined. If any error be found in them, anew proclamation issues, giving a short day. If he appear not, his goods may be arrested, and they may proceed. (Seld.Jud., 98, 99.)

2117. In the English usage the articles of impeachment are substituted for an indictment and distinguished from it by less particularity of specification.—In Chapter LIII of Jefferson's Manual the following is given in the sketch of some of the principles and practices of England" on the subject of impeachments:

Articles. The accusation (articles) of the Commons is substituted in place of an indictment. Thus, by the usage of Parliament, in impeachment for writing or speaking, the particular words need not be specified. (Sach. Tr., 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616.)

2118. Articles of impeachment being presented against a Senator, he was sequestered from his seat and was ordered to and did recognize for his appearance.

Form of recognizance given by the respondent in an impeachment case for his appearance.

The Senate Journal included in full the bond given by a respondent for his appearance to answer articles of impeachment.

On July 7, 1797,[1] when articles of impeachment from the House of Representatives were exhibited in the Senate against William Blount, a Senator, it was ordered that he be sequestered from his seat and enter into recognizance for his appearance to answer said impeachment.

Mr. Blount thereupon named his sureties, who were satisfactory to the Senate, and the recognizance was approved by the Senate and executed in its presence as follows:

Be it remembered, That on the 7th day of July, in the year of our Lord 1797, personally appeared before the President pro tempore and Senate of the United States William Blount, esq., Senator of the State of Tennessee; Thomas Blount, esq., Member of the House of Representatives of the United States from the State of North Carolina, and Pierce Butler, esq., of South Carolina, who severally acknowledged themselves to owe to the United States of America the following sums, that is to say: The said William Blount the sum of $20,000, and the said Thomas Blount and Pierce Butler each the sum of $15,000, to be levied on their respective goods and chattels, lands, and tenements, on the condition following, that is to say:

The condition of the foregoing recognizance is such that if the said William Blount shall appear before the Senate of the United States to answer to certain charges of impeachment to be exhibited against him by the House of Representatives of the United States, and not depart therefrom without leave, that then the above recognizance shall cease to exist, otherwise be and remain in full force and virtue.

Sealed and delivered in Senate of the United States this 7th day of July, 1797.

WILLIAM BLOUNT. [L. S.]
THOMAS BLOUNT. [L. S.]
PIERCE BUTLER. [L. S.]

ATTEST:
SAMUEL A. OTIS,
Secretary of the Senate of the United States.

[1] First session Fifth Congress, Senate Journal, p. 389.

This bond appears in full in the Senate Journal.

2119. Form of writ of summons issued to respondent in an impeachment case.

Form of precept indorsed on writ of summons in an impeachment case.

All processes in an impeachment trial are served by the Sergeant-at-Arms of the Senate unless otherwise ordered.

Rule XXIV of the "Rules of procedure and practice of the Senate when sitting in impeachment trials" provides:

FORM OF SUMMONS TO BE ISSUED AND SERVED UPON THE PERSON IMPEACHED.

THE UNITED STATES OF AMERICA, *ss:*

The Senate of the United States to ——— ———*, greeting:*

Whereas the House of Representatives of the United States of America did, on the ——— day of ———, exhibit to the Senate articles of impeachment against you, the said ——— ———, in the words following:

[Here insert the articles.]

And demand that you, the said ——— ———, should be put to answer the accusations as set forth in said articles, and that such proceeding, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice;

You, the said ——— ———, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the ——— day of ———, at 12.30 o'clock p.m., then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness ——— ———, and [Presiding Officer of the said Senate], at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———,

Presiding Officer of the Senate.

FORM OF PRECEPT TO BE INDORSED ON SAID WRIT OF SUMMONS.

THE UNITED STATES OF AMERICA, *ss:*

The Senate of the United States to ——— ———*, greeting:*

You are hereby commanded to deliver to and leave with ——— ———, if conveniently to be found, or, if not, to leave at his usual place of abode, or at his usual place of business in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least—days before the appearance day mentioned in the said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———,

Presiding Officer of the Senate.

All process shall be served by the Sergeant-at-Arms of the Senate, unless otherwise ordered by the court.

This is the form agreed to in 1868.[1]

[1] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

2120. Under the parliamentary law the respondent answers the summons in custody if the case be capital and the accusation be special, but not if it be general.

The accusation being of misdemeanor only, the respondent, under the English usage, does not answer the summons in custody, but the Lords may commit him until he find sureties for his future appearance.

Under the parliamentary law the respondent, if a Lord, answers the summons in his place; if a Commoner, at the bar.

Under the English practice a copy of the articles is furnished to the respondent and a day is fixed for his answer.

According to the parliamentary law the respondent, on accusation for misdemeanor, may answer the articles by person or by writing or by attorney.

A respondent in a case of impeachment for misdemeanor answers the articles before the Lords in such a state of liberty or restraint as he was in when the Commons complained of him.

In English impeachments the respondent has counsel in accusation for misdemeanor, but not in capital cases.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Appearance. If he appear, and the case be capital, he answers in custody; though not if the accusation be general. He is not to be committed but on special accusations. If it be for a misdemeanor only, he answers, a Lord in his place, a Commoner at the bar, and not in custody, unless on the answer the Lords find cause to commit him till he finds sureties to attend and lest he should fly. (Seld. Jud., 98, 99.) A copy of the articles is given him and a day fixed for his answer. (T.Ray.;1 Rushw. 268; Fost., 232; 1 Clar. Hisft. of the Reb., 379.) On a misdemeanor his appearance may be in person or he may answer in writing or by attorney. (Seld. Jud., 100.) The general rule on accusation for a misdemeanor is that in such a state of liberty or restraint as the party is when the Commons complain of him, in such he is to answer. (Ib., 101.) If previously committed by the Commons, he answers as a prisoner. But this may be called in some sort judicium parium suoram. (Ib.) In misdemeanors the party has a right to counsel by the common law, but not in capital cases. (Seld. Jud., 102, 105).

2121. Under the parliamentary law the answer of the respondent to impeachment need not observe great strictness of form.

The respondent in an impeachment case may not, under the English law, plead in his answer a pardon as bar to the impeachment.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Answer. The answer need not observe great strictness of form. He may plead guilty as to part and defend as to the residue; or, saving all exceptions, deny the whole, or give a particular answer to each article separately. (I Rush., 274; 2 Rush., 1374; 12 Parl. Hist., 442; 3 Lords' Journ., 13 Nov., 1643; 2 Wood., 607.) But he can not plead a pardon in bar to the impeachment. (2 Wood., 615; 2 St. Tr., 735.)

2122. Under the parliamentary law of impeachments the pleadings may include a replication, rejoinder, etc.—In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Replication, rejoinder, etc. There may be a replication, rejoinder, etc. (Seld. Jud., 114; 8 Grey's Deb., 233; Sach. Tr., 15; Journ. House of Commons, 6 March, 1640–41.)

2123. The pleadings were the subject of full discussion during the Belknap trial.

The extent of dilatory pleadings in the Belknap trial was commented on as an innovation on American and English precedents.

In the Belknap trial the House was sustained in averring in pleadings as to jurisdiction matters not averred in the articles.

The articles of impeachment in the Belknap case were held sufficient although attacked for not describing the respondent as one subject to impeachment.

The Senate having assumed jurisdiction in the Belknap impeachment, declined to permit the respondent to plead further, but gave leave to answer the articles.

On May 4, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore announced that the Senate had adopted the following:

That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such arguments discuss the question whether the issues of fact are material, and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

As to the second question referred to, Mr. Matt H. Carpenter, of counsel for the respondent, summarized thus:[2]

Briefly, the attitude of the case is this:

The articles of impeachment charge that the respondent, Belknap, was at one time Secretary of War, and while holding that office did certain things which are declared by said articles to be high crimes and misdemeanors.

The respondent pleads to the jurisdiction of the court that when this proceeding was commenced he was not an officer of the United States, but was a private citizen.

The first replication avers that he was Secretary of War when he committed the acts complained of, and the respondent has demurred.

A second replication by the House charges that after the acts were committed the House had commenced an investigation, with a view to impeachment, and that the respondent with full knowledge of the fact resigned his office, with intent to evade impeachment. This replication has closed in issues of fact which are pending for trial.

The court has ordered an argument in regard to the sufficiency of the plea in abatement, the materiality of the issues of fact, and also whether the House can support the jurisdiction by matters alleged in subsequent pleadings, but not alleged in the articles of impeachment.

Mr. Manager Scott Lord summarized[3] more at length:

For the proper consideration of these questions it is expedient that at this stage of the case I call your attention precisely to what the issues are. I do not intend to read the pleadings in full, but only such parts of them as may be necessary for the understanding of this point. Article 1 presents as follows:

"That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the 8th day of October, 1870, had the power and authority, under the laws of the United States, as Secretary of War as aforesaid, to appoint a person to maintain a trading establishment

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[1] First session Forty-fourth Congress, Senate Journal, p. 928; Record of trial, p. 27.

[2] Record of trial, p. 37.

[3] Pages 31, 32.

at Fort Sill, a military post of the United States; that said Belknap, as Secretary of War as aforesaid, on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading establishment at said military post.

* * * * * * *

"That thereafter, to wit, on the 10th day of October, 1870, said Belknap, as Secretary of War aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans, so made by him as Secretary of War as aforesaid, the said Belknap did, on or about the 2d day of November, 1870, unlawfully and corruptly receive from said Caleb P. Marsh the sum of $1,500, and that at divers times thereafter, to wit, on or about the 17th day of January, 1871, and at or about the end of each three months during the term of one whole year, the said William W. Belknap, while still in office as Secretary of War as aforesaid, did unlawfully receive from said Caleb P. Marsh like sum of $1,500 in consideration of the appointment of said John S. Evans by him, the said Belknap, as Secretary of War as aforesaid, and in consideration of his permitting said Evans to continue to maintain the said trading establishment at said military post during that time."

Then in article 3:

"Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time and to appoint some other person to maintain said trading establishment, but criminally disregarding his duty as Secretary of War and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said military post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy, and to the great disgrace and detriment of the public service.

"Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office."

The defendant in this case answered to these articles:

"And the said William W. Belknap, etc., says, that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States."

The House of Representatives duly adopted and filed a general and special replication. A part of the latter is as follows:

"The House of Representatives of the United States say that the said William W. Belknap, after the commission of each one of the acts alleged in the said articles, was and continued to be such officer, as alleged in said articles, until and including the 2d day of March, A. D. 1876, and until the House of Representatives, by its proper committee, had completed its investigation of his official conduct as such officer in regard to the matters and things set forth as official misconduct in the said articles, and the said committee was considering the report it should make to the House of Representatives upon the same, the said Belknap being at the time aware of such investigation and of the evidence taken and of such proposed report.

"And the House of Representatives further say that while its said committee was considering and preparing its said report to the House of Representatives recommending the impeachment of the said William W. Belknap for the matters and things set forth in the said articles, the said William W Belknap, with full knowledge thereof, resigned his position as such officer on the said 2d day of March A. D. 1876, with intent to evade the proceedings of impeachment against him. And the House of Representatives resolved to impeach the said William W. Belknap for said matters as in said articles set forth on said 2d day of March, A. D. 1876."

To this replication the defendant rejoins, among other things, that the—

"Chairman of said committee then declared to said Belknap that he, said Clymer, should move in the said House of Representatives, upon the statement of said Marsh, for the impeachment of him, said Belknap, unless the said Belknap should resign his position as Secretary of War before noon of the next day, to wit, March the 2d, A. D. 1876; and said Belknap regarding this statement of said Clymer,

chairman as aforesaid, as an intimation that he, said Belknap, could, by thus resigning, avoid the affliction inseparable from a protracted trial in a forum which would attract the greatest degree of public attention and the humiliation of availing himself of the defense disclosed in said statement itself which would cast blame upon said other persons, he yielded to the suggestion made by said Clymer, chairman as aforesaid."

There is a joinder in demurrer and a surrejoinder by the House of Representatives, a portion of which surrejoinder I will read:

"And the said House of Representatives, as to the fast and second subdivisions of the rejoinder to the second replication of the House of Representatives to the plea of the defendant to the said articles of impeachment, wherein the said defendant demands trial according to law, the said House of Representatives, in behalf of themselves and all the people of the United States, do the like."

Now, I call the attention of this court to the fact that in regard to two of the allegations made in the second replication by the House the defendant tendered issues and the House of Representatives joined in such issues, and I shall argue to this court and produce authorities presently to show that the defendant, having thus tendered issues joined in by the House, he can not go behind them, and can not question the right of this tribunal to hear and determine the matters thus brought before it.

Then there are four special rejoinders which the defendant made. One of them I have read to this court. In regard to each of the other three not read, the House of Representatives tendered an issue to be tried by this court; and what does the defendant do? Does he say that these matters are improperly before this court? Does he say that any injury will result to him in having these facts fully and fairly and truthfully investigated by this tribunal? Not at all. So far from it, with great formality he tenders a similiter in the following words:

"And the said Belknap, as the surrejoinders of said House of Representatives to the third, fourth, fifth, and sixth rejoinders of the said Belknap to the second replication of said House of Representatives above pleaded, whereof said House of Representatives have demanded trial, the said Belknap doth the like."

We say that they are estopped upon every principle known to legal proceedings, known to the trial of cases in court, from attempting now to evade these issues. It was very proper on the part of this tribunal to raise this question, if it saw fit; but I apprehend, when the authorities are reviewed upon this point it will be seen that it was too late for anybody to raise this question. Of course any question involving the jurisdiction of this court may be raised at any time; but on questions which do not involve its jurisdiction, but only facts pertaining thereto, no matter in what form of pleading these facts get before it, it is too late, when both parties have so tendered issues to be tried by this tribunal, for the defendant or for any member of this court to prevent such trial; and this I shall show abundantly by the authorities. If otherwise this tribunal, the most august in the land, supposed above all others capable of reaching to the direct truth regardless of forms and ceremonies, has not the power of a court of a justice of the peace; for I affirm that on the other side not one authority can be found, in the whole range of authorities, showing that when issues are joined on questions of fact before the most inferior court it has not the power to try and determine them; and therefore the question amounts to this: Has this tribunal less authority than the most inferior court in the United States or in any other land?

The first authority I introduce upon this point affirms this doctrine, that the plaintiff in his replication may introduce new matter to fortify his declaration. Now what is the question before this court? The very resolution gives us the victory in this regard; it assumes that such facts are in aid of a pertinent question before this court in support of its jurisdiction. I admit we could allege no new offense in this way; we could tender no new or distinct issue upon the merits as to the crime or misdemeanor which this defendant committed; but the question which he raises is a dilatory one, it is not one relating at all to his guilt or his innocence. It is a question of jurisdiction. He raises that question and affirms certain facts relating thereto; and we, in aid of that jurisdiction, bring in certain other facts relating thereto. This is the true statement of the case; we did what we have done in aid of the jurisdiction, and this the pleader may always do.

After the citation of various authorities, Mr. Manager Lord continued: [1]

[1] Page 33.

I call the attention of the court now to the report of a committee of the British House of Commons, a learned and intelligent committee, a committee which has made a report that win go down with the ages, and I apprehend be received as the law on this subject so long as civilization exists. I call attention to Burke's Works, seventh volume, page 490, where the committee consider the "rules of pleading in courts of impeachment." I never have heard yet of any rule as to pleadings in a criminal court besides the indictment and the plea. Sometimes a defendant puts in what we call a special plea. If a question of jurisdiction is raised it is usually raised ore tenus. But what are the rules of pleading in this court? Such committee say:

"Your committee do not find that any rules of pleading, as observed in the inferior courts, have ever obtained in the proceedings of the high court of Parliament, in a cause or matter in which the whole procedure has been within their original jurisdiction. Nor does your committee find that any demurrer or exception as of false or erroneous pleading hath been ever admitted to any impeachment in Parliament as not coming within the form of the pleading."

The members of this court know the distinguished character of Mr. Walpole not only as a lawyer but as a statesman.

Mr. Walpole said—

Page 497—

"Those learned gentlemen (Lord Wintoun's counsel) seem to forget in what court they are. The have taken up so much of your lordship's time in quoting of authorities and using arguments to show your lordships what would quash an indictment in the courts below that they seem to forget they are now in a court of Parliament and on an impeachment of the Commons of Great Britain."

And page 501—

"A great writer on the criminal law, Justice Foster, in one of his discourses, fully recognizes those principles for which your managers have contended, and which have to this time been uniformly observed in Parliament. In a very elaborate reasoning on the case of a trial in Parliament (the trial of those who had murdered Edward the II) he observes this: 'It is well known that in parliamentary proceedings of this kind it is, and ever was, sufficient that matters appear with proper light and certainly to a common understanding, without that minute exactness which is required in criminal proceedings in Westminster Hall. In these cues the rule has always been loquendum et vulgus."

We say, therefore, if the articles are defective and the second replication not of strict right, all is cured by rejoinder, surrejoinder, and similiter. And in regard to the main question presented by the second replication—not the most conclusive question perhaps, but it may be called the main question of the second replication—namely, whether this defendant has the right to evade the Constitution and defeat its operations by his own will, he confesses and avoids. He admits on the record that he resigned for the purpose of evading this impeachment. It is true he says he was not guilty, and resigned for other purposes; but that is utterly immaterial to this question, because he does admit, I repeat, that he resigned for the purpose of defeating this impeachment.

[1] I will not stop, Senators, to answer the suggestion of counsel that the chairman of that committee had the right, in behalf of this nation, and in behalf of the House of Representatives of the United States of America, to make a contract with the defendant that if he would get out of the office of Secretary of War before a certain hour he should not be impeached for these high crimes and misdemeanors, which, if these articles are true, had polluted him for years, and made him of all men that have ever appeared in a court of impeachment the most unfit to hold civil office. I deny such a right. I am astonished that counsel of respectability and of high standing should stand in this court and assume for a moment that the chairman of a committee had a right to make any such infamous contract; but that is one of the issues. I was surprised the more to hear it stated here, because it is one of the issues. The allegation of such agreement we absolutely deny; we deny that any such contract was made. By our surrejoinder we tender an issue upon that question, and it is accepted by the other side by filing their similiter.

Reference has been made also to the fact that the Constitution leaves the defendant subject to an indictment, and that an indictment may be found against him. The two proceedings, Senators, are entirely and absolutely distinct. One has nothing to do with the other, for the statute to which the counsel referred (sec. 1781 of the Revised Statutes) does not pretend to change the law or rules of impeachment.

Now I wish to call the attention of this tribunal to another consideration, and that is that on this question you are not to give the defendant the benefit of any of those rules which are provided for criminal cases. Assuming, for the sake of the argument, that he is accused as a criminal, and that this proceeding is a criminal proceeding, so that when we get to the merits he may say that he is entitled to the presumption of innocence, that he is entitled to be defended by counsel—and certainly he has illustrious counsel—that he would be entitled to the right of challenge before a jury, and is entitled to confront the witnesses; assuming that this was an indictment and he was before one of the courts of the land and should stand up and claim all these privileges, they of course would be given to him, and we do not care about challenging them here. For the sake of the argument, we admit that here upon the merits he has all these privileges, so far as applicable in this court. What I say is that on this question of jurisdiction he has no such privilege; on the contrary, he has not as many privileges, as the authorities will show, as he would have in a civil action.

This is not one of the questions over which the law watches with such jealousy to guard the rights of a defendant. So long as it is true that no case of fact can be made, no evidence can be offered under which speculation may not peer: so long as it is true that sometimes innocent man suffer; so long as that maxim exists in our law that it is better that ninety-nine guilty men go free than that one innocent have suffer, the common law will allow a person accused of crime the presumption and privileges we have referred to. But what have these questions to do with a mere abstract question of law? The question now presented to you has nothing to do with his guilt or innocence; it has nothing to do with his imprisonment; it has nothing to do with any question personal to himself. It is purely a legal one, and must be considered precisely as though it arose in a civil action, excepting, as before suggested, that he has not all the privileges in this regard that he would have in a civil action. When a defendant in a criminal action raises a dilatory plea it does not receive the consideration which it does in a civil action.

What is the object in pleading in criminal actions? Allow me to call the attention of the court to 2 Archbold's Criminal Practice and Pleadings, sixth edition, volume 2, page 206:

"The object of pleading, whether in civil or criminal actions, is to inform the parties of the facts alleged by each against the other with such clearness and distinctness as to enable them to prepare for the trial of disputed facts or for the application of the law to those which are admitted. In its application to criminal cases it is a statement of a crime imputed to the prisoner with such a particularity of circumstances only as will enable him to understand the charge and prepare for his defense, and as will authorize the court to give the appropriate judgment upon conviction."

At common law a defendant in a criminal action was not allowed to plead in abatement as in civil action (I Archbold, p. 110; Barber's Criminal Law, p. 343), and can not tender a bill of exceptions. (Garbett's Criminal Law, vol. 2, p. 521.) Therefore you see, Senators, that while the law has always been watchful to protect life and liberty, intending that no innocent man should be falsely accused of crime, yet in regard to the surroundings of the case, in regard to the mere question of pleadings, he has certainly had no more privilege, and certainly has now no more privilege, than in a civil action.

Mr. Montgomery Blair, of counsel for the respondent, said: [1]

I pass now to the second branch of the question presented by the order of the Senate, and that is on the materiality of the allegations of the second replication and of our rejoinder. We did not regard the replication as tendering a material issue, and for that reason we might, and perhaps ought to have, demurred; but having, as we believed, a conclusive answer to it in the rejoinder which we made, we chose that course, preferring that in this maneuvering for position—that is all it amounts to—our friends on the other side should not have the advantage of us.

It needs no argument to show that if only persons holding office are amenable to impeachment it must be charged in the articles that they hold office; and describing the defendant as "late Secretary of War" does not bring him within the description of persons given in the Constitution as amenable to impeachment. It would not be sufficient for them to have alleged that "the defendant does not now hold office, but was an officer a tone time, and resigned in order to avoid impeachment." That would not have been sufficient certainly, for, if so, an ordinary court of justice might entertain jurisdiction of a person who had not been served with process upon an allegation that the defendant, hearing that

[1] Page 31.

it was intended to serve process upon him, had incontinently taken himself out of the jurisdiction of the court. There is no imaginable difference between the cases. We heard that they intended to impeach us, and, as the Constitution limited the prosecution to persons in office, we stepped over the line, just as a citizen of the United States who happens to be in New York, and learns that somebody there wants to serve him with a writ, betakes himself to New Jersey.

A man has a right to avoid lawsuits. The defendant here had a right, however innocent he might have been, to avoid the ruin which the law-books tell him attend invariably the prosecution of a private person by this overwhelming power. No sensible man, unless he had ample means, would undertake a conflict of that sort if he could avoid it and character enough to stand before the country to justify his action. But the Supreme Court of the United States have settled again and again an analogous question, that a man residing in one State may convey his property to persons outside of it to give a court jurisdiction, provided he does it in good faith. That principle was decided in the case of McDonald *v.* Smalley (I Peters, 120); also Smith *v.* Kernochen (7 Howard, 198); Jones v. Lee (18 Howard, 76); Briggs *v.* French (2 Sumner, 252).

The court also holds in those cases that a man may change his residence from a State in order to assert his title to property within that State in the Federal courts against persons holding it adversely provided he changes his residence in good faith. Does anybody doubt that we resigned in good faith? Does anybody suppose or suspect that the defendant's was a colorable resignation; that he is to be restored to office when this prosecution ceases? Certainly not. And therefore the case corresponds entirely in principle to the decision I have cited. If jurisdiction may be obtained by the voluntary act of a party done in good faith, no reason can be suggested why a jurisdiction may not be avoided by a voluntary act done also in good faith. We were inclined to demur to the original pleading, and the original pleading is defective in the point that I have already brought to the attention of the court in not describing this defendant as one subject to impeachment, and in describing him in fact as a person who is not subject to impeachment, because it says that he was "late Secretary of War."

On the third question which is presented for consideration by the order of the Senate I think little need be said. They can not amend their articles by a new assignment in a replication. Nobody ever heard of an amendment of an indictment; and I may add that the court in the case of Barnard held that articles of impeachment were not amendable. I could, by looking over the books, perhaps find some accidental decision of a refusal of a court to allow an indictment to be amended. Indictments are quashed for defects which could be amended at any stage of a civil action as of course, and a new indictment must be found before further proceedings can be had. This, with the decision in the case of Barnard, at page 192, volume 1, that there could be no amendment of articles of impeachment, will dispose of the question suggested by the order of the Senate as to whether a necessary allegation not made in the articles could be supplied in the subsequent pleadings.

Mr. Matt. H. Carpenter, also of counsel for respondent, said: [1]

This court can only acquire jurisdiction, in a proceeding of impeachment, by articles presented by the House, showing a case of impeachable criminality; that is, a case where the act complained of is impeachable, and the actor subject to impeachment. In other words, the articles must be such as to require no aid from subsequent pleadings. In this case the articles describe the respondent as "late Secretary of War." Within the strictness of allegation required by common law criminal courts such descriptio personae would not be equivalent to an allegation that he was no longer in that office. Therefore, and to meet the view sometimes entertained that a citizen holding one office may be impeached for misconduct in another, we interposed the plea to the jurisdiction, stating affirmatively that at the time of impeachment the respondent was not any officer of the United States. He was impeached at the bar of the Senate—if formal announcement that articles would be presented against him is an impeachment—on the 2d day of March, A. D. 1876. Some of the articles charge that he continued to be Secretary of War to or until (I forget which) the 2d day of March. This excludes the 2d day of March from his holding office; therefore, if we are right in contending that only a person holding office can be impeached, the articles fail to show a case within jurisdiction.

And I think it would have been safe for us to demur to the articles. But not wishing to take risks upon a technical construction, we thought it safer to plead affirmatively the fact that the respondent

[1] Page 45.

was not holding any office at the time of impeachment. Undoubtedly, to any plea of the respondent in confession and avoidance of the articles, the prosecution might have replied in confession and avoidance; but not so to a plea which, in substance, is a denial of any fact which should have been stated in the articles, to show jurisdiction. If the articles themselves are deficient in not stating any fact necessary to entire jurisdiction—jurisdiction of the offense and the offender—then this court never acquired jurisdiction.

It results from the fact that this court has only a special jurisdiction, that the first pleading must show a case within the jurisdiction. This was held with regard to jurisdiction of circuit courts of the United States in Brown *v.* Keene (8 Peters, 112); Jackson *v.* Ashton (8 Peters, 148); Hodgson *v.* Bowerbank (5 Cranch, 303); Mossman *v.* Higginson (4 Dallas, 12), and Jackson *v.* Twentyman (2 Peters 136).

The honorable manager [Mr. Lord] yesterday referred us to two cases—2 Chitty's Reports, 367, and 2 Maule & Selwyn, 75. These were actions of quo warranto—that is, civil suits to try the title to an office, to be followed by a judgment for damages and costs. The court held, what everybody would concede, that resignation did not preclude final judgment.

One Senator at least—Senator Howe—will remember a somewhat remarkable case of this kind in our own State, where he happened to be on the winning and myself on the losing side. I refer to the case State on the relation of Bashford *v.* Barstow. In this case, after the court had declared its jurisdiction, the attorney-general came into court and filed a discontinuance.

But the court held that the case was really a civil cause, in favor of the relator, against Barstow, who was in possession of the office; that the State had no interest in the question, and was only a formal party.

The learned manager also asserted that in a criminal cause there could be no such thing as a replication and rejoinder. If he will take the trouble to examine Wentworth's Pleadings he will find that he is in error; and if he will examine Archbold's Criminal Pleadings he will find the very forms from which we have drawn our pleadings subsequent to the plea in abatement.

On May 29 [1] the Senate, after several days of deliberation, agreed to these resolutions, the first by a vote of yeas 37, nays 29, and the second by a vote of yeas 35, nays 22.

1 *Resolved,* That in the opinion of the Senate, William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

2. *Resolved,* That at the time specified in the foregoing resolution [fixing the time for delivering this judgment] the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the game hereby is, overruled; and it being the opinion of the Senate that said plea is insufficient in law, and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught, which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid.

On June 1,[2] after the announcement of the decision, Mr. Matt H. Carpenter, of counsel for the respondent, commented on the effect of the findings:

The defendant first pleaded to the jurisdiction of this court. The managers filed a replication, to which the respondent demurred; and the managers joined in the demurrer.

The rule is that each pleading must answer the preceding one. The replication, if sufficient in law, was a valid answer to the plea. The validity of the replication in matter of law was put in issue by our demurrer. And had the court upon the demurrer held the replication bad, then the court would have looked back to the plea itself to see whether or not it was sufficient in law; and if it had found the plea to be bad, then the court would have held in favor of the prosecution; upon the principle that a bad replication is as good as the bad plea to which it is a response. But in this case the court overruled our demurrer to the replication, thus holding the replication a sufficient answer to the plea.

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[1] Senate Journal, pp. 944–947; Record of trial, p. 76.

[2] Record of trial, pp. 159, 160, 163.

Was there therefore any necessity for the court to go back through the record and pass upon the sufficiency of prior pleadings? The plea to the jurisdiction having been answered by a replication which the court held good by overruling our demurrer to it, what was the necessity for the court to go back through the record? The only question raised by the plea was the jurisdiction of this court over the respondent; and whether or not the prosecution was entitled to a final judgment, or whether the judgment should be respondent ouster, is a question to be examined.

But I submit with great confidence that the question of sufficiency in law of the articles of impeachment was not before the court; and that after judgment upon the question of jurisdiction, of respondent ouster, the respondent was at liberty to begin his defense, as he might have done without questioning the jurisdiction.

In case on indictment, when the defendant challenges the jurisdiction of the court, and fails to make good his objection, he is remitted to every privilege he would have possessed if he had commenced his defense with questioning the jurisdiction; that is, he may move to quash, or he may plead in bar, or plead the general issue.

If I were compelled alone to take the responsibility in this case I should plead no further, but leave the managers to their own course; and in that case would not the managers be entitled to move for final judgment? This would be so, I think, had the issue been one of fact only. But here there was an issue of law and several issues of fact, all of which the court has disposed of by the order just entered.

We have appeared and pleaded, and if the court have held our defense insufficient, may we not stand upon it, without filing further pleadings? My impression is that the next step to be taken is for the managers to move for judgment, after which we could move for leave to plead further, which I have no doubt the court would grant.

All this, of course, is upon the supposition that the court has overruled the plea to the jurisdiction. The order declaring the jurisdiction was not concurred in by two-thirds of the Senators present. That is, less than two-thirds of the Senate think there is jurisdiction to convict the respondent.

Manifestly a court which has not jurisdiction to convict has no jurisdiction to try the respondent; and such pretended trial would be wholly extrajudicial. No witness could be indicted for false swearing at such trial, nor punished for contempt for not obeying a subpoena.

It therefore becomes a very important question to be settled by the respondent's counsel, whether any, and if any what, further steps should be taken on the part of the respondent. An order has been entered in the record, as an order of the court, overruling the plea to the jurisdiction. But the journal of the proceedings shows that thirty-five Senators concurred in the order, and twenty-two dissented.

Speaking for myself only (not having consulted with my colleagues), I maintain that upon the whole record the order is void, for the reason that it was not concurred in by two-thirds of the Senators.

Mr. Manager Scott Lord said:

One question which the learned counsel has discussed before you the managers do not feel authorized to discuss while the order of this Senate remains. By its order the demurrer to the replication of the House of Representatives is overruled, the plea of the defendant is overruled and held for naught, and the articles of impeachment are held sufficient. Now, apprehending that this order has been made upon due consideration, that the Senators understood all these pleadings and made this order in that view, we do not feel called upon, I repeat, to discuss the questions pertaining thereto until some motion is made to change the order; and if such a motion should be made, if the Senate, after this deliberation and after this carefully prepared order, takes into consideration the question whether it will change its order, then the managers will desire to be heard.

And on June 6,[1] when the Senate was determining the length of time to be allowed to the respondent to answer on the merits, Mr. Manager William P. Lynde said:

We have already been occupied for several weeks with dilatory pleadings. We have had a plea to the jurisdiction of the Senate. It has been suggested by the counsel for the respondent that they would yet dermur, or ask leave of the Senate to demur, to the articles of impeachment. The managers

[1] Record of trial, p. 163.

believe that these dilatory pleadings have been indulged in by this Senate quite too long and without a precedent. I find no precedent either in England or in this country for dilatory pleadings on impeachment. In the first case tried under our Constitution against Senator Blount, it is true, the respondent filed a plea to the jurisdiction which is regarded as a dilatory pleading; but that was without authority and without precedent. There never had been a case in England where a plea of that kind had been allowed to be put into articles of impeachment, and it stands alone in this country.

The time which has already been occupied in this case must satisfy the Senate that it is not right that these dilatory pleadings should be introduced or allowed. In the case of Judge Barnard in New York, where the counsel for the respondent applied to the court for leave to file a demurrer or leave to move to quash certain articles of impeachment, the court refused the request and required the defendant to plead to the merits, stating that in the course of the trial of the case all those questions of law could be availed of by the parties and would be decided by the court.

Now, we think that if a precedent of this kind is established, if this Senate will go on and hear dilatory plea after dilatory plea, first a plea to the jurisdiction, a plea in abatement, then a demurrer to the form, there is no end; and when shall we arrive at a trial of this case upon the merits? If there was an officer of this Government now in office who endangered the liberties of the people, who was engaged in a conspiracy against the Government, and he stood impeached before the Senate, if these dilatory pleas were allowed, the evil to be apprehended from his action might be carried into effect and realized. And yet it is claimed that it is a matter of right by the respondent, on the other side, and the courts of impeachment of this country have, by precedent at least if not by direct vote, decided that when an officer of the Government is impeached he can not be suspended from the functions of his office while the trial is progressing. No; it has been the aim and intention of the courts in all cases of impeachment that a speedy trial should be had, that the respondent should be required to answer to the merits, and then the court would consider the question, and the whole question, and protect and save the country.

Mr. Carpenter also raised another question: [1]

The question of the sufficiency in law of the articles themselves has not been raised by a demurrer thereto, has not been argued by either side, nor submitted to the court. The only question raised, argued, or submitted was the question of jurisdiction of the defendant; that is, whether the court had power to pass upon the sufficiency of the articles, or take any other step whatever in the cause. Had the court affirmed jurisdiction (as I claim it has not), then we could have moved to quash the articles, or demurred to them, or joined issue for trial. I do not hesitate to affirm that none of these articles, with possibly one exception, state the necessary facts to constitute a good indictment. Mere rhetoric and denunciation will not do. It is not enough to say that the defendant has been guilty of high crimes and misdemeanors; but the articles must state every fact which is an element of crime. And although the same strictness of pleading has not been required in cases of impeachment as in ordinary criminal causes, yet every fact relied upon to constitute the crime must be stated; and on the trial the proof can not go beyond the averments of the articles. In the several impeachment trials in this country defendants have not resorted to formal pleadings. In Blount's case his response was more like an answer to a bill in chancery than a pleading in a criminal cause. It was a plea to the jurisdiction, a demurrer, and answer, all in one.

But I assume that where the respondent chooses to avail himself of formal and particular pleading, which the experience of a thousand years has shown to be essential to the protection of innocence, this court will not deny the right, at least without a hearing.

I therefore assume that the court, on its attention being called to the very sweeping terms of this order, will, of its own motion, vacate so much of it as holds that the articles of impeachment are sufficient in law.

The sufficiency in law of the articles is as material to the conviction of the respondent as is the truth in point of fact of the matters therein charged. Before there can be a conviction several things must be established:

First. That the defendant, in fact, has done, or omitted to do, certain things;

Second. That the things he has done or omitted constitute a crime;

Third. And not merely a crime, but a high crime or misdemeanor, meriting impeachment; and

[1] Record of trial, page 159.

Fourth. That the respondent is subject to impeachment, and this court has jurisdiction over him for the hearing and determination of this cause.

If any one of these elements be wanting, there can be no conviction. And of course, as soon as any one of these propositions is established in favor of the respondent he is entitled to an acquittal. I thin the point as to jurisdiction has been determined in his favor, inasmuch as more than one-third of the Senate has declared against jurisdiction. But what course we ought to take as a matter of expediency—whether we should move to vacate the order altogether and that the respondent be dismissed; or demur to the articles; and if the demurrer is overruled, answer to the merits and go to trial—should only be determined after consultation of the respondent's counsel.

To this Mr. Manager Scott Lord replied: [1]

One other suggestion. We apprehend that the true object of all trials, civil or criminal, is to reach the merits at the earliest moment. The defendant here stands accused by impeachment, having been a high officer of the Government, of certain crimes and misdemeanors. He has put in one dilatory plea, and that has occupied all his time. He now proposes, after this Senate has so deliberately entered this order; after it, having examined all the pleadings, has found these articles of impeachment sufficient, to try again in that direction. He proposes to demur to the articles of impeachment; and while I can not, perhaps, strictly call a demurrer a plea, yet, in a broader sense, it is. The defendant proposes another dilatory proceeding; I may call it properly another dilatory plea. And how many shall he have? It is absolutely in the discretion of the Senate whether to give him this privilege or not. It is in the discretion of any court of civil or criminal jurisdiction, unless controlled by statutory law.

This defendant accused of these high crimes, after having by his dilatory plea occupied weeks of time, seeks further delay. After this court, under rules which are broader and more liberal than in other courts in regard to pleadings, has deliberately overruled his demurrer, deliberately held his plea for naught, and that the only pleading before this tribunal is the pleading called the "articles of impeachment," and after this court has solemnly adjudged that these articles are sufficient, the defendant by his learned counsel asks you to go back into the courts of law, for rules not binding even there. He wants you to adopt the rules which he says are held in criminal courts, and give him the right, under all the circumstances of this case, to put in this further dilatory plea, because he says what? That he could go into a criminal court and take up these articles of impeachment, and one by one satisfy the tribunal that the pleading would not be good as an indictment. What if he could, and what if the technical rule availed here? It nevertheless is in the discretion of this court whether it will allow him again to stand on a technical point instead of proceeding to the merits. I apprehend it is an application which will not be favored by the Senate. I apprehend this Senate sitting as a court of impeachment will hardly take the position, after this deliberate order, that it will open the whole case again, and for what? Not from a sense of justice to the defendant; not for the purpose of ascertaining the truth; but simply that learned counsel skilled in the criminal courts may stand in this august tribunal and urge that these articles of impeachment have not all the words and phraseology which he thinks would be necessary in a court of criminal jurisdiction to maintain an indictment.

I will not now discuss the question whether the articles of impeachment are sufficient. The Counsel himself has confessed the rule that pleadings in this court are entirely distinct and separate as to mere technical rules from pleadings in ordinary criminal proceedings. This court has a broader range; it has an easier path in its high jurisdiction to reach the merits, and therefore I may say, with all respect to this tribunal, that it would be a most extraordinary proceeding, in the judgment of the managers, for this court, without claim of any possible injustice to the defendant, to open this case for another dilatory plea instead of requiring him to go to trial upon the merits.

The Senate finally [2] discarded an order providing that the respondent "have leave to plead further or answer the articles of impeachment within ten days," and agreed to the following:

Ordered, That W. W. Belknap have leave to answer the articles of impeachment within ten days from this date; and that in default of an answer to the merits within ten days, by respondent, to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

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[1] Record of trial, page 160.

[2] Senate Journal, p. 949; Record of trial, pp. 164, 165.

This question of pleadings was touched upon also in the final arguments, Mr. Matt H. Carpenter, speaking [1] at length on the view already advanced by him, and Mr. Manager Scott Lord opposing.[2]

2124. The answer of respondent is part of the pleadings of an impeachment trial, and exhibits in the nature of evidence may not properly be attached thereto.—On February 3, 1905,[3] in the Senate, sitting for the trial of Judge Charles Swayne, at the end of the portion of respondent's answer relating to the first article of impeachment, certain exhibits were attached to show the practice of other Federal judges in certifying their expense accounts to the Department at Washington. Judge Swayne was accused in the first article of rendering false accounts.

At the conclusion of the reading of this portion of the answer, Mr. John M. Thurston, of counsel for the respondent, said:

> Mr. President, we have attached as exhibits to this answer to the first article three certificates, one from the fifth, one from the seventh, and one from the ninth judicial circuits of the United States, which show that, almost without exception, the amount of $10 per diem was drawn by each and all of the judges, both of the circuit and district courts of those circuits, in their attendance outside of their districts, under the provisions of these laws. We have been unable up to the present time to secure from the Secretary of the Treasury the additional certificates for the other districts.

After concluding the reading of the entire answer of the respondent, Mr. Thurston said:

> Now, Mr. President, referring to the fact that certain exhibits which we desired to attach to our answer to article No. 1 had not been attached because of the fact that the Secretary of the Treasury in the short space of time has been unable to furnish it to us, we move as follows:
>
> Counsel for respondent move on order giving them leave to hereafter attach to the answer herein to article 1, as exhibits, additional copies of certificates of the Secretary of the Treasury, showing the amounts certified to and received from the United States by the judges of the first, second, third, fourth, sixth, and eighth judicial circuits, as their reasonable expenses for travel and attendance while holding court away from the places of their residences, and outside of their respective districts, in the year 1903, it having been impossible for the Secretary of the Treasury to prepare and furnish the same to respondent up to the present time.

Mr. Manager Palmer said that the managers did not admit that these exhibits were material,[4] but that they would not object except on the question of delay that might be caused.

Mr. Charles W. Fairbanks, of Indiana, offered this order:

> *Ordered,* That the respondent, Charles Swayne, have leave to hereafter, not later than the 10th instant, attach as further exhibits to his answer to article 1 of the articles of impeachment copies of the certificates of the Secretary of the Treasury, referred to in said answer, showing the amounts certified to and received from the United States by the judges of the first, second, third, fourth, sixth, and eighth judicial circuits as their reasonable expenses for travel and attendance while holding court away from the place of their residence, and outside of their respective districts, in the year 1903.

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[1] Record of trial, pp. 330–334.

[2] Pages 334, 335.

[3] Third session Fifty-eighth Congress, Record, pp. 1820, 1830–1832.

[4] They had been excluded in the examination before the committee of the House of Representatives, with the assent of the minority as well as majority of the committee. See minority views, House Report No. 3021, third session Fifty-eighth Congress.

Mr. Joseph W. Bailey, a Senator from Texas, said:

Mr. President, as a matter of good practice—and I presume we are to conduct this trial according to good practice—it seems to me that this is a request for time in which to exhibit evidence as a part of the pleadings. If this matter is admissible before this court at all, it is admissible as evidence. It does not occur to me as an appropriate proceeding to be giving time in which counsel for the respondent may file evidence with their pleadings. That is as I look at it. If it were desirable to give the counsel time to prepare new allegations I should not object to an order for that; but I do object to having this court put into the attitude of expressly and by order providing for delay, in producing as a part of the pleadings, what properly, as it seems to me, belongs only to the production of evidence.

Mr. Manager Palmer also said:

If, as suggested by the Senator from Texas [Mr. Bailey], it is true that these exhibits are to be considered as evidence, then certainly they ought to be attached before the managers are asked to reply. We had expected to ask until next Monday to reply or to demur or to except to this answer, and the answer ought to be complete before we are asked to reply to it. If this time is postponed until the 10th of February our answer will have been in, and if these matters are matters of evidence it might be quite a serious consideration. Therefore we object to the extension of the time until the 10th of February.

Mr. Thurston then said:

Mr. President, the respondent and his counsel are so anxious to interpose no obstruction to the speedy trial of this case that if, as suggested, our motion would be taken as a ground for asking delay we here and now withdraw it.

The Presiding Officer announced:

The motion is withdrawn, and the Chair supposes the order proposed by the Senator from Indiana is also withdrawn.

So the subject was dropped.

2125. Counsel for respondent in the Swayne trial interposed a plea as to jurisdiction of offenses charged in certain articles, but declined to admit that it was a demurrer with the admissions pertinent thereto.

During time of presentation of testimony in the Swayne trial counsel of respondent were permitted to file a brief on their pleas to jurisdiction.

Form of brief on plea to jurisdiction filed by counsel for respondent in Swayne trial.

On February 22, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, after the counsel for the respondent had begun to present testimony, but before they had concluded, Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, the respondent has at all times insisted, and still does insist, upon the pleas to the jurisdiction as to the first seven counts. It had been the purpose of my associate, Mr. Higgins, to present our statement and arguments with respect to those pleas as apart of his opening statement. In deference to the evident wish of the Senate and to the imperative demand for the completion of the legislative duties of the Senate, he decided to waive that privilege.

We have prepared a statement and argument as to those pleas to the jurisdiction which we could, of course, use on the final arguments in the case. But we feel it would be fairer to the Senate and to the managers to present those now, and as our position upon the pleas to the jurisdiction and as a part of our presentation of the case we now ask to present our statement and argument and have it printed in the Record, so that the Senate and the managers may have an opportunity before the close of the case to consider it. [To the managers on the part of the House.] Is there any objection?

[1] Third session Fifty-eighth Congress, Record, pp. 3026–3035.

Mr. Manager Henry W. Palmer, of Pennsylvania, replied that the managers did not object.

The Presiding Officer [1] said:

The brief prepared by counsel on the question of jurisdiction as to the first seven articles will be inserted in the Record unless there be objection on the part of the managers or of Senators.

Mr. Thurston then said:

Mr. President, I feel it is our duty to state that this presentation of the historical, constitutional and parliamentary procedure in impeachment proceedings has been prepared not by counsel for respondent, whose names are attached to it, but by a gentleman who is renowned as a scholar along constitutional lines and a lawyer of great ability, and without naming him we wish to disclaim any credit that may attach to the preparation of this document.

Mr. Manager Palmer then stated a question, and the following occurred:

Mr. Manager PALMER. Are you demurring to the first seven articles of impeachment upon the ground that they do not charge an impeachable offense? Is that the idea?

Mr. THURSTON. Our pleas are in to that effect, if the manager has read them.

Mr. Manager PALMER. Exactly. I understand you are filing a demurrer to the first seven articles on the ground that they do not charge impeachable offenses.

Mr. THURSTON. We did interpose special pleas to those articles.

Mr. Manager PALMER. And this argument is intended to support those pleas?

Mr. THURSTON. Yes, Sir.

Mr.Manager PALMER. Of course your demurrer admits the truth of all that is stated in those articles. Mr. THURSTON. I beg pardon.

Mr. Manager PALMER. It could not be a demurrer if it did not.

Mr. THURSTON. I beg pardon, Mr. President. We have not demurred. Our pleas stand, and the manager can take any legal view of them that he chooses to present.

The heading and signatures of the document were as follows:

IN THE SENATE OF THE UNITED STATES SITTING AS A COURT OF IMPEACHMENT. THE UNITED STATES OF AMERICA AGAINST CHARLES SWAYNE, A JUDGE OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF FLORIDA. UPON ARTICLES OF IMPEACHMENT PRESENTED BY THE HOUSE OF REPRESENTATIVES.

Argument in support of the pleas to the jurisdiction interposed in behalf of the respondent to articles 1, 2, 3, 4, 5, 6, and 7, such pleas presenting the contention that the facts set forth in said articles, even if true, do not constitute impeachable high crimes and misdemeanors as defined in the Constitution of the United States.

* * * * * * *

The pleas to the jurisdiction interposed in behalf of respondent to articles 1, 2, 3, 4, 5, 6, and 7 should be sustained, because the facts set forth in said articles, even if true, do not constitute "high crimes and misdemeanors, "as defined in Article II, section 4, of the Constitution of the United States.

ANTHONY HIGGINS,
JOHN M. THURSTON,
Counsel for Respondent.

2126. The managers being introduced in the Senate and having signified their readiness to exhibit articles of impeachment, the Presiding Officer directs proclamation to be made.

Form of proclamation made by the Sergeant-at-Arms when managers bring articles of impeachment to the Senate.

Articles of impeachment being exhibited by the managers, the Presiding Officer says that the Senate will take proper order and inform the House thereof.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

In 1868 the Senate ceased in its rules to describe the House of Representatives while acting in impeachment cases as the grand inquest of the nation.

Present form and history of Rule II of the Senate rules for impeachments.

Rule II of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

> When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit articles of impeachment against any person, the [Presiding Officer] of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against——;" after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

The origin of this rule is found in the trial of William Blount in 1797.[1] In 1804[2] at the impeachment of Judge Pickering, the committee having charge of the rules—Messrs. Uriah Tracy, of Connecticut, Stephen R. Bradley, of Vermont, Abraham Baldwin, of Georgia, Robert Wright, of Maryland, and William Cocke, of Tennessee—made a new draft of the words to be repeated after proclamation. At the trial of Blount they had been:

> All persons are commanded to keep silence while the Senate of the United States are receiving articles of impeachment against——, on pain of imprisonment.

Mr. Tracy's committee modified this to this form:

> All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachments, articles of impeachment against——

For the trial of Judge Chase, in 1805, the rule was adopted in practically the identical form agreed to by Mr. Tracy's committee, except that the words "sitting as a court of impeachments" were omitted.[3] There does not seem to have been significance in the omission of these words, since the articles of impeachment against Judge Chase were received by the Senate sitting as a high court of impeachment. In 1868, during the proceedings against President Johnson, the rules were revised, but the committee reported[4] this rule in the form as used since 1805. While the rules were under debate on February 29, Mr. Thomas A. Hendricks, of Indiana, said as to the language of the announcement:

> In the Constitution which the fathers adopted, after grave consideration, they said that the House of Representatives should impeach an officer. We say that "the grand inquest of the nation" shall impeach. Where is the advantage of this new language? Why not make proclamation in the Senate here that "the House of Representatives impeaches the President of the United States?" It is not sufficiently high sounding is all the trouble about it. It expresses exactly the thought that the Constitution does, truly and correctly, and does not refer us to some body of men not known to our system of government.

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[1] First session Fifth Congress, Senate Journal, p. 433; Annals, p. 498.

[2] First session Eighth Congress, Senate Journal, pp. 382, 383; Annals, p. 225.

[3] Second session Eighth Congress, Senate Journal, pp. 509, 510.

[4] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, pp. 246, 248, 811; Globe, pp. 1521, 1522, 1594.

The matter was not further discussed, and on March 2,[1] on motion of Mr. Hendricks, without further debate or division, the words "grand inquest of the nation" were stricken out and "House of Representatives" inserted. So the rule came to its present form.

2127. Upon presentation of articles of impeachment and the organization of the Senate for the trial, a writ of summons is issued to the accused.

The writ of summons to one accused in articles of impeachment recites the articles and notifies him to appear at a fixed time and place and file his answer.

The rule specifying the method of serving writs of summons to one accused in articles of impeachment.

The person accused in articles of impeachment failing to appear or to answer, the trial proceeds as on a plea of not guilty.

The person accused in articles of impeachment may appear in person or by attorney.

If a plea of guilty be entered in answer to articles of impeachment, judgment may be entered without further proceedings.

Present form and history of Rule VIII of the Senate sitting for impeachment trials.

Rule VIII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

> Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or, appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

This rule dates from 1868,[2] when it was adopted preliminary to the trial of President Johnson. It was reported from a committee of which Mr. Jacob M. Howard, of Michigan, was chairman, in its present general form; but during consideration in the Senate the word "court" was stricken out wherever it occurred, and the word "Senate" substituted, to conform to a general decision of the Senate.

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[1] Senate Journal, p. 246; Globe, p. 1594.

[2] Second session Fortieth Congress, Senate Journal, pp. 238, 812; Globe, pp. 1533, 1534, 1602; Senate Report No. 59.

2128. At 12.30 p. m. on the day of the return of the summons against a person impeached, the Senate suspends business and the Secretary administers an oath to the returning officer.

Form of oath administered to the returning officer in an impeachment case.

The oath taken by the returning officer in an impeachment case is spread on the records.

Present form and history of Rule IX of the Senate in impeachment cases.

Rule IX of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

> At 12.30 o'clock afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: "I, ——— ———, do solemnly swear that the return made by me upon the process issued on the —— day of ———, by the Senate of the United States, against ——— ———, is truly made, and that I have performed such service as therein described: So help me God." Which oath shall be entered at large on the records.

This rule, with slight changes, dates from the Chase trial in 1805.[1] In 1868[2] in preparation for the trial of President Johnson, it was adopted in exactly its present form.

2129. In an impeachment case the writ of summons being returned, the accused is called to appear and answer the articles.

The person impeached being called to appear and answer, a record is made as to appearance or nonappearance.

The person impeached may appear to answer the articles in person or by attorney, and a record is made as to the mode of appearance.

When the person accused in articles of impeachment appears by agent or attorney, a record is made naming the person appearing and the capacity in which he appears.

Present form and history of Rule X of the Senate sitting for impeachments.

Rule X of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" provides:

> The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

This rule was first adopted in 1805,[3] for the Chase trial. In 1868,[4] during proceedings for the impeachment of President Johnson, the rules were generally revised, but this rule was changed only by dropping out the word "exhibited" after "articles of impeachment." It was then agreed to in the present form.

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[1] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[2] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 134.

[3] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[4] Second session Fortieth Congress, Senate Journal, p. 813; Globe, p. 1534; Senate Report No. 59.

2130. In impeachment proceedings before the Senate counsel for the respondent is admitted and heard.

Present form and history of Rule XIV of the Senate sitting for impeachment trials.

Rule XIV of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

This rule in identically its present form dates from the Chase trial in 1805.[1] It then embodied what had been the practice in preceding trials.

2131. In impeachment trials all motions made by the parties or counsel are addressed to the Presiding Officer, and must be in writing, if required.

Present form and history of Rule XV of the Senate sitting for impeachment trials.

Rule XV of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

All motions made by the parties or their counsel shall be addressed to the Presiding Officer, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table.

This rule was first drafted in 1805,[1] for the trial of Judge Chase. It had then an additional clause providing how the vote should be taken on such motions. In 1868,[2] when the rules were revised, it was given its present form, the words "presiding officer" being substituted for "President of the Senate," and the clause relating to voting being stricken out. The words "or any Senator" were also inserted at this time.

2132. In an impeachment trial the case is opened by one person on each side.

The final arguments on the merits in an impeachment trial are made by two persons on each side, unless ordered otherwise upon application.

The final argument on the merits in an impeachment trial is opened and closed by the House of Representatives.

Present form and history of Rule XX of the Senate sitting for impeachment trials.

Rule XXI of the "Rules of proceeding and practice for the Senate when sitting in impeachment trials" is as follows:

The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

This rule dates from 1868[3] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a revision of the rules, in view of the approaching trial of President Andrew Johnson. The rule as reported was in this form:

XXI. The final argument on the merits may be made by two persons on each side, and the argument shall be opened and closed on the part of the House of Representatives.

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[1] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[2] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.

[3] Second session Fortieth Congress, Senate Report No. 59.

On March 2,[1] this rule was debated fully, and amended so as to stand in its present form. Mr. Charles Sumner, of Massachusetts, proposed an amendment which, after discussion, was adopted in form as follows:

The case, on each side, shall be opened by one person.

During the debate Mr. Roscoe Conkling explained this amendment on behalf of Mr. Sumner, who had been called away:

The Senator from Massachusetts thought that when the managers came here and rose to open their case and had proceeded an hour perhaps the Senator from Indiana or some other Senator would say, "This now is a proceeding, a question falling within the first of these two rules; it is a preliminary or interlocutory matter, and therefore to be restricted to an hour." That there might be no question about it, the Senator from Massachusetts proposes that the two rules shall stand precisely as they are now, the latter of which rules gives to counsel the right to sum up the evidence at any length they please, be it a day or four days or ten days each; but that before the evidence has been delivered, before the witnesses are called, that explanatory statement which is called "an opening" shall be made by one person on each side, one manager on the part of the House of Representatives in the beginning, and one counsel on the part of the respondent after the evidence for the prosecution is closed and the respondent comes to make his case. To cover that, the Senator from Massachusetts interposes this rule between the two (leaving the previous rule to operate upon interlocutory matters, as it does), to provide for the opening of the case on each side respectively before the evidence is delivered, and then to leave to counsel to sum up, or close the case, or, in the language of the rule, to make the "final argument on the merits" at any length they please. That is the meaning of it, as I understand it.

A question having been raised by Mr. Thomas A. Hendricks, of Indiana, Mr. Conkling said further:

The idea is that the practice is to be precisely as it is in Indiana—not the practice in Westminster Hall, but the practice as we know it in this country. The plaintiff, for illustration, opens his case and gives his evidence and finishes it; then the defendant opens his case and gives his evidence and finishes it; and then the summing up occurs. That is the design here—that the prosecutors for the House of Representatives open their case and prove it as far as they can; then the respondent opens his case and proves it as far as he can. That is precisely what the amendment means, I submit. I know that is the design of the mover.

The amendment was agreed to without division.

A more serious question arose as to the number of persons who should be permitted to sum up on each side. Mr. James W. Grimes, of Iowa, objected that the number should not be restricted, saying:

If I remember rightly the history of impeachment trials in England, the members of the managers and the counsel on the part of the defense have addressed their arguments to a particular issue that was involved in a particular specification; and I think that was the case in this country in the celebrated Chase trial, and in the Peck trial. There were divers and sundry specifications, to each of which the defendant pleaded not guilty. One manager argued each particular specification; and one of the counsel on the part of the defense replied to him. Each article was one of the points upon which the court had to pronounce that the defendant was either guilty or not guilty, and each was argued separately.

Now, had we not better leave this whole matter to be settled by a conference between the attorneys of the respective sides when they shall reach the argument than to say now peremptorily that ten or twenty articles shall all be combined in the speech of the counsel instead of being severed, as they have been in previous trials, and limiting them to two speeches on each side? My own opinion is that a question of practice of that kind belongs purely to the court; and if we are to resolve ourselves from a Senate into a court, it ought to be settled by the court itself, when the Chief Justice, who is to preside over us, is present to give us the aid of his counsel.

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[1] Senate Journal, pp. 242, 243, 814; Globe, pp. 1580–1585.

Mr. Garrett Davis, of Kentucky, speaking in the same line, said:

I can state to the honorable Senator from Vermont and to the Senate that in every case of crime of any great interest, and especially a capital crime, I have never known the argument of the case on the part of the defense by a less number of counsel than three, and it is often by five. I agree with the Senator from Indiana that in the management of the case, if you introduce more than two counsel, if they are competent counsel, you embarrass the case and you weaken the prosecution or the defense. But it is not so always in the argument of cases of importance. It is a universal practice in the criminal courts of Kentucky that where a case of interest involving capital punishment is under trial, and the accused desires it, he is heard by at least three counsel in his defense.

Mr. President, I have learned this fact in relation to impeachments—that they are to be treated with more liberality on both sides than the stringent practice and forms and rules of proceeding in criminal cases, and that those rules which are introduced into criminal cases to economize time have never been resorted to as a general rule in the trial of impeachments. It seems to me that all the modes of proceeding and all the practice in cases of impeachment ought to be more liberal, ought to be more free from restrictions, and especially technical restrictions, and restrictions simply to save time, than criminal prosecutions. And yet the honorable committee that have reported these rules of proceeding and practice are restricting the proceedings in this and all future cases of impeachment much more rigorously than is known in the criminal practice in the courts of Kentucky.

Mr. James Dixon, of Connecticut, said:

I most deeply regret to see what I think I see, what I can not help seeing, in the remarks of the Senator from Massachusetts and some other Senators. That Senator speaks as if the consumption of a day or two days or three days or even four days, taken up in the defense of this great trial, was to be regretted, a thing to be deprecated and avoided; and he points out as something to be shunned that Mr. Burke spoke four days in the great trial of Warren Hastings. I confess I have not that feeling. I regret that the Senator has it; I regret that any Senator has it. I do not think it is to the credit of this body when entering upon this great trial, impartial as undoubtedly we all are, wishing to do justice in a solemn case of this kind, bringing before us the President of the United States, that gentlemen are disposed to deny him on the final argument upon ten charges the privilege of being heard by as many counsel as he wishes.

In behalf of the restriction, Mr. Sumner said:

The Senator forgets that on the trial of Judge Peck Mr. Wirt, in a speech which I have sometimes thought was the most masterly forensic effort in the history of our country, occupied the attention of the Senate two full days. The Senator will also remember that on the trial of Warren Hastings, Mr. Burke occupied the attention of the court of impeachment for four successive days, and there were other gentlemen on both sides, managers, and also counselors for the defense, who occupied the attention of the court each for several days.

I merely refer to these historical precedents that we may be reminded in advance of the possibilities of a trial like this; and a Senator near me says, the probabilities. Perhaps that is a better word; but I prefer to express myself in the most moderate manner, and I therefore said simply "the possibilities." It seems to me that it is our duty to provide againstprobabilities or possibilities even.

And Mr. George F. Edmunds, of Vermont, said:

Now, as to the propriety of this rule as a general rule. Is there a Senator on this floor who would stand up and say of his own personal knowledge of criminal practice in his own State that this rule does not exist in all their courts? I do not mean as a written rule necessarily; but is it not a general rule in every court in the United States of America, either State or national, that only two counsel are heard on a side in the summing up of a cause? A man is tried for his life, and, as a general rule—there may be exceptions, but I never heard of them in that case—only two counsel are heard in his defense, and only two for the prosecution. So all civil rights and questions involving the operations of law over vast sections of country are determined in the same way. This very day, in another Chamber of this building, before the Supreme Court of the United States, a cause is argued which may involve the peace and safety of the inhabitants of ten States, and of millions of persons, and it is confined, by the rules of that court, to two counsel on a side, and nobody complains that any injustice is being done to any one.

After the debate had continued for some time, Mr. Edmunds proposed the following amendment, which was agreed to without division:

Insert, after the words "on each side," the words "unless otherwise ordered by the court upon application for that purpose."

The word "court" was afterwards changed to "Senate" in accordance with a general conclusion to which the Senate had arrived.

Mr. Dixon, referring to the law of Connecticut as a precedent, then proposed the addition of the following clause:

And the counsel of the party accused in all trials to which these rules are to apply shall be allowed the closing turn in the final argument.

Mr. Orris S. Ferry, of Connecticut, said it had been the law of Connecticut since 1848, but had worked badly. The amendment was rejected without division.

2133. In the opening address in an impeachment trial it is proper to outline what it is expected to prove; but it is not proper to quote evidence which may or may not be admissible later.—On February 10, 1905,[1] in the Senate sitting for the trial of Charles Swayne, Mr. Henry W. Palmer, of Pennsylvania, was making the opening address on behalf of the managers, and had outlined what they expected to prove in support of the article charging the improper use of a private railway car. Mr. Palmer went on to say:

The respondent acknowledged the facts, as above stated, but defended his action upon the ground that the property of the railroad company being in the hands of the court, he, the judge of the court, had a right to use it without making compensation to the railroad company.

When questioned on the subject, we shall prove that he said, in answer to this question:

"Q. You said this car was one of the cars in possession of the court, because the road was in the hands of a receiver?—A. Yes.

"Q. You said that it was the privilege of the court to use that car, because the road was in the hands of a receiver?—A. Yes."

Mr. John M. Thurston, of counsel for the respondent, objected:

Mr. President, the statement that is now being read, as the record shows, is a part of the testimony of Judge Swayne taken before the committee of the House of Representatives, which, under the acts of Congress, can not be used against him in any criminal prosecution; and therefore it is improper to make the statement that the chairman of the managers is now proceeding to make. We object to the presentation here, by statement or otherwise, of any testimony that was given by Judge Swayne, the respondent, before the House committee, claiming his right, under the law of the Congress of the United States, that it can not be used against him in any criminal prosecution, of which this certainly is one.

After brief argument the Presiding Officer[2] said:

Of course, the managers on the part of the House and the counsel on the part of the respondent have somewhat wide latitude in their opening statements, but the Presiding Officer is of opinion that testimony which has been given by Judge Swayne on the occasion referred to ought not to be cited at length. He has a right to plead his privilege. He can not be obliged to criminate himself. * * * It seems to the Presiding Officer to be an indirect way of getting before the Senate the fact that Judge Swayne had testified to this. The Presiding Officer suggests to the manager that he may properly omit the reading of testimony which has been given on another occasion by Judge Swayne.

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[1] Third session Fifty-eighth Congress, Record, pp. 2232, 2233.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

Very soon after, in outlining the case as to the charge of nonresidence, Mr. Palmer said:

The facts, as they will appear in the testimony, are that after his confirmation as judge in 1890 he established his residence at St. Augustine, in a house rented from Mr. Flagler, and lived there with his family until the boundaries of his district were changed by the act of Congress in the year 1894. Judge Swayne states that he was urged by his friends not to move his family or furniture, that the next Congress would probably restore his district, and therefore his furniture was allowed to remain in St. Augustine until the year 1900, when he rented the Simmons cottage in Pensacola and lived there at intervals until 1903, when his wife bought a home. During the six years—

Mr. Higgins objected.

Mr. President, I wish to say that that statement is again contrary to the rule we have invoked as to the statute.

The Presiding Officer [1] held—

The Presiding Officer thinks that the manager has a right to state what he expects to prove, but that he ought not to go further by citing any testimony which has been given by Judge Swayne on another occasion as the means by which he expects to prove it.

2134. The opening address in an impeachment trial should be confined to what is to be proven, and how it is to be proven, and should not include extended argument on the whole case.—On February 21,1905 [2] in the Senate sitting for the impeachment trial of Judge Charles Swayne Mr. Anthony Higgins, of counsel for the respondent, was making the opening address preliminary to the introduction of testimony for the respondent, and in the course of his remarks made various citations which he asked the Secretary to read. Thus he had read extracts from the decisions of the Supreme Court of the United States in the cases of Bradley *v.* Fisher; In re Cuddy, petitioner; In re Savin, and an extract from the answer of one O'Neal in a lawsuit out of which arose one of the causes of Judge Swayne's impeachment.

After the reading of this extract the Presiding Officer [1] interrupted saying:

The Secretary will suspend for a moment. Why does the counsel claim that this is proper in an opening? The Presiding Officer supposed that the opening of a case on the part of the managers or on the part of counsel should be limited to a statement of the issues raised in the case, and what the parties propose to prove either for the prosecution or the defense. How do these extracts which the Secretary has been asked to read fall within what the Presiding Officer supposes to be the proper line of an opening on behalf of the respondent?

Mr. Higgins replied:

I will state, Mr. President, in the first instance, that a perusal of the statement of counsel in the Peck case shows that the managers went very fully into the merits of the case on the argument. Mr. Meredith, in opening for the respondent, did not. I thought, therefore, that I was entirely within the rules of this anomalous proceeding, which is not by common law, is not in equity, but is according to the lex et consuetudo parliamenti. The articles and answers are drawn from the civil law. They are not known to our own practice, and therefore I have supposed that it was a proceeding where the largest latitude was given to counsel in the first instance.

In the second place I desire to say, Mr. President, on this interesting point that the Greenhut testimony has not been read, and it is impossible to get a statement of the issues without it. I could have

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, p. 2977.

had read the affidavit of Greenhut, I could have read Greenhut's testimony, so as to get them before the court as to what they would show, but I have elected to leave them out, and was stating what O'Neal's was. Moreover, I thought it was the shortest way in which I could proceed.

The Presiding Officer then said:

The Presiding Officer, of course, does not wish to limit counsel for respondent as to any of their just rights, but as was suggested a moment ago the Presiding Officer supposed that an opening on behalf of the person accused was to be confined strictly to the issues raised and what the counsel expected to prove, and how they expected to be able to prove it. This opening seems to have taken the form of an extended argument on the whole case, which the Presiding Officer had supposed would be more proper, to say the least, when the case came to be finally argued. Perhaps the Presiding Officer is only expressing a little the impatience of the Senate, and without attempting to fix limits, he wants to suggest that the opening should be concluded as quickly and as rapidly as counsel feel that it can be in presenting their case to the Senate.

2135. At the trial of President Johnson both managers and counsel for respondent objected successfully to the rule limiting the number speaking in final argument.

In the final argument in the Johnson trial the conclusion was required to be by one manager.

The privilege of submitting a written instead of an oral argument in the final summing up was allowed in the Johnson trial.

In the Johnson trial the Senate declined to limit the time of the final arguments.

The Chief Justice ruled during the Johnson trial that a proposed order should, under the Senate practice, lie over one day before consideration.

On April 11, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Frederick T. Frelinghuysen, Senator from New Jersey, proposed the following:

Ordered, That as many of the managers and of the counsel for the respondent be permitted to speak on the final argument as shall choose to do so.

The Chief Justice[2] held that under the rules of the Senate the order would not be considered until the next day.

On April 13,[3] the order came up in the Senate sitting for the trial, and Mr. Charles Sumner, of Massachusetts, at once proposed the following to come in at the end:

Provided, That the trial shall proceed without any further delay or postponement on this account.

Mr. Manager Thomas Williams, of Pennsylvania, referred to the rule of the Senate (Rule XXI), which provided that the final arguments "may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives," and said that the rule as it stood was calculated to embarrass the managers, whose number had been fixed by the House at seven. In the preceding impeachment cases wherein a defense had been made, the cases of

[1] Second session Fortieth Congress, Senate Journal, p. 887; Globe Supplement, p. 147.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] Senate Journal, p. 891; Globe Supplement, pp. 160–163.

Judges Chase and Peck, the numbers of managers were, respectively, seven and five, and in the one case six of the seven managers were heard in concluding argument, and in the other all five were heard. In neither of those cases did there seem to have been any question as to the right of the House to be heard through all its managers. And going to the English precedents, in the famous case of Warren Hastings all the managers were heard in argument.

After further debate Mr. Frelinghuysen modified his order as follows:

Ordered, That as many of the managers and of the counsel for the President be permitted to speak on the final argument as shall choose to do so: *Provided,* That the trial shall proceed without any further delay or postponement on this account: *And provided further,* That only one manager shall be heard in the close.

Mr. Manager George S. Boutwell objected to the proposition to limit the close to one manager. He recited that in the trial of Judge Peck the case was first summed up by two managers on the part of the House, then the case of the respondent was argued by two of his counsel, and then the case was closed by the arguments of two managers. And in the case of Judge Peck, after the, counsel for the respondent had concluded, the case was closed by three managers. He also cited the ably conducted trial of Judge Prescott, in Massachusetts, wherein two arguments were made by the managers after the close of the argument for the respondent.

Mr. Sumner then proposed to amend by striking out the last proviso and inserting:

And provided, That according to the practice in cases of impeachment the several managers who speak shall close.

Mr. George H. Williams, of Oregon, in order to test the sense of the Senate as to the desirability of changing the existing rule, moved that the order and pending amendment be laid on the table. This motion was agreed to, yeas 38, nays 10.

On April 14,[1] Mr. Sumner offered this order:

Ordered, In answer to the motion of the managers, that under the rule limiting the argument to two on a side unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager.

This order going over for consideration until the next day a discussion arose as to the time of submitting the written arguments, and Mr. John Conness, of California, proposed this amendment:

Strike out all after the word "ordered" and insert:

"That the twenty-first rule be so amended as to allow as many of the managers and of the counsel for the President to speak on the final argument as shall choose to do so: *Provided,* That not more than four days on each side shall be allowed; but the managers shall make the opening and the closing argument."

The question being taken, the substitute was disagreed to, yeas 19, nays 27.

Thereupon Mr. Jonathan Doolittle, of Wisconsin, proposed an amendment:

Strike out all after the word "ordered" and insert:

"That upon the final argument two managers of the House open, two counsel for the respondent reply; that two other managers rejoin, to be followed by two other counsel for the respondent; and they, in turn, to be followed by two other managers of the House, who shall conclude the argument."

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[1] Senate Journal, pp. 896, 897; Globe Supplement, pp. 174, 175.

Thereupon Mr. Charles D. Drake, of Missouri, moved that the proposed order and pending amendment be postponed indefinitely. This motion was agreed to, yeas 34, nays 15.

On April 20,[1] after the introduction of evidence had been concluded, Mr. Manager John A. Logan asked of the Senate sitting for the impeachment trial, that he be permitted to file a printed argument instead of arguing orally. After some discussion Mr. William M. Stewart, a Senator from Nevada, offered this order:

Ordered, That the honorable Manager Logan have leave to file his written argument to-day and furnish a copy to each of the counsel for the respondent.

To this Mr. John Sherman, a Senator from Ohio, offered the following as a substitute:

That the managers on the part of the House of Representatives and the counsel for the respondent have leave to file written or printed arguments before the oral argument commences.

Mr. Stewart accepted the substitute as an amendment, and it was considered by the Senate in lieu of the original resolution offered by Mr. Stewart.

On April 22 the amendment of Mr. Stewart, in its modified form, was considered, and Mr. George Vickers, a Senator from Maryland, proposed as a substitute:

As the counsel for the President have signified to the Senate sitting as a court for the trial of the impeachment, that they did not desire to file written or printed arguments, but preferred to argue orally, if allowed to do so: Therefore,

Resolved, That any two of the managers other than those who under the present rule are to open and close the discussion, and who have not already addressed the Senate, be permitted to file written arguments at or before the adjournment of to-day, or to make oral addresses after the opening by one of the managers and the first reply of the President's counsel, and that other two of the counsel for the President who have not spoken may have the privilege of reply, but alternating with the said two managers, leaving the closing argument for the President and the managers' final reply to be made under the original rule.

This proposed substitute was agreed to, yeas 26, nays 20; but immediately thereafter the order as amended by the substitute was disagreed to, yeas 20, nays 26.

Thereupon Mr. Vickers offered the following:

Ordered, That one of the managers on the part of the House be permitted to file his printed argument before the adjournment of to-day, and that after an oral opening by a manager, and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel, and the final reply of a manager under the existing rule.

Mr. John Conness, a Senator from California, thereupon moved to amend by striking out all after the word "ordered" and inserting:

That such of the managers and counsel for the President as may choose to do so have leave to file arguments on or before Friday, April 24.

The amendment of Mr. Conness was disagreed to, yeas 24, nays 25.

The original order as proposed by Mr. Vickers being under consideration, it was, on motion of Mr. Reverdy Johnson, of Maryland, amended by striking out the word "one" in the first line and inserting "two." Then, on motion of Mr. John Sherman, of Ohio, the words "or written" were inserted between the words

[1] Senate Journal, p. 916; Globe Supplement, pp. 247–251.

"printed" and "arguments." And on motion of Mr. John Conness, of California, the time was lengthened from "adjournment of to-day" to "before to-morrow noon."

Thereupon Mr. John B. Henderson, of Missouri, offered an amendment subsequently modified to read as follows:

Amend by striking out all after the word "ordered" and inserting:

"That subject to the twenty-first rule all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before 11 o'clock of Monday, the 27th instant."

A motion to lay the whole subject on the table was disagreed to, yeas 13, nays 37.

At this stage of the proceedings Mr. Thomas A. R. Nelson, of Tennessee, of counsel for the President, addressed the Senate, asking that all the counsel for the President who should be able to participate—Mr. Stanbery being ill—should have leave to address the Senate either orally or in writing, as they should elect. He concluded:

I may say, although I am not expressly authorized to do so, that I am satisfied the President desires that his cause shall be argued by the two additional counsel whom he has provided in the case, besides the three counsel who were heretofore selected for that purpose; and I trust you will not deny us this right. I trust that you will feel at liberty to extend it to all the counsel in the case. If we choose to avail ourselves of it we will do so. I have no sort of objection, so far as I am concerned, that the same right shall be extended to all or to more than an equal number of the managers on the other side. I trust that the resolution will be so shaped as to embrace all the counsel who are engaged in the cause in behalf of the President.

Mr. Nelson also cited the precedent of Judge Chase's trial, when six of the managers and five of counsel for the respondent were permitted to address the Senate.

After consideration of suggested amendments, Mr. Lyman Trumbull, of Illinois, proposed to amend Mr. Henderson's amendment by striking out all after the word "that" and inserting:

As many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally.

And this amendment was agreed to, yeas 29, nays 20.

Then, on motion of Mr. Charles R. Buckalew, of Pennsylvania, these words were added:

But the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

Mr. Richard Yates moved to amend by striking out all after the word "that" and inserting:

Four of the managers and four of the counsel for the respondent be permitted to make printed or written or oral arguments, the managers to have the opening and closing, subject to the limitation of the twenty-first rule.

This amendment to the amendment was disagreed to, yeas 18, nays 31.

Then by a vote of yeas 28, nays 22 the substitute of Mr. Henderson, as amended by the propositions of Messrs. Trumbull and Buckalew, was agreed to, and then the order as amended was agreed to. So it was—

Ordered, That as many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally, but the conclusion of the oral argument shall be by one manager as provided in the twenty-first rule.

2136. After elaborate investigation it was held that the opening and closing arguments on incidental questions in impeachment trials belong to the side making the motion or objection.

The claim of the managers to the closing of all arguments arising in course of an impeachment trial has been denied after examination of American and English precedents.

Discussion of the technical forms of pleading in an impeachment trial, as related to right of opening and closing arguments on an incidental question.

Instance wherein the Senate sitting for an impeachment trial fixed the number of managers and counsel to argue on an incidental question.

One of the managers in an impeachment trial may not move to rescind an order of the Senate as to the conduct of the trial.

On March 23, 1868,[1] in the Senate while sitting for the trial of the impeachment of President Johnson, the counsel for the President offered an application that thirty days be allowed the President and his counsel for the preparation of his case.

The managers for the House of Representatives were first heard, Mr. Manager John A. Logan opposing the request. Then Mr. William M. Evarts, of counsel for the President, was heard in favor. Mr. Manager James F. Wilson next opposed, and was followed by Mr. Henry Stanbery, counsel for the President, who favored the application.

Then Mr. Manager John A. Bingham proposed to reply on behalf of the House of Representatives.

The Chief Justice,[2] who was the Presiding Officer under the Constitution, said:

The Chair announced at the last sitting that he would not undertake to restrict counsel as to number without the further order of the Senate, the rule not being very intelligible to him. He will state further that when counsel make a motion to the court the counsel who makes the motion has invariably the right to close the argument upon it.

Thereupon Mr. Manager Bingham asked the decision of the Senate, saying:

Mr. President, with all respect touching the suggestion just made by the Presiding Officer of the Senate, I beg leave to remind the Senate, and I am instructed to do so by my associate managers, that from time immemorial in proceedings of this kind the right of the Commons in England and of the Representatives of the people in the United States to close the debate has not been, by any rule, settled against them. On the contrary, in Lord Melville's case, if I may be allowed and pardoned for making reference to it, the last case, I believe, reported in England, Lord Erskine presiding, when the very question was made which has now been submitted by the Presiding Officer to the Senate, one of the managers of the House of Commons arose in his place and said that he owed it to the Commons to protest against the immemorial usage being denied to the Commons of England to be heard in reply to whatever

[1] Second session Fortieth Congress, Globe Supplement, pp. 23–27.

[2] Salmon P. Chase, of Ohio, Chief Justice of the United States.

might be said on behalf of the accused at the bar of the Peers. In that case the language of the manager, Mr. Giles, was:

"My Lords, it was not my intention to trouble your lordships with any observations upon the arguments you have heard; and if I now do so it is only for the sake of insisting upon and maintaining that right which the Commons contend is their acknowledged and undoubted privilege—the right of being heard after the counsel for the defendant has made his observations in reply. It has been invariably admitted when required."—(State Trials, vol. 29, p. 762; 44 to 46 George III.)

Lord Erskine "responded the right of the Commons to reply was never doubted or disputed."

Following the suggestion of the learned gentleman who has just taken his seat, I believe that when that utterance was made it had been the continued rule in England for nearly five hundred years.

In this tribunal, in the first case of impeachment that ever was tried before the Senate of the United States under the Constitution (I refer to the case of Blount), the Senate will see by a reference to it that although the accused had the affirmative of the issue, although he interposed a plea to the jurisdiction, the argument was closed in the case by the manager of the House, Mr. Harper. (Wharton's State Trials of the United States, pp. 314–315.)

When I rose, however, at the time the honorable Senator spoke, I rose for the purpose of making some response to the remarks last made for the accused; but as the Presiding Officer has interposed the suggestion to the Senate whether the managers can further reply I do not deem it proper for me to proceed further until the Senate shall pass upon this question.

Some discussion arising, Mr. Reverdy Johnson, of Maryland, called for the reading of this rule:

20. All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

Mr. Manager Bingham thereupon stated that the managers had used but thirty-five minutes of their time.

Thereupon Mr. Bingham was allowed to proceed.

At the close of his remarks there was no claim for recognition from the counsel for the President, and a vote was taken.

2137. On April 1, 1868,[1] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, a witness called by the managers, was being examined, when counsel for the President objected to the competency of a certain question. After arguments had proceeded for some time, the following colloquy occurred between Messrs. Managers John A. Bingham and Benjamin F. Butler on the one side and Mr. Henry Stanbery, of counsel for the President, on the other:

Mr. Manager BINGHAM. I rise to a question here. I understand that we speak here under a rule of the Senate, as yet at least, that requires us to be restricted to an hour on each side.

MR. STANBERY. And one counsel, if you go according to the rule.

Mr. Manager BINGHAM. No; I do not understand that. I understand, on the contrary, that the practice heretofore thus far in the progress of this trial has been to allow the counsel to divide their time as they pleased, within but one hour on each side. The point to which I rise now, however, is this: That we understand that in a proceeding of this sort the managers have always claimed and asserted, where the point was raised at all, the right to conclude upon all questions that were raised in the progress of the trial. The hour has been well nigh expended in this instance on each side, as I am told, though I have not taken any special note of the time. But we raise the question; and I state that the fact that our time has been exhausted, as I am advised, is the only reason why I raise it now; and thus we are cut off from any further reply. Our only object in raising the question is that we shall not be deemed to have waived it, because we are advised that it was settled years ago in Melville's case by the Lord Chancellor presiding and by the Peers that the managers might waive their privilege by their silence.

Mr. Manager BUTLER. We have the affirmative.

Mr. STANBERRY. On this question? Oh, no.

[1] Second session Fortieth Congress, Globe Supplement, p. 70.

2138. On April 28, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the following order was made in a secret session of the Senate, which had retired for consultation, and was reported:

Ordered, That the hearing proceed on the 4th of May, 1876, at 12 o'clock and 30 minutes p. m.; that the opening and close of the argument be given to the respondent; that three counsel and three managers may be heard in such order as may be agreed on between themselves, and that such time be allowed for argument as the managers and counsel may desire.

The argument here referred to was on a question in the nature of a demurrer raised by the plea of the respondent that he was not amenable to impeachment for acts done as Secretary of War because of his resignation of said office.

The order having been read in the Senate sitting publicly for the impeachment, Mr. Manager Scott Lord, on behalf of the House of Representatives, announced that the managers requested to be heard on the question of the opening and closing arguments, and also in regard to the number of managers who should be allowed to speak.

Then Mr. Manager Lord proposed a motion [2] to rescind the order.

The President pro tempore [3] said:

The Chair would state to the manager that a motion by him to rescind the order of the Senate would not be in order; but the manager is permitted to address the Senate.

The question being thrown open to argument, three main points were involved:

1. The rule suggested by the state of the question.
2. The American precedents.
3. The effect of English usage.

(1) As to the rule suggested by the state of the question, Mr. Matt. H. Carpenter, of counsel for the respondent, stated, in support of their claim to the opening and closing, the conditions under which the question presented itself:

Now let me briefly state the condition of the pleadings in this case.

To the articles of impeachment the respondent interposed a plea to the jurisdiction, averring that, when the House ordered the impeachment, and when the articles were exhibited, he was not an officer of the United States, but was a private citizen, etc.

It is contended by some that a citizen holding one office may be removed by impeachment for prior misdemeanors in another office. If this be sound, then the plea to the jurisdiction set up new matter; that is, that he was not in any office. Some of the articles of impeachment did not show that he was out of office as Secretary of War, and none of them averred that he was a private citizen. To this plea the House of Representatives replied double; first, that he was Secretary of War when the acts complained of were done, and continued in such office "down to the 2d of March, 1876;" second, that he was in such office "until and including the 2d day of March, 1876," and until the House, by its committee, had completed an investigation, etc.

At this point Mr. Roscoe Conkling, of New York, interposed to say that this reply of the House was a replication.

Mr. Carpenter (continuing) said:

Certainly, and so they call it.

To the first replication the respondent interposed a demurrer; found on page 8 of printed proceedings. And the managers filed a joinder in demurrer; found on page 9.

The honorable manager [Mr. Hoar] now claims that the first replication was a demurrer. An

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[1] First session Forty-fourth Congress, Senate Journal, pp. 925—927; Record of trial, pp. 19–27.

[2] Record of trial, p. 19.

[3] T. W. Ferry, of Michigan, President pro tempore.

inspection will show that it was not. It does not object to the plea as insufficient in matter of law, but because of certain facts therein set forth. We demurred to this replication, and they joined in demurrer.

If all the pleadings subsequent to the articles of impeachment are regarded as immaterial, then the substance of the matter is, we have demurred to the articles. And a demurrer to the articles is an affirmative assertion that, conceding the truth of the matters therein contained, they are insufficient in law; and upon this proposition we hold the affirmative.

Mr. Carpenter also said:

There is no question as to what is the rule in the courts of law. There it is well settled that the party demurring has the right to open and close the argument. The rules of pleading and proceeding in the ordinary courts of justice, no less than the great canons of the common law, have resulted from centuries of practical experience in the administration of justice, and have been approved by the sages of the law as the best methods to elicit truth and administer justice. If these rules are wisely devised to insure these ends, why should they be departed from in this trial? Is there other motive here than to ascertain the truth and do justice? One of two things is clear; those rules should be observed here or abolished there. It is impossible to maintain that one system of procedure will secure justice in one tribunal and produce injustice in another. And the question is whether the methods which have been established, and from time to time improved, in the courts of law, which are in almost continuous session and dealing with endless variety of causes, are less reliable than rules which might be adopted in a court like this which sits only occasionally after long intervals, and where the personnel of the court is likely to be wholly changed between one trial and another.

Mr. Montgomery Blair, also of counsel for the respondent, said:

The first to which I will call the attention of the Senate is the case of Barnard, with which the managers have shown their familiarity, having referred to it in connection with this plea in abatement. Throughout that case the rule which obtains in courts of justice was adhered to, that counsel who maintained the affirmative of the issue had the opening and reply upon such issue. I would also say—and I am making my remarks very brief—in regard to the affirmative of the issue that this is substantially a demurrer to the articles, because every lawyer knows that in a proceeding like this the articles themselves must allege all the facts necessary to give the jurisdiction in the case alleged and proved. This court of impeachment is a court of limited jurisdiction under the Constitution, and in every court of that character the facts upon which the jurisdiction rests must appear on the complaint by which the case is initiated and inviting the action of the court.

Now, every party demurring has the opening and closing, and the argument which is addressed to the court on the other side, that, as they have the affirmative of the general issue, therefore they ought to be heard in opening and replying upon all the questions arising in the progress of the case, would with equal propriety give the plaintiff in every other court the reply on all such questions, whether applied to a question of law or a question of fact. But that is not the rule. In this case we demur, and thus say that, assuming all the facts alleged to be true, the House of Representatives has no case. That is an affirmative proposition that no impeachment can be maintained on the facts charged, and therefore we are entitled to the opening and conclusion of the argument.

Mr. Manager George F. Hoar, on the other hand, contended:

I desire for one moment to call the attention of the Senate to the fact that the managers undertake here the affirmative of this issue. It is true that the respondent has interposed what he calls a plea to the jurisdiction, and that the jurisdictional question has been raised by making an issue upon that plea; but that is a matter of form and not of substance. If the counsel for the respondent had seen fit to enter a general plea of "not guilty," the question of the jurisdiction of the Senate to try and convict would have been involved in the final vote upon that question. To show the jurisdiction of the court over the subject-matter of the inquiry is a part of the affirmative issue involved in the presentment of articles. So that by the logic of ordinary practice we are brought to the same result as we should be if it were not a question of the prerogative of the House, and the accustomed and well-settled methods of proceeding in impeachment.

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The substance of this issue is this: The House of Representatives say the defendant did certain acts as Secretary of War, and remained Secretary of War until the 2d day of March. The defendant replies, "I was not Secretary of War when you presented your articles, or before," leaving it ambiguous whether he means never before, or that there was a time before when he did not hold the office. In order not to be entangled by that ambiguity, the House of Representatives say, "We mean to assert, as we said before, that you were Secretary of War down to the 2d day of March; and the fact that

you have gone out since (which is the only fact, as we understand the pleadings, now newly set up by you) is not a sufficient answer to our original article."

* * * * * * *

I understand that the question which the Senate ought to determine is this—this is the substance of the whole thing: Is the fact newly affirmed, and first affirmed by this respondent, to wit, the fact that he had ceased to be Secretary of War when these articles were presented, a sufficient answer to the charge? You can not escape that simple proposition. That is what you have got to try: Is the fact newly set up by the defendant, that he had ceased to be Secretary of War when these articles were presented, a sufficient answer to this charge? He sets that up and the House of Representatives say that is no sufficient answer; and that is a demurrer in substance and in fact; and on the question whether a fact so set up by my antagonist newly, for the first time in the case, is a sufficient answer to what I have said, I am always entitled to the opening and close.

The House of Representatives, in the first instance, allege in the original articles:

"ART. 3. That said William W. Belknap was Secretary of War of the United States of America before and during the month of October, 1870, and continued in office as such Secretary of War until the 2d day of March, 1876."

Now, if the Senate will be good enough to observe the plea, which was put in by the honorable counsel, it is this:

"That this honorable court ought not to have or take further cognizance of the said articles of impeachment exhibited and presented against him by the House of Representatives of the United States, because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States."

In that replication there is an ambiguity. If the respondent had said that at the time of the presentment of the articles of impeachment he was not a civil officer, it would have presented the naked question of jurisdiction without ambiguity or difficulty, and the House would have demurred; but he inserts the word "before." That may have one of two meanings. It may amount to an allegation that he was never, before the original articles of impeachment were presented, a civil officer of the United States. I do not say that that astute purpose was in the mind of the counsel who drew the pleading. If we had demurred simply, if we had made a simple demurrer, the respondent might then have come before the Senate and argued that he had responded to the articles that he never was a civil officer of the United States at any time before they were presented, and we should have been left to a discussion upon the verbiage of the article and to the danger of being excluded from court by a blunder in not giving the proper construction to the defendant's language. Accordingly we set up no new matter, but we simply reassign, in regard to the fact which is left doubtful on the expression of the defendant's plea, what we said in our original articles; in other words, we say, "We mean to say that you were a civil officer of the United States until the 2d of March; and therefore, that being the meaning of our original article, your plea presents no legal or proper response." It is a case, therefore, of a reassignment or a reaffirmation of a fact originally set forth in a mode in which the meaning of the original allegation can not be questioned, and saying that, therefore, that fact being considered, the plea of the respondent shows no answer in law. Thus we have presented to the Senate in substance an issue made here in this way—a statement of the original articles that the defendant was a civil officer of the United States down to the 2d day of March, reaffirmed in the replication; a statement by the defendant that before these articles were presented he had ceased to be such civil officer; and a statement on the part of the House of Representatives that that last allegation is no defense to the charge; in other words, a simple demurrer to what is pleaded and well pleaded in the original article; and on such demurrer by the invariable rule of courts both of law and equity the party sustaining the demurrer has the affirmative.

Upon the larger question (setting aside now the pleadings and taking the substance of the issue upon the question of jurisdiction) the plaintiff always has the affirmative. If the respondent had contented himself with introducing a naked plea of "not guilty," he could have availed himself of his objection to the jurisdiction upon that plea, and it would have required the judgment of the court to be given against him or in his favor, without setting up the fact at all, because the original articles do not allege that at the time of the presenting of the articles he was a civil officer of the United States.

And it may be proper to say one further word in conclusion. I understand, in accordance, as was suggested in the very significant question put I think by the honorable Senator from New York, that the true rule of pleading in impeachment cases is this: The House of Representatives present articles setting up the substance of the transaction on which they rely, not in the form of an indictment or of a bill in equity or of a civil declaration certain to a certain intent in general, but setting forth the substance of a transaction. It is not necessary to give dates. You may say "on or about the time." It is not necessary to give legal results or intendments. Then the defendant comes in and in his answer either denies the whole matter if there was no such transaction as is set up, or if there was a transaction of the kind, but an innocent and not a guilty one, with certain different and other circumstances, he tells the story as he alleges it to be, setting up at the same time all special suggestions of law or of defense of fact on which he relies; and the pleadings are made up in that way by a joinder of issue. I do not think it is in the power of parties by pleadings of fact such as take place in ordinary courts of law to compel the Senate to determine, except in its discretion, several issues of fact in succession. Suppose an issue of fact were made up on this question of jurisdiction, is the Senate to be compelled to lay aside its legislative business and determine that, and then the defendant answer over, perhaps setting up some other matter strictly in bar, and have that determined, and so the Senate put to a trial of half a dozen successive issues of fact? I respectfully submit that that is not the rule, but that the proper method of pleading is the one which I have first stated.

Undoubtedly it would have been very proper that the matter set up in this second replication should have been set up in the original articles; but it is also well settled in matters of impeachment that the House of Representatives has in its discretion the right at any time to file additional articles if it see fit. It is also true that this new matter set up in the second replication has been pleaded to without objection on the part of the defendant; that it is before the Senate as an allegation in the cause presented by the authority of the House; and whether it should or should not have been originally inserted in the articles becomes now of no consequence.

(2) As to the American precedents, Mr. Manager Hoar said:

This question arose in the trial of President Johnson, and with the leave of the Senate I will cite that authority and the English authority on which the Senate then based its action. After a discussion of a question of practice which came up, as to the course of proceeding in the trial, the Chief Justice, then presiding in the Senate, after the managers for the House had closed what they had to say, inquired of the counsel for the President respondent whether they desired to reply to what had been said by the managers, and the managers representing the House interposed with this suggestion:

"Mr. Manager BINGHAM. Mr. President, with all respect touching the suggestion just made by the Presiding Officer of the Senate, I beg leave to remind the Senate, and I am instructed to do so by my associate managers, that from time immemorial in proceedings of this kind the right of the Commons in England, and of the Representatives of the people in the United States, to close the debate has not been by any rule settled against them. On the contrary, in Lord Melville's case—"

And this, I believe, is the last case of impeachment which has taken place in England—"if I may be allowed and pardoned for making reference to it, the last case, I believe, reported in England, Lord Erskine presiding, when the very question was made which has now been submitted by the Presiding Officer to the Senate, one of the managers of the House of Commons arose in his place and said that he owed it to the Commons to protest against the immemorial usage being denied to the Commons of England to be heard in reply to whatever might be said on behalf of the accused at the bar of the Peers. In that case the language of the manager, Mr. Giles, was:

"My lords, it was not my intention to trouble your lordships with any observations upon the arguments you have heard; and if I now do so, it is only for the sake of insisting upon and maintaining that right which the Commons contend is their acknowledged and undoubted privilege, the right of being

heard after the counsel for the defendant has made his observations in reply. It has been invariably admitted when required.' (29 State Trials, p. 762, 44–46 George III.)

"Lord Erskine 'responded the right of the Commons to reply was never doubted or disputed.'

"Following the suggestion of the learned gentleman who has just taken his seat, I believe that when that utterance was made it had been the continued rule in England for nearly five hundred years.

"In this tribunal, in the first case of impeachment that ever was tried before the Senate of the United States under the Constitution (I refer to the case of Blount), the Senate will see by a reference to it that although the accused had the affirmative of the issue, although he interposed a plea to the jurisdiction, the argument was closed in the case by the manager of the House, Mr. Harper."

In response to that claim, the distinguished and able counsel for the President, who, I need not remind many of the most distinguished Members of this body, fought every inch of ground, yielded to the demand; and throughout the President's trial, from that time, the House of Representatives was heard in reply upon every question that arose, whether a question of the admission of evidence, of the proceedings, or the final question, following therein the English precedents for five hundred years and the precedent adopted in the first case of impeachment in the Senate, and acting therein also in accordance with what, so far as I have been able to examine, has been the proceeding in every case of impeachment in a State tribunal in this country.

* * * * * * *

In the Blount trial, I believe I have stated with sufficient distinctness, the plea being that William Blount was a Senator of the United States, and therefore not an impeachable civil officer, and also that he had laid down his office before the proceedings were instituted—upon that issue, which presented simply the question of jurisdiction, the opening and close were with the House.

* * * * * * *

Blount's case was the case to which I referred. In the haste of replying to the learned counsel I used the phrase, "the rule settled by itself for the Senate in the first case which came before them." In point of fact, it appears upon the report that the order of proceeding was settled by the four distinguished counselors who took part in it by an agreement, and there is no vote or other express action of the Senate to be found; and it was my purpose, on the suggestion of one of my honored associates, to have made that explanation to the Senate at this time, but it passed from my mind. But Blount's case seems to me to be a very significant and important authority, for it is not credible that those four lawyers, four as able lawyers as the bar of the United States afforded at that time, Mr. Jared Ingersoll, Mr. Bayard, Mr. Harper, and Mr. Dallas, would have conceded so important an advantage to the managers on the part of the House of Representatives without any equivalent, unless they had understood the practice to be so.

* * * * * * *

I speak at this moment only from memory, but I do not understand that the learned counsel correctly states the only American precedent to which he has referred—the case of Barnard. In Barnard's case a plea was interposed to the jurisdiction, in substance the same plea which is interposed here, applying to several of the articles. That plea was argued by itself, and upon that argument the counsel for the State had the opening and the close.

On the other hand, Mr. Carpenter said:

In Blount's trial the House of Representatives had interposed the first demurrer, and therefore the managers were entitled to open and close the argument. In the report of that case (2 Annal of Congress, p. 2248), it is said:

"Mr. Bayard, the chairman, having communicated with Mr. Ingersoll, the leading counsel for the defendant, it was agreed between them that the managers should proceed in the argument first on the part of the prosecution, and that the right to reply should belong to the managers."

That is, the managers and the counsel for the defendant, being good lawyers, were agreed that the managers were entitled to open and close the argument upon the demurrer interposed by them. Such is the rule in all courts of justice. And yet the honorable manager [Mr. Hoar] refers to this understanding between counsel as to the rights of the managers, in that case, to show that the managers, in all cases, are entitled to open and close the argument upon a demurrer interposed by the defendant; which would be exactly the reverse of the rule in courts of law.

Indeed, the broad proposition is maintained by the honorable manager that in the argument of every question to arise in this case, upon every motion made by either side, and upon every demurrer,

no matter by which side interposed, the managers are entitled to the opening and close. And I understood him to contend at your last sitting that this was conceded by the eminent counsel who defended the impeachment against President Johnson, when the question was first raised by Mr. Manager Bingham; and that the court and counsel on both sides thereafter proceeded on that hypothesis.

But an examination of the report of that trial shows that the honorable manager was under a total misapprehension. I read from page 77 of the first volume of the Congressional edition of that trial:

"Mr. Howard and Mr. Manager Bingham rose at the same time.

"The CHIEF JUSTICE. The Senator from Michigan.

"Mr. MANAGER BINGHAM. On the part of the managers I beg to respond to what has just been said.

"Mr. HOWARD. I beg to call the attention of the President to the rules that govern the body.

"Mr. MANAGER BINGHAM. I will only say that we have used but thirty-five of the minutes of the time allowed us under the rule.

"The *Chief Justice.* The Chair announced at the last sitting that he would not undertake to restrict counsel as to number—

They had been restricted as to time—

"without the further order of the Senate, the rule not being very intelligible to him. He will state further that when counsel make a motion to the court, the counsel who makes the motion has invariably the right to close the argument upon it.

"Several SENATORS. Certainly."

Mr. Bingham, however, wished to be heard, and by unanimous consent was heard, just as this body, unquestionably, by unanimous consent would hear any manager on this honorable board who might ask such indulgence. So Mr. Bingham was heard. It is true that in his remarks he set up this unwarrantable claim, which has been repeated by his successor, that the House of Representatives had the right to close every argument whether they had the affirmative of the particular issue or not; but the silence with which the Senate listened leads me to infer that they were perfectly satisfied with the ruling of the Chief Justice, made before Mr. Bingham took the floor, and never recalled, and which was supported by "several Senators" answering from their places "certainly." No vote was taken on the question. It was an interlocutory question; I believe, a motion by the defendant for additional time to answer.

The Chief Justice ruled emphatically that whichever party made a motion, the counsel who made it had invariably the right to close the argument upon it, and several Senators responded "certainly." And nothing occurred to show that the remarks of Mr. Bingham affected the opinion of the Chief Justice or of the Senators who responded in approval. Certainly the ruling was not changed.

(3) As to the English precedents, Mr. Manager Hoar said:

I understand that the rules of proceedings upon impeachment are not governed by the principles or precedents of ordinary criminal courts. The House of Lords or the Senate sitting as a court of impeachment undoubtedly derives great light in the application of the principles of common justice and of law from the sages of the law; but nevertheless impeachment is a proceeding which stands on its own constitutional ground. It is an investigation into the guilt of great public offenders abusing official trusts by the legislative bodies of the country where that practice prevails. In that investigation, as everywhere else, those legislative bodies are equals. Neither branch of the American Congress stands as a suitor at the bar of the other; neither branch of the British Parliament stands as a suitor at the bar of the other; but the concurrent judgment of the two branches is necessary to an impeachment, just as the concurrent judgment of the two branches is necessary to an act of legislation. In the English Parliament the House of Commons brings to the bar of the Lords every bill which it passes, and requests the assent of the Lords thereto, just as in the English Parliament the House of Commons brings to the bar of the House of Lords the fact that it has ascertained the guilt of a great public offender in the course of its official duty, and asks the judgment of the House of Lords as to his guilt and his punishment.

It is an absolutely settled principle of right that upon all questions which arise in the trial of an impeachment the House of Commons has the right to reply. It is a principle which has existed in England for four hundred years, which, when the term "impeachment" is used in our Constitution in clothing this body with one of its highest functions, was imported, as all the other constitutional attendants of an impeachment were imported, except whre they are expressly varied by the Constitution itself.party demurring has the affirmative and the reply in support of his demurrer. except where they are expressly varied by the Constitution itself.

* * * * * * *

But the burden and the duty is on us of proving that charge according to the precedents of this Senate and of all senates, according to the precedents of the House of Lords in England sitting as a court of impeachment, and not according to the precedents of police courts or inferior courts of any other kind sitting anywhere. And the precedents of this Senate and of all senates sitting as a court of impeachment have adopted the rule practiced upon in the English House of Lords, from which impeachments come, for five hundred years, that on all questions the party instituting the proceeding and having the burden of proof throughout the whole issue has the right to reply. That is the proposition, and to that proposition no answer whatever has been vouchsafed or suggested by the honorable counsel for the defendant.

The further proposition, to which no reply has been suggested, was that in this particular on this special issue now made up, the precedent of this Senate and of all senates sitting as a court of impeachment precisely corresponds and agrees with the precedents of all courts whatever, that where a plea to the jurisdiction is interposed and to that plea a demurrer is filed, which—leaving out now this second matter of fact—is the question here, the party demurring has the affirmative and the reply in support of his demurrer.

* * * * * * *

In regard to the English precedent, I beg leave respectfully to refer honorable Senators to a report of which Mr. Burke is the author from a committee appointed by the House of Commons to inspect the journals of the Lords with a view of ascertaining the occasion of the great delay which had happened in the trial of Warren Hastings. This inspection and report were made in the seventh year of that trial. Mr. Burke makes in this report a most ample and thorough discussion of the entire procedure in cases of impeachment in Parliament. He begins by considering the matter of pleadings and the matter of evidence and other matters of procedure, and states in the fullest manner the principle upon which the claim of the managers rested. I do not mean to say that he states anything in regard to this particular question of the opening and close. The report is silent upon that particular subject, but he states the doctrine. He begins by saying:

"Your committee finds that the Lords, in matter of appeal or impeachment in Parliament, are not of right obliged to proceed according to the courts or rules of the Roman civil law, or by those of the law or usage of any of the inferior courts in Westminster Hall, but by the law and usage of Parliament."

Then he cites various precedents from the earliest times, and finds that always the court proceed according to the law and usage of Parliament. Then he cites Lord Coke:

"As every court of justice hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, etc., so the high court of Parliament, suis propriis legibus et consuetudinibus subsistit. It is by the lex et consuetudo parliamenti that all weighty matters in any parliament moved, concerning the peers of the realm, or Commons in Parliament assembled, ought to be determined, adjudged, and discussed by the course of the Parliament and not by the civil law, nor yet by the common laws of this realm used in more inferior courts.

"This is the reason that judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but secundum legem. et consuetudinem parliamenti; and so the judges in divers Parliaments have confessed."

Then he goes on under the "rule of pleading:"

"Your committee do not find that any rules of pleading as observed in the inferior course have ever obtained in the proceedings of the high court of Parliament in a cause or matter in which the whole procedure has been within their original jurisdiction. Nor does your committee find that any demurrer or exception, as of false or erroneous pleading, hath been ever admitted to any impeachment in Parliament, as not coming within the form of the pleading; and, although a reservation or protest is made by the defendant—matter of form, as we conceive—'to the generality, uncertainty, and insufficiency of the articles of impeachment,' yet no objections have in fact been ever made in any part of the record."

I do not think it is worth while to detain the Senate with reading very full and copious extracts from this report. I will take the liberty of placing the book where it will be reached by Senators when they discuss this question.

Taking the other view, Mr. Carpenter said:

In the next place, whatever may be the precedents in the House of Lords in trying an impeachment, we have the authority of the honorable manager himself who has just taken his seat that they are not binding at all in a trial of impeachment under our Constitution. In the debate which took place in

the House (if it can be called a debate where nobody was allowed to speak) as to the ordering of the impeachment, the honorable manager himself stated that the British rules were not applicable, and consequently no aid could be drawn from the trial of Warren Hastings. Now I submit that whatever may have been the rule in the trial of impeachments in England this court should make its own rule, and that should be the rule of right and justice.

I deny, as respectfully as a man may deny anything that comes from a coordinate branch of this Congress, that the House appears here in any other attitude than we appear here, a suitor in this cause. Is it possible, where the Constitution says we are to have a trial, and the House of Representatives presents itself here as the accuser, that it is a part of the court; that it is entitled to any favor here that we are not entitled to? The rule uniformly adopted by the courts of law is a rule which the experience of hundreds of years has determined to be wise and proper, and that is the rule which I understand this Senate has ordered for this trial.

And Mr. Montgomery Blair argued:

It is altogether a mistake, also, that this proceeding was ever otherwise considered here or in England as standing upon any different footing in its general principles than any other proceedings at law. Woodeson, in his lecture on the subject of impeachment (volume 2, page 596), treats it as a suit. His language is that "the House of Commons, as the grand inquest of the nation, become suitors for penal justice." Wilson in his Parliamentary Law speaks of the articles as analogous to an indictment, and hence the rules of practice ought to conform to those of the courts in analogous circumstances, and if they vary from them in England, it does not follow a practice there which does not conform to the general principles recognized here. We have greatly restricted the impeachment proceeding; it is not the proceeding here as there in many of its essential features.

In conclusion, Mr. Carpenter quoted from Cushing's Law and Practice of Legislative Assemblies.

Mr. Joseph E. McDonald, of Indiana, moved to rescind the order giving the opening and closing to the counsel for the respondent.

Mr. A. S. Merrimon, of North Carolina, asked this question:

Do the managers claim to reply in the discussion of all questions, as a matter of right, or only on the ground of practice, which the court may in its sound discretion rightfully change?

Mr. Manager Hoar replied:

I respectfully reply to that question that we do not concede that whatever be the constitutional and lawful prerogatives of the House of Representatives in this regard can be rightfully changed without the assent of the House itself.

The Senate, by a vote of 40 yeas, 18 nays, voted to retire for consultation.

Having retired, the question recurred on the motion of Mr. McDonald, which was decided in the negative; yeas 20, nays 34.

Thereupon, on motion of Mr. George S. Boutwell, of Massachusetts, it was—

Ordered, That four managers on the part of the House of Representatives may be allowed to submit arguments upon the question whether the respondent is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office, and whether the issues of the fact presented in the pleadings are material, and also whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

And then, the Senate having returned to its chamber, the President pro tempore said:

The presiding officer is directed to state that the motion to reconsider the vote by which the order of argument was made is overruled, and also to state that an order is made granting the request of the managers on the part of the House that four of the managers be permitted to argue the case.

2139. On July 7, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question arose as to the admissibility of certain testimony.

Mr. Manager John A. McMahon, who had objected to the testimony, claimed the right as the objector to the opening and closing of the argument, but offered to waive the opening.

Mr. Matt. H. Carpenter, of counsel for the respondent, admitted the right claimed, and insisted that the managers should exercise it.

Thereupon Mr. McMahon argued, and was followed by Mr. Carpenter. Then Mr. Manager George A. Jenks closed.

2140. Instance of action by the Senate as to improper language used by counsel for respondent in an impeachment trial.

The presiding officer at an impeachment trial exercises authority to call to order counsel using improper language.

On April 29, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, and during the final arguments in the case, Mr. Charles Sumner, a Senator from Massachusetts, offered the following:

Whereas Mr. Nelson, one of the counsel for the President, in addressing the Senate, has used disorderly words, as follows, namely: Beginning with personalities directed to one of the managers he proceeded to say, "So far as any question that the gentleman desires to make of a personal character with me is concerned, this is not the place to make it. Let him make it elsewhere if he desires to do it" and whereas such language, besides being discreditable to these proceedings, is apparently intended to provoke a duel or to signify a willingness to fight a duel, contrary to law and good morals: Therefore,

Ordered, That Mr. Nelson, one of the counsel of the President, has justly deserved the disapprobation of the Senate.

The Chief Justice[3] said that the proposition of Mr. Sumner was not before the Senate if objected to.

Mr. John Sherman, of Ohio, thereupon objected.

Mr. Manager Benjamin F. Butler, who was the manager referred to, asked that no further action be taken in regard to the language referred to.

On April 30,[3] the proposition came before the Senate sitting for the trial.

Pending consideration, Mr. Henry B. Anthony, of Rhode Island, asked Mr. Nelson if he intended by the language to challenge the manager to a duel.

Mr. Nelson said that he did not particularly have a duel in mind. He simply resented a charge by the manager, and he had no idea of insulting the Senate.

Mr. Reverdy Johnson, of Maryland, moved that the proposition lie on the table, and the motion was agreed to; yeas 35, nays 10.

2141. On June 16, 1876,[4] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, offered a paper in the nature of a plea that the proceeding be dismissed because the Senate had affirmed its jurisdiction of the case by less than a two-thirds vote.

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[1] First session Forty-fourth Congress, Record of trial, pp. 192, 193.

[2] Second session Fortieth Congress, Senate Journal, p. 927; Globe supplement, p. 341.

[3] Senate Journal, p. 928; Globe Supplement, pp. 350, 351.

[4] First session Forty-fourth Congress, Record of trial, p. 170.

Objection arose to placing the paper on file, whereupon Mr. Black said:

Mr. President, we offer a paper asserting our legal and constitutional rights, as we understand them. A Senator rises and says he objects; a manager rises and says he objects. Is that a reason for simply throwing it under the table? Is there not to be some reason given for such a thing as that? What is to be done with this? Walk over us I admit you can, if a majority see proper to do so. They can do as they please; they can order it to be thrown under the table; but some little respect ought to be shown a man who is struggling for his liberty and his reputation—

Mr. George F. Edmunds, a Senator from Vermont, interrupting, said:

I call the counsel to order. I do not think, that the language he is addressing to the Chair is fit to be addressed to this court.

The President pro tempore [1] said:

Counsel will use language which is proper and decorous. * * * The counsel win proceed, using proper language. The Chair will call him to order if he does, not use proper language.

2142. It was held that a motion relating to the sitting of the Senate in an impeachment trial might be argued by counsel.—On July 7, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, a Senator from Vermont, moved that the Senate take a recess until 7.30 p.m. for the purpose of an evening session.

Mr. Matt H. Carpenter, of counsel for the respondent, was making an appeal against an evening session, when Mr. Edmunds raised the question of order that on a question of this kind counsel were not entitled to be heard.

The President pro tempore [1] overruled the point of order.

Thereupon Mr. Carpenter made his protest, and the Senate decided the motion of Mr. Edmunds in the negative.

2143. In arguing in an impeachment trial counsel take position under direction of the Senate.—On July 25, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, was about to address the Senate in the final summing up, when Mr. John A. Logan, a Senator from Illinois, said:

Before the counsel proceeds, I will state that I have heard some complaints made about the position that the counsel and managers have to occupy in the presence of the Senate. I therefore suggest that the counsel be allowed to occupy any position he desires from which to address the Senate.

Thereupon, by unanimous consent, Mr. Carpenter was permitted to stand in the outer tier of seats.

2144. Instance wherein a manager was permitted to move a change of the rules governing the Senate in impeachment trials.—On April 11, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager John A. Bingham, on behalf of the managers, moved in the Senate for a change in one of the rules governing the trial.

This motion was entertained.

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[1] T. W. Ferry, of Michigan, President pro tempore.

[2] First session Forty-fourth Congress, Record of trial, p. 202.

[3] First session Forty-fourth Congress, Record of trial, pp. 318, 319.

[4] Second session Fortieth Congress, Globe supplement, p. 147.

2145. Instance wherein the managers of an impeachment declined to answer a question propounded by a Senator during the trial.—On April 1, 1868,[1] in the Senate, during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, was under examination. Counsel for the President objected to a question tending to elicit from witness the substance of a conversation with General Thomas, and statements of the latter as to the means by which the President proposed to obtain possession of the war office.

In the course of the discussion as to the admissibility of the question, Mr. Reverdy Johnson, Senator from Maryland, propounded the following:

> The honorable managers are requested to say whether evidence hereafter will be produced to show—
>
> *First,* That the President, before the time when the declarations of Thomas, which they propose to prove, were made, authorized him to obtain possession of the office by force or threats, or intimidation, if necessary; or,
>
> *Secondly,* If not, that the President had knowledge that such declarations had been made and approved of them.

To which Mr. Manager John A. Bingham replied:

> I am instructed by my associates to say—and I am in accord in judgment with them, Mr. President—that we do not deem it our duty to make answer to so general a question as that; and it will certainly occur to the Senate why we should not make answer to it.

2146. During an impeachment trial the managers and counsel for the respondent are required to rise and address the Chair before speaking.—On July 7, 1876,[2] in the Senate sitting for the impeachment of trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon, and Mr. Matt. H. Carpenter, of counsel for the respondent, were engaged in a colloquy, when the President pro tempore[3] said:

> The Chair will remind the gentlemen that they must rise to speak, and address the Chair. The Chair will insist upon it. * * * The Chair will again remind gentlemen, and hopes he does it for the last time, that the counsel as well as the managers should address the Presiding Officer, that he may maintain the rights of the parties. It is due to the Senate that it should be done; and the duty of the Chair demands it to protect the respect due to the Senate. The Chair will state, also, that he will not recognize a gentleman on either side unless he does rise and address the Presiding Officer.

2147. During an impeachment trial a proposition by managers or counsel is not amendable by Senators, but yields precedence to one made by a Senator.

A proposition offered by a Senator during an impeachment trial is amendable by Senators, but not by managers or counsel.

On June 6, 1876,[4] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a proposition fixing the time for the hearing of evidence on the merits was under discussion, and motions were offered by the managers for the House of Representatives, by the counsel for the respondent, and

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[1] Second session Fortieth Congress, Globe supplement, pp. 70, 71.

[2] First session Forty-fourth Congress, Record of trial, pp. 190, 191.

[3] T. W. Ferry, of Michigan, President pro tempore.

[4] First session Forty-fourth Congress, Record of trial, p. 166.

by Senators. A question arising as to amendment and precedence the President pro tempore [1] said:

The Chair has ruled that a proposition made by managers or counsel is not amendable by Senators; but any proposition made by a Senator is amendable by a Senator, nor can the proposition made by Senators be amended by the counsel or managers. A motion made by a Senator has priority of one offered by the managers or the counsel.

2148. During an impeachment trial an order proposed by a Senator is debatable by managers and counsel, but not by Senators.—On June 1, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. William Pinckney Whyte, a Senator from Maryland, offered an order fixing the time for further pleadings on behalf of the respondent. Mr. Matt. H. Carpenter, of counsel for the respondent, and Mr. Manager Scott Lord, on behalf of the House of Representatives, discussed the proposed order at some length.

Thereupon Mr. Allen G. Thurman, a Senator from Ohio, proposed to address the Senate.

The President pro tempore [1] reminded him that debate was not in order:

Mr. Thurman said:

I do not wish to debate, but I want to know the rule of the Senate on this subject. I want to know whether there is to be an unlimited discussion of counsel and managers on every order that is offered by a Senator. In my judgment it is all irregular.

The President pro tempore said:

The Chair will state in reply to the Senator from Ohio that the Chair was holding under the rule that each of the parties is entitled to one hour's debate on any motion or order submitted.

2149. During the Peck impeachment trial the respondent assisted his counsel in examining witnesses, in argument on incidental questions, etc.—On January 11, 1831,[3] in the hight court of impeachment during the trial of the cause of the United States *v.* James H. Peck, the respondent, who was United States district judge of Missouri, assisted his counsel, personally addressing the court to offer documentary evidence, to explain testimony which he proposed to offer, to propound questions to the witness, to make a statement supplementary to the testimony of a witness, and to argue as to the admissibility of certain testimony.

2150. Delays in the Johnson trial caused by illness of counsel for respondent were the occasion of protest on the part of the managers and of action by the Senate.—On April 16, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. William M. Evarts, of counsel for the President, announced that the defense had reached a point where it would not be convenient to produce any more testimony on this day. On April 14 the Senate had adjourned because of the illness of Mr. Henry Stanbery, of counsel for the respondent, and on April 15 the proceedings had been modified somewhat because of his continued illness. He was still absent on the

[1] T. W. Ferry, of Michigan, President pro tempore.

[2] First session Forty-fourth Congress, Record of trial, p. 160.

[3] Second session Twenty-first Congress, Report of trial of James H. Peck, pp. 267–272.

[4] Second session Fortieth Congress, Globe Supplement, pp. 208, 209; Senate Journal, pp. 906, 907.

16th, when Mr. Evarts, after introducing considerable testimony made announcement as above stated.

This caused a protest from Mr. Manager Benjamin F. Butler, in the course of which he said:

We adjourned early on Monday, as you remember, and on the next day there was an adjournment almost immediately after the Senate met because of the learned Attorney-General. Now, all we ask is that this case may go on.

If it be said that we are hard in our demands that this trial go on, let me contrast for a moment this case with a great State trial in England, at which were present Lord Chief Justice Eyre, Lord Chief Baron McDonald, Baron Hotham, Mr. Justice Buller, Sir Nash Grose, Mr. Justice Lawrence, and others of Her Majesty's judges in the trial of Thomas Hardy for treason. There the court sat from 9 o'clock in the morning until 1 o'clock at night, and they thus sat there from Tuesday until Friday night at 1 o'clock, and then, when Mr. Erskine, afterwards Lord Chancellor Erskine, asked of that court that they would not come in so early by an hour the next day because he was unwell and wanted time, the court after argument refused it, and would not give him even that hour in which to reflect upon his opening which he was to make, and which occupied nine hours in its delivery, until the jury asked it, and then they gave him but a single hour, although he said upon his honor to the court that every night he had not got to his house until between 2 and 3 o'clock in the morning, and he was regularly in court at 9 o'clock on the following morning.

That is the way cases of great consequence are tried in England. That is the way other courts sit. I am not complaining here, Senators, understand me. I am only contrasting the delays given, the kindnesses shown, the courtesies extended in this greatest of all cases, and where the greatest interests are at stake, compared with every other case ever tried elsewhere. The managers are ready. We have been ready; at all hazards and sacrifices we would be ready. We only ask that now the counsel for the President shall be likewise ready, and go on without these interminable delays with which when the House began this impeachment the friends of the President there rose up and threatened.

At the conclusion of Mr. Butler's remarks, Mr. John Conness, Senator from California, offered this order:

Ordered, That on each day hereafter the Senate sitting as a court of impeachment shall meet at 11 o'clock a. m.

Mr. Charles Sumner proposed the following as a substitute therefor:

That, considering the public interests which suffer from the delay of this trial, and in pursuance of the order already adopted to proceed with all convenient dispatch, the Senate will sit from 10 o'clock in the forenoon to 6 o'clock in the afternoon, with such brief recess as may be ordered.

Under the ruling the proposed order went over to April 17 for consideration, when Mr. Sumner's proposed substitute was disagreed to, yeas 13, nays 30. The original order offered by Mr. Conness was then agreed to, yeas 29, nays 14.

The Senate had heretofore met at 12 m. under the rule.

2151. Instance during an impeachment trial wherein the Presiding Officer admonished managers and counsel not to waste time.—On February 15, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, in the course of the introduction of testimony, the Presiding Officer[2] said:

While the Presiding Officer makes no criticism on the course of the examination and cross-examination, he desires to say that the time of the Senate is very precious, and he hopes that there will be as little time taken by immaterial questions, either by the managers or by counsel, as possible, and that we may get along with this case.

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[1] Third session Fifty-eighth Congress, Record, p. 2625.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

2152. The Senate, and not the Presiding Officer, decides on a motion for attachment of a witness.

Instance wherein, during the Swayne trial, testimony was introduced to show the propriety of an attachment against an absent witness.

On February 10, 1905,[1] in the Senate sitting for the trial of Judge Charles Swayne, after the pleadings had been concluded and when the witnesses were called, Mr. Henry W. Palmer, of Pennsylvania, manager on behalf of the House of Representatives, said:

Mr. President, in the case of Joseph H. Durkee, of Jacksonville, Fla., we have a certificate of a physician stating that he is not able to attend. The certificate was sent to the Presiding Officer and by him handed to me, and it has been exhibited to counsel on the other side.

Mr. Durkee is a witness who has been subpoenaed by both sides, and is a material and important witness. I have a witness present who will testify with respect to Mr. Durkee's present condition, and I ask that Mr. B. S. Liddon be summoned to testify what Mr. Durkee's present condition is, for the purpose of moving for an attachment.

Mr. Liddon was then sworn and examined, giving testimony indicating that Mr. Durkee was able to attend.

The testimony being concluded, Mr. Palmer announced that on that showing the managers would ask for an attachment. He suggested, however, that if the counsel for respondent would consent, it could be arranged to take the deposition of the witness at his home. The counsel declined to agree to this.

Then the Presiding Officer[2] said:

The Senate will take into consideration the motion for an attachment, and decide it later on. The Presiding Officer will merely say at the present time that it seems to be understood that the witness is suffering from a serious disease, which makes it very difficult for him to travel, certainly without an attendant, and that for that reason his son, who is a physician, has been summoned. It would seem as if it were hardly required to issue an attachment until information is communicated to the Senate as to whether there is a real refusal on the part of the witness to come or whether the witness will come with his son as an attendant.

For that reason the Presiding Officer suggests that a decision of the motion be postponed, and the Sergeant-at-Arms will be instructed to ascertain whether the witness will come under the circumstances.

Later on this day, however, on a question relating to another witness, the Presiding Officer said[3]:

The rules require that a motion for an attachment shall be decided by the Senate rather than by the Presiding Officer. The Presiding Officer, however, will suggest that the motion being now made, a decision upon it can be delayed for a little time. There may be some further information. So it is not necessary to submit the question at this time to the Senate, unless it be desired.

2153. On February 13, 1905,[4] in the Senate sitting for the trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, in respect to the application made by counsel for the respondent for an attachment against Louis P. Paquet, we desire to have the matter properly investigated as to whether the witness is really able to attend or not, and to that end we ask that the attachment may issue, and that the officer or the Sergeant-at-Arms serving the same may be charged with the discretion of determining whether the

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[1] Third session Fifty-eighth Congress, Record, pp. 2229, 2230.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

[3] Record, p. 2242.

[4] Third session Fifty-eighth Congress, Record, pp. 2459, 2460.

witness is able to attend or not. That is the course which has been pursued in practice with which I am familiar. In other words, where there is doubt in the mind of the court or of counsel as to whether a witness is able to attend or not, the court awaits the return of the sheriff or the marshal in the premises.

The Presiding Officer [1] said:

The sixth rule of the Senate for impeachment trials provides that motions for attachment must be decided by the Senate rather than the Presiding Officer. Whether it be necessary for the Senate to retire to consult upon this matter the Presiding Officer does not know, but he will state the motion to the Senate.

Mr. Paquet, a witness summoned for the respondent, has furnished the certificate of a physician that he has been ill since January 31, and is still ill, confined to his bed, and probably will not be able to travel for two or three weeks. Counsel for respondent now moves that an attachment may issue, and that the Sergeant-at-Arms in serving the same be authorized to use his discretion to determine whether the witness is or is not able to travel. Unless there be some motion made to retire for the consideration of this question, the Presiding Officer will submit the motion to the Senate.

Mr. John C. Spooner, a Senator from Wisconsin, said:

Mr. President, whether a witness shall be brought by an attachment or not is for the judgment of the Senate as a court, I should think, and I should like to hear it somewhat discussed, if there are authorities sustaining the proposition, that a court issues an attachment for a witness leaving it to the sheriff to determine whether the judgment of the court or the writ shall be executed or not. I should like to have the authorities produced.

After this suggestion the motion for process was temporarily withdrawn.

2154. Rule in the Swayne trial governing Senators as to colloquies and questions addressed by them to managers, counsel, or other Senators.

In the Swayne trial Senators were permitted a freedom of debate greater than usual.

On January 27, 1905,[2] in the Senate sitting for the impeachment of Judge Charles Swayne, a debate arose between Mr. Henry W. Palmer, of the managers for the House of Representatives, and Mr. J. C. S. Blackburn, a Senator from Kentucky.

The Presiding Officer said:

The Chair wishes to observe at this point that he doubts the propriety of debate between Senators and the managers of the impeachment on the part of the House. He does not speak positively upon that question, not having had an opportunity to examine the precedents.

On February 3,[3] in the Senate sitting for the trial, Mr. Augustus 0. Bacon, of Georgia, offered and the Senate agreed to an order containing the following rule:

It shall not be in order for any Senator to engage in colloquy, or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

The effect of this rule seems to have been to permit debate and suggestions by Senators. Thus on February 10 [4] Mr. Joseph W. Bailey, of Texas, suggested as to testimony and debated. On February 13 [5] there was extended debate of Senators on the subject of issuing processes for witnesses. On February 14 [6] Mr. Porter J. McCumber, of North Dakota, and others, discussed evidence. Also on February

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, pp. 1450, 1451.

[3] Record, p. 1819.

[4] Record, p. 2240.

[5] Record, pp. 2459, 2460.

[6] Record, p. 2532.

23,[1] on an order relating to the printing of arguments of managers, there was free debate by the Senators. Yet on an important question relating to the admissibility of testimony, arising on February 14[2] and 16, the Senate, after some debate, decided to enforce the rule providing for secret sessions. In other cases, also, the doors were closed. But during this trial Senators were permitted a greater freedom of debate than in other trials.

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[1] Record, pp. 3142–3145.

[2] Record, pp. 2536–2540, 2720, 2721, 2899.

Chapter LXVIII.

PRESENTATION OF TESTIMONY IN AN IMPEACHMENT TRIAL.

2155. The judgment of the Lords in impeachments is given in accordance with the law of the land.

The trial of impeachments before the Lords is governed by the legal rules of evidence.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments.

Judgment. Judgments in Parliament, for death, have been strictly guided per legem terrae, which they can not alter; and not at all according to their discretion. They can neither omit any part of the legal judgment, nor add to it. Their sentence must be secundum, non ultra legem. (Seld. Jud., 168,

[1] Rules as to evidence in Blount's case (see. 2309) and Pickering's case (see. 2331).

[2] Subpoenas issued by direction of a committee. Section 2463 of this volume. As to issuing process. Section 2483. Senate decides as to attachment of witness. Section 2152. Witness excused. Section 2394.

[3] Objection to evidence by a Senator. Section 2268.

[4] A person charged with impeachable offense not compelled to furnish evidence against himself. Section 2514.

[5] Exhibitions in nature of evidence not to be attached to articles. Section 2124. Briefs as to pleas to jurisdiction filed during presentation of testimony. Section 2125. Testimony not in order during voting on the articles. Section 2396.

[6] See also sections 2082–2089, 2138, 2226, 2230, 2239.

171.) This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevailed; for impeachments are not framed to alter the law, but to carry it into more effectual execution against too powerful delinquents. The judgment therefore is to be such as is warranted by legal principles or precedents. (6 Sta. Tr., 14., 2 Wood., 611.) The chancellor gives judgment in misdemeanors; the lord high steward formerly in cases of life and death. (Seld. Jud., 180.) But now the steward is deemed not necessary. (Fost., 144; 2 Wood., 613.) In misdemeanors the greatest corporal punishment hath been imprisonment. (Seld. Jud., 184.) The King's assent is necessary in capital judgments (but 2 Wood., 614, contra), but not in misdemeanors. (Seld. Jud., 136.)

2156. In the Belknap trial the Senate directed the managers and counsel for respondent to furnish to one another lists of the witnesses they proposed to call.

The Senate denied in the Belknap trial the application of respondent's counsel for a statement of the facts which the managers expected to prove by each witness.

Form of a motion submitted by counsel for respondent in an impeachment trial.

On June 6, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, an order was made providing that on July 6, 1876, the Senate would proceed to hear the evidence on the merits of the trial in this case.

Thereupon Mr. Montgomery Blair, of counsel for the respondent, submitted this motion:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES

v.

WILLIAM W. BELKNAP.

William W. Belknap, by his counsel, moves the court that an order be made upon the managers on the part of the House of Representatives to furnish within twenty-four hours to the accused or his counsel a list of the witnesses whom they intend to call, together with the particulars of the facts which they expect to prove by them.

It being stated on behalf of the managers that a large portion of the testimony, and especially the material testimony, had been printed, Mr. Blair said:

Of course in respect to that part of the testimony which has been printed, it is very easy to furnish it to us; but I beg leave to say that there is a large portion of the testimony taken before the Judiciary Committee of which we are not at all informed, which we have applied to the managers for copies of, but they repelled us and refused to give them to us. We do not know what part of it they may rely on at all. We have rumors of its character from the press; but we do not know what part of it they mean to rely upon, or what facts they mean to rely upon; and as we are ordered to prepare, we want to make that preparation to meet such case as they may make.

Mr. Allen G. Thurman, a Senator from Ohio, asked this question:

Is there any precedent for the order asked for, either in impeachment trials or in ordinary courts of criminal jurisdiction?

To this Mr. Jeremiah S. Black, of counsel for the respondent, replied:

No; but certainly there ought to be one made. * * * We do not go upon precedent here; that is, this application is not founded upon anything that has ever happened before. There never was a case like this before. I have never heard whether the managers object to this order or not. If they do, I cannot conceive for what reason. Certainly they do not intend to keep us in ignorance of the kind of

[1] First session Forty-fourth Congress, Senate Journal, p. 951; Record of trial, pp. 167–169.

case they are going to produce against us and take us by surprise and then proceed and run over us and get a conviction against us on grounds that we have no notice of. They do not think it is unfair, I suppose, to tell us beforehand what sort of facts they intend to produce.

They have their witnesses here, or at least within easy reach. Ours are scattered all over the continent; some of them in California, others in the Indian Territory. It becomes absolutely necessary for us, as soon as we can, to get out our subpoenas for witnesses and use all diligence in bringing them here. If the trial is to go on upon the 6th of July or at any other time, even a month later than that, we will be hard pressed for time. We can not know what particular witness we need or how many of them unless we are informed of theirs and understand what facts they mean to prove or try to prove.

I maintain, as to every public accuser, a manager of the House of Representatives, an attorney-general, or district attorney, if he has a criminal case which he intends to prosecute against a citizen, that he is bound by his duty and as a lover of justice to disclose the whole case to the defendant as fully as possible and at the earliest moment.

The gentlemen say, when we ask them for this list, that it is a secret which they have the right to keep and they will keep it until the moment of the trial and then spring it upon us, so that we shall be unable to meet it by contradiction or explanation. They wish to take us by surprise as much as possible, and convict the defendant, if they can, without giving him a chance to show his innocence. They say there is no precedent for such a call as we make upon them now. Nothing like this is found in the common-law cases. I do not know how far back they want us to go for a precedent old enough to suit them. In modern times it has never been refused. I admit that by the common law, whose authority they invoke, a man on trial in any criminal court had no chance at all for life or liberty. He was not allowed counsel. He was not allowed to call witnesses. He was not confronted with the witnesses against him. None of those privileges which are secured in our Constitution were given to a party charged with a criminal offense by the ancient common law. That common law was a bloody old beast.

Mr. Manager Scott Lord, on behalf of the House of Representatives, said:

What is the proposition which the counsel makes? It is no more and no less than this, that he has the right to invade the room of the managers, that he has the right to ascertain their course of trial, that he has the right to know every possible witness to prove a certain fact.

Sufficient it is to say that the wisdom of all the ages is against it. The learned counsel had better devote himself to answering the question of the Senator, and find whether in all the past ages a single precedent of this kind has been had in any criminal proceeding. It is not enough for him to rise here and say he did not hear the managers object. He may possibly have been out of the room. It is not enough for him to stand here and say, "We need to make a precedent in this case." It is enough for us to answer that he asks for an extraordinary precedent, extraordinary proceeding, against the wisdom of all the past, and in regard to which he can not find the first authority in rummaging through all the books of the common law and all the books relating to criminal jurisprudence. I am surprised that any such proposition should be seriously made here, that we should be compelled, in advance, to disclose to him the names of witnesses and what each witness is expected to testify to, when we have laid before him in the broadest manner every charge that we make, and one article of these articles of impeachment contains seventeen specifications.

The order proposed by counsel for respondent was disagreed to by the Senate, without division.

The Senate then agreed to this order:

Ordered, That the managers furnish to the defendant, or his counsel, within four days, a list of witnesses, as far as at present known to them, that they intend to call in this case; and that, within four days thereafter, the respondent furnish to the managers a list of witnesses, as far as known, that he intends to summon.

2157. In the Belknap trial the Senate adjourned to await the attendance of a witness declared by the respondent, on oath, to be "material and necessary for his defense."

The Senate declined to postpone formally the Belknap trial to await the attendance of a witness for the respondent.

Respondent's application in the Belknap trial for delay to await a witness's arrival was not required to be accompanied by a statement as to what he would prove.

Form of respondent's application for delay to await a witness in an impeachment trial.

On January 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, after the testimony for the respondent had proceeded some time, Mr. Matt. H. Carpenter, of counsel for the respondent, announced that one witness whom they had asked to have summoned—John S. Evans—had not appeared. He said that his presence was necessary at this stage, and asked the Senate sitting, for the trial to adjourn some reasonable time for Mr. Evans to arrive.

To this the managers on the part of the House of Representatives objected.

Mr. Manager George F. Hoar said:

I understand the rule and practice to be perfectly well settled and enforced in all courts where justice is administered according to the forms and practice of the common law that a party in a civil or criminal case applying either for a continuance or a postponement on account of the absence of a witness must show—

First. That the witness has been duly summoned;

Second. That the evidence which the witness would give if present is material and important to his cause; and,

Third. That the evidence must be so set forth that the opposite party may, if he choose, elect to admit that the witness, if present, would so testify; not to admit the fact, but that the witness, if present, would so testify; and that election is always tendered to the opposite party.

There is but one exception to the universality of that rule, which is, that where the evidence is of itself of a character which the witness only could state, that is not required of the party, as, for instance, if the question were of the construction of a dam which had been taken away, the scientific expert under whose direction that structure was built would be the only person who could describe it, and it would be impossible for the party ordinarily to say what his witness would testify to on that subject if he were present; but with that exception, of the evidence of experts where it is of such a character that the evidence could not be understood by the party who undertakes to set it forth, the rule is universal.

In the present case I fully concede that the defendant's counsel ought to stand before the Senate as if they had summoned the witness. They applied to the Senate for a subpoena. The Senate granted the order. The Sergeant-at-Arms did not execute it because, as he understood, there had been a subpoena issued already and served at the instance of the other party. So we agree that the defense stands here in all respects having used all diligence to obtain the presence of this witness; but the defendant shows no reason whatever why he should not state the evidence which Mr. Evans would give if he were present and give us an opportunity to elect to consent to that evidence. In fact, Mr. Evans, it appears, has been twice examined very fully in regard to this whole transaction before two different committees of the House. It is true that there was nobody present at that examination representing the defendant, and therefore certainly it is true that the defendant can not be sure that the facts favorable to him within Evans's knowledge were brought out in that examination. I do not overlook that. I make that concession also as fully as the learned counsel could desire. Still, either he can state what Mr. Evans would testify if he were present, and his reasons for believing that he would so testify, or he has no reason to believe that Evans's testimony would be valuable to him if he were here. He can not escape, as it seems to me, that dilemma. Either he has no reason to suppose that Mr. Evans would be more important to him than any other citizen of the United States who is at a distance of a thousand miles from this place or he can state what it is that this witness knows and would prove, and give us the opportunity to make our election.

I conceive that any distinction in practice which has grown up in State courts between a first continuance from term to term and a second continuance from term to term has nothing whatever to do

[1] First session Forty-fourth Congress, Senate Journal, pp. 976, 977; Record of trial, pp. 258–261.

with this matter. This is not a court having terms. It is a court which expires with its first and only term. This is not the case of an application for a continuance of a trial made before trial. It is a case where the trial has begun and has proceeded with the full consent in this particular of both parties. The evidence is fresh in the minds of all the members of the court. This, therefore, is a simple application for the postponement of a trial which is already far advanced toward its termination.

My associate [Mr. Manager Jenks] desires me to state the case of the trial of Smith and Ogden in the circuit court of the United States, where Judge Paterson establishes the rule that I have stated.

Mr. Montgomery Blair, of counsel for the respondent, said:

It is proposed, I suppose, from this initiatory proceeding, to treat this as an application for a continuance. Everything that has been said proceeds upon the assumption that we have applied for a continuance of this case, whereas we only ask that a witness who has been duly summoned, who ought to be here now, for whose absence we are not responsible, should be allowed a reasonable time to make his appearance, being detained by freshets or some other cause for which the party defendant is not in any way responsible. We have no disposition to abuse the patience of this body. We do not expect a delay beyond the time when the Senate will be in session in the transaction of its other business. We do not expect to detain this body with any long speeches. We have evinced no disposition whatever at any time, as I may appeal to the experience of every gentleman who hears me, to abuse the patience of this body in any respect, and above all not to try any sharp practice upon this body, but to have a fair trial.

I utterly protest against the application of rules derived from other proceedings altogether to the occasion which has arisen now, which is not an application for a continuance. We only ask that this body will wait until a man who has been summoned by its order makes his appearance here so that we may proceed with our examination.

While I am up I will say, however, that my learned friend on the other side and the very learned gentleman who makes this proposition are altogether mistaken or I am in regard to the rules of practice about what terms a party is to have who makes his application for a continuance. The gentleman who is associated with me has said that on application for a second continuance under the rules of the State in which I have practiced the party is required to state what the witness is expected to prove. The practice which prevails in the circuit court of this District and in Maryland, as my learned friend who represents that State on this floor [Mr. Whyte] will bear me out, is that where a party makes an application for a continuance, and states what he expects to prove by the witness, that proof is assumed to be a fact, not that the witness has proved it, but it is assumed to be a fact, an indisputable fact, according to the practice prevailing in this District, and in Maryland, from which State we derive the practice that prevails in the District. So that if the rule is to be enforced here, and the analogy is to be taken from the practice prevailing in this District, if we state what we expect to prove by this witness, and they proceed to trial, what we expect to prove is assumed to be an undisputed fact. That is the law of this District and the practice of the courts of the United States in the District of Columbia. That is a peculiar law. It does not prevail in the other courts with which I am familiar. It does not prevail in Missouri, where I practiced a great many years; but it is a law of this District and of Maryland. So then there are differences in respect to the laws of the different States. There is no uniform law on this subject. There is no common law upon this subject. There is none here recognized by this body. This court will have to make a rule for itself, and especially will it have to make a rule for itself in a proceeding which is not a motion for a continuance, but a motion for the delay of this trial until a witness can reach here who has been duly summoned. * * *

And, in response to a question by Mr. Manager Hoar, Mr. Blair said:

The gentleman knows perfectly well that when cases are called for trial in the ordinary courts of judicature the parties are asked whether they are ready for trial, that then and there the parties announce whether they are ready or not, and that motions for continuance are made and settled before they proceed to trial. Here there has been no occasion of that kind. We have been required to go to trial on this occasion without any "ifs "or "ands" about it, whether we were ready or not. We have been appointed a given day to be here. We have been notified that our witnesses would be summoned, and we have had the allowance of a committee of this body to summon them. We put their names in the hands of the officer to summon them. He has summoned them; and it is not our fault that this witness is not here. The analogies of the gentleman break down. One of the most unjust things in this world is to apply false analogies. It is the most misleading of all modes of reasoning.

Mr. Jeremiah S. Black, also of counsel for the respondent, argued:

I deny utterly the rule which they lay down with so much emphasis as being the true and only rule applicable to such a case—that is, that when a party is caught with an absent witness whom he had used all diligence to get here, and who he had good reason to believe would be here—it is either fair or just or law to push him forward or make him show the specific testimony which the witness would give if he were here, unless there be some reason to doubt the good faith of the application or the materiality of the witness, supposing him to be here.

The managers have produced a book, The Trials of Smith and Ogden. There the counsel for the accused asked for the continuance of the cause until they should be able to get certain witnesses from Washington, to which it was objected that they had not stated what specific facts the witnesses would prove if they were present in court. Mr. Colden, of counsel for the defense, answered:

"That is not the law as we have hitherto understood it. If we are obliged to offer an affidavit, we conceive it to be sufficient, in the first instance, to declare generally that the witnesses are material without specifying the particular points to which they are to testify, and that without them our client can not safely proceed to trial."

To which the answer of the judge was this:

"You must offer an affidavit, and must show in what respect the witnesses are material."

Now mark the reason upon which that ruling was founded:

"The facts charged in the indictment took place, and are laid, in New York; the witnesses are admitted to have been during that period at Washington. The presumption is therefore that they can not be material, and this presumption must be removed by affidavit."

That is the rule. If we were asking for a postponement on account of a witness who manifestly was a thousand miles off at the time the fact which we wished to examine him upon occurred, that would raise such a presumption against us that the court would very properly call upon us to show how that witness could be a material witness. They have cited this book as a precedent, and, so far as I have read it, it is a sound precedent. Let them follow it up.

At the conclusion of the arguments, Mr. Roscoe Conkling, of New York, proposed this order, which was agreed to without division:

Ordered, That the Senate will receive any evidence otherwise competent which the counsel for the respondent assure the Senate will be connected with the case by the testimony of the witness Evans, now absent, but whom the respondent duly asked to have summoned and who is expected to appear.

Later, during the same day,[1] Mr. Carpenter announced:

Now, Mr. President, we have completed all the testimony that in our opinion as counsel we can properly and safely introduce until Mr. Evans is sworn. We now repeat the request that the court adjourn for a reasonable time to enable Mr. Evans to be present.

Mr. Manager McMahon said:

We certainly renew our objections, Mr. President, to a continuance without a compliance with the rule, or, if not the rule, a rule that ought to be established by the Senate, that the materiality or pertinency of the testimony expected be submitted to the Senate. The question has been argued.

Soon after Mr. Carpenter asked leave to file this affidavit in support of their motion:

United States Senate sitting as a court of impeachment

The United States
v.
William W. Belknap

District of Columbia, *ss:*

W. W. Belknap, being first duly sworn, on oath says that he has stated to his counsel, Hon. J. S. Black, Montgomery Blair, and Matt. H. Carpenter, what he expects to prove by John S. Evans, and

[1] Senate Journal, pp. 978–981; Record of trial, pp. 269–273.

after such statement is advised by his said counsel, and verily believes, that the testimony of said Evans is material and necessary for his defense in this cause, the said Evans being the same person upon whose appointment the articles of impeachment are based; that said affiant is informed and believes that said Evans is en route for Washington and detained by high water obstructing the roads, but that he will be in as soon as he can get here, and this application for postponement of the trial is made in good faith, and not for delay.

WM. W. BELKNAP.

Subscribed and sworn to before me this 12th day of July, A. D. 1876.

W. J. MCDONALD,
Chief Clerk Senate.

Mr. Manager McMahon said:

The objection has been fully stated, and we only rise now to enter it formally here.

In support of the objection Mr. Manager Elbridge G. Lapham said:

The respondent entered upon the trial without objection, upon the assumption that he was ready for trial. We are now in the midst of the trial; and a different rule, I submit, applies to this case from what would have been applicable if this application to postpone had been made before the trial commenced, upon the ground that Evans was not here in attendance. We have waited until the evidence on our side is completed, with the right to call this witness in case he comes, for we want him, I apprehend, much more than the defense. We have waited until the defense have exhausted in the main their evidence, according to the suggestion of the counsel. Now they propose to stop this trial midway, and postpone the further hearing by reason of the absence of this witness, without any suggestion as to what they propose to prove in respect to this case by him. I submit that an application now, pending the trial, is upon an entirely different footing from an application made before the trial is entered upon on the supposition and statement that the party is not ready for trial and can not properly commence it. The defendant did not ask to postpone this case on the ground that his witnesses were not here. He entered upon the trial on the 6th of the present month, the day assigned by the Senate for the trial, without objection that he was not prepared to go through with it. It was then the proper time, if his witnesses were not here, for him to have asked a postponement until their arrival. Having entered upon the trial, and having proceeded to the point we now have reached, I submit that the application to postpone is upon a different footing from what it would have been if made then.

Mr. Carpenter replied:

Mr. President, the reason for strictness against an application made to adjourn a cause after the trial of it has commenced in a court of law is that a jury is not a continuing institution. It is summoned for a term, and it never comes again. That particular body never comes a second time. That is the reason, and it is always stated so, why greater strictness is observed in regard to the postponement of a trial commenced before a jury. Everything that has been done must he lost. The testimony at the next term must be retaken, and the whole case proceed de novo. Here is a trial in the court of impeachment before the Senate of the United States, a body that can not die as long as the Government lives, a continuous institution, that is not to lose the benefit of what has been done. The strict attention which has been paid by every Senator here to this testimony shows that it will never fade from his recollection. There is not the slightest fear that when the Senate shall postpone this hearing for a week or ten days to have this witness arrive any of the testimony will be even faintly fading away at all in the minds of the Senate. The argument, therefore, made by the managers as to a nisi prius trial before a jury has no application.

Again, he says we ought to have applied for a continuance before we commenced the trial. I have already stated to the Senate, and now repeat, that when we made our application to have this witness subpoenaed he was not subpoenaed in our behalf, because the Government had subpoenaed him themselves. The Government were here with their case, and Mr. Evans was one of their witnesses, and we have heard from first to last that he was one of their main and principal witnesses, the thought of whose absence makes their grief overflow. We had no doubt that the managers were acting in good faith. We had no doubt that they would not proceed to the trial until they knew their chief witnesses were at command.

Mr. Carpenter then presented this request:

The respondent's counsel ask for an order that the further trial of this cause be postponed until notice be given by the Senate to the House of Representatives of the United States and to the respondent.

Pending consideration of this application, the Senate sitting for the trial adjourned.

On July 13 the President pro tempore laid before the Senate a communication from the Sergeant-at-Arms of the Senate describing the efforts made to secure the attendance of the witness, and stating that the latter had started for Washington, but had been detained by bad roads.

Mr. Thomas F. Bayard, a Senator from Delaware, having propounded to counsel for the respondent a question which had not been answered, proposed the following:

That as a condition precedent to the order for postponement of this trial asked for on the 12th instant by the respondent it is

Ordered, That the respondent inform the Senate what in substance he proposes to prove by John S. Evans, the witness on the ground of whose absence postponement is asked.

Mr. Carpenter then said:

Mr. President and Senators, I desire in the first place to enter a respectful protest against being compelled in a criminal case to state what we expect to prove by a witness. I do that, not for its importance in this case so much as I hold that every lawyer defending a person accused in any court owes it to his profession to stand by the regular practice, and I understand that to be the regular practice almost without exception, that where a defendant in a criminal case is not in fault as to the subpoenaing of a witness he is not compellable to state what he expects to prove by that witness.

In this case, however, one or two things I may state. In the first place, we expect to prove by Mr. Evans one reason why he was not appointed when he first applied for this position, and that was that he intended to form a partnership with Durfee * * * and that that was one important reason why he was not appointed at first.

In the next place, let me say that Mr. Evans is the man upon whose appointment these articles rest. We have never examined him nor had an opportunity to do so. He has sworn twice before a committee of the House, and the testimony presented by the managers is quite voluminous in manuscript. We have never read it; at least I have never read it; and I never supposed we should be called upon to read it, because we had the assurance of the Government that Mr. Evans was to be here. It seems now, from the statement of the Sergeant-at-Arms, that Mr. Evans was here and was released temporarily by the managers themselves without consultation with us. Our witness has been subpoenaed by the order of the Senate, has been here, has been discharged or released temporarily by the opposite party without consultation with us, and we desire to call and examine him.

Now we are asked, "Will you state what you expect to prove by him?" We can not, because we do not know what he will swear to in regard to certain points. And, sir, in a trial like this where every word we utter goes upon the record to be called back in the summing up of this case to show that we were mistaken about what the witness would swear, we should be guarded and prudent. We know this man Evans has had intimate knowledge of the management of that tradership from first to last, for he has been the trader. We know from glancing through certain other testimony and from certain other facts within our knowledge that he must have knowledge of certain subjects which we think if he would swear one way will be important to us; if he would swear the other way it might not be so beneficial to us. We think he will swear in our favor; and yet we do not know what he will swear; and therefore we do not know what we expect to prove by him.

The Senate, without further action on the application, adjourned.

On July 14 the Senate sitting for the trial adjourned to Monday, the 17th, the following order being made:

Ordered, That when the Senate sitting for the trial of impeachment adjourns it be till Monday next, and that the trial then proceed.

On Monday, the witness not having arrived, Mr. George F. Edmunds, a Senator from Vermont, proposed this order:

Ordered, That the respondent have leave to examine John S. Evans at any stage of the proceedings prior to the termination of the argument-in-chief to any matter material to his defense.

But on motion of Mr. William Pinkney Whyte, of Maryland, it was

Ordered, That the Senate sitting in this trial adjourn until Wednesday, the l9th instant.

On Wednesday Mr. Evans was present, and was sworn.

2158. The Senate sitting on impeachment trials is empowered by rule to compel the attendance of witnesses.

The Senate sitting on impeachment trials has authority to enforce obedience to its orders, writs, judgments, etc., punish contempts, and make lawful orders and rules.

The Sergeant-at-Arms is authorized by rule to employ necessary aid to enforce the lawful orders, writs, etc., of the Senate sitting on impeachment trials.

Discussion as to the power of the Senate sitting on impeachment trials to command assistance of the military, naval, or civil service of the United States.

Discussion as to the power of the Senate sitting on impeachments to enforce its final judgment.

Present form and history of Rule VI of the Senate sitting for impeachment trials.

Rule VI of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the Sergeant-at-Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

This rule dates from the revision made in 1868, at the time of the impeachment proceedings against President Johnson. The committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported [1] the rule in this form:

VI. The court shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of and disobedience to its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the presiding officer may, by the direction of the court, require the aid and assistance of any officer or person in the military, naval, or civil service of the United States, to enforce, execute, and carry into effect the lawful orders, mandates, writs, precepts, and judgments of said court.

The Senate having come to a conclusion which caused the word "court" to be discarded, the word "Senate" was substituted.[2] Before that was done, however,

[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Globe, p. 1602.

another question had been presented by the motion of Mr. Willard Saulsbury, of Delaware, who moved to strike out the lines—

> And the Presiding Officer may, by the direction of the court, require the aid and assistance of any officer or person in the military, naval, or civil service of the United States, to enforce, execute, and carry into effect the lawful orders, mandates, writs, precepts, and judgments of said court.

Debate arose on this motion,[1] involving two points-one as to the power of the Senate to command such assistance for its incidental or interlocutory judgments, and the other as to the power to enforce by such means, or by any means, its final judgment.

In support of his motion Mr. Saulsbury said:

> My reason for making this motion is that, in my judgment, it is not in the constitutional power of the Senate of the United States, when acting in the discharge of its ordinary duties or as a court, to command the services of the Army and Navy or of any officer of the Army and Navy; that if it is proper to clothe the court with such a power it is necessary to pass an act of Congress giving them the authority, if such an act itself could be constitutionally passed. Suppose that this provision of this article remained, and the court called upon the officers of the Army and Navy to assist the court in the discharge of its duties, and they should assist them either as officers or in company with men under their command, what power would the court have to compel their attendance and their assistance? They are already under the command, in the first instance, of the General of the Army, and, secondly and chiefly, under that of the President of the United States.
>
> How, therefore, can the Senate, acting as a Senate, command the services of the Army and Navy or the officers of the Army and Navy? Suppose they refuse to obey the order of the court made upon them for any attendance or to assist the court, how can you enforce that order? I submit, Mr. President, if their services can be invoked by any agency whatever, it can only be done after the passage of an act by the two Houses of Congress; that the court then would be acting in pursuance of law; but that the orders of this body, this Senate, are not law, and that the words, if they remain, will be a nullity and inoperative.

Mr. George H. Williams, of Oregon, said:

> Assuming that the Senate, when it proceeds to try an impeachment, is a court, I suppose it possesses those powers as to the execution of its judgments that other courts possess—no other or greater powers. I do not suppose that it can be contended that the Senate can make a rule which will have the force of law. True, the Senate may provide for its own government in the transaction of any particular kind of business; but I do not understand that the Senate can make a rule that will operate upon persons outside of the Senate, or that will operate like a legislative act.
>
> Assuming, then, that the Senate, in making these rules, is confined to the creation of orders that regulate its own actions, it seems to me to follow necessarily that the court has no power by the use of military force to execute its judgment. Take any court; if you please, the supreme court of the District of Columbia. Suppose a judgment is rendered by that court; it becomes the duty of the ministerial officer, the marshal or the sheriff, to execute that judgment. If resistance is made to the process in his hands, then he may summon the posse comitatus for the purpose of executing that process; and if the resistance is so strong as to defeat his proceedings, under such circumstances, if there be any law of the land which authorizes it, he may call upon the military to assist him in the execution of the process. But I submit that when judgment is rendered by the court the jurisdiction of the court is at an end, so far as enforcing its execution is concerned. Can the supreme court of the District of Columbia make an order and enter it upon its records that if any process of that court is resisted a military or naval force shall be employed in the execution of that process? * * * as to whether the court in session may make an order commanding the military or naval forces of the United States to do any act whatever, unless it may be to protect the court, to protect its dignity, to preserve decorum. That is an inherent power in the court. But can the court issue an order as a court and say to General Grant, "You marshal your army in such a place for such a purpose? Or can it issue an order to any admiral in the Navy to put his

[1] Senate Journal, pp. 238, 812; Globe, pp. 1526–1533.

armed vessels in any particular position for any purpose? It seems to me that, if there is no law on the subject, there ought to be a law providing for the enforcement of judgments that are rendered in cases of this kind. If there be no law, then such a law ought to be enacted; but because there is no law the Senate has no power to assume to create such a law and exercise legislative power. I do not desire to have the Senate in making these rules go beyond its jurisdiction, though I am in favor, of course, of all rules that are necessary to enable the Senate to transact its business. But it does seem to me that if in a case of impeachment that may be tried before the Senate a judgment of guilty should be pronounced by the court it can make no subsequent order for the execution of that judgment. If the person who is to be removed from office by that judgment refuses to obey that judgment, then legislation will be necessary or some other power must be interposed.

Mr. John Sherman, of Ohio, concurred with Mr. Williams if the rule was intended to enforce the final decree of the court. But he conceived that the rule was intended to apply only to what might be called the interlocutory orders of the court, to compel the attendance of witnesses, or judgments finding recalcitrant witnesses in contempt.

Mr. Reverdy Johnson, of Maryland, said:

I concur with the honorable Member from Delaware and the honorable Member from Oregon that we have no power to adopt the rule which we are asked to adopt. The rule which we are asked to adopt is one which, when proposed in the committee, of which I had the honor to be a member, I resisted, and I have seen no reason to change the opinion which led me to that course.

The authority conferred upon the Senate is to try all cases of impeachment, and the Constitution provides that when the President is the party impeached the Chief Justice is to preside; and the judgment which the Senate, acting as a court of impeachment, may pronounce can not extend beyond a declaration that the party impeached shall be removed from office and be thereafter ineligible to any other office of trust or profit under the United States. The "judgment shall not," in the language of the Constitution, "extend further than" that; and upon that judgment being rendered in the case of a President—we are to look at that as a case which is really now before us with reference to this question—the Vice-President, if we have one, is to become President; and if the Vice-President is himself the President and is himself the party impeached, the President pro tempore of the Senate is to become President. No process, therefore, is necessary to enforce that judgment to that extent. The moment it has been pronounced the incumbent who has been impeached ceases to be President, and the party next in succession becomes at once the President. When he is the President he has precisely the same authority that he who is elected President and who takes his office at the termination of the term of his predecessor has.

Mr. George F. Edmunds, of Vermont, argued:

I should be sorry to see us strip ourselves, by refusing to adopt a rule of this kind, of the power which that rule confers. It is a power which inheres in a body like this, as it does to the House of Commons and the House of Lords in England, from whence we derive our theory of trying impeachments. This rule only regulates and puts in force in the way of execution this existing power. We have to act as an organized body, whether sitting as a Senate or sitting as a court, because, as I said before, it is the same body exercising different functions, sitting for different purposes. Therefore, when the Constitution permits us to make rules and regulations for the government of the Senate, I think under the Constitution we can make a regulation for the government of the Senate when it is exercising any of the functions that the Constitution imposes upon it. Being of the opinion that this power to protect ourselves, and to enforce any order or mandate that the Constitution authorizes us to make, exists, while I agree that it ought to have the assistance of law in a great many respects, it being in my judgment an inherent power, we have a right to regulate and to name the cases in which it shall be put in exercise. As I have said before, if any question arises after we are sworn, and the Chief Justice takes the chair, as to the fact that the functions of the court are cramped by these general rules, it will be time enough then for the court to say that it will or will not (because it is the same body) change or execute them. Now, I should be sorry to see the Senate exercising the constitutional power of making rules and regulations in general, refuse to provide for putting in exercise a power of this kind, while I hope and believe it will not be necessary to make use of it; especially in view of the fact that it has been published to the

world in another place (using parliamentary language), by a distinguished leader, that our orders, processes, and mandates will be resisted. * * *

The Constitution says that we are to try and adjudge, and there the Constitution stops; and hence, upon the logic of that proposition, inasmuch as the Constitution does not provide how we are to get the Chief Justice in here in a certain case, or how we are to be sworn in a certain other case, the law providing no oath, the Constitution providing no oath, merely stating that we are to be sworn, we are perfectly helpless. In short, the argument is that the Constitution is not a code of procedure; that it does not contain a set of rules and regulations. Mr. President, that is a mistake. It is a mistaken idea of the nature of the Constitution, of the idea of conferring constitutional power. Wherever there is a grant of power by a law or by a constitution to a tribunal or a body or a person, there is granted in that power, as a part of it, there is conferred as in it and of it and a part of it all the power that is necessary, justly and properly necessary, to the due exercise of the power conferred. So the Supreme Court frequently decided in the days of Marshall; and I challenge contradiction upon the proposition. * * *

The Senate gives itself the power, without having an endless debate on the subject, to direct its Presiding Officer, when we have a justice of the Supreme Court on trial or any other man accused, to apply to the President of the United States and ask of him the assistance that is necessary to protect us in the exercise of our functions. It does not assume the legislative power of imposing any penalty if that President should refuse. There is the distinction. If we were desiring to get a witness into court who refused to come, and force were needed to bring him upon attachment, it would be necessary, if he should bring action against one of the assistants of the Sergeant-at-Arms, for that assistant to defend on the authority of the Senate, and to prove that it was by our authority that he assisted the Sergeant-at-Arms in bringing in the witness. Now, what does this rule provide? It provides for all such cases in advance, without having a squabble over them at the time. By it our authority is given in advance, by a mere order to that effect on a single point, to call upon everybody to assist in the enforcement of our process.

Now, as to the final process, if you speak of it as process—it is not so spoken of in the report; it is spoken of as a judgment—it is said that the word "judgment" may include the final judgment. The term "judgment," of course, does in its natural meaning include final judgments as well as interlocutory ones; but we must always construe language in reference to the subject to which it is to be applied. As applied to interlocutory judgments, we all seem to agree that it is proper. When you come to final judgment, although there is no express exception made, the nature of the final judgment has been well stated by the Senator from Ohio; it is a judgment the very force and operation of the pronouncing of which is to change the office, speaking in the case of a President, from one person to another; so that the judgment in a certain sense may be said to execute itself. Therefore, if you say the word includes final judgment, and you may in that literal sense, it does no harm, because all that then you would call upon anybody to do would be to call upon the new and lawful President of the United States to assist the Senate in putting himself into possession of his own office.

The motion of Mr. Saulsbury, to strike out, was agreed to, yeas 25, nays 15. Mr. Lyman Trumbull, of Illinois, said during the debate:

I will state that in the committee, as I was a member of it, I thought it better not to have this clause in, and I was in favor of the old rules as far as they could be made applicable to the present case. I thought the fewest changes made the best. Now, I submit to the Senate whether we shall not accomplish all we want by adopting the old rule on this point. I think the Senator from Indiana will be satisfied with that, and I think we ought all to be satisfied with it. The old rule provided that the Presiding Officer "shall also be authorized to direct the employment of the marshal of the District of Columbia, or any other person or persons during the trial, to discharge such duties as may be prescribed by him." The marshal has authority under the general laws to call a posse, if necessary, to call on the military if necessary. We have a marshal in the District of Columbia not acceptable I believe to everybody, but I think a marshal who will do his duty, whatever his duty is, as faithfully as anybody else. Why not strike out all of the words of this rule? After the word "court" strike out and insert what I have read, so as to read:

"The Presiding Officer may by the direction of the court direct the employment of the marshal of the District of Columbia, or any other person or persons, during the trial to discharge such duties as may be prescribed by him."

I think that would get us out of this difficulty.

Objection was made to this old rule—which dated from the trial of Judge Chase, in 1805—on the ground that the marshal of the District of Columbia had duties of his own prescribed by law, and might not be at the service of the Senate. There was discussion also as to his power, and the power of the Sergeant-at-Arms, to summon a posse comitatus to assist. Finally Mr. Trumbull's proposition was put in form as follows, and agreed to without division:

And the Sergeant-at-Arms, under the discretion of the court, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of said court.

Subsequently, in accordance with the general principle agreed on, the final words "said court" were stricken out, and the "Senate" inserted.

So the rule was finally agreed to in the form in which it now exists.

2159. The Senate, sitting for the Belknap trial, declined to order process to compel the attendance of a witness who had been subpoenaed by telegraph merely.—On July 10, 1876,[1] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, asked for an attachment to compel the attendance as a witness of John S. Evans. Mr. Carpenter stated that Evans had been subpoenaed, but had not appeared. The following return was read:

WASHINGTON, D. C., *July 1, 1876.*

I made service of the within subpoena, telegraphing the same to the within-named John S. Evans, at Fort Sill, Ind. T., on the evening of the 22d day of June, 1876.

JOHN R. FRENCH,
Sergeant-at-Arms United States Senate.

Mr. Manager John A. McMahon also said:

I will state in addition that I have seen a dispatch in the Sergeant-at-Arms's room from John S. Evans acknowledging the receipt of this subpoena.

It was then

Ordered, That an attachment issue for the said John S. Evans.

Presently Mr. George F. Edmunds, a Senator from Vermont, asked if there was proof that Evans had been served with the subpoena. It having been stated in reply that the proof being by telegraph, Mr. Edmunds moved to reconsider the vote on the order, and the motion was agreed to.

Then a discussion arose, in the course of which it was developed that the subpoena for this witness, as well as for other witnesses living at a distance, had been served by telegraph.

Mr. John W. Stevenson, a Senator from Kentucky, said he was not aware of any law permitting a witness to be subpoenaed by telegraph, and expressed a doubt as to the legality of an attachment based on a subpoena thus served. Mr. Rocsoe Conkling, of New York, expressed the same doubt, and Mr. Edmunds said:

That is no service in point of law.

On motion of Mr. Edmunds the subject was laid on the table.

Then, on motion of Mr. Edmunds,

Ordered, That a subpoena issue commanding the said John S. Evans to appear forthwith before the Senate.

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[1] First session Forty-fourth Congress, Senate Journal, p. 969; Record of trial, pp. 226–228.

2160. The Senate sitting for an impeachment trial, has commanded a reluctant witness to produce certain papers in its presence.—On July 8, 1876,[1] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Leonard Whitney was sworn and examined as a witness on behalf of the United States. The witness was manager for the Western Union Telegraph Company and had been subpoenaed to produce telegrams passing between Caleb P. Marsh and the respondent.

Mr. John A. McMahon, of the managers for the House of Representatives, said to the witness:

> Now open your package and see what dispatches you have from Washington to New York, passing between Mr. Marsh or R. G. Carey & Co. and W. W. Belknap.

The witness replied:

> Before I do so I wish to state that I can not produce these telegrams unless I am required to do so by the court; and I respectfully submit to the court that they are privileged communications, and I ought not to be required to produce them.

The President pro tempore[2] thereupon submitted the question to the Senate, Shall the witness produce the telegrams? and it was decided in the affirmative without division.

2161. In impeachment trials before the House of Lords it is the practice to swear and examine the witnesses in open house.

Under the parliamentary law witnesses in an impeachment trial may be examined by a committee.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments:

> Witnesses. The practice is to swear the witnesses in open house, and then examine them there; or a committee may be named who shall examine them in committee, either on interrogatories agreed on in the House or such as the committee in their discretion shall demand. (Seld. Jud., 120, 123.)

2162. Form of oath administered to witnesses in impeachment trials.

Form of subpoena issued to witnesses in impeachment trials.

In impeachment trials subpoenas are issued on application of managers or the respondent or his counsel.

Form of direction for service of subpoenas to witnesses in impeachment trials.

Discussion as to the competency of the Senate to empower one of its officers to administer oaths.

Present form and history of Rule XXIV[3] of the Senate sitting for impeachment trials.

Rule XXIV of the "rules of procedure and practice for the Senate when sitting in impeachment trials" provides:

> Witnesses shall be sworn in the following form, viz: "You, ———. do swear (or affirm, as the case may be) that the evidence you shall give in the case now pending between the United States and ——— shall be the truth, the whole truth, and nothing but the truth, so help your God." which oath shall be administered by the Secretary or any other duly authorized person.

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[1] First session Forty-fourth Congress, Record of trial, p. 216. The Senate Journal (p. 966) indicates that Mr. Matt. H. Carpenter, of counsel for the respondent, made the objection instead of the witness, but the verbatim account in the Record of trial seems conclusive.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] See also section 2080 of this volume for other portions of this rule.

FORM OF A SUBPOENA TO BE ISSUED ON THE APPLICATION OF THE MANAGERS OF THE IMPEACHMENT OR OF THE PARTY IMPEACHED OR OF HIS COUNSEL.

To ——— ——— greeting:

You and each of you are hereby commanded to appear before the Senate of the United States, on the——day of ——, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———.

Fail not.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this —— day of ———, in the year of our Lord ———, ——— ———,and of the Independence ——— of the United States the ——

Presiding Officer of the Senate.

FORM OF DIRECTION FOR THE SERVICE OF SAID SUBPOENA.

The Senate of the United States to ——— ———, greeting:

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington, this —— day of ——, in the year of our Lord , and of the Independence of the United States the

———— ———, *Secretary of the Senate.*

These forms were agreed to in 1868[1] on report from a committee of which Mr. Jacob M. Howard, of Michigan, was chairman. They were adopted, with slight variations of phraseology from the forms used in the impeachments of Blount and Chase, in 1797 and 1805. The words "high court of impeachment," which had been introduced in the forms as reported, were stricken out in accordance with a general conclusion of the Senate as to its functions.

As reported, the rule provided simply that the oath to witnesses should be administered by the Secretary. The words "or any other person duly authorized" were added on motion of Mr. Roscoe Conkling, of New York. A difference of opinion had arisen as to the power of the Senate to confer on anyone the authority to administer an oath.

Mr. John Sherman, of Ohio, argued[2] that it could only be done by law, because if perjury should arise, the oath must be shown to be administered by an officer authorized by law to administer an oath. The Secretary had power to do so. Mr. Howard held that the Senate had the power, as belonging to its judicial function in trying the case, to provide for the administration of the oath.

2163. In impeachments a Senator called as a witness is sworn and testifies standing in his place.

Present form and history of Rule XVII of the Senate in impeachment trials.

Rule XVII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

This rule dates from 1797,[3] when it was adopted for the trial of William Blount. In 1805,[4] at the time of the trial of Judge Chase, it received verbal changes merely.

[1] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

[2] Globe, p. 1593.

[3] First session Fifth Congress, Senate Journal, p. 566; Annals, p. 2197.

[4] Second session Eighth Congress, Senate Journal, pp. 511–513; Annual , pp. 89–92.

2164. During the Belknap trial Senators were called as witnesses and were sworn, and testified standing in their places.—On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, said:

Mr. President, I desire to call Senator Allison, of Iowa.

The President pro tempore I said:

The Senator will stand in his place and be sworn.

Hon. William B. Allison was sworn and examined, standing in his place. Similarly, George G. Wright, a Senator, was called, sworn, and examined.

2165. In an impeachment trial testimony is presented generally and is not classified according to the article to which it applies.—On February 11, 1805,[3] in the high court of impeachments during the trial of the case of the United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, a witness was called, in behalf of the managers, when Mr. Robert G. Harper, counsel for the respondent, stated that this witness was called on an article subsequent to that on which the witnesses already examined had testified. He would submit a proposition to the honorable managers to go through at one time the whole of the testimony on each article. It might not be the regular course, but if gentlemen assent to it, said Mr. Harper, we shall prefer it; it will be convenient to the witnesses, many of whom may be discharged before the whole of the testimony is gone through.

Mr. John Randolph, jr., of Virginia, chairman of the managers, said:

Though this mode may have its advantages, it is attended with its difficulties. A witness may be found to support more than one article. With regard to the first article, I have no objection to this course; but with regard to the subsequent articles I have.

The President[4] said:

If the gentlemen are agreed, I will take the sense of the Senate on the course to be pursued.

Mr. Randolph said:

It is the wish of the managers not to depart from the usual course.

Mr. Harper said:

We do not claim it as a right.

2166. In the Johnson trial the Chief Justice held that evidence might be introduced during final arguments only by order of the Senate.—On April 20, 1868,[5] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, after the testimony had been nearly closed on both sides, Mr. Manager John A. Bingham suggested that it might be the desire of the managers later to examine one or more witnesses. This caused a discussion as to the admission of testimony after the beginning of the final arguments. Mr. Reverdy Johnson, a Senator from Maryland, expressed the opinion that such a course would

[1] First session Forty-fourth Congress, Senate Journal, p. 977; Record of trial, p. 267.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Second session Eighth Congress, Annals, p. 193.

[4] Aaron Burr, of New York, Vice-President, and President of the Senate.

[5] Second session Fortieth Congress, Globe supplement, p. 239.

not be in accordance with the American practice. Mr. Manager Bingham suggested that it had been done in the trial of Judge Chase, although he could not speak positively.

The Chief Justice [1] said:

In case the honorable managers desire to put in further evidence after the argument it will be necessary to obtain an order of the Senate; at least it would be proper to obtain such order before the argument proceeds.

2167. The proposition that evidence in an impeachment trial may be admitted or excluded by a majority vote has not been questioned seriously.—On July 21, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, was making his argument in the final summing up, and was holding that, as two-thirds of the Senate were required to convict, so also two-thirds were required on a vote determining jurisdiction.

Mr. Allen G. Thurman, a Senator from Ohio, propounded this question:

If it requires two-thirds of the Senators present to overrule the respondent's plea to the jurisdiction, does it not follow that two-thirds are necessary to overrule any objections to testimony made by the respondent or to sustain an objection to testimony made by the managers?

Mr. Black replied:

No; clearly not. I admit that is a very fair attempt at the reductio ad absurdum of our proposition, but it does not succeed. What I say is that two-thirds are required to establish any fact which is an essential element in the conviction. Every other fact may be established and every other order may be made by a bare majority. I do not say that, because this is a court of impeachment and two-thirds of the Senate are required to concur in a final conviction, therefore every time an adjournment is moved it can not succeed without a majority of two-thirds.[3]

2168. Witnesses in an impeachment trial are examined by one person on either side.

Present form and history of Rule XVI of the Senate sitting for impeachments.

Rule XVI of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

This rule was first drafted in 1805 [4] for the trial of Judge Chase. In the revision of 1868,[5] preparatory to the trial of President Johnson, it was amended by striking out the words "cross-examined in the usual form," and inserting "cross-examined by one person on the other side."

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] First session Forty-fourth Congress, Record of trial, p. 315.

[3] During the trial of President Johnson a suggestion was made by Mr. Garrett Davis, of Kentucky, that the two-thirds rule should prevail as to ruling questions of evidence or law against the respondent, and he introduced an order to that effect; but it was not acted on. Second session Fortieth Congress, Senate Journal, p. 382.

[4] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[5] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.

2169. The managers in the Swayne trial having offered to prove a statement made by respondent before the House committee, counsel successfully resisted the reading of the statement as part of the offer.

An argument by counsel for respondent against the "offer of proof" method of presenting evidence in an impeachment trial.

Instance wherein counsel for respondent in the Swayne trial was called to order for language reflecting on the conduct of the managers.

On February 14, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry W. Palmer, of Pennsylvania, offered to prove that the respondent on the 28th day of November, 1904, at the city of Washington, D.C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement.

At this point Mr. John M. Thurston, of counsel for the respondent, objected to the reading of the statement, saying:

Mr. President, standing here as objecting to this offer, I repeat what I said a few days since about this attempt to present to this court the statements made by Judge Swayne while he was a witness before a committee of the House of Representatives. The offer to prove what he said before that committee is all that, under any rule of practice that has ever prevailed in any court, can be made. It has never been held that in offering to prove what a witness had said somewhere else a statement could be made in the offer of what he had said somewhere else, because that would, by indirection and by pettifogging, Mr. President, present to the court, the judge, or the jury the statement of what the evidence would show when it was really admitted, if at all, and evidently in the expectation——

At this point Mr. Edmund W. Pettus, of Alabama, intervened and said:

Mr. President, I object to the word "pettifogging" being used in this court.

The Presiding Officer[2] said:

The Presiding Officer thinks that the word ought not to have been used.

Mr. Thurston then continued:

I apologize for the use of that word. I was not using it with reference to this offer. I was saying that it was a common custom in some courts to attempt to show by a statement of this kind what a witness had said somewhere else, when the attorneys making the offer knew and understood perfectly well that the statement itself would not be proper evidence to be introduced in the case, and that an offer of this kind was and is an attempt to present to a court evidence known to be improper, prohibited by the statutes of the United States, and its reading to the court in an offer must necessarily be, and can only be, an attempt by indirection to place in the record and before the judges testimony that they know is not legal testimony and ought not to be considered.

Now, Mr. President, I do not wish to reflect—and if I have made any reflections upon these honorable managers I withdraw them—I do not wish to reflect upon them in this case, but I do say that in other cases and in other courts where offers of this kind have been made they have been necessarily made with the express desire to place in the record and before the court and the jury a line of evidence that is prohibited by the law of the land from being presented. We object both to the offer to introduce the testimony and to the offer to read the proposed testimony to this court. Mr. President, we also protest against this manner of presenting evidence by an offer to prove something.

The only proper way, in our judgment, if the managers wish to produce this testimony and have this court pass upon its competency, is to put a witness on the stand or to offer the record, to ask the question,

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[1] Third session Fifty-eighth Congress, Record, pp. 2536, 2537.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

or let the record be objected to, and pass upon that. I do not think it is proper for us, Mr. President—and the occasion may arise in this case where it would be most desirable for us, if it were proper—to offer to prove a certain statement of fact that we do not believe can be introduced in evidence if objected to upon the other side. But, sir, feeling our responsibility here, we will not attempt to offer before this court a statement of anything, nor will we attempt to offer in this court to prove facts setting it forth. What facts we have to prove we will prove by records, or we will prove them by questions directed to the witnesses presented in the court, and let the objections, if any there be, be taken in the regular way and upon legal lines.

Mr. Manager Palmer announced that he would hand the statement to the court and let the court pass upon it:

Mr. Joseph W. Bailey, of Texas, said:

Mr. President, while the Presiding Officer passes on such questions in the first instance, Senators must pass upon it finally, and they know what is offered before they can vote intelligently upon the question. It is unprecedented to say that the court shall not be permitted to hear what is offered before passing upon the admissibility of it. * * * for my own guidance, I would like to know exactly the question before the court.

The Presiding Officer said:

It is in writing. The managers offer to prove that the respondent on the 28th day of November, 1904, in the city of Washington, D.C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement. Then the statement is recited.

No further demand was made for the reading of the statement, and it was not read.

2170. Managers and counsel disagreeing as to method of direct and cross examination of a delayed witness the Senate ordered examination in accordance with the regular practice.—On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the managers announced:

We desire to state to the Senate that we are through with our case in chief for the United States with this exception, that if Mr. Evans arrives in the usual course of the trial of this case, we desire to put him on the stand, or if he is put upon the stand by the defense we desire permission to put to him such questions as would be competent and proper if he were examined by us in chief; but we do not ask the delay of this case one hour for the arrival of Mr. Evans. On the contrary, we ask that it proceed.

The President pro tempore said:

Is there objection to this privilege of examination being reserved?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected.

On July 19[2] John S. Evans appeared, and was called as a witness on behalf of the respondent.

Mr. Carpenter said:

Mr. President, I desire to say to the managers that Mr. Evans is now upon the stand. If they wish to examine him as a witness on the part of the prosecution, we make no objection to their doing so. If they do not, we give them notice that we shall insist on their being held to a proper cross-examination.

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[1] First session Forty-fourth Congress, Record of trial, p. 255.

[2] Senate Journal, p. 981; Record of trial, p. 273.

Mr. Manager John A. McMahon said:

Mr. President, we desire to state to the Senate that we shall claim the right to call out on cross-examination whatever is legitimate and proper in this case. I think, after having waited for nearly a whole week for the witness to come to accommodate the defense, that the Senate will endeavor to expedite matters by enabling us to put our questions to the witness upon cross-examination with the full privilege of the gentlemen in rebutting to ask him to explain all those matters about which we may inquire, which will make one examination answer all the purposes of this case, whereas if we now examine him the gentlemen on their side will have a right only to cross-examine him as to what we examined into, and then they must put him on the stand, we cross-examine him, and so on, making really a double examination, and upon the good sense of the Senate on that question we rely now. The gentlemen may examine Mr. Evans.

Mr. Carpenter rejoined:

It will be recollected that the manager stated to the Senate that Mr. Evans was one of his most important witnesses. When he closed his case, he closed it reserving the right to call Mr. Evans if he should appear at any time during the trial. Mr. Evans is now present. We waive all objection to his being examined in chief on the part of the Government if they wish to examine him. If they do not, we shall insist, as far as we can insist, that when they come to the cross-examination they shall be restricted to the proper rules of cross-examination.

Thereupon, on motion of Mr. Roscoe Conkling, a Senator from New York, it was—

Ordered, That the managers proceed to examine the witness Evans in chief; or, should they decline to do so, the respondent may proceed to examine the witness in chief, with the right of the managers to cross-examine him like any other witness.

2171. The Senate prefers that managers and counsel, in examining witnesses in an impeachment trial, shall stand in the center aisle.—On February 15, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, it was directed that the managers in examining witnesses should stand in the center aisle of the Senate Chamber, near the rear row of seats, so that the answers of witnesses might be heard readily by the Senators.

Later, however, Mr. Anthony Higgins, of counsel for the respondent, urged that he must stand by the table in examining witnesses, as he needed to consult certain documents.

But generally managers and counsel stood in the central aisle when conducting the examinations.

2172. Witnesses in an impeachment trial give their testimony standing unless specially permitted to sit.—On February 14, 1905,[2] in the Senate sitting for the trial of Judge Charles Swayne, a witness, Joseph H. Durkee, had been sworn, when the Presiding Officer[3] said:

The witness asks that he may be allowed to be seated. He may sit if there is no objection. The witness will please raise his voice and answer all questions so as to be heard all over the Chamber.

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[1] Third session Fifty-eighth Congress, Record, pp. 2615, 2620.

[2] Third session Fifty-eighth Congress, Record, p. 2535.

[3] Orville H. Platt, of Connecticut, Presiding Officer.

2173. The Senate assigns the place to be occupied by witnesses testifying in an impeachment trial.—On July 6, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the testimony was about to begin, when the President pro tempore[2] suggested that witnesses take a place at the right of the Chair, on a level with the Secretary's desk; but at the suggestion of the managers and several Senators a place on the floor in front of the Secretary's desk was assigned to the witnesses.

Later[3] Mr. Theodore F. Randolph, a Senator from New Jersey, said:

Mr. President, is there any objection on the part of the Senate and counsel to have the witness stand at your right or left? So far as I am concerned, it is utterly impossible for me to hear one word out of three that is spoken. It has been so during the whole time. If I take the seat of another Senator, it is at his inconvenience. This is my seat. I have no right to another, but I have a right to hear what is said.

The President pro tempore said:

The Chair will state to the Senator that he designated a little higher place for the witnesses, but the managers and counsel thought it would be preferable to have the witness in front of the desk, and the Chair submitted that to the Senate, and, as there was no objection, the witnesses were placed there.

Then the President pro tempore put the request to the Senate, and it was ordered that the witnesses stand on the right of the Chair on a level with the Secretary's desk.

2174. During the trial of Judge Chase one of the counsel for the respondent was sworn and examined as a witness.—On February 15, 1805,[4] in the high court of impeachments during the trial of the case of the United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, Luther Martin, one of the counsel for the respondent, was sworn and examined as a witness in behalf of the respondent.

2175. The order of taking testimony in an impeachment trial is sometimes waived by consent of both parties.—On February 16, 1905,[5] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, the witness Belden, of New Orleans, has not yet arrived, and with the exception of that one witness, so far as we know now, our case is complete, and we are willing that the respondent may go on with his testimony, with the privilege to us of calling General Belden when he arrives.

Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, this suggestion was made to me this morning by the managers, and we have no objection to their proposed arrangement, it being, as I understand, that they have closed their case in chief, except as to the testimony of Judge Belden, who is to be produced by them and examined upon his arrival. We make no objection to that request. We should like, however, that they place Judge Belden upon the stand as soon as he does arrive, in order that as far as possible we may have their entire case in before we present our own witnesses.

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[1] First session Forty-fourth Congress, Record of trial, p. 179.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Record of trial, p. 182.

[4] Second session Eighth Congress, Senate Impeachment Journal, p. 520; Annals, p. 246.

[5] Third session Fifty-eighth Congress, Record, pp. 2719, 2720.

2176. A question put by a Senator to a witness in an impeachment trial is reduced to writing and put by the Presiding Officer.

All orders and motions, except to adjourn, are reduced to writing when offered by Senators in impeachment trials.

The Presiding Officer in an impeachment trial is the medium for putting questions to witnesses and motions and orders to the Senate.

Present form and history of Rule XVIII of the Senate sitting for impeachments.

Rule XVIII of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

> If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer.

This rule dates from the Chase trial in 1805.[1] In the revision of 1868,[2] preparatory to the trial of President Johnson, the form was modified by the insertion of the parenthetical clause and the use of the words "Presiding Officer" for "President."

2177. In defiance of Rule XVIII for impeachment trials, the Senate has established the practice that Senators may interrogate managers or counsel for respondent.

Instance of an appeal from a ruling of the President pro tempore in the Senate sitting for an impeachment trial.

While the Senate was sitting for the impeachment trial of William W. Belknap, late Secretary of War, arguments, continuing from May 4 to May 8, 1876, were offered by the managers on the part of the House of Representatives and the counsel for the respondent on the question of the jurisdiction of the Senate to try a citizen not in civil office at the time of the presentation of articles of impeachment. In the course of these arguments, members of the Senate frequently interrupted the managers and counsel for respondent with questions[3] relating to various points touched in the argument. These questions were generally presented in writing.

2178. On July 20, 1876,[4] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager William P. Lynde was submitting an argument in the final summing up of the case, when Mr. William W. Eaton, a Senator from Connecticut, interrupting, said:

> Mr. President, is it proper that I should ask the manager a question?

The President pro tempore[5] said:

> It has been so ruled by the Senate.

And thereafter, during the trial, both the managers and counsel for respondent were interrupted by questions.[6]

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[1] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[2] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 813, 814; Globe, p. 1568.

[3] First session Forty-fourth Congress, Record of trial, pp. 33, 42, 43, 47, 60.

[4] First session Forty-fourth Congress, Record of trial, p. 296.

[5] T. W. Ferry, of Michigan, President pro tempore.

[6] Pages 297, 315 of Record of trial.

2179. On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, a Senator from Vermont, following a custom that had existed during the trial, proposed a question to counsel for the respondent.

Mr. Roscoe Conkling, a Senator from New York, raised a question of order as to the right of a Senator to interrogate counsel.

The President pro tempore[2] said:

The Senator from New York calls the attention of the Chair to the fact that the rule does not authorize the questioning of counsel, but of witnesses. * * * The rule will be read.

"XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing and put by the Presiding Officer."

* * * The Chair will state that in administering the rule he would not feel authorized to permit a question to be put to the counsel or the managers, for the rule provides only for Senators to question witnesses, and not counsel or managers to be questioned by them. * * * The Senator from New York has stated the point of order, and the Chair simply holds that under the rule No. 18, and which is the only one bearing upon the subject and upon which he rules, the Chair sustains the point of order.

Mr. Edmunds appealed, and on the question, "Shall the decision of the Chair stand as the judgment of the Senate?" There appeared yeas 18, nays 21. So the Chair was overruled, and the question proposed by Mr. Edmund was put to counsel.

2180. Questions asked by Senators in an impeachment trial, whether of managers, counsel, or witnesses, must be in writing.—On July 11, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, several Senators had addressed verbal questions to the managers and to counsel for the respondent. Mr. Roscoe Conkling, a Senator from New York, having called attention to the rule, which he condemned as absurd, the President pro tempore[2] said:

As the Senator from New York has alluded to the fact that the question was not put in writing, the Chair will say that it has not been done in order to facilitate business, and a moment ago one of the Senators was about to reduce a question to writing and the Senator from New York stated that the practice had been otherwise. * * *

The Chair to facilitate business has allowed questions to be put without being reduced to writing by their propounders.

Later, colloquies and objection having arisen, the President pro tempore ruled:

The Chair will enforce the rule. Colloquies must cease. Objection has been made, and the Chair must enforce the rule. He will state that on the part of Senators, to guard against any breach of the rules and unpleasantness, he will require all questions to be reduced to writing; and then certainly there can no debate. The counsel will proceed.

Mr. Richard J. Oglesby, a Senator from Illinois, asked:

Does the decision of the Chair, that no questions can be put hereafter without being reduced to writing, cover questions put by the court to one of the counsel?

The President pro tempore said:

It covers all questions put by members of the Senate. The rule does not require the questions on the part of the parties to be reduced to writing unless so required by the Chair or a Senator; but all questions put by members of the Senate the rule requires shall be put in writing.

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[1] First session Forty-fourth Congress, Senate Journal, pp. 976, 977; Record of trial, pp. 258, 259.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] First session Forty-fourth Congress, Record of trial, pp. 248, 249.

2181. On July 19, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary, of War, John S. Evans, a witness on behalf of the respondent, was on the stand, when Mr. Theodore F. Randolph, a Senator from New Jersey, proposed to ask orally a question. The suggestion being made that the question should be reduced to writing, Mr. Randolph urged that such had not been the practice.

The President pro tempore[2] said:

The Chair will observe at this time that so far as questions have been put to witnesses by Senators the rule in the recollection of the Chair has been observed until this time, and the Chair called the attention of the Senator from California, who put a question just now without reducing it to writing, to the fact that the rule required it to be done. The question having been put and it having been reduced to writing, by calling the attention of the Senator to the rule the Chair did his duty. Heretofore no questions have been put to witnesses, as the Chair recollects, without having been first reduced to writing.

2182. Chief Justice Chase finally held, in the Johnson trial, that the managers might object to a witness answering a question put by a Senator.—On April 13, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was examined as a witness, and Mr. Reverdy Johnson, a Senator from Maryland, presented in writing a question for the witness to answer.

To this question Mr. Manager John A. Bingham, in behalf of the House of Representatives, objected.

Mr. Garrett Davis, a Senator from Kentucky, thereupon raised the question that one of the managers had no right to object to a question propounded by a member of the court.

The Chief Justice[4] said:

When a member of the court propounds a question, it seems to the Chief Justice that it is clearly within the competency of the managers to object to the question being put and state the grounds for that objection, as a legal question. It is not competent for the managers to object to a member of the court asking a question; but after the question is asked, it seems to the Chief Justice that it is clearly competent for the managers to state their objections to the questions being answered.

2183. On April 13, 1868,[5] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman had been called as a witness on behalf of the respondent. In the course of the examination, Mr. Reverdy Johnson, a Senator from Maryland, propounded this question:

Did you at any time, and when, before the President gave the order for the removal of Mr. Stanton as Secretary of War, advise the President to appoint some other person in the place of Mr. Stanton?

Mr. Benjamin F. Butler, one of the managers for the House of Representatives, at once objected to the question as leading in form, and also as being incompetent according to the decisions of the Senate as to this line of inquiry.

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[1] First session Forty-fourth Congress, Record of trial, p. 275.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Second session Fortieth Congress, Senate Journal, p. 894; Globe Supplement, pp. 169, 170.

[4] Salmon P. Chase, of Ohio, Chief Justice.

[5] Second session Fortieth Congress, Senate Journal, p. 892; Globe Supplement, p. 166.

Mr. Garrett Davis, a Senator from Kentucky, raised a question as to whether or not the managers or the counsel for the defense could interpose any objection to a question by a member of the court.

The Chief Justice [1] said:

The Chief Justice thinks that any objection to the putting of a question by a member of the court must come from the court itself.

Thereupon Mr. Charles D. Drake, a Senator from Missouri, objected to the question.

The Chief Justice said:

The only mode in which an objection to the question can be decided properly is to rule the question admissible or inadmissible; and that is for the Senate. The question of the Senator from Maryland has been proposed unquestionably in good faith, and it addresses itself to the witness in the first instance, and it is for the Senate to determine whether it shall be answered by the witness or not. Senators, the question is whether the question propounded by the Senator from Maryland is admissible.

And the question being taken, there appeared yeas 18, nays 32. So the question was excluded.

2184. Either managers or counsel in an impeachment trial may object to an answer to a question propounded to a witness by a Senator.—On February 11, 1905,[2] in the Senate sitting for the trial of Judge Charles Swayne, a witness A. H. D'Alemberte, was sworn and examined. In the course of the examination a Senator, Mr. Augustus O. Bacon, of Georgia, proposed this question:

Q. Does the law of Florida require the payment of a poll tax from each male citizen of the State who is over 21 and under 55 years of age, without reference to the question whether or not he votes?

Mr. Manager Henry W. Palmer, of Pennsylvania, objected, saying:

In the opinion of the managers, that is a question of law, not of fact. I suppose we have a right to object to a question by a Senator, under the rule, and we object to that question. It is a matter of law, and I do not suppose the witness is a lawyer.

The Presiding Officer [3] said:

If the objection is insisted upon, the Presiding Officer thinks that the question is improper, for the reason that it relates to a matter of law; but the Presiding Officer would suggest that this examination has so far proceeded upon questions of law very largely.

Mr. Henry Cabot Lodge, a Senator from Massachusetts, raised a question as to whether or not the managers might object to a question propounded by a Senator.

The Presiding Officer said:

Perhaps not in the technical way in which objections are made in court, but the Presiding Officer thinks that either the managers on the part of the House or the counsel for the respondent have a right to raise the question, to be decided by the Presiding Officer, as to whether evidence is admissible. * * * The Presiding Officer does not at this time desire to make any binding or irreversible rule, but if such a case can be supposed as that a Senator should put an improper or inadmissible question to a witness the Presiding Officer thinks that that question being raised he would have a right to rule upon it.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Third session Fifty-eighth Congress, Record, pp. 2393, 2397, 2399.

[3] Orville H. Platt, of Connecticut, Presiding Officer.

Later Mr. Manager Palmer said:

While the witness is coming I wish to submit to the President the authority on which I objected to the question asked by the Senator from Illinois [Mr. Hopkins]. It is a ruling made by Chief Justice Chase in the trial of Andrew Johnson, and is to be found in the second volume of the Congressional Globe, at pages 166, 169, and 170, where it was decided that the managers had a right to object to a question asked by a Senator.

I merely call attention to the authority to show that I was not objecting without some reason.

A little later Mr. Joseph B. Foraker, a Senator from Ohio, said:

I deem it my duty to call attention to the fact that on page 310 of Extracts from Journals of the Senate of the United States of America in Cases of Impeachment I find the following ruling by the Chief Justice.

Mr. Johnson, Senator, having asked a question, objection was made by the managers.

"Mr. Manager Bingham having commenced an argument in support of the objection,

"Mr. Davis raised the question of order that it was not in order for the managers to object to a question propounded by a Member of the Senate.

"The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such question."

The ruling by the Chief Justice was submitted to the Senate and was sustained by the Senate, the rule on that subject being Rule XVIII, Governing Impeachment Trials, which reads as follows:

"XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer."

In other words, the rule is without qualification; and this is the first time I ever heard it suggested that a court conducting a trial did not have a right to put any question the court might see fit to ask. If there be any ruling such as managers have stated there is, made by the Chief Justice in the course of that trial, I have overlooked it.

Later Mr. Manager Palmer said:

Mr. President, the managers have been asked for the particular authority for making objection to a question asked by a Senator. I refer the Senator from Ohio [Mr. Foraker] to the Congressional Globe, volume 40, trial of Andrew Johnson, page 169, in which the Chief Justice made this ruling. * * * The 13th of April, 1868, page 169. The ruling was as follows:

"The CHIEF JUSTICE. The honorable manager will wait one moment. When a member of the court propounds a question, it seems to the Chief Justice that it is clearly within the competency of the managers to object to the question being put and state the grounds for that objection as a legal question. It is not competent for the managers to object to a member of the court asking a question; but after the question is asked it seems to the Chief Justice that it is clearly competent for the managers to state their objections to the questions being answered.

The Presiding Officer said:

The manager will allow the Presiding Officer to refer to the ruling which was cited by Senator Foraker. It is in these words:

"The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such question."

The ruling seems to be that an objection can not be made to a Senator putting a question, but that the admissibility of the evidence to be given might be objected to and discussed.

Mr. Manager Palmer said:

That is right. That is what we understood. We objected to the admissibility of the answer to such a question, because we did not think it was a legal question.

The Presiding Officer continued:

That is what the Chair understood; not that the managers objected to a question being put by a Senator, but objected to the question being answered.

Mr. Manager Palmer added:

Yes; we objected to its being answered, not to its being asked.

2185. The Senate decided that it might, in an impeachment trial, permit a Senator to interrogate a witness, although both managers and counsel for the respondent objected.—On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, had been examined by the managers, cross-examined by counsel for the respondent, and had responded to questions put by Members of the Senate. Thereupon Mr. John A. Logan, a Senator from Illinois, proposed another question.

Mr. Matt H. Carpenter, of counsel for the respondent, objected to the question, and Mr. Manager John A. McMahon, on the part of the House of Representatives, seconded the objection.

Mr. Allen G. Thurman, a Senator from Ohio, asked what business the court had to ask a question to which both parties objected.

Mr. Logan said:

I presume that members of the court here stand upon an equality, and that one has as good a right to ask a question as another, provided it is a proper question, couched in proper language. I asked a question a while ago of the witness what the understanding was between him and Mrs. Bower. I did not use the name, but that was it, and he gave the understanding, and in that answer he incidentally remarked that he had an understanding with the former Mrs. Belknap. The question was argued by the managers and counsel for the respondent; the vote was taken by yeas and nays, and the Senate voted that the question should be answered; and the witness did answer the question. In furtherance of that question, I have asked what the understanding was with the former Mrs. Belknap.

Mr. Thurman said:

The House of Representatives here is represented by its managers; the defendant is represented by his counsel; and when both sides agree as to what are the issues upon which they will put in evidence, I really do not see, with entire respect to the Senator from Illinois and every other Senator, that it is any part of the duty of the Senate which is to sit here as impartial judges to introduce a new line either of prosecution or of defense. I see no reason for it; and if the Senate has erred once, it is no reason why it should err again. If neither the managers on the part of the House nor the counsel for the defendant have seen fit to go into the arrangements, if there were any, between the witness and this deceased lady or this living lady, it is no business of ours to go into them. If it is necessary for the purposes of public justice that they should be gone into and the testimony would be legitimate, it is to be presumed that the House of Representatives, through its managers, would have asked us to hear the testimony. If it were necessary for the defense that the matter should be gone into, it is to be presumed that the counsel for the defense would have introduced it as a defense. It is not for us to supply any deficiency of the prosecution or to supply any deficiency of the defense.

Mr. Oliver P. Morton, of Indiana, said:

I simply want to state that I regard it as the absolute right of this court or any member of it, with the consent of his brother judges or a majority of them, to ask any question; and the idea that the court can be overruled by the counsel on either side agreeing that the question shall not be asked is something entirely new.

The Senate decided, by a vote of yeas 23, nays 17, that the question should be admitted.

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[1] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, pp. 241, 242.

2186. Instance wherein both managers and counsel for respondent were permitted to object to questions proposed by Senators.—On April 18, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Alexander W. Randall, Postmaster-General, was sworn as a witness on behalf of the respondent. In the course of the examination, Mr. John Sherman, a Senator from Ohio, proposed in writing this question:

State if, after the 2d of March, 1867, the date of the passage of the tenure-of-office act, the question whether the Secretaries appointed by President Lincoln were included within the provisions of that act came before the Cabinet for discussion; and if so, what opinion was given on this question by members of the Cabinet to the President.

Mr. Manager John A. Bingham objected that the evidence sought to be obtained was incompetent under the decisions of the Senate already made.

The question being taken, there appeared in favor of admitting the testimony 20 yeas, and against 26 nays. So the testimony was not admitted.

2187. On July 11, 1876[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, had been examined and cross-examined, when Mr. John H. Mitchell, a Senator from Oregon, proposed in writing this question:

Q. Why did you send to W. W. Belknap, Secretary of War, the one-half of the various sums of money received by you from Evans at Fort Sill?

Mr. Matt H. Carpenter, of counsel for the respondent, objected, saying:

Mr. President, the celebrated Jeremiah Mason in the trial of a very important case once said, when a judge put a question to a witness, he being counsel for the defense, that if the question was put on the part of the plaintiff, he objected to it; if it was put on behalf of the defendant, he withdrew it. * * * The Government have gone through the examination of this witness; we have cross-examined him; the court has allowed them to go partially into a redirect examination, and they have concluded it. This question put by the managers now would certainly be objectionable, and I presume that we have the same right to object to a question put by the court that we would have if it were put by the managers. * * * They have had one redirect examination, the court overruling our objection to it, to give it to them. Now after this will this court permit the managers to return to that subject and open the examination of this witness? And if they will not permit the managers to do it, will the court do it themselves? If a question can not be objected to when put by one of the court which would be ruled out if put by the counsel, then this is a strange proceeding and we are in a singular situation. I say this of course with entire respect to the Senator who asks the question; but we must have a right to object to the question, and for the purpose of testing whether it is proper or improper, it must be considered as a question put by the managers, and put by the managers at this time, is there the slightest doubt that the Senate would rule it out?

The Senate, without division, determined that the question should be admitted.

The witness replied to it:

Simply because I felt like doing it. It gave me pleasure to do it. I sent him the money as a present always, gratuitously. That is the only reason I had.

Thereupon Mr. George F. Edmunds, a Senator from Vermont, asked:

I should like to ask the witness, in connection with his last answer, whether General Belknap knew, in advance of these remittances from time to time, how large the present was going to be that was to be sent?

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[1] Second session Fortieth Congress, Senate Journal, p. 913; Globe supplement, p. 238.

[2] First session Forty-fourth Congress, Senate Journal, p. 971; Record of trial, pp. 237, 238.

Mr. Carpenter said:

Mr. President, I object to that question upon the ground that one man can not swear what another man knows. It is physically and intellectually impossible. If he could say that he told Mr. Belknap a thing, if he could prove any fact, that fact may be proved; but could I be put on the stand to swear what the Senator from Vermont knows upon any subject? I should say he knows all about it, but any particular knowledge on a particular subject I could not be called to swear to. Nobody can.

Mr. Montgomery Blair, also of counsel for respondent, said:

Mr. President and Senators, there is another objection to this question that I hope the Senate will consider before voting that this question shall be admitted, and that is that this witness is a Government witness, and that the interrogatory of the Senator is to impeach the witness on the part of the prosecution. It implies that he has not stated the truth.

The question being submitted, the Senate, without division, decided that the interrogatory should be admitted.

2188. While managers or counsel may argue in objection to a question put to a witness by a Senator in an impeachment trial, the Senator may not reply.—On July 19, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, John S. Evans, post trader at Fort Sill, was called as a witness on behalf of the respondent. It was alleged that Evans had been appointed by respondent through improper influence by one Marsh, who had shared by the terms of a contract in Evans's profits and divided them with respondent.

Mr. Theodore F. Randolph, a Senator from New Jersey, proposed this question to witness:

The question is this: What amount of goods did Mr. Evans sell at Fort Sill during any one year pending this contract?

Mr. Matt. H. Carpenter, of counsel for respondent, objected:

The object of that question seems to be to show that he made an improvident contract with Marsh and paid him too much. I submit that that can have no materiality to this cue. If the managers trace $500 home to Belknap in the form of a bribe, it is just as complete a case as $50,000. If he paid him an unreasonable bribe, it is no worse than to pay ten cents.

Mr. Randolph said:

I am unfortunately placed to argue the question with the counsel—

The President pro tempore [2] said:

Debate is not in order. The question will be put.

Thereupon, without division, the Senate decided that the question should be admitted.

2189. Rule of the Senate in the Swayne trial permitting managers or counsel to offer motions or raise questions as to evidence and prescribing the manner thereof.—On January 27, 1905,[3] in the Senate sitting for the impeachment of Judge Charles Swayne, Mr. Henry W. Palmer, of Pennsylvania, of the managers for the House of Representatives, offered the following:

Ordered, That lists of witnesses be furnished the Sergeant-at-Arms by the managers and the respondent, who shall be subpoenaed by him to appear on the 10th day of February, at 1 o'clock p.m.

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[1] First session Forty-fourth Congress, Record of trial, p. 275.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Third session Fifty-eighth Congress, Record, pp. 1450, 1451.

Later Mr. Charles W. Fairbanks, a Senator from Indiana, said:

We understand that the order which the managers of the House have asked for can not properly be put by them, and I suppose it is the proper practice to regard the order offered as a request. I offer,upon the request of the managers of the House, for present consideration, the order which I send to the desk.

Later, after the Senate had resumed its legislative sessions, Mr. Joseph W. Bailey, of Texas, said:

Mr. President, a moment ago, when the Senate was sitting as a court, it was doubted if the managers on the part of the House are permitted under the rules to make a motion. My own opinion is that nobody but a Senator can make a motion to be voted on by the Senate, but it would be a most anomalous situation if an attorney in any kind of a court could not make motions before that court to be acted on by that court. And for my own guidance—I am sure that other Senators are in much the same frame of mind—I should like to have that question settled. If it would be proper, I should like to have the Judiciary Committee report, or if the Senate prefers, a special committee, what have been the practice and the precedents in that respect.

It was pointed out that the Senate already had appointed a select committee to examine such questions, and that they would consider this question.

On February 3[1] Mr. Augustus 0. Bacon, of Georgia, offered, and the Senate sitting for the trial agreed to, an order as follows:

Ordered, That in all matters relating to the procedure of the Senate sitting in the trial of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, whether as to form or otherwise the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request, or objection, the same shall be directly addressed to the Presiding Officer and not otherwise.

2190. During final argument in the Chase trial the managers claimed and obtained the right to introduce testimony to justify evidence of an impeached witness.—On February 25, 1805,[2] in the high court of impeachments, during the trial of the case of United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, the testimony had been closed, the beginning on behalf of the managers in the final argument had been made, and two of the counsel for the respondent had submitted arguments, when Mr. John Randolph, Jr., of Virginia, chairman of the managers, moved the examination of Hugh Holmes, who would testify in corroboration of the testimony of John Heath, a witness for the managers, whose evidence had been attacked. Mr. Randolph explained that Mr. Holmes did not attend until the evidence for the managers had been concluded. Mr. Randolph further said:

I only state this circumstance in tenderness to the character of the witness, and that Mr. Holmes is ready to prove that, pending the trial of Callender, Mr. Heath did declare to him as having passed in his presence such a conversation as the witness has stated. It is not our wish to press his evidence, because we know that the evidence of a witness thus rebutted can establish nothing material to the prosecution. But we are ready, if the court and counsel for the respondent agree, to receive his testimony.

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[1] Record, p. 1819.

[2] Second session Eighth Congress, Senate Impeachment Journal, p. 523; Annals, p. 541.

Mr. Robert G. Harper, counsel for the respondent, said:

It is not for us to say how the honorable managers shall proceed in conducting this prosecution. We have no objection to Mr. Holmes being examined, and we feel perfectly indifferent whether Mr. Heath be abandoned or not. Should Mr. Holmes not be examined, I presume it will be understood that he was offered to support the declaration of Mr. Heath.

Mr. Randolph said it was not intended to abandon Mr. Heath.

Mr. Harper inquired how long Mr. Holmes had been in the city. If correctly informed he had been here three days, and if so, his testimony might have been adduced before the defense on the part of the respondent was made.

Mr. Randolph said the delay in offering Mr. Holmes to the court arose solely from an indisposition to interrupt the counsel for the defendant. The character of Mr. Holmes stood too high to be impeached. It was only when they heard the correctness of Mr. Heath's testimony questioned that the managers deemed it necessary to do that, for the not doing of which they had received the censure of the counsel for the respondent. Mr. Randolph then moved that Hugh Holmes should be sworn.

The President [1] said the reasons assigned for the admission of Mr. Holmes's testimony, so far as they arose from tenderness to the character of Mr. Heath, could have no weight with the court. The only question for them to decide was whether his testimony was or was not material.

Mr. Joseph H. Nicholson, of Maryland, one of the managers, said he held it to be the right of either party, at any stage of the trial, when the evidence of a witness was impeached, to justify it by the testimony of another witness. He asked the receiving, therefore, of Mr. Holmes's testimony as a matter of right, not of favor.

The yeas and nays were taken on examining Mr. Holmes, and were yeas 21, nays 11.

2191. Instance of a suggestion by the Presiding Officer in the Swayne trial as to the form of a question.—On February 20, 1905 [2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness on behalf of the managers was questioned by Mr. Manager David A. De Armond, of Missouri:

Q. Now, then, as to the matter of that newspaper article. I understood you to say that you knew nothing whatever about it, and that you so stated during the hearing of these contempt proceedings?—A. Yes, sir.

Q. And that Mr. Davis made a similar statement concerning himself?—A. I heard it; yes, sir.

Q. In the court, during the contempt proceedings?—A. Yes, sir.

Q. I will ask you whether there was anything else offered in testimony by those supporting the complaint against you than these two matters?—A. Nothing whatever.

Q. Then I will ask you whether there was anything upon which testimony could have borne in the matter brought out against you?

Mr. John M. Thurston, of counsel for the respondent, objected to this question.

The Presiding Officer [3] said:

In that form the question is hardly admissible. * * * The witness might be asked if he supposed there was anything which was important which was overlooked.

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[1] Aaron Burr, of New York, Vice-President, and President of the Senate.

[2] Third session Fifty-eighth Congress, Record, pp. 2905, 2906.

[3] Orville H. Platt, of Connecticut, Presiding Officer.

2192. Decision as to the limits within which counsel in an impeachment trial may criticize a witness.—On February 18, 1805,[1] in the high court of impeachments, during the trial of the case of The United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, John Montgomery, was called and in the course of cross-examination Mr. Robert G. Harper, counsel for the respondent, said:

I will now proceed to show that Mr. Montgomery, in his strong anxiety to get Judge Chase impeached, has remembered things which nobody else remembers, and has heard things which nobody else heard.

Mr. John Randolph, Jr., of Virginia, chairman of the managers, said:

I will ask of this court whether the witnesses we have called are not under their protection?

The President said:

If the counsel, in the testimony they adduce, come up to what they state they can prove, they will not be subject to reproach; if they do not, they merit it.

Mr. Randolph said:

I have no objection to the counsel impugning the veracity of one witness by the evidence of another and descanting upon it, but I think they take an improper liberty when they undertake to say, before it is proved, that what is deposed by a witness never passed.

The President [2] said:

I understand the gentleman to say that he will prove by another witness that what has been deposed never did pass.

Mr. Harper said:

Precisely so, sir.

2193. In the Swayne trial the Presiding Officer generally ruled on questions of evidence instead of submitting them directly to the Senate.—On February 21, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, the Presiding Officer submitted a question relating to the admissibility of evidence, to the Senate directly, without ruling himself. Generally, in the course of this trial the Presiding Officer ruled, and very rarely indeed was the judgment of the Senate asked. The cases wherein the Presiding Officer submitted the question at once to the Senate without ruling himself were rare, and exceptional. On February 23 [4] occur several instances when the Presiding Officer submitted the decision at once to the Senate, and thereafter on the few succeeding days he submitted questions with more frequency.

2194. When the judgment of the Senate is asked after the Presiding Officer has ruled on a question of evidence, the form of question is, "Is the evidence admissible?"—On February 14, 1905,[5] in the Senate sitting for the impeachment trial of Judge Charles Swayne a question arose as to an offer of

[1] Second session Eighth Congress, Annals, p. 291.

[2] Aaron Burr, of New York, Vice-President, and President of the Senate.

[3] Third session Fifty-eighth Congress, Record, p. 2979.

[4] Record, pp. 3147, 3167.

[5] Third session Fifty-eighth Congress, Record, p. 2540.

evidence, and the judgment of the Senate was asked by Mr. Joseph W. Bailey, a Senator from Texas. The Presiding Officer said:

Objection was made to the introduction of certain evidence. The offer on the part of the managers of the House to prove what Judge Swayne stated before a committee of the House when he appeared voluntarily before that committee was objected to by counsel for the respondent. The Presiding Officer ruled that without inquiring technically whether it was testimony which Judge Swayne gave, or technically whether this was a criminal court, that the intention of the statute referred to was such as made it proper to exclude the testimony; and from that the Senator from Texas took an appeal.

Mr. Joseph B. Foraker, a Senator from Ohio, raised a question:

Mr. President, I submit it is not technically correct to call it an appeal. The rule provides that when the Chair has ruled, it may, if any Senator so requests, submit the question to the Senate. I understand this is simply a request that the question be submitted to the Senate. * * * The question submitted to the Senate should be whether or not the objection of counsel for the respondent shall be sustained. So an affirmative vote would sustain the objection.

Mr. Albert J. Hopkins, a Senator from Illinois, said:

Would not the form under that rule then be as to whether the decision of the Chair shall stand as the judgment of the court?

Mr. Shelby M. Cullom, a Senator from Illinois, said:

I desire to read a paragraph from the trial of the President of the United States years ago:

"The CHIEF JUSTICE. Senators, the Chief Justice is unable to determine the precise extent to which the Senate regards its own decisions as applicable. He has understood the decision to be that, for the purpose of showing intent, evidence may be given of conversation, with the President at or near the time of the transaction. It is said that this evidence is distinguishable from that which has been already introduced. The Chief Justice is not able to distinguish it, but he will submit directly to the Senate the question whether it is admissible or not."

The Presiding Officer [1] said:

This is the rule:

"And the presiding officer on the trial may rule [on] all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the Members of the Senate."

The presiding officer was of opinion that the question was whether the evidence was admissible. * * * The presiding officer then submits to the Senate the question whether the evidence offered by the managers on the part of the House is admissible.

2195. The right to ask a decision of the Senate after the Presiding Officer has ruled preliminarily on evidence belongs to a Senator, but not to counsel.—On July 7, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question by counsel for the respondent to a witness was objected to by Mr. Manager John A. McMahon.

The President pro tempore [3] said:

The Chair sustains the objection.

Mr. Matt. H. Carpenter, of counsel for respondent, asked if he might appeal to the Senate.

The President pro tempore [3] held that he might not, but said that a Senator might have the point submitted to the Senate.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] First session Forty-fourth Congress, Record of trial, p. 192.

[3] T. W. Ferry, of Michigan, President pro tempore.

2196. The Senate finally decided in the Swayne trial that under the rule debate on the admission of evidence might not take place in open Senate.—On February 14, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, the decision of the Senate was asked on a question relating to the admissibility of evidence. Mr. Joseph W. Bailey, a Senator from Texas, proposed to debate the question, when a question as to debate arose, and the Presiding Officer[2] said:

In the opinion of the Presiding Officer, the matter can be discussed in the Senate upon the appeal and the vote be taken here, or the Senate can, if it so desires, retire to its conference chamber for discussion. Either course may be pursued, according to the wish of the Senate.

After Mr. Bailey had proceeded in debate for some time, Mr. Augustus O. Bacon, a Senator from Georgia, cited Rules VII and XXIII, saying:

The rule is peremptory that except when the doors are closed there must be no debate, short or long. * * * I read Rule VII to show that Rule XXIII does not in any manner modify the provision of Rule VII as to debate except when the Senate is in secret session; "when the doors shall have been closed," in the language of the rule. I do not think that debate upon any question which may arise is in order. Senators will perceive necessarily that a contrary rule would in its operations protract the session of a court of impeachment beyond the possibility of any practical termination.

The Presiding Officer said:

The Presiding Officer is of opinion that the point of order taken by the Senator from Georgia is well taken, and that the only exception is that contained in Rule VII. Rule XXIII provides:

"All orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation."

The exception in Rule VII is that upon all such questions the vote shall be without a division. But Rule XXIII provides that all orders and decisions shall be by yeas and nays. The exception referred to in Rule VII is upon questions relating to the introduction of evidence and incidental questions; if the vote of the Senate is asked, it may be decided without a division, unless the yeas and nays are demanded.

The Presiding Officer thinks the point is well taken.

2197. In an argument as to the admissibility of evidence, it is not proper to read the very evidence objected to.—On February 23, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, proposed to submit as evidence certain extracts from the official record of Congressional debates.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, having objected, Mr. Thurston said:

I am offering the proceedings. They directly bear upon the construction of this act, and I have a right to refer to the Congressional Record in the debates, at least; for instance, Mr. Allen, in the Senate, when this provision was under consideration, offered the following—

Mr. Manager Olmsted said:

I object to the gentleman putting in an argument the evidence to which we object. I understand he was about to read from the debates.

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[1] Third session Fifty-eighth Congress, Record, pp. 2538, 2539.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

[3] Third session Fifty-eighth Congress, Record, pp. 3165, 3166.

The Presiding Officer [1] said:

The Presiding Officer thinks that counsel can make the argument that he desires to make without reading the Congressional debates. He desires to show the nature of the evidence which he proposes to introduce by introducing these debates. They are something more than debates. They are action upon amendments and various motions that were made. The Presiding Officer thinks that that can be done without any actual reading of the debates. There can be statements by counsel as to the particular matter to which he wishes to call the attention of the Senate without reading the debates.

2198. The Chief Justice held, in the Johnson trial, that the offering of evidence might not be interrupted by a question relating to business incident to the trial or to legislative sessions.—On April 3, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, the managers on behalf of the House of Representatives were engaged in offering certain documentary evidence, when Mr. Henry B. Anthony, a Senator from Rhode Island, proposed to call up for consideration a matter of business pending in a legislative session of the Senate.

The Chief Justice [3] said:

It is not in order to call up any business transacted in legislative session.

Thereupon Mr. Anthony, proposing to call the matter up as originating in the Senate sitting for the trial, moved that a place be assigned on the floor to the reporter of the Associated Press.

The Chief Justice said:

The Chief Justice thinks it is not in order to interrupt the business of the trial with such a motion.

2199. In the Belknap trial, by consent of both sides, a statement of what would be proven by an absent witness was admitted, subject to objection as to its relevancy.—On July 10, 1876,[4] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, asked for the reading of two telegrams, one from Gen. W. T. Sherman and the other from Gen. P. H. Sheridan, setting forth that urgent military necessity rendered it desirable that the latter should not leave his post to testify before the Senate in this case. The telegrams having been read, Mr. Carpenter said:

In consequence of those telegrams, and not wishing to interrupt the public service unnecessarily, we have agreed, if the court will permit us, to let it go upon the record, as follows:

I. It is admitted that Lieut. Gen. Phil Sheridan would, if present, testify to the good official character of the respondent while Secretary of War.

II. That in regard to all the applications made for leave to sell liquors at the military posts the matter was referred by the Secretary of War to him, and by him investigated and reported on, and his report in all cases was adopted by the Secretary of War.

III. And that a part of a letter from him, Sheridan, to the Secretary of War, dated March 29, 1872, may be read in evidence and that the same, and said admission, shall be taken and regarded as testimony in this cause with the same effect as though General Sheridan had appeared and testified to the same effect.

It is understood, of course, that all these different points are subject to the objection that they are irrelevant or incompetent if the counsel on the other side chooses to raise that objection.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Second session Fortieth Congress, Globe supplement, p. 99.

[3] Salmon P. Chase, of Ohio, Chief Justice.

[4] First session Forty-fourth Congress., Senate Journal, p. 968; Record of trial, p. 219.

Mr. Manager John A. McMahon said:

We admit that he would be asked these questions and would answer in that way, provided they were competent or material.

2200. The presentation and reading of a document during introduction of evidence in an impeachment trial was held not to preclude an objection as to its admissibility.—On April 2, 1868,[1] in the Senate sitting for the trial of Andrew Johnson, President of the United States, Mr. Manager James F. Wilson, of Iowa, offered in evidence a certain letter from President Johnson to Gen. U. S. Grant.

The letter having been read, Mr. Henry Stanbery, of counsel for the President, asked that certain documents referred to by the letter as accompanying it be read. The managers having announced that they did not propose to offer the accompanying documents, Mr. Stanbery entered an objection to the admission of the letter without the accompanying documents.

Mr. Manager Wilson raised the point that the objection came too late, since the letter had been submitted and read and was in evidence.

The Chief Justice [2] said:

The Chief Justice is of opinion that objection may now be taken.

2201. In the Belknap trial the Presiding Officer, on request of respondent's counsel, required the reading in full of letters presented in evidence.—On July 8, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon, in the course of the introduction of testimony, offered a series of letters, the reading of which began.

Mr. George G. Wright, a Senator from Iowa, while admitting that the counsel had the right to have the letters read at length, asked if, in order to save time, they might not be regarded as read.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected and demanded that the letters be read in full.

The President pro tempore [4] directed the reading to proceed.

2202. The Chief Justice held, in the Johnson trial, that offer of documentary proof should state its nature only, but that the Senate might order it to be read in full before acting on the objection.—On April 18, 1868,[5] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Alexander W. Randall, Postmaster-General, was sworn as a witness on behalf of the respondent, and testified that Foster Blodgett, postmaster at Augusta, Ga., had been suspended from office on complaints both written and verbal. Certified copies of the official papers relating to the removal were then offered in evidence by Mr. William M. Evarts, of counsel for the respondent.

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[1] Second session Fortieth Congress, Globe Supplement, pp. 81, 82.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] First session Forty-fourth Congress, Record of trial, p. 206.

[4] T. W. Ferry, of Michigan, President pro tempore.

[5] Second session Fortieth Congress, Globe Supplement, p. 236.

Mr. Manager Benjamin F. Butler, having intimated that there might be objection, the Chief Justice [1] said:

The counsel for the President will state what they propose to prove in writing. * * * It will be necessary to state what the order and letters are; otherwise the court will be unable to judge of their admissibility.

Thereupon Mr. John Sherman, a Senator from Ohio, said:

I think we have a right to ask for the reading of the letters to know what we are called upon to vote.

The Chief Justice said:

The Senate undoubtedly have a right to order the letters to be read. * * * The usual mode of proposing to prove is by stating the nature of the proof proposed to be offered, and then, upon an objection, the Senate decides whether proof of that description can be introduced. It is not usual to read the proof itself. Undoubtedly it is competent for the Senate to order it to be read.

Mr. Evarts thereupon made this offer in writing:

We offer in evidence the official action of the Post-Office Department in the removal of Mr. Blodgett, which removal was put in evidence by oral testimony by the managers.

Mr. Butler having withdrawn all objection, the papers were then offered and read.

2203. Decisions as to the extent to which a witness in an impeachment trial may use memoranda to refresh his memory.—On February 11, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, George Hay was sworn as a witness, and made this statement:

The greater part of the evidence I am to deliver relates to what was said by me as counsel for J. T. Callender, who was indicted for a libel on the President of the United States, and what was said by one of the judges; for I do not recollect to have heard the voice of Judge Griffin at any time during the trial. In order to make this statement as accurate as possible, as my memory is not strong, it is necessary to resort to a statement made by myself and the counsel associated with me in the defense of J. T. Callender, which I now hold in my hand, and every part of which, according to my best recollection, is correct.

Mr. Robert G. Harper, counsel for the respondent, here interrupted Mr. Hay and said:

The witness may refer to anything done by himself at the time the occurrences happened which he relates. But I submit it to the court how correct it is to refer to what was not done by him, or done at the time.

The President asked Mr. Hay whether the notes were taken by him.

Mr. Hay said:

The statement was made by different persons. Some parts were made by myself, perhaps the greater part; the rest by Mr. Nicholas and Mr. Wirt. I believe I shall be able to state from it every material occurrence which took place at the time. With regard to those parts of the statement not made by me, a reference to them will call to my recollection the facts mentioned in such parts. If I state anything which I do not distinctly recollect, upon adverting to the statement, I will explain the actual situation of my mind on that point.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Eighth Congress, Annals, pp. 193–195; Senate Impeachment Journal, p. 518.

Mr. Joseph H. Nicholson, of Maryland, one of the managers, said:

If I understand the witness, it is not his intention to give the paper in his hand as evidence, but merely to refer to it for the purpose of refreshing his memory.

Mr. Harper said:

I do not understand the way in which it is meant to use the paper. I apprehend that it is a rule of evidence that nothing but notes made at the time of the transactions related can be received as evidence. I therefore am of opinion that a reference to this statement is inadmissible, because a part of it is made by others, and none of it made at the time.

Mr. Caesar A. Rodney, of Delaware, one of the managers, said:

When we advert to what has been stated by the witness, who says he does not mean to state in evidence anything in the paper of which he has not, independently of it, a distinct recollection, I think it is within the law to admit him to avail himself of it. I apprehend that had I attended the trial of Callender and taken minutes, and others had attended and not taken notes, if by recurring to my notes there should be recalled to their recollection facts so distinctly that they could swear to them before the court, it would be competent to admit their reference to such notes.

Mr. George W. Campbell, of Tennessee, one of the managers, inquired whether the objection was not confined to that part of the statement not made by the witness?

Mr. Harper said the objection related to the whole of it.

Mr. Campbell believed that a witness might use any memorandum to refresh his memory; and that it was not necessary that it should be made at the point of time when the events happened. It is sufficient if made at a time when his remembrance of the facts was correct. With regard to that part not taken by himself, if he perused it at a time so shortly after the events related, as to be able to determine it accurate, and now recognize the memorandum to be the same, it was sufficient.

Mr. Luther Martin, counsel for the respondent, said he had been many years in the practice of the law. The rules of evidence were probably different in different States. But he had always supposed that a witness could not be permitted to use any memorandum not made by himself, or at the time of the events related, or near it. He may, before he comes into court, consult any memorandum for the purpose of refreshing his memory, but not in court.

The President [1] said:

The witness proposes to make use of a memorandum under the circumstances which he has stated. The question is, shall the witness be permitted to make use of it?

Mr. John Quincy Adams, of Massachusetts, a Senator, said:

I am not prepared to answer that question at present, not knowing the nature of the minutes the witness proposes to use. I therefore move that the Senate retire before the question is taken.

The question on retiring was taken, and on division lost.

Mr. Adams said he wished to see the papers before he voted.

The President asked Mr. Hay whether it was in his own handwriting.

Mr. Hay replied that it was not; but that it was written by a clerk from a printed statement.

[1] Aaron Burr, of New York, Vice-President, and President of the Senate.

The President asked:

Have you the parts made by yourself separate?

Mr. Hay said he had not.

The President then put the question:

Shall the witness be permitted to make use of, as a memorandum, a paper containing a statement of facts, composed by himself and other gentlemen, in relation to the trial of James T. Callender, sometime after the trial, the paper proposed to be made use of being a copy made by his clerk from a printed paper which contained the said statement.

And there appeared yeas 16, nays 18.

2204. On April 3, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, William N. Hudson was sworn and examined by the managers for the House of Representatives as to a certain speech of the President which he assisted in reporting at Cleveland, Ohio. Being questioned as to certain interruptions which the President experienced while speaking, the witness was told by Mr. Manager Butler that he might refresh his memory from any memorandum or copy of a memorandum. Witness then proceeded to use a copy of the newspaper in which the report was printed.

Mr. William M. Evarts, of counsel for the President, objected that the witness should speak by his recollection if he could. If he could not, he might refresh it by the presence of a memorandum which he made at the time.

The Chief Justice[2] having drawn from the witness that the memorandum made by him at the time was lost, and that the newspaper contained a copy of that memorandum, ruled as follows:

It is inquired on the part of the managers what interruptions there were, and the witness is requested to look at a memorandum made at the time in order to refresh his memory. Of that memorandum he has no copy, but he made one at the time, and it is lost. The Chief Justice rules that he is entitled to look at a paper which he knows to be a true copy of that memorandum. If there is any objection to that ruling, the question will be put to the Senate.

2205. It was held in the Peck trial that a witness might correct oral testimony already given by himself.

In correcting testimony previously given in an impeachment trial a witness was not permitted to put in a paper made up in part from the recollections of other persons.

On January 17, 1831,[3] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, William C. Carr presented himself before the court and stated that since the evidence had been closed a written statement of the testimony had been shown to him, from which he perceived that the evidence which he had given was in one point defective, from want of remembrance of certain circumstances. He now therefore prayed leave of the court to present a condensed statement of the facts which had been omitted. He had reduced them to writing under the solemnity of an oath. In doing so he had not chosen to rely altogether upon his own recollection, but had referred to that of two other witnesses in this cause, and also had consulted two other gentlemen concerned in the matter. He hoped that the court would deem this paper admissible. If not, he wished to be subjected to oral examination.

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[1] Second session Fortieth Congress, Globe Supplement, pp. 102, 103.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] Second session Twenty-first Congress. Report of the trial of James H. Peck, pp. 286, 287.

Objection being made by the managers on behalf of the House of Representatives, the paper was withdrawn and the witness was examined orally.

On January 11,[1] B. C. Lucas had presented himself and addressed the court as follows:

I find it incumbent upon me to suggest to the court that since I gave my testimony some facts have occurred to my recollection which then escaped my memory.

Mr. Jonathan Meredith, counsel for the respondent, said:

The witness appears with a view of explaining or supplying a defect in his testimony as before delivered.

The President of the court[2] said:

The witness has a right to make an explanation of his testimony.

2206. Instance wherein depositions offered in an impeachment trial were purged of matters in conflict with the rule laid down as to evidence.— On January 10, 1831,[3] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, Mr. Jonathan Meredith, counsel for the respondent, offered in evidence and read certain depositions. He stated that in consequence of decisions just made by the court of impeachment, relative to the admissibility of evidence, he had stricken from the depositions, which had been taken in Missouri, all those portions which were covered by the principles of the decision. The depositions, he said, had been examined jointly by the managers for the House of Representatives and himself, and the portions to be expunged had been mutually agreed upon.

2207. The Senate struck from the record of an impeachment trial certain statements of fact introduced by a manager in argument, without support of evidence.

On an order presented by a Senator in the course of an impeachment trial it was held that Senators might debate only in secret session.

An order affecting the conduct of a manager being presented during an impeachment trial, he was permitted to explain.

On April 16, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of a speech of protest against the delays of the proceedings, introduced certain tabular statements of the sales of gold by the Government, with the object of supporting his claim that the delay in the trial of the President was reacting unfavorably on the country. These statements were printed in the Globe for that day.

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[1] Report of trial of James H. Peck, p. 279.

[2] John C. Calhoun, of South Carolina, Vice-President and President of the Senate.

[3] Second session Twenty-first Congress, Senate Impeachment Journal, p. 332; Report of trial of James H. Peck, p. 239.

[4] Second session Fortieth Congress, Senate Journal, pp. 907, 908; Globe supplement, pp. 209, 210.

On April 17, the Senate having convened for the trial, Mr. Orris S. Ferry, a Senator from Connecticut, offered the following:

Whereas there appear in the proceedings of the Senate of yesterday as published in the Globe of this morning certain tabular statements incorporated in the remarks of Mr. Manager Butler upon the question of adjournment, which tabular statements were neither spoken of in the discussion nor offered or received in evidence: Therefore,

Ordered, That such tabular statements be omitted from the proceedings of the trial as published by rule of the Senate.

Mr. Thomas A. Hendricks, of Indiana, asked if it would be in order for a Senator to defend the Secretary of the Treasury against the attacks of the manager.

The Chief Justice [1] said that the rules positively prohibited debate. He said, however:

The question of order is made by the resolution proposed by the Senator from Connecticut. Upon that question of order, if the Senate desire to debate, it will be proper that it should retire for consultation. If no Senator moves that order, the Chair conceives that it is proper that the honorable manager should be heard in explanation.

Mr. Manager Butler thereupon made a brief explanation.

The order proposed by Mr. Ferry was then agreed to without division or debate.

2208. Having ascertained that certain testimony was within the scope of the articles of impeachment, the Senate reversed a decision that the testimony was immaterial.

Discussion as to whether or not the cross-examination in an impeachment trial may go beyond the scope of the direct examination.

Instance wherein a President pro tempore presiding at an impeachment trial made a decision as to evidence.

On July 7, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, General Irvin McDowell, a witness for the Managers, was cross-examined by Mr. Matt H. Carpenter, of counsel for the respondent. It had been charged against the respondent that he had appointed one Marsh to be post trader at Fort Sill, but that the name of one Evans had been substituted, said Evans having contracted with Marsh to share with him the profits, while Marsh remained away from Fort Sill and at his home in New York, and, it was charged, shared the money sent by Evans with the respondent. The witness, by direction of the Secretary of War, had drawn an order relating to absentee post traders. The examination proceeded thus:

Q. (By Mr. Carpenter). In regard to the post trader residing at the post, was there any object in that except to keep him at all times subject to military regulation and bring him more nearly within the control of the men who ought to control—the military officers?—A. My own view in drawing up that order was aimed at the question in hand of there being what I supposed to be a post trader at Fort Sill residing in New York.

Q. Would it make any difference whether he resided in New York or any other place, provided the rates at which he must sell were fixed?—A. I do not know whether it would or not.

Q. Can you conceive any difference?—A. I will only say what was in my mind at the time I drew the order up, that it was with reference to correcting an admitted abuse.

Q. The abuse, as you understood it, was sales at extravagant prices, was it not?—A. No; it was a

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] First session Forty-fourth Congress, Senate Journal, pp. 962, 963; Record of trial, pp. 190–192.

man holding a place and exacting or receiving a large sum of money for it, having no capital, and doing no service for the money he received.

Q. Is there any way that that could injure the soldier or the country, unless he charged higher prices in consequence of that arrangement?

Mr. Manager John A. McMahon objected to this question, saying:

The objection we make to the question is that it is an endeavor to exculpate the accused by simply proving that he did not hurt the soldiers, although he may have hurt Evans. It seems to me that in the trial of a person for official malfeasance in an impeachment case, if we prove that the Secretary of War is in a corrupt combination with a person who has procured an appointment, by which the person who gets the appointment, for example—and I will give the example, Evans—is to divide the money that Evans may be able to force out of this person, to say that that is innocent simply because is does not raise the price of provisions at the garrison or the price of thread or cotton or whatever else may be wanted there, is certainly to the managers something new in the development of this case and of the theory of the defense. We do not care whether he raised the price of provisions a copper, from our standpoint.

Mr. Mongomery Blair, of council for the respondent, argued:

Mr. President and Senators, I beg to call the attention of the court to the fact that the gentleman in the close of his speech, and his colleague in the opening of his, assumed here as proved and established before this court the very thing that they have yet to prove, of which there is not a scintilla of proof before the court. He says, of course, if they prove that this defendant received this money it is an impeachable offense, and it does, not make any difference what this order was drawn for. He goes back constantly harping on that and repeating it as the substance of the thing proved, when it remains yet to be proved, and when the question before this court bears directly upon that question, to show that by the course of conduct adopted by this defendant he could not have known that there was any such contract in existence between these parties.

The effort which we are here now making and the effect of this proof is as positive as it can be made to negative the assumption upon which these gentlemen are asking these questions. Is it not legitimate for us to ask this witness—an experienced officer of the Army, who himself did call upon the Secretary to inform him of this evil in existence and to suggest remedies for it—whether or not the remedy which he himself suggested was not adequate to the evil which he undertook to meet? The question whether the trader lived at the post or anywhere else is, as we expect to show, utterly immaterial; and yet we see that that circumstance was made to figure in the opening of this argument, and is continued to this moment, as the only way of escape from the conclusion and weight of this testimony that the defendant misrepresented to the officer who drew this order the fact that the trader resided not at the post but in New York.

The witness has not said any such thing; he has not said at all that this defendant represented to him any such thing. He has not said that, to begin with. Those are words put into his mouth by these gentlemen. He has not asserted at any time that the defendant told him that the trader lived in New York and that this was carried on for that purpose. He says, to be sure, that, as he now recollects it, he understood the fact to be that he did reside somewhere else; but we will show him and show this court before we get through that in that his recollection is mistaken. We will show him that he knew then, at the time, that the trader did not live in New York, but lived at the post. Hence this totally immaterial circumstance in its bearing upon this order is utterly swept out of the way, and the testimony will be left to bear with its whole force upon the fact that this defendant did not know and could not know of the existence of this contract which is the basis of the proceedings.

I therefore insist that this is a principal, material question to be answered by the witness, and the fact of the resistance to it makes it manifest to the court that it is a pretty material question.

The question being submitted to the Senate, the question was excluded; yeas 20, nays 31. So the Senate sustained the objection.

Before the above vote had been taken Mr. Samuel J. R. McMillan, a Senator from Minnesota, had briefly called attention to the fact that in one of the articles of impeachment it was charged that Evans was retained in office by the Secretary of

War not only corruptly, but that his retention there was "to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States," etc., and suggested that although that issue might not be the only issue in the case, it was an issue that might be a material one, and upon which the Senate would have to pass in their finding.

Soon after the vote,[1] the same witness being under cross-examination, Mr. Carpenter asked:

It is charged in the third article of impeachment that the things alleged to have been done there—that is, the making of this agreement between Evans and Marsh—had been to the great injury and damage of the officers and soldiers of the Army of the United States stationed at that post. In what way could such contract injure the officers of the United States?

Mr. Manager McMahon having objected, the President pro tempore[2] sustained the objection on the ground that a similar question had already been ruled out.

Mr. Carpenter having protested and asked for a hearing, Mr. A. S. Merrimon, a Senator from North Carolina, asked for a vote on the ruling of the Chair, and the President pro tempore submitted the question:

Shall this interrogatory be admitted?

In arguing, Mr. Manager McMahon said:

We have yet offered no proof in this case to show that this has been detrimental to the service of the United States in the view in which the ethics of the gentleman seem to indicate to him may be important. It is a matter really for him in the defense if there is anything in it; and he has no right when we put a witness upon the stand to go into his substantive defense on that point.

The second objection we have in this case is the one which the Senate has already decided. Suppose that we should, taking an indictment, find in that indictment that the offense charged was alleged to be against the peace and dignity of the State of Ohio, or the State of New York, or against the commonwealth; and you were to put a witness on the stand and attempt to prove that it was not against the peace and dignity of the State of Ohio or the State of New York, because it was done in a corner where the State did not see it or had nothing to do with it, and would not know it unless one of the parties told it. It seems to me that it is entirely irrelevant, and it certainly strikes me as a new argument in morals that it is not improper, not an impeachable offense, for a Secretary of War or a Secretary of the Navy to dole out his offices to the men that will make the best bargain with him, without reference to the question whether it may be injurious to the public service or not.

Mr. Carpenter argued—

there is, as every lawyer knows, a conflict in the decisions in England and in some of the States of this country in regard to the extent to which a cross-examination may go. The rule in England, I understand to be, and in many of the States, that when a witness is called upon the stand, the other party may cross-examine him as to anything pertinent to the issue. The rule in other States is the reverse, and the rule I am bound to say in the Supreme Court of the United States is that you can only cross-examine as to matters referred to by the direct examination. But I submit to the Senate that in this trial, circumstanced as we are, with many army officers in attendance here whose public duties, as important as the duties of any officer, require their immediate return, and who are staying here every day to the prejudice of the public service, that rule, which after all is one in the discretion of the court, should in this case be, as I understand the English rule to be, that we may ask any witness called to the stand any question pertinent to the issue. There are many advantages in this. In the first place, it will place before the Senate in a compact form most of the testimony upon a particular subject.

In the next place, it will be a great convenience to all these witnesses. I do not understand, how-

[1] Senate Journal, p. 963; Record of trial, pp. 192–194.

[2] T. W. Ferry, President pro tempore.

ever, that I am now going at all beyond the scope of the direct examination. I make this remark because the question will undoubtedly arise hereafter as to other witnesses.

Now the managers say they have not as yet introduced any proof to show that this arrangement was detrimental to anybody. If they admit that it was not, then I do not wish to take a moment of your time in proving that it was not. If they concede that not a soldier paid one cent more for any article that was sold at that post in consequence of this arrangement between Marsh and Evans, that is the end of it. That is all I want to show by this testimony; but we are able to show, and shall if permitted, that notwithstanding this arrangement between Evans and Marsh, Evans never increased his prices on a single article. He has, as he has sworn elsewhere, upon the general average of his prices, charged less than he did before the arrangement made with Marsh.

The question being put on admitting the interrogatory, it was decided in the negative without division.

A little later,[1] the same witness having testified to his official relations with the respondent Mr. Carpenter asked, on cross-examination:

What has been his character as Secretary of War?

Mr. Manager McMahon said:

We object to this question, and will state our objection to the Senate. I think this is clearly substantive matter of defense, and must come into the trial of this case when the defendant opens his side of the case; but I will say to the gentleman here, though it may not waive the proof upon his part, that the managers upon their part, as I understand, are perfectly willing to concede that up to the time of the development of these matters his character was as good as could be desired or wished.

Mr. Carpenter said:

This question, Mr. President and Senators, falls within the class of questions to which I before referred. Of course it is not a cross-examination, but if not answered now, it may make it necessary to keep General McDowell here for several days before it can be put in. I therefore offer it now and let the Senate rule upon it, and then, of course, we shall know exactly what course to take in regard to other evidence from other witnesses.

The Senate, without division, decided that the question should be admitted.

On July 19[2] John S. Evans, the post trader at Fort Sill, was a witness and was asked this question by Mr. Carpenter:

After you returned to Fort Sill and after that contract made between you and Mr. Marsh, by which you bound yourself to pay him sums of money on dates fixed in the contract, did you put up the prices of your goods at the fort?

Mr. Manager McMahon objected that the Senate had already decided that this line of inquiry was not permissible.

Mr. Carpenter argued:

The fourth article, if I remember the number rightly, charges that in consequence of this arrangement between Marsh and Evans the soldiers and officers of the Union Army were defrauded and compelled to pay extravagant and exorbitant prices. Now we offer to show that that is not true. Let the managers strike it out of the articles and we do not care for the proof. If it remains in the articles, we offer to disprove it and will prove by this witness that he not only did not increase his prices, but that they were absolutely lower from that time out until he was removed than they had ever been before, and not, as he expresses it, the one-tenth part of 1 cent was added to the price of goods sold to the soldiers in consequence of that arrangement.

The Senate, by a vote of yeas 26, nays 13, decided that the question should be admitted.

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[1] Senate Journal, p. 963; Record of trial, p. 195.

[2] Senate Journal, p. 982; Record of trial, pp. 279, 280.

2209. In the Belknap trial the Senate permitted a redirect examination which was not responsive to the facts elicited in cross-examination.—On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was, after the direct examination, cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent.

At the conclusion of this cross-examination, Mr. John A. McMahon, of the managers on the part of the House of Representatives, resumed examination, which proceeded:

Do you remember upon any occasion when Evans & Co. made payment in a check of Northrop & Chick to you for $500?

Mr. Montgomery Blair, of counsel for the respondent, objected to the question, for reasons stated by Mr. Carpenter:

We have simply cross-examined this witness. We have shown nothing whatever, nor have we attempted to show anything whatever, except what is legitimate matter of cross-examination. They may reexamine in regard to the new matters we have called out in cross-examination, but nothing else. They can not go on now and by this witness attempt to show any consideration or anything of that kind, because that is a part of their case; they have examined the witness upon that subject and called out from him such evidence as they could and passed him over for cross-examination, and they can not return to it now.

Mr. Allen G. Thurman, a Senator from Ohio, suggested:

I wish to suggest that even if the question is not strictly responsive to the cross-examination it is in the discretion of the court to permit it to be answered.

The question being put to the Senate, "Shall said interrogatory be allowed," it was decided in the affirmative without division.

2210. In the Swayne trial it was held that cross-examination should be responsive to the examination in chief.—

On February 20, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, Simeon Belden, was under cross-examination by Mr. John M. Thurston, of counsel for the respondent, and the following occurred:

Q. As your associate, did he have authority to sign your name, together with his own, as counsel in the matter of these proceedings?—A. He had not—not that I recollect.

Mr. THURSTON (handing paper to Mr. Manager Olmsted). As a part of our cross-examination we offer this paper in evidence.

The paper, which was afterwards read, was as follows:

LAW NO. 72, IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. MRS. FLORIDA M'GUIRE V. PENSACOLA CITY COMPANY ET AL.

HON. F. W. MARSH,

Clerk United States Circuit Court, Northern District of Florida.

DEAR SIR: Please enter the above cause on the trial or call docket for trial at the coming term of court.

LOUIS P. PAQUET,
SIMEON BELDEN,
Attorneys for Plaintiff

PENSACOLA, FLA., *October 28, 1901.*

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[1] First session Forty-fourth Congress, Senate Journal, p. 971; Record of trial, p. 237.

[2] Third session Fifty-eighth Congress, Record, p. 2900.

Mr. Manager David A. De Armond, of Missouri, suggested an objection.

Mr. Thurston said:

If I understand evidence, a paper which is a legitimate part of the res gestse, of the transaction upon which the witness was examined in chief, may be offered when identified as a part of the cross-examination. We may never desire to present any case on our side, but we can not tell until we have the evidence on the other side in.

Mr. Manager De Armond said:

Mr. President, we do not want to be understood as conceding the proposition which the counsel for the respondent has just stated. The question of the admissibility of a paper is a question that will have to be determined when it is offered; and, of course, if a paper could be introduced as a matter of cross-examination, the question of its competency could not be considered, or there would have to be delay to consider the admissibility of something offered by the opposite side when we are offering our testimony. But as to this paper, and only as to this paper, we do not care.

The Presiding Officer [1] said:

The Presiding Officer understands it is offered merely as a part of the cross-examination. * * * Whether it becomes admissible or pertinent in any other view of the case is a matter to be determined afterwards.

Later, on the same day,[2] and during the cross-examination of the same witness, the following occurred:

Q. You afterwards tried that same case, after it was rebrought, in that same court—A. Yes, air.

Q. And there you had every opportunity to secure your witnesses, did you not?—A. We had all facilities on that trial.

Q. You got all the witnesses you wanted?—A. I think we did.

Q. I will ask you to examine this paper [handing paper to witness] and see if it is the praecipe for witnesses filed by you as the witnesses you desired subpoenaed for that trial of the case when it did come on?—A. I suppose this is the list. I did not make it out; neither did I sign it.

Q. Signed by your associate, Mr. Davis, for himself and yourself?—A. I think so.

Mr. Thurston said:

Mr. President, it is not necessary to introduce this original paper in evidence, as it already constitutes a part of the record that the other side has put in. Possibly I may be mistaken, the whole record may not have gone in. I ask to have read the names of these witnesses and their residences as showing that all their witnesses, very few in number, resided immediately in and about the courthouse at Pensacola.

The Presiding Officer said:

The Presiding Officer has some trouble about having these documents read by the Secretary. Counsel undoubtedly have a right to ask the witness on cross-examination, the witness having testified that there were forty or fifty witnesses, how many witnesses were used when the case came to trial. But the Presiding Officer can not see how it is proper at this time to have this part of the record read. The cross-examination can proceed without the introduction of the paper.

Mr. Thurston said:

Mr. President, we submit to the ruling. We will offer the paper in our own time, when that comes.

2211. On February 20, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, Simeon Belden, was under cross-examination by Mr. John M. Thurston, of counsel for the respondent, when the following occurred:

Q. This contempt proceeding was brought jointly against you, Davis, and Paquet, was it not?—A. Yes, sir.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Record, pp. 2901, 2902.

[3] Third session Fifty-eighth Congress, Record, p. 2905.

Q. At the time you have Spoken of it was only tried as to Davis and yourself?—A. Yes, Sir.

Q. Further proceedings were thereafter had in that case against your associate, Mr. Paquet, were they not?—A. Other proceedings were had later on.

Q. And those resulted in his making and filing a written apology, did they not?

Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, we are about to object to that. There is a better way of proving that, if it is true, and then it has nothing to do with the case, anyhow. There is no proceeding against Judge Swayne here regarding what he did or did not do with respect to Judge Paquet, and even if it is important to ask what he did or did not, or why he did or did not do it, there is a better way of showing it.

Mr. Thurston said:

I offered it as a part of the res gestae.

The Presiding Officer [1] said:

The Presiding Officer does not see how that is a part of the cross-examination of this witness upon anything he said. * * * It may become admissible when counsel for the respondent take up the case. The Presiding Officer does not see how it is cross-examination.

2212. Rulings in the Swayne trial as to right of counsel of respondent to introduce documents in evidence during their cross-examination of witnesses for the managers.—On February 15, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness for the managers, Elza T. Davis, was under cross-examination by Mr. Anthony Higgins, of counsel for the respondent, when these questions were asked and answered:

Q. (Producing paper.) Mr. Davis, will you kindly look at the paper I hand you and say whether or not that is your signature?

A. (After examining paper.) Yes, Sir; that is my signature.

Q. Is that a paper presented for you in the United States circuit court for the fifth judicial circuit, relating to the habeas corpus?

A. I do not think it was presented in my case. I think that is an affidavit which was prepared in New Orleans, which Judge Paquet had prepared, and which I signed.

Mr. HIGGINS. If the court please, this is an original paper, and I offer it in evidence.

Mr. Manager David A. De Armond, of Missouri, objected that the paper might not thus be introduced in evidence.

The Presiding Officer [1] said:

The Presiding Officer thinks that it is hardly proper to offer this document in evidence on the part of counsel at this time. If they desire to cross-examine the witness upon anything contained in this document, they can do so without offering it formally as evidence now. * * * The Presiding Officer understands that the witness under cross-examination has been asked if a certain document bears his signature, and he says that it does. The Presiding Officer supposes that it is entirely proper for counsel upon cross-examination to ask him any proper question relating to what is in the document, but that this is not the time to offer it in evidence.

2213. Instance wherein during cross-examination in an impeachment trial the Senate sustained objection to evidence on a point not touched in direct examination and of doubtful pertinency.—On July 10, 1876 [3] in the Senate sitting for the impeachment trial of William W. Belknap, late

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, p. 2622.

[3] First session Fifty-fourth Congress, Senate Journal, p. 970; Record of trial, p. 234.

Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent. A question arose as to whether or not respondent had ordered witness to a Dakota station as a punishment for testimony given before a committee of the House of Representatives in relation to the post tradership at Fort Sill, and Mr. Carpenter offered, in this connection, as follows:

The offer is to show that the President ordered Mr. Belknap as Secretary of War to send a regiment of infantry to Dakota; that Belknap ordered General Sherman to send a regiment of infantry to Dakota; that Sherman ordered General Sheridan to send a regiment of infantry to Dakota; that Sheridan ordered General Pope to send a regiment of infantry to Dakota, and Pope designated the Sixth Infantry, of which Colonel Hazen happened to be colonel. That is all the connection Belknap had with that transaction, and there is the proof of it. [Holding up a bundle of papers.] We offer these papers.

Mr. Manager McMahon said:

We object, and I will state the ground of our objection. We have given no evidence on this point. We concluded the examination of General Hazen without asking him when or where he was ordered after he had given the testimony before the House committee. We did so because we did not desire to encumber this record or this case with any other question except the one legitimately before the Senate. We did it because we were aware of General Hazen's own letter from which we might have drawn our own conclusions, but we care to draw none now and have made nothing upon it; and, as I repeat to the gentleman, he is endeavoring in this case to try a side issue, that side issue being in the first instance whether General Hazen had told the truth about a particular matter; and in the second instance (which has no connection with this case) whether General Belknap sent him to the frozen country because General Hazen testified before the Military Committee.

The question being submitted to the Senate, the evidence was excluded without division.

2214. The Chief Justice held, in the Johnson trial, that a witness recalled to answer a question by a Senator might be reexamined by counsel for respondent.

The Chief Justice declined to rule finally that cross-examination of a witness in an impeachment trial should be concluded before his dismissal.

On April 13, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was recalled as witness at the request of Mr. Reverdy Johnson, a Senator from Maryland, and was asked a certain question submitted in writing by Mr. Johnson, and admitted, after objection, by vote of the Senate.

The witness having answered the question, Mr. Henry Stanbery, of counsel for the respondent (in whose behalf General Sherman had been called originally as a witness), proposed another question.

Mr. Manager Benjamin F. Butler objected that, as counsel for respondent had dismissed the witness, he might not be examined again by counsel for respondent when brought back by a question of the court.

The Chief Justice[2] said:

The Chief Justice thinks it is entirely competent for the Senate to recall any witness. The Senate has decided that the question shall be put to the witness. That amounts to a recalling of him, and the Chief Justice is of opinion that the witness is bound to answer the questions. Does any Senator object?

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[1] Second session Fortieth Congress, Globe supplement, p. 169.

[2] Salmon P. Chase, of Ohio, Chief Justice.

A little later Mr. Stanbery proposed another question to the witness, and Mr. Manager Butler objected again to the renewal of the examination by the counsel for the President.

The Chief Justice said:

Nothing is more usual in courts of justice than to recall witnesses for further examination, especially at the instance of one of the members of the court. It is very often done at the instance of counsel. It is, however, a matter wholly within the discretion of the court, and if any Senator desires it the Chief Justice will be happy to put it to the court, whether the witness shall be further examined.

Argument arising, Mr. William M. Evarts, of counsel for the President, said:

The question, Senators, whether a witness may be recalled is a question of the practice of courts. It is a practice almost universal, unless there is a suspicion of bad faith, to permit it to be done, and it is always in the discretion of the court. In special circumstances, where collusion is suspected between the witness and counsel for wrong purposes adverse to the administration of justice, a strict rule may be laid down. Whatever rule this court in the future shall lay down as peremptory, if it be that neither party shall recall a witness that has been once dismissed from the stand, of course, will be obligatory upon us, but we are not aware that anything has occurred in the progress of this trial to intimate to counsel that any such rule had been adopted, or would be applied by this court.

Mr. Manager Butler said:

Mr. President, on Saturday this took place. This question was asked:

"In that interview"—

That is, when the offer was made—

"what conversation took place between the President and you in regard to the removal of Mr. Stanton?

That question was offered to be put, and after argument, and upon a solemn ruling, twenty-eight gentlemen of the Senate decided that it could not be put. That was exactly the same question as this, asking for the same conversation at the same time. Then certain other proceedings were had, and after those were had the counsel waited some considerable time at the table in consultation, and then got up and asked leave to recall this witness this morning for the purpose of putting questions. The Senate gave that leave and adjourned. This morning they recalled the witness and put such questions as they pleased, and we spent as many hours, as you remember, in doing that. On Saturday they had got through with him, except that they wanted a little time to consider whether they would recall him; they did recall him this morning, and after getting through with him the witness was sent away. Then he was again recalled to enable one of the judges to put a question to satisfy his mind. Having put his question and satisfied his mind of something that he wanted satisfied, something that he wanted to know, how can it be that that opens the case to allow the President's counsel to go into a new examination of the witness? How do they know, if he is not acting as counsel for the President, and there is not some understanding between them, which I do not charge—how can the President's counsel know that his mind is not satisfied? He recalled the witness for the purpose of satisfying his own mind, and only for that reason. I agree it is common to recall witnesses for something that has been overlooked or forgotten, but I appeal to the Presiding Officer that while—and I never have said otherwise—a member of the court who wants to satisfy himself by putting some question may recall a witness for that purpose, it never is understood that that having been done the case was opened to the counsel on either side to go on and put other questions. The court is allowed to put the question, because it is supposed that the judge wants to satisfy his mind on a particular point. After the judge has satisfied his mind on that particular point then there is to be an end, and it is not to open the case anew. I trust I have answered the honorable Senator from Maryland that I meant no imputation. I was putting it right the other way.

After further argument, the Chief Justice said:

The Chief Justice will explain the position of the matter to the Senate. The Senator from Maryland desired that the following question should be put to the witness (General Sherman): "When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 31st of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?" To that question the witness replied, "he did" or "yes." That answer

having been given, the Senator from Maryland propounded the further question, "The witness having answered yes, will he state what he said his purpose was?" The witness having made an answer to that question, either partial or full, the Chief Justice is unable to decide which, the counsel for the President propose this question: "Have you answered as to both occasions?" That is the same question which the Senator from Kentucky now proposes to the Chief Justice, and which he is unable to answer. The Senator from Oregon [Mr. Williams] objects to the question proposed by the counsel for the President upon the ground that General Sherman, having been recalled at the instance of a Senator, and having been examined by him, he can not be examined by counsel for the President. The Chief Justice thinks that that is a matter entirely within the discretion of the Senate, but that it is usual, under such circumstances, to allow counsel to proceed with their inquiries relating to the same subject-matter.

The question was then put to the witness.

Later, as the witness had concluded, Mr. Manager Bingham stated that the managers might desire to recall him on the morrow.

Mr. William M. Evarts, of counsel for the President, then said:

We must insist, Mr. Chief Justice, that the cross-examination must be finished before the witness is allowed to leave the stand.

After brief discussion the Chief Justice said:

Undoubtedly the general rule is that if the managers desire to cross-examine they must cross-examine before dismissing the witness, but that will be a question for the Senate when General Sherman is recalled.

2215. The Senate decided in the Belknap trial that a witness recalled, after direct and cross examination, to answer a question by a Senator might not be again subjected to direct examination.—On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, had been examined by the managers, cross-examined by counsel for the respondent, and had responded to questions put by Members of the Senate. Then Mr. Manager John A. McMahon proposed a question.

To this Mr. Matt. H. Carpenter, of counsel for the respondent, objected, saying:

Both parties have made this case to the Senate as they have chosen to make it; and the court has gone through in its own way, searching for facts, and, I understand, has rested also. Now, is it possible that the parties are to take this case up again and have any rights they would not have, arising from the examination as it took place on their part respectively? They can not go back with such a question certainly, unless it be on account of some questions that the court has put; and that certainly can not renew their right. They put this witness on the stand and exhausted him as far as they thought it was safe to do so; then we cross-examined him; both parties rested; and now the court has rested. Now we protest that the managers can not ask any more questions of this witness.

Mr. McMahon argued:

I understand even the order in which a witness is examined in a court of justice to be always a matter within the discretion of a court. A witness who has been fully discharged and gone may be called back and asked a question because something new has been developed in the case; and often—it is so laid down in the elementary books—you may recall a witness who has been absolutely discharged to ask him whether upon a certain occasion at a certain place he did not say so and so to A B, for the purpose of calling A B right there to contradict him. That is a very common practice.

Now, after the Senate has in the exercise of its discretion put further questions to this witness and eliminated a part of the truth from his bosom, what we want now is directly in the same line to put a question throwing light upon the very questions that have been put.

[1] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, pp. 240, 241, 243.

Mr. Montgomery Blair, of counsel for the respondent, replied:

I know what the gentleman says to be true that a witness may be recalled at any time at the discretion of the court; but the court presides over the trial and looks after the interests of justice, and therefore it is within the competency of the court, as every lawyer knows, to allow a witness to be recalled. But I appeal to this court and to its discretion and ask this court to consider whether it is just to allow this witness to be recalled and reexamined in the manner that it is now sought to do when the gentlemen have made their case, exhausted the witness, turned him over to us and we made a very brief cross-examination, and now when the manager seeks to have the last word of this witness and to reiterate and ding-dong in the ears of the Senate every time he makes a speech denunciations of our client as if he was appealing on the last argument of the case? I appeal to the Senate and to the justice of the Senate to know whether such a course of examination ought to be tolerated.

The point having been raised that the question had been already asked in practically the same form, Mr. McMahon withdrew it.

But soon thereafter, the witness in the meanwhile having answered questions put by Senators, Mr. Manager McMahon proposed another question.

Mr. Carpenter said:

That we object to. Unless the court mean to say that the whole case may now be opened by the managers, that is an improper question. It is their direct proof, and they have gone over that.

The Senate, without division, sustained the objection and excluded the question

2216. In the Johnson trial the Senate declined to admit as rebutting evidence a document not responsive to any evidence offered on the other side.—On April 20, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, after the defense had concluded their testimony, Mr. Manager Benjamin F. Butler proposed to put in evidence the nomination sent by the President to the Senate on the 13th of February, 1868, of Lieutenant-General Sherman to be general by brevet, and the nomination of Maj. Gen. George H. Thomas, sent to the Senate on the 21st of February, 1868, to be lieutenant-general by brevet and general by brevet.

Mr. William M. Evarts, of counsel for the respondent, objected:

It does not seem to us, Mr. Chief Justice and Senators, to be relevant, and it certainly is not rebutting. We have offered no evidence bearing upon the only evidence you offered under the eleventh article, which was the telegrams between Governor Parsons and the President on the subject of reconstruction. We have offered no evidence on that subject. * * * It is very apparent that this does not rebut any evidence we have offered. It is then offered as evidence in chief that the conferring of brevets on these two officers is in some way within the evil intents that are alleged in these articles. We submit that on that question there is nothing in this evidence that imports any such evil intent.

To this Mr. Manager Butler replied:

I only wish to say upon this that we do not understand that this case is to be tried upon the question of whether evidence is rebutting evidence or otherwise, because we understand that to-day the House of Representatives may bring in a new article of impeachment if they choose, and go on with it; but we have a right to put in any evidence which would be competent at any stage of the cause anywhere. * * * In many of the States—I can instance the State of New Hampshire—I am sure the rule of rebutting evidence does not obtain in their courts at all. Each party calls such pertinent and competent evidence as he has up to the hour when he says he has got through from time to time; and in some other of the States it is so applicable, and no injustice is done to anybody.

The Chief Justice having submitted the case to the Senate, there appeared in favor of receiving the evidence, yeas 14, nays 35. So the evidence was not received.

[1] Second session Fortieth Congress, Senate Journal, p. 915; Globe Supplement, p. 247.

2217. The question as to whether or not testimony in an impeachment trial might be taken by a committee of the Senate.—On March 25, 1904,[1] in the Senate, Mr. George F. Hoar, of Massachusetts, submitted the following resolution, which was considered by unanimous consent and agreed to:

Resolved, That the Committee on Rules be directed to consider and report whether any amendment be desirable in the Senate rules relating to impeachments, and especially whether the rules may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate.

[1] Second session Fifty-eighth Congreas, Record, p. 3660.

Chapter LXIX.

RULES OF EVIDENCE IN AN IMPEACHMENT TRIAL.

2218. After discussion of English precedents, the Senate ruled decisively in the Peck trial that the strict rules of evidence in force in the courts should be applied.

Witnesses in an impeachment trial are required to state facts and not opinions.

Decision as to the limits within which expert testimony may be admitted in an impeachment trial.

On January 7, 1831,[2] in the high court of impeachment during the trial of the case of The United States *v.* James H. Peck, a witness, Robert Walsh, was examined on behalf of the respondent, and Mr. William Wirt, counsel for the respondent, asked this question:

> When you read the strictures signed "A Citizen," did they strike you as misrepresenting the opinion of the court in a manner calculated to awaken the contempt and indignation of the people of Missouri, and to impair the confidence of the suitors in that court in the intelligence and integrity of the tribunal?

Judge Peck was impeached for punishing for contempt the author of a letter signed "A Citizen" and published in a St. Louis paper, criticising an opinion delivered by Judge Peck in the case of Goulard's heirs.

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[1] Under parliamentary law the Lords are governed by the legal rules of evidence. Section 2155 of this volume.

Legal rules of evidence insisted on in trial of Humphreys. Section 2395.

As to necessity of proof of intent to secure judgment for the fact. Sections 2381, 2382.

[2] Second session Twenty-first Congress, Senate Impeachment Journal, p. 331; Report of the trial of James E. Peck, pp. 229–239.

Mr. Henry R. Storrs, of New York, one of the managers for the House of Representatives, objected to this question, on the ground that the witness was asked for an opinion instead of a fact. The question for the court to settle in this trial was this: Did the strictures misrepresent the opinion? That was a question which must be decided on facts. The witness was now asked his conclusion, but was that an evidence of fact?

Mr. Jonathan Meredith, counsel for the respondent, argued that the question at issue involved a knowledge of the obscure and intricate subject of Spanish titles and the application of Spanish laws in Louisiana Territory. The witness, from his familiarity with those subjects, was able to assist the court in forming its opinion. The managers had denied that professional knowledge was needed to show whether or not one paper misrepresented another; but Mr. Meredith held that in this case the court of impeachment could not be presumed to possess the requisite knowledge to enable it to form a correct judgment, unassisted by the opinions and conclusions of others. Therefore the proposed testimony was competent. Furthermore, the intention of the respondent in punishing the author of the strictures was a question of importance, and the proposed testimony would be pertinent to that branch of the discussion.

Mr. William Wirt, also counsel for respondent, elaborated the points outlined by his associate, but before doing so made remarks on the law of evidence as applied to impeachments:

> In the well-known case of Warren Hastings, which occupied England so long, a most able and masterly protest was entered by Mr. Burke and the managers on the part of the House of Commons against the application of the rigid rules of evidence which governed the practice of the courts of law. It was contended before that tribunal that instead of the strict and iron rules of a law court, the field was broad and liberal, and to be controlled by no rule but the Lex et consuetudo Parliamenti. The protest is extended, very learned, and rests on numerous authorities; and if this court could have an opportunity to review it, they would not feel the least hesitation as to the fact that they are not to be trammeled and hemmed in by the rigid rules of evidence. I find that in the remarks of the Federalist respecting the high court of impeachment erected by the Constitution of this country, the writer lays it down as a conceded point that the strictness which prevails in the ordinary criminal courts does not apply here, nor is it required that the article of impeachment should be drawn up with all the rigid precision of an indictment. The proceedings in this highest court are to be more liberal and free, and nearer substantially to the course pursued by courts conversant with the civil than the criminal law. Mr. Rawle has the same idea. And the question would be, if the original view could now be before this court, whether this tribunal, which is not an appellate court on all questions of law, and is not, therefore, conversant with the strict rules of law, but whose whole jurisdiction has respect to impeachments alone, should or should not open itself to all lights which can be brought to bear on this decision, and whether more injustice would not accrue from narrowing the apertures through which light is to be received, than from opening them in all directions from whence a single ray can touch them.

In reply, Mr. James Buchanan, of Pennsylvania, chairman of the managers, argued at length in support of the objection, saying in the course of his remarks:

> This question in four lines embraces the very essence of the respondent's defense—the very question to be decided by the court, and asks the witness to substitute his opinion for the judgment of the tribunal. I ask, Is there a court in the United States, however inferior its grade, which, on the trial of am indictment for a libel, would not, without an argument, overrule the opinion of a witness as to whether the matter charged to be libellous was or was not a libel, and what would be its effect on the

public mind? Does it not strike everyone at the first blush that no such court could be found in any portion of this country?

The gentleman who last addressed the court has argued the question with very great ingenuity, and has presented a variety of topics introductory to the new doctrine which he has advanced concerning the law of evidence. He at first contended (though he afterwards waived the point) that the rules of evidence, by which all other courts of the United States are bound, ought not to be applied in their strictness to this high court of impeachment; and to sustain this proposition, he cited the celebrated protest of Mr. Burke upon the trial of Warren Hastings. But the gentleman seems to have forgotten that in that far-famed trial this very question was fairly made and decided; and it was held that the House of Lords, when sitting as a high court of impeachment, was bound by the same rules of evidence which regulated the proceedings of the most inferior courts of the kingdom. The whole trial of Judge Chase proceeded upon the same principle.

But even without such a precedent, could there be a reasonable doubt upon this question? What, sir? Against whom is it that this tremendous power of impeachment is invoked? Is it not against high state criminals? Men of standing and influence and character? And when the House of Representatives bring a culprit of this description to trial, are they to be told that in crimes affecting the whole nation, and which, in their consequences, may bring ruin upon the people, that the accused shall enjoy rights and privileges and immunities which are denied to any ordinary citizen, when arraigned before the most inferior court in the land? We deny the existence of any power, even in this high court, to dispense with the rules of evidence. When the House of Representatives become accusers, it is their right to have these rules administered here as they are administered by the Supreme Court and the other tribunals of the country.

There is another point of view in which the doctrine for which we contend will appear peculiarly proper and necessary. Will not the proceedings upon this trial be regarded as a precedent? And if this court shall decide questions of evidence against the law of the land will not such decisions bring the law of evidence into doubt and confusion throughout the United States?

The gentleman has also invoked the Federalist to his aid; and what does it say? Does it declare that on the trial of impeachments there is to be a departure from the established rules of proceeding, and that testimony is to be admitted here which ought to be rejected in a court of law? By no means. It merely recognizes the principle of the English law, that "in the delineation of the offense" in the form of the article of impeachment the same rigid exactness is not required which is necessary in framing an indictment. There is not the least intimation that this court, in the progress of the trial, ought to depart from the ordinary rules of evidence.

In further argument Mr. Storrs said:

I confess I feel alarmed to hear it gravely urged here that an impeachment is to be governed by other rules than the well-known and long-established rules of evidence. Rules of evidence are as much a part of the law of the land as any other part of it, and they constitute the security of every man. A more dangerous principle could not be broached, or a more alarming principle established than that, in the trial of an impeachment, the ordinary rules of evidence are to be relaxed; and I was, I confess, surprised that the respondent should seek to unsettle a principle the overturning of which might easily lead to the most unjust and oppressive proceedings. If this is to be done in favor of the respondent, will it be done in favor of him alone, or may not State favorites be shielded or State victims be destroyed by the same process?

On the question, "Shall this interrogatory be put to the witness?" there appeared yeas 7, nays 35.

Again, on January 10,[1] the same witness being under examination, Mr. Meredith asked this question, which on objection was excluded by a vote of yeas 1, nays 39:

Do you think that the publication signed "A Citizen" was calculated to incense the claimants against the court, and to impair, in their minds, their confidence and respect for the court?

[1] Journal, p. 332; Report of trial, p. 239.

2219. In the Johnson trial the Senate declined to agree to a declaration modifying the strictness of the ordinary rules of evidence.—On April 16, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Charles Sumner, of Massachusetts, proposed the following as a declaration of opinion to be adopted as an answer to the constantly recurring questions on the admissibility of testimony:

Considering the character of this proceeding, that it is a trial of impeachment before the Senate of the United States, and not a proceeding by indictment in an inferior court;

Considering that Senators are, from beginning to end, judges of law as well as fact, and that they are judges from whom there is no appeal;

Considering that the reasons for the exclusion of evidence on an ordinary trial where the judge responds to the law and the jury to the fact are not applicable to such a proceeding;

Considering that, according to parliamentary usage, which is the guide in all such cases, there is on trials of impeachment a certain latitude of inquiry and a freedom from technicality;

And considering, finally, that already in the course of this trial there have been differences of opinion as to the admissibility of evidence;

Therefore, in order to remove all such differences and to hasten the dispatch of business, it is deemed advisable that all evidence offered on either side not trivial or obviously irrelevant in nature shall be received without objection, it being understood that the same when admitted shall be open to question and comparison at the bar in order to determine its competency and value, and shall be carefully sifted and weighted by Senators in the final judgment.

Mr. John Conness, of California, moved that the paper lie on the table, and the question being taken, there appeared yeas 33, nays 11. So the paper was laid on the table.

2220. In an impeachment trial testimony that can be construed as fairly within the purport of the articles is admitted.—On April 2, 1868 ,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Charles A. Tinker was called and sworn as a witness on behalf of the managers, to prove the following dispatches:

MONTGOMERY, ALA.,
January 17, 1867.

Legislature in session. Efforts making to reconsider vote on constitutional amendment. Report from Washington says it is probable an enabling act will pass. We do not know what to believe. I find nothing here.

LEWIS E. PARSONS,
Exchange Hotel.

His Excellency ANDREW JOHNSON, *President.*

UNITED STATES MILITARY TELEGRAPH,
EXECUTIVE OFFICE, WASHINGTON, D. C.,
January 17, 1867.

What possible good can be obtained by reconsidering the constitutional amendment? I know of none in the present posture of affairs; and I do not believe the people of the whole country will sustain any set of individuals in attempts to change the whole character of our Government by enabling acts or otherwise. I believe, on the contrary, that they will eventually uphold all who have patriotism and courage to stand by the Constitution and who place their confidence in the people. There should be no faltering on the part of those who are honest in their determination to sustain the several coordinate departments of the Government in accordance with its original design.

ANDREW JOHNSON.

HON. LEWIS E. PARSONS, *Montgomery, Ala.*

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[1] Second session Fortieth Congress, Senate Journal, p. 902; Globe Supplement, p. 195.

[2] Second session Fortieth Congress, Senate Journal p. 877; Globe supplement, pp. 90–92.

Mr. Butler stated that he introduced this evidence under the tenth and eleventh articles of impeachment to show how President Johnson had endeavored to oppose the reconstruction legislation of Congress, of which the defeated amendment referred to in the dispatches was a part. Lewis E. Parsons was provisional governor of Alabama, and a man of influence.

The counsel for the President objected to the evidence because it did not refer to acts charged in the articles of impeachment. The tenth article referred to the President's speeches, and not to telegrams; and the eleventh charged him with trying to remove Secretary of War Stanton, and with trying to prevent the execution of the reconstruction laws. Mr. William M. Evarts, of counsel for the President, said:

"Designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted."

That is the entire purview of the intent. Now, the only acts charged as done with this intent are the delivery of a speech at the Executive Mansion in August, 1866, and two speeches, one at St. Louis and the other at Cleveland, in September, 1866. The article concludes that by means of these utterances—

"Said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit and was then and there guilty of a high misdemeanor in office."

That is the gravamen of the crime; that he brought the presidential office into scandal by these speeches made with this intent. Senators will judge from the reading of this telegram, dated in January, 1867, whether that supports the principal charge or intent of his derogating from the credit of Congress or bringing the presidential office into discredit.

The eleventh article has for its substantive charge nothing but the making of the speech of the 18th of August, 1866, saying that by that speech he declared and affirmed—

"In substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and, also, thereby denying, and intending to deny, the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and in pursuance of said declaration"—

That is, in pursuance of the speech made at the Executive Mansion on the 18th of August, 1866—

"The said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, A. D. 1868, at the city of Washington, in the District of Columbia, did, unlawfully, and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled, "An act regulating the tenure of certain civil offices,' passed March 2, 1867"—

Which was after the date of this dispatch—

"By unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War."

The court will consider whether this dispatch touches that subject.

"And also by further unlawfully devising and contriving, and attempting to devise and contrive, means, then and there, to prevent the execution of an act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes,' approved March

2, 1867; and also to prevent the execution of an act entitled 'An act to provide for the more efficient government of the rebel States,' passed March 2, 1867."

Also, after the date of this dispatch. It is under one or the other of these two articles that this dispatch is, in its date and in its substance, supposed to be relevant.

Mr. Evarts concluded by contending that there was nothing in the telegram that showed the President guilty of crime or misdemeanor in opposing legislation of Congress or in doing anything mentioned in the articles.

Mr. Manager George S. Boutwell specifically cited the concluding words of the eleventh article, wherein the President was charged with "attempting to devise and contrive, means then and there * * * to prevent the execution of an act" known as the reconstruction act. The adoption of the constitutional amendment was part of the reconstruction system, and the telegram to Governor Parsons was an act hostile to reconstruction.

The question being taken, the Senate decided, yeas 27, nays 17, that the evidence should be admitted.

2221. In the Johnson trial the Senate held inadmissible as evidence of an intent specified in the articles an act not specified in the articles.—On April 2, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, William E. Chandler, formerly Assistant Secretary of the Treasury, was called by the managers and sworn. The question "Do you know Edmund Cooper?", asked by Mr. Manager Benjamin F. Butler, caused Mr. Henry Stanbery, of counsel for the President, to ask what was the object of eliciting testimony concerning Mr. Cooper. After discussion, Mr. Butler offered the following in writing:

We offer to prove that after the President had determined on the removal of Mr. Stanton, Secretary of War, in spite of the action of the Senate, there being no vacancy in the office of Assistant Secretary of the Treasury, the President unlawfully appointed his friend and theretofore private secretary, Edmund Cooper, to that position as one of the means by which he intended to defeat the tenure-of-civil-office act and other laws of Congress.

Mr. Manager Butler further stated that the proof was offered under the eighth and eleventh articles of impeachment.

Objecting to the testimony offered, Mr. William M. Evarts, of counsel for the President, quoted the eighth article's charge against the President:

"With intent unlawfully to control the disbursement of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868, did unlawfully and contrary to the provisions of an act entitled 'An act regulating the tenure of certain civil offices,' passed March 2, 1868, and in violation of the Constitution of the United States, there being no vacancy in the office of Secretary for the Department of War, and with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows; that is to say:"

Having quoted the article, Mr. Evarts continued:

Now, you propose to prove under that, that there being no vacancy in the office of Assistant Secretary of the Treasury, he proposed to appoint his private secretary, Edmund Cooper, Assistant Secretary of the Treasury. That is the idea, is it, under the eighth article? We object to this as not admissible under the eighth article. As by reference it will be perceived it charges nothing but an

[1] Second session Fortieth Congress, Senate Journal, pp. 875, 876; Globe Supplement, pp. 86–89.

intent to violate the civil-tenure act, and no mode of violating that except, in the want of a vacancy in the War Department, the appointment of General Thomas contrary to that act.

As for the eleventh article, the honorable court will remember that in our answer we stated that there was in that article no such description, designation of ways or means, or attempt at ways and means, whereby we could answer definitely; and the only allegations there are, that in pursuance of a speech that the President made on the 18th of August, 1866, he—

"Afterwards, to wit, on the 21st day of February, A. D. 1868, at the city of Washington, in the District of Columbia, did unlawfully, and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled 'An act regulating the tenure of certain civil offices,' passed March 2, 1867, by unlawfully devising and contriving and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also by further unlawfully devising and contriving and attempting to devise and contrive means, then and there, to prevent the execution of an act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes,' approved March 2, 1867; and also to prevent the execution of an act entitled 'An act to provide for the more efficient government of the rebel States,' passed March 2, 1867, whereby," etc.

The only allegation here as to time and principal action, in reference to which all these unnamed and undescribed ways and means were used, is that on the 21st of February, 1868, at the city of Washington, he did unlawfully and in disregard of the Constitution attempt to prevent the execution of the civil tenure-of-office act by unlawfully devising and contriving and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from resuming his place in the War Department. And now proof is offered here, substantively, of efforts in November, 1867, to appoint, in the want of a vacancy in the office of Assistant Secretary of the Treasury, Mr. Edmund Cooper. We object to that evidence.

Mr. Butler urged that the appointment of Cooper was one of the means whereby the President sought to so arrange in the Treasury Department that General Thomas's requisitions from the War Department should be honored.

Mr. John A. Bingham, of the managers, also urged that the appointment of Cooper was intended as a means of illegally drawing money from the Treasury on requisitions of an illegal acting Secretary of War. Mr. Bingham further said on the question of evidence:

We consider the law to be well settled and accepted everywhere in this country and England today that where an intent is the subject-matter of inquiry in a criminal prosecution, other and independent acts on the part of the accused, looking to the same result, are admissible in evidence for the purpose of establishing that fact. And we go further than that. We undertake to say, upon very high and commanding authority, not to be challenged here or elsewhere, that it is settled that such other and independent acts showing the purpose to bring about the same general result, although at the time of the inquiry the subject-matter of a separate indictment, are nevertheless admissible. I doubt not that it will occur to the recollection of honorable Senators that among other cases illustrative of the rule which I have just cited it has been stated in the books—the cases have been ruled first and then incorporated into books of standard authorities—that where a party, for example, was charged with shooting with intent to kill a person named, it was competent, in order to show the malice, the malicious intent of the act, to show that at another time and place he laid poison. A party is charged with passing a counterfeit note; it is competent, in order to prove the scienter, to show that he was in possession of other counterfeit notes of a different denomination; and the rule, as stated in the books, is that what is competent to prove the scienter, as a general principle, is competent to prove the intent.

Before deciding the question several Senators propounded questions tending to show whether or not an Assistant Secretary of the Treasury could, in defiance of his chief, the Secretary of the Treasury, or without a special designation from

him, or after his removal, honor requisitions for money from the Treasury. The responses of witnesses and the reading of the law did not make plain that the Assistant Secretary would have the power, and rather suggested that he would not have it.

The question being taken as to the admissibility of the evidence, the yeas were 22, the nays 27. So the evidence was not admitted.

2222. In the Johnson trial the Senate declined to admit evidence of a fact bearing on the question of intent, no issue having been accepted in the pleadings on this point.

The Senate refused, in the Johnson trial, to admit as evidence in mitigation testimony held otherwise inadmissible.

Instances in the Johnson trial wherein the decisions of the Chief Justice on questions of evidence were overruled.

Instances wherein Senators propounded questions to counsel during arguments as to admissibility of evidence.

On April 17, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gideon Welles, Secretary of the Navy, was sworn and examined as a witness on behalf of the respondent. Mr. Welles testified that he was present at a Cabinet meeting on Friday, February 26, 1867, and thereupon Mr. William M. Evarts, of counsel for the respondent, submitted the following offer of proof:

> We offer to prove that the President, at a meeting of the Cabinet while the bill was before the President for his approval, laid before the Cabinet the tenure-of-civil-office bill for their consideration and advice to the President respecting his approval of the bill; and thereupon the members of the Cabinet then present gave their advice to the President that the bill was unconstitutional and should be returned to Congress with his objections, and that the duty of preparing a message, setting forth the objection to the constitutionality of the bill, was devolved on Mr. Seward and Mr. Stanton; to be followed by proof as to what was done by the President and Cabinet up to the time of sending in the message.

Mr. Manager Benjamin F. Butler at once objected to the admission of the proposed testimony.

The arguments on this question of evidence were made principally on April 18.

Mr. Manager James F. Wilson, in arguing against the admissibility of the testimony, pointed out that the House of Representatives had, in their replication, made no issue on the question whether or not the President had been advised by his Cabinet that the tenure-of-office act was unconstitutional. Whether the President was so advised or not they held to be immaterial to this case, and hence objected to the testimony on that point as irrelevant.

Mr. Manager Wilson continued:

> The respondent is arraigned for a violation of and a refusal to execute the law. He offers to prove that his Cabinet advised him that a certain bill presented for his approval was in violation of the Constitution; that he accepted their advice and vetoed the bill; and upon that, and such additional advice as they may have given him, claims the right to resist and defy the provisions of the bill, notwithstanding its enactment into a law by two-thirds of both Houses over his objections. In other words, he claims, substantially, that he may determine for himself what laws he will obey and execute, and

[1] Second session Fortieth Congress, Senate Journal, pp. 909–911; Globe supplement, pp. 225–231.

what laws he will disregard and refuse to enforce. In support of this claim he offers the testimony which, for the time being, is excluded by the objection now under discussion. If I am correct in this, then I was not mistaken when I asserted that this objection confronts one of the most important questions involved in this case. It may be said that this testimony is offered merely to disprove the intent alleged and charged in the articles; but it goes beyond this and reaches the main question, as will clearly appear to the mind of anyone who will read with care the answer to the first article. The testimony is improper for any purpose and in every view of the case.

Mr. Manager Wilson next proceeded to examine the constitutional provisions relating to the executive power, and the punishment of impeachment, and then said:

The executive power was created to enforce the will of the nation; the will of the nation appears in its laws; the two Houses of Congress are intrusted with the power to enact laws, the objections of the Executive to the contrary notwithstanding; laws thus enacted, as well as those which receive the executive sanction, are the voice of the people. If the person clothed for the time being with the executive power—the only power which can give effect to the people's will—refuses or neglects to enforce the legislative decrees of the nation, or willfully violates the same, what constituent elements of governmental power could be more properly charged with the right to present and the means to try and remove the contumacious Executive than those intrusted with the power to enact the laws of the people, guided by the checks and balances to which I have directed the attention of the Senate? What other constituent parts of the Government could so well understand and adjudge of a perverse and criminal refusal to obey, or a willful declination to execute, the national will, than those joining in its expression? There can be but one answer to these questions. The provisions of the Constitution are wise and just beyond the power of disputation in leaving the entire subject of the responsibility of the Executive to faithfully execute his office and enforce the laws to the charge, trial, and judgment of the two several branches of the legislative department, regardless of the opinions of Cabinet officers or of the decisions of the judicial department. The respondent has placed himself within this power of impeachment by trampling on the constitutional duty of the Executive and violating the penal laws of the land.

After contrasting the constitutions of the United States and England, the manager quoted an opinion given by Attorney-General Black, dated November 20, 1860, wherein it was stated that "to the Chief Executive Magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed," and proceeded:

A departure from this view of the character of the executive power, and from the nature of the duty and obligation resting upon the officer charged therewith, would surround this nation with perils of the most fearful proportions. Such a departure would not only justify the respondent in his refusal to obey and execute the law, but also approve his usurpation of the judicial power when he resolved that he would not observe the legislative will, because, in his judgment, it did not conform to the provisions of the Constitution of the United States touching the subjects embraced in the articles of impeachment on which he is now being tried at your bar. Concede this to him, and when and where may we look for the end? To what result shall we arrive? Will it not naturally and inevitably lead to a consolidation of the several powers of the Government in the executive department? And would this be the end? Would it not rather be but the beginning? If the President may defy and usurp the powers of the legislative and judicial departments of the Government, as his caprices or the advice of his Cabinet may incline him, why may not his subordinates, each for himself, and touching his own sphere of action, determine how far the directions of his superior accord with the Constitution of the United States, and reject and refuse to obey all that come short of the standard erected by his judgment?

In conclusion, Mr. Manager Wilson said:

Concede to the President immunity through the advice of his Cabinet officers and you reverse, by your decision, the theory of our Constitution.

Mr. Benjamin R. Curtis, of counsel for the respondent, in arguing, said that he should not consume time to reply to those matters which seemed to touch the merits of the case. This was simply a question as to the admissibility of proofs. Continuing, Mr. Curtis said:

The honorable manager has read a portion of the answer of the President, and has stated that the House of Representatives has taken no issue upon that part of the answer. As to that, and as to the effect of that admission by the honorable manager, I shall have a word or two to say presently. But the honorable manager has not told you that the House of Representatives, when the honorable managers brought to your bar these articles, did not intend to assert and prove the allegations in them which are matters of fact. One of these allegations, Mr. Chief Justice, as you will find by reference to the first article and to the second article and to the third article, is that the President of the United States in removing Mr. Stanton and in appointing General Thomas intentionally violated the Constitution of the United States; that he did these acts with the intention of violating the Constitution of the United States. Instead of saying, "it is wholly immaterial what intention the President had; it is wholly immaterial whether he honestly believed that this act of Congress was unconstitutional; it is wholly immaterial whether he believed that he was acting in accordance with his oath of office, to preserve, protect, and defend the Constitution when he did this act"—instead of averring that, they aver that he acted with an intention to violate the Constitution of the United States.

Now, when we introduce evidence here, or offer to introduce evidence here, bearing on this intent, evidence that before forming any opinion upon this subject he resorted to proper advice to enable him to form a correct one, and that when he did form and fix opinions on this subject it was under the influence of this proper advice, and that consequently when he did this act, whether it was lawful or unlawful, it was not done with the intention to violate the Constitution—when we offer evidence of that character, the honorable manager gets up here and argues an hour by the clock that it is wholly immaterial what his intention was, what his opinion was, what advice he had received and in conformity with which he acted in this matter.

* * * * * * *

I therefore say that when the question of his intention comes to be considered by the Senate, when the question arises in their minds whether the President honestly believed that this was an unconstitutional law, when the particular emergency arose, when if he carried out or obeyed that law he must quit one of the powers which be believed were conferred upon him by the Constitution, and not be able to carry on one of the departments of the Government in the manner the public interests required—when that question arises for the consideration of the Senate, then they ought to have before them the fact that he acted by the advice of the usual and proper advisers; that he resorted to the best means within his reach to form a safe opinion upon this subject, and that, therefore, it is a fair conclusion that when he did form that opinion it was an honest and fixed opinion which he felt he must carry out in practice if the proper occasion should arise. It is in this point of view, and this point of view only, that we offer this evidence.

In the course of the discussion Mr. Jacob M. Howard, a Senator from Michigan, had proposed this inquiry:

Do the counsel for the accused not consider that the validity of the tenure of office bill was purely a question of law, to be determined on this trial by the Senate; and, if so, do they claim that the opinion of Cabinet officers touching that question is competent evidence by which the judgment of the Senate ought to be influenced?

To this Mr. Curtis answered:

The constitutional validity of any bill is, of course, a question of law which depends upon a comparison of the provisions of the bill with the law enacted by the people for the government of their agents. It depends upon whether those agents have transcended the authority which the people gave them, and that comparison of the Constitution with the law is, in the sense that was intended undoubtedly by the honorable Senator, a question of law.

The next branch of the question is "whether that question is to be determined on this trial by the Senate."

That is a question I can not answer. That is a question that can be determined only by the Senate themselves. If the Senate should find that Mr. Stanton's case was not within this law, then no such question arises, then there is no question in this particular case of a conflict between the law and the Constitution. If the Senate should find that these articles have so charged the President that it is necessary for the Senate to believe that there was some act of turpitude on his part connected with this matter, some mala fides, some bad intent, and that he did honestly believe, as he states in his answer, that this was an unconstitutional law, that an occasion had arisen when he must act accordingly under his oath of office, then it is immaterial whether this was a constitutional or unconstitutional law; be it the one or be it the other, be it true or false that the President has committed a legal offense by an infraction of the law, he has not committed the impeachable offense with which he is charged by the House of Representatives. And, therefore, we must advance beyond these two questions before we reach the third branch of the question which the honorable Senator from Michigan propounds, whether the question of the constitutionality of this law must be determined on this trial by the Senate. In the view of the President's counsel there is no necessity for the Senate to determine that question. The residue of the inquiry is:

"Do the counsel claim that the opinion of the Cabinet officers touching that question"—

That is, the constitutionality of the law—

"is competent evidence by which the judgment of the Senate might be influenced?"

Certainly not. We do not put them on the stand as experts on questions of constitutional law. The judges will determine that out of their own breasts. We put them on the stand as advisers of the President to state what advice, in point of fact, they gave him, with a view to show that he was guilty of no improper intent to violate the Constitution.

Mr. Curtis next read a question propounded by Mr. Reverdy Johnson, a Senator from Maryland:

"Do the counsel for the President understand that the managers deny the statement made by the President in his message of December 12, 1867, to the Senate, as given in evidence by the managers at page 45 of the official report of the trial that the members of the Cabinet gave him"—

That is, the President—

"the opinion there stated as to the tenure of office act; and is the evidence offered to corroborate that statement, or for what other object is it offered?"

To this Mr. Curtis replied:

We now understand, from what the honorable manager has said this morning, that the House of Representatives has taken no issue on that part of our answer; that the honorable managers do not understand that they have traversed or denied that part of our answer. We did also understand before this question was proposed to us that the honorable managers had themselves put in evidence the message of the President of the 12th of December, 1867, to the Senate, in which he states that he was advised by the members of the Cabinet unanimously, including Mr. Stanton, that this law would be unconstitutional if enacted. They have put that in evidence themselves.

Nevertheless, Senators, this is an affair, as you perceive, of the utmost gravity in any possible aspect of it; and we did not feel at liberty to avoid or abstain from the offering of the members of the President's Cabinet that they might state to you, under the sanction of their oaths, what advice was given. I suppose all that the managers would be prepared to admit might be—certainly they have made no broader admission—that the President said these things in a message to the Senate; but from the experience we have had thus far in this trial we thought it not impossible that the managers, or some one of them speaking in behalf of himself and the others, might say that the President had told a falsehood, and we wish, therefore, to place ourselves right before the Senate on this subject. We desire to examine these gentlemen to show what passed on this subject, and we wish to do it for the purposes I have stated.

Mr. George H. Williams, a Senator from Oregon, proposed this question:

Is the advice given to the President by his Cabinet with a view of preparing a veto message pertinent to prove the right of the President to disregard the law after it was passed over his veto?

To this Mr. Curtis replied:

It is not of itself sufficient; it is not enough that the President received such advice; he must show that an occasion arose for him to act upon it which in the judgment of the Senate was such an occasion that you could not impute to him wrong intention in acting. But the first step is to show that he honestly believed that this was an unconstitutional law. Whether he should treat it as such in a particular instance is a matter depending upon his own personal responsibility without advice. That is the answer which I suppose is consistent with the views we have of this case.

The arguments being closed, the Chief Justice [1] said:

Senators, the question now before the Senate, as the Chief Justice conceives, respects not the weight but the admissibility of the evidence offered. To determine that question it is necessary to see what is charged in the articles of impeachment. The first article charges that on the 21st day of February, 1868, the President issued an order for the removal of Mr. Stanton from the office of Secretary of War; that this order was made unlawfully, and that it was made with intent to violate the tenure of office act and in violation of the Constitution of the United States. The same charge in substance is repeated in the articles which relate to the appointment of Mr. Thomas, which was necessarily connected with the transaction. The intent, then, is the subject to which much of the evidence on both sides has been directed; and the Chief Justice conceives that this testimony is admissible for the purpose of showing the intent with which the President has acted in this transaction. He will submit the question to the Senate if any Senator desires it.

The question being taken, there appeared yeas 20, nays 29. So the evidence was decided to be inadmissible.

Immediately thereafter [2] a question asked of the same witness by Mr. Evarts was challenged, thereby bringing from the counsel for the respondent this offer:

We offer to prove that at the meetings of the Cabinet at which Mr. Stanton was present, held while the tenure of office bill was before the President for approval, the advice of the Cabinet in regard to the same was asked by the President and given by the Cabinet; and thereupon the question whether Mr. Stanton and the other Secretaries who had received their appointment from Mr. Lincoln were within the restrictions upon the President's power of removal from office created by said act was considered, and the opinion expressed that the Secretaries appointed by Mr. Lincoln were not within such restrictions.

Mr. Manager Butler objected that this question related to the construction of a law, while the other related to its constitutionality; and that both questions fell under the same principle.

After argument, the Chief Justice said:

The Chief Justice is of opinion that this testimony is proper to be taken into consideration by the Senate sitting as a court of impeachment; but he is unable to determine what extent the Senate is disposed to give to its previous ruling, or how far they consider that ruling applicable to the present question.

The question being submitted to the Senate, it was decided, yeas 22, nays 26, that the evidence was inadmissible.

Very soon thereafter [3] another question asked of the same witness was objected to, whereat the counsel for the respondent presented this offer:

We offer to prove that at the Cabinet meetings between the passage of the tenure of civil office bill and the order of the 21st of February, 1868, for the removal of Mr. Stanton upon occasions when the condition of the public service was affected by the operation of that bill came up for the consideration

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Senate Journal, pp. 911, 912; Globe supplement, pp. 230, 231.

[3] Senate Journal, p. 912; Globe supplement, p. 233.

and advice of the Cabinet, it was considered by the President and Cabinet that a proper regard to the public service made it desirable that upon some proper case a judicial determination on the constitutionality of the law should be obtained.

To this Mr. Manager Butler objected:

Mr. President and Senators, we, of the managers, object, and we should like to have this question determined in the minds of the Senators upon this principle. We understand here that the determination of the Senate is, that Cabinet discussions, of whatever nature, shall not be put in as a shield to the President. That I understand, for one, to be the broad principle upon which this class of questions stand and upon which the Senate has voted; and, therefore, these attempts to get around it, to get in by detail and at retail—if I may use that expression—evidence which in its wholesale character can not be admitted, are simply tiring out and wearing out the patience of the Senate. I should like to have it settled, once for all, if it can be, whether the Cabinet consultations upon any subject are to be a shield.

In reply, Mr. Evarts argued:

By decisive determinations upon certain questions of evidence arising in this cause you have decided that, at least, what in point of time is so near to this action of the President as may fairly import to show that in his action he was governed by a desire to raise a question for judicial determination shall be admitted. About that there can be no question that the record will confirm my statement. Now, my present inquiry is to show that within this period, thus extensively and comprehensively named for the present, in his official duty and in his consultations concerning his official duty with the heads of Departments, it became apparent that the operation of this law raised embarrassments in the public service and rendered it important as a practical matter that there should be a determination concerning the constitutionality of the law, and that it was desirable that upon a proper case such a determination should be had.

Mr. John B. Henderson, a Senator from Missouri, proposed this question to the managers:

If the President shall be convicted, he must be removed from office.

If his guilt should be so great as to demand such punishment, he may be disqualified to hold and enjoy any office under the United States.

Is not the evidence now offered competent to go before the court in mitigation?

To this Mr. Manager Butler replied that usually evidence in mitigation should be submitted after verdict and before judgment. Therefore, he said:

There is an appreciable time in this tribunal, as in all others, between a verdict of guilty and the act of judgment; and if any such evidence can be given at all, it must, in my judgment, be given at that time. It certainly can not be given for any other purpose.

The Chief Justice having submitted the question of admissibility to the Senate there appeared yeas 19, nays 30. So the evidence was not admitted.

Immediately thereupon [1] Mr. Evarts asked of the same witness this question:

Was there, within the period embraced in the inquiry in the last question, and at any discussions or deliberations of the Cabinet concerning the operation of the tenure of civil office act and the requirements of the public service in regard to the same, any suggestion or intimation whatever touching or looking to the vacation of any office by force or getting possession of the same by force?

To this Mr. Manager Butler objected as wholly immaterial and excluded under the principles of the last ruling. He said, in response to a question by the Chief Justice, that it was not worthwhile to object to the question as leading.

The Chief Justice having submitted the question of admissibility to the Senate, there appeared yeas 18, nays 26. So the question was excluded.

[1] Senate Journal, p. 913; Globe Supplement, p. 234.

2223. Evidence that from the nature of the charge was immaterial was ruled out during the Swayne trial, although respondent's answer had seemed to lay a foundation for it.—On February 14, 1905,[1] in the Senate sitting for the trial of Judge Charles Swayne, a witness, Elza T. Davis, was under examination, when Mr. Porter J. McCumber, a Senator from North Dakota, said:

Mr. President, I want to direct the attention of the Presiding Officer to a matter in the way of an inquiry for information. I understand that the pleadings of this case do make an issuable fact possibly of the question of inconvenience; but what I wish to ask the Chair is this: When the law itself provides that it shall be unlawful for a judge to reside outside of his district, with no question whatever of convenience or inconvenience, whether the time of the Senate could properly be taken up upon an issue which, to my mind, is in no wise involved in the case. I call the Chair's attention to the law, which is very specific.

"Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

If the question, it seems to me, Mr. President, of convenience or inconvenience is a question at all, it is precluded by the statute itself, which presumes that it will be convenient, or more convenient, if the judge resides there, or less convenient if he does not.

I do not know how many witnesses the managers on the part of the House may have on this subject, but it seems to me that the Chair, sitting as a judge, would necessarily have to rule that all this matter was wholly immaterial. The simple question is, Was he or was he not a resident? And I submit to the Chair whether it should be gone into, and, if so, the limit that should be allowed, taking the position myself that under the statute it can not be an issuable fact.

I may say to the Chair that we might take up a week on this subject, and then every Senator and attorney might concur in the opinion that the question of convenience or inconvenience would not affect it in the least.

Mr. Manager James B. Perkins, of New York, said:

Mr. President, if I may make a suggestion to the Presiding Officer in reference to the suggestion made by the Senator from North Dakota, I will say that the suggestion just made entirely corresponds with what I suggested yesterday, when I asked a somewhat similar question of one of the witnesses. It is the view of the managers, as it is of the Senator, that this evidence is immaterial. The statute says, as the Senator has properly stated, that if the judge does not reside within his district it shall be a high misdemeanor, and whether convenience or inconvenience resulted is, in our judgment, wholly immaterial.

However, in the answer of the respondent, it is alleged that in his belief his absence from his district caused no inconvenience to suitors. To meet that, not knowing what the views of the Senate might be; not knowing but that someone might say, "Ah, well, this judge was absent, but it did no harm, and there was no inconvenience and no suitors suffered," we thought it might be well to offer some evidence on this subject.

But we are entirely content to take the ruling of the Chair that the evidence is immaterial and to offer no more of it, although we have other witnesses whom we could call. As the Senator has suggested, this is a branch on which indefinite evidence might be given if we saw fit to subpoena a sufficient number of lawyers.

Mr. John M. Thurston, of counsel for respondent, said:

Mr. President, counsel for the respondent fully agree with the position stated by the Senator from North Dakota [Mr. McCumber] and also the position as acquiesced in by the managers. We do not believe this testimony is material or relevant. We did, however, in framing our answer have in mind the fact that before the committee of the House great stress had apparently been laid in the examination of witnesses upon testimony which they claimed tended to show that Judge Swayne's temporary absences from Florida had caused inconvenience to suitors and attorneys. Therefore we thought we

[1] Third session Fifty-eighth Congress, Record, pp. 2532, 2533.

were compelled to meet what had appeared in a previous investigation to be, in the theory of the managers, material. We do not believe it is.

We believe that the question of fact before the court is this, and only this: Did Judge Swayne have a residence in the district for which he was appointed? And that question of fact is in no wise changed or modified by reason of any further situation which may involve the convenience or the inconvenience of suitors or of attorneys.

After further argument the Presiding Officer [1] said:

Unless some Senator desires to have the matter submitted to the Senate, the Presiding Officer thinks that this testimony has some bearing upon the question of residence; that so far as the question of inconvenience is concerned, that is not material to the issue.

And later, during cross-examination of the witness, the Presiding Officer said:

The Presiding Officer does not think that the evidence in relation to the inconvenience of this witness by reason of the absence of Judge Swayne from Florida or Pensacola is material or even admissible, but that so much of his testimony as proves the fact that the judge was absent from Florida at Guyencourt, Del., at certain times is admissible for what it is worth.

2224. A question being raised in the Swayne trial that certain evidence was immaterial, the pleadings were examined to determine whether or not the issue involved was raised.—On February 10, 1905,[2] in the Senate sitting for the trial of Judge Charles Swayne, Mr. Marlin E. Olmsted, of Pennsylvania, one of the managers, called Payne W. Chase, a witness, to prove the charge that the respondent had made false certificates of expenses.

Mr. Joseph W. Bailey, a Senator from Texas, said:

Mr. President, I may be mistaken as to the pleadings, but my understanding is that there is no issue as to the receipt and expenditure as alleged by the House, and that at most all that remains for the Senate to do is to determine the effect of the respondent having drawn the maximum allowance, and to determine, upon the state of the pleadings—it being alleged that he drew the money and did not expend it—what the law in that case is.

If I am right about that, I suggest that the calling of witnesses upon this charge, which involves the question of expense and receipt, would be a useless consumption of the time of the Senate.

Mr. Olmsted replied that an examination of the pleadings would show that the proposed testimony was necessary.

The Presiding Officer[1] said:

A cursory examination of the pleadings leads the Presiding Officer to the conclusion that there is no direct admission in the answer of the respondent that the expenses were actually less than the sum charged, and it seems that evidence may be introduced to show that they were less.

2225. A certified paper, bearing only indirectly on a question at issue, was ruled out in the Swayne trial.—On February 23, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, offered testimony in the following words:

Mr. President, on behalf of the respondent, I make the offer of a certified copy of the proceedings of the meeting of the board of county commissioners of Leon County, Fla., December 10, 1904. It is the board which was spoken of by a witness yesterday—Milton Jackson. I have presented the paper to the learned chairman of the managers, and would ask if there is any objection to it. * * * It is that the county commissioners of Leon County, Fla., in which is situated the city of Tallahassee, adopted

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, pp. 2240, 2241.

[3] Third session Fifty-eighth Congress, Record, p. 3145.

a resolution at that time extending to Judge Swayne as the judge of the northern district of Florida, having to make a residence within his district, an invitation to reside in the city of Tallahassee. That evidence is before the court. The matter was brought to the attention of a witness (who has been examined here) by the Judge, who told him, the witness testified, that he would not live in Tallahassee because he had taken his residence in Pensacola. It is a fact and a circumstance connected with the act of residence.

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to it as irrelevant, incompetent, and tending to throw no light on the subject-matter under discussion.

The Presiding Officer [1] said:

This paper is a certified copy of the action of the board of county commissioners, held in Tallahassee, being an invitation sent to Judge Swayne to make his permanent home in Tallahassee. The Presiding Officer does not see how it is evidence in this case. If any Senator desires, he will submit the question to the Senate. [A pause.] It is not admitted.

2226. In impeachment trials the rule that the best evidence procurable should be presented has been followed.

It was decided in the Belknap trial that a witness might not be examined as to the contents of an existing letter without the letter itself being submitted.

Instance wherein the President pro tempore ruled on evidence during an impeachment trial.

On April 4, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Robert S. Chew, chief clerk of the State Department, was sworn as a witness on behalf of the House of Representatives, and examined by Mr. Manager Benjamin F. Butler as to the practice of making temporary appointments of assistant secretaries of Departments to perform the duties of their chiefs in the absence of the latter. The witness testified that the appointments in such cases were made by the President, or by his order. Mr. Butler then asked:

Did the letter of authority in most of these cases * * * proceed from the head of the Department or from the President?

Mr. William M. Evarts, of counsel for the President, objected that the letter of authority showed from whom it came, and was the best evidence on that point.

In the discussion which followed, the counsel for the President intimated that they did not object if the question was intended to elicit a reply as to whose manual possession the paper came from. But if it was intended to ascertain who signed the paper, then the paper itself would be the best evidence.

Mr. Butler reduced the question to writing as follows:

Question. State whether any of the letters of authority which you have mentioned came from the Secretary of State or from what other officer?

The Chief Justice [3] thereupon made an inquiry which led to this colloquy:

The CHIEF JUSTICE. "Came from the Secretary of State." Do I understand you to mean signed by him?

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Second session Fortieth Congress, Globe supplement, p. 118.

[3] Salmon P. Chase, of Ohio, Chief Justice.

Mr. Manager BUTLER. I am not anxious upon that part of it, sir. I am content with the question as it stands.

The CHIEF JUSTICE. The Chief Justice conceives that the question in the form in which it is put is not objectionable, but—

Mr. Manager BUTLER. I will put it, then, with the leave of the Chief Justice.

The CHIEF JUSTICE. The Chief Justice was about to proceed to say that if it is intended to ask the question whether these documents of which a list is furnished were signed by the Secretary, then he thinks it is clearly incompetent without producing them.

Mr. Manager BUTLER. Under favor, Mr. President, I have no list of these documents; none has been furnished.

The CHIEF JUSTICE. Does not the question relate to the list which has been furnished?

Mr. Manager BUTLER. It relates to the people whose names have been put upon the list; but I have no list of the documents at all. I have only a list of the facts that such appointments were made, but I have no list of the letters, whether they came from the President or from the Secretary or from anybody else.

The CHIEF JUSTICE. In the form in which the question is put the Chief Justice thinks it is not objectionable. If any Senator desires to have the question taken by the Senate, he will put it to the Senate. [To the managers, no Senator speaking.] You can put the question in the form proposed.

Mr. Manager BUTLER (to the witness). State whether any of the letters of authority which you have mentioned came from the Secretary of State, or from what other officer.

Mr. CURTIS. I understand the witness is not to answer by whom they were sent.

Mr. Manager BUTLER. I believe I have this witness.

The CHIEF JUSTICE. The Chief Justice will instruct the witness. [To the witness.] You are not to answer at present by whom these documents were signed. You may say from whom they came.

2227. On July 10, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, counsel for the respondent. The witness testified that he had proposed in a letter to Mr. James A. Garfield, a Member of the House of Representatives, to give information as to post traders, and as a result had been subpoenaed before the Military Committee in 1872. He also testified as to writing letters to the Secretary of War, General Belknap. Then Mr. Carpenter asked:

Q. Do you recollect writing a long letter to General Belknap dated September 12, 1875?

Witness replied that he did.

Thereupon Mr. Carpenter proposed to ask:

Do you recollect using these words, or substantially these words, in that letter to General Belknap, namely: "I was summoned to Washington to give evidence upon staff organization of the French and German armies. After finishing upon these subjects I was questioned upon the subject of post traders. I at first remonstrated, on the ground that I had not reported the matter to you" (that is, the Secretary), "because I believed the Commissary Department would defeat any action in that direction?"

Mr. Manager John A. McMahon objected, saying:

You have no right to cross-examine him in regard to the contents of a letter without submitting it to him. * * * If you say it is a memorandum of a letter that was destroyed, no matter; but if you claim to have the letter you can not cross-examine him on it without putting it in his hand.

We make objection, Mr. President and Senators, to the witness being asked any question as to the contents of a letter which the counsel apparently holds in his hand. If he does not have it, the objection at any rate goes to the point that it having been addressed to the defendant, the counsel must first show it to have been destroyed.

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[1] First session Forty-fourth Congress, Senate Journal, p. 970; Record of trial, pp. 231–233.

The question being submitted, the Senate, without division, excluded the question.

Thereupon Mr. Carpenter said:

Mr. President, if the Senate will pardon me just a moment, I did not state the ground of the question, because I thought it was apparent. The witness has just sworn to a totally different state of facts; that he came here on subpoena and was examined on this matter in obedience to the subpoena. On cross-examination we got from him the fact that he wrote a letter to General Garfield from his post. Now, here is a letter, or at least I am inquiring of him now if he did not write to General Belknap, on the 12th of September, 1875, a totally different account of that transaction. * * * Senators will recollect that this witness testified here that he gave testimony before the House Military Committee, because he thought if he conferred directly with the Secretary of War he would not pay any attention to it. He then swears he did write a letter and sent it through the regular military channels, communicating everything to General Belknap that he swore to before the committee. In this letter, of which I now question him, he writes, as we claim and offer to prove by him, that he did not report the matter to the Secretary for the reason that he knew the Commissary Department would not permit it to be done.

Mr. George F. Edmunds, a Senator from Vermont, said: "The letter will show," to which Mr. Carpenter replied: "The letter I do not propose to give in evidence."

Objection being made to this debate, Mr. John H. Mitchell, a Senator from Oregon, moved to reconsider the vote whereby the evidence had been excluded.

Thereupon Mr. Montgomery Blair, of counsel for the respondent, argued:

It seems to me that the ruling of the Senate is made upon a rare misconception of the question submitted by my colleague in this case. Here is a witness upon the stand who testifies that he wrote a certain letter to the Secretary of War, semiofficial or official, he does not know which, communicating facts in relation to abuses prevailing at these trading posts in the Indian country, and that the reason why he did not go to the Secretary of War rather than go before the Military Committee to testify about these abuses was that he had written such a letter and that it had received no attention. Now, we want to ask him—and it is perfectly competent; no lawyer I think will deny the competency of it—whether he had not stated to another person on another occasion directly the contrary of that, stating the person and the time, leaving us the liberty of calling in that person, of calling for that letter, and showing that he is here stultifying himself and falsifying himself. * * * I said that I believed every lawyer in this body would recognize the principle that it was perfectly competent to ask a witness whether or not he had on a different occasion given a different account of the same subject than that he now offers. * * * I have not investigated the subject fully; but it seems to me perfectly plain that a party may be called upon to say whether he had not at a different time to a different person made a different statement; and this letter falls entirely within the common practice of showing that a witness had made on a different occasion a different statement in regard to the same subject-matter.

Mr. Manager McMahon said:

I think the Senate will discover that a while ago when I interrupted the witness when the contents of a letter were stated to him, I was right in regard to the law. I read now from an elementary book, Greenleaf on Evidence:

"§ 463. A similar principle prevails in cross-examining a witness as to the contents of a letter or other paper written by him. The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it. For the contents of every written paper, according to the ordinary and well-established rules of evidence, are to be proved by the paper itself, and by that alone, if it is in existence."

That is very simple; and I was right a while ago, notwithstanding the overpowering weight of the gentlemen on the other side.

The Senate, without division, disagreed to the motion to reconsider.

2228. On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Nelson H. Davis, Inspector-General of the Army, was examined as a witness on behalf of the respondent, and was asked this question by Mr. Matt. H. Carpenter, of counsel for the respondent:

Q. Were you instructed by General Belknap as Secretary of War at any time to investigate into the standing and character of Durfee & Peck?

Durfee had been partner of one Evans, who was alleged to have been corruptly appointed post trader at Fort Sill by the respondent, and Mr. Carpenter explained the purpose of the question:

Mr. Durfee was Evans's partner, and Mr. Evans informed the Secretary of War of that fact. The Secretary of War had his suspicion that Durfee & Peck or Durfee himself was not the proper man to be appointed, and we propose to show that he ordered this witness to proceed there and inquire into the matter; that he did inquire into it, not at that particular post, but as to these men, and it was in consequence of that that Mr. Evans, who, it was understood, would go into company with Durfee if he was appointed, was not at that time appointed. Afterwards he did not form that partnership, and he was appointed without objection.

Mr. Manager McMahon objected to the question, saying that it was first desirable to know whether the instructions were written or verbal.

Thereupon Mr. Carpenter waived the question, and asked of witness:

Did you investigate?

Mr. Manager McMahon objected on the ground that the matter was all of record, and hence that the record would be the best evidence.

The question being submitted to the Senate, the journal and record of trial show that the objection was overruled without division, but no record of an answer by the witness appears, and Mr. Carpenter at once proceeded to another matter, as if the question had been excluded.

2229. On July 12, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Maj. Gen. John Pope was examined as a witness on behalf of the respondent, and testified as to applications on the part of the post trader at Fort Sill for permits to sell liquor. The witness described the usual way in which such permits were forwarded to the War Department, and then Mr. Matt. H. Carpenter, of counsel for the respondent, asked:

Do you know any instance while General Belknap was Secretary of War, in which he overruled recommendations of the officers through whose hands the application had come?

Mr. Manager John A. McMahon objected, saying:

It seems to me, Mr. President, that the record ought to settle that question. Everything goes officially through the departments and the action of the Secretary of War upon it, favorable or unfavorable, ought to be proved by the record and not by the mere recollection of a witness who has had so many other transactions.

The question being submitted to the Senate, the objection was sustained without objection.

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[1] First session Forty-fourth Congress, Senate Journal, p. 976; Record of trial, p. 258.

[2] First session Forty-fourth Congress, Record of trial, p. 256.

Very soon after Mr. Carpenter asked, and the witness began to answer, as follows:

Q. Do you recollect any applications in regard to licenses for selling liquor at Fort Sill while General Belknap was Secretary of War?—A. I remember an application, simply because I had occasion to look it up recently, that the officers at Fort Sill——

Mr. Manager McMahon said:

We object to this. The witness himself discloses the fact that he remembers it because he has recently seen the official documents. Now, I say that the official documents must be produced.

The President pro tempore [1] said:

The manager took exception that the record should be produced, and on the prior ruling of the Senate the Chair ruled that the objection was well taken. If the counsel prefers, the Chair will submit the question to the Senate.

No request was made that the question be submitted, and the examination proceeded: [2]

Q. (By Mr. Carpenter.) Do you know anything of the extension of the reservation about Fort Sill, and when it took place?—A. Fort Sill was a post established at the time I took command of the department. My predecessor in command, General Schofield, was written to from the War Department, I think, directing him to take some steps to have the reservation extended and properly surveyed——

Mr. Manager McMahon objected, saying:

I am obliged again to say that all these are matters of record. The gentleman has a client who understands all about getting copies of them, who is thoroughly informed, and we must certainly object to having oral testimony as to what is matter of record.

The Senate, without division, sustained the objection.

In relation to these decisions, Mr. Carpenter said:

General Pope is very anxious to get away from here and get back to his post, and we are willing to accommodate in every way to reach that result; but if the managers are to pursue the present captious course of objection and require these documents to be produced, they have got to be looked up in the Department, and General Pope will have to stay and swear in view of them; and after Mr. Evans arrives we shall then want him also in regard to two or three points that we can not inquire of now. * * * What I have spoken of now are these very matters that were covered by the questions that you objected we must get the records here to show. General Pope knows just as much about the matter without looking through forty pages as he will after he does that; but still the Senate has sustained the objection; and if you insist on it General Pope must remain. That is all.

Mr. Manager McMahon said:

We certainly must try the case according to the rules of evidence. We want to see the records themselves.

2230. In the Swayne trial hearsay testimony introduced to show inconvenience to litigants from respondent's conduct was ruled out.

Instance during the Swayne trial, wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 13, 1905,[3] in the Senate sitting for the trial of Judge Charles Swayne, John S. Beard was sworn and examined.

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[1] T. W. Ferry, of Michigan, President pro tempore.

[2] Senate Journal, pp. 975, 976.

[3] Third session Fifty-eighth Congress, Record, p. 2467.

Mr. Manager James B. Perkins, of New York, asked:

Have you ever heard complaints made by counsel of inconvenience in their practice by reason of the absence of Judge Swayne from Florida?

Mr. John M. Thurston, of counsel for respondent, objected, saying:

We object to asking for hearsay testimony. If there are any such cases, the attorneys themselves are within call, and the honorable manager is asking this witness to state nothing more than what some other attorney may have said.

Mr. Manager Perkins said:

Well, Mr. President, how else can the matter of common reputation be proven? The answer of Judge Swayne it seems to us is immaterial. The law requires that he shall live in the district, and if he was not a resident it was a high misdemeanor. But in his answer it is alleged by way of palliation that he does not think inconvenience resulted to the bar. That we can only meet by evidence of this character.

The Presiding Officer [1] said:

The Presiding Officer will submit this question to the Senate. The manager asks the witness, having first inquired who were the lawyers who did most of the business before the district court, if this witness had heard them complain of inconvenience growing out of the absence of Judge Swayne. Objection is made. The Presiding Officer will submit that question to the Senate. Senators who think the question is a proper one will say "aye" [putting the question]; contrary, "no." In the opinion of the Chair the "noes" have it. The objection is sustained.

2231. Testimony as to what was said by the agent or coconspirator of respondent in regard to carrying out respondent's order, the said order being a ground of the impeachment, was admitted.

Instance wherein the Chief Justice ruled on the admissibility of evidence during the Johnson trial.

On March 31, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Walter A. Burleigh, Delegate in Congress from Dakota Territory, was sworn, and the examination was begun by Mr. Manager Benjamin F. Butler. Mr. Burleigh testified that he had known Lorenzo Thomas, Adjutant-General of the Army, for several years, and that he had called on General Thomas at his house on the evening of February 21 last, and had a conversation with him.

Thereupon Mr. Manager Butler asked a question which, on the succeeding day, was reduced to writing as follows:

You said yesterday, in answer to my question, that you had a conversation with Gen. Lorenzo Thomas on the evening of the 21st of February last. State if he said anything as to the means by which he intended to obtain, or was directed by the President to obtain, possession of the War Department? If so, state all he said as nearly as you can.

Mr. Henry Stanbery, of counsel for the President, objected to the question. In making his objection, Mr. Stanbery first reviewed the orders issued by the President to Mr. Secretary Stanton and to General Thomas, and continues:

Now, what proof has yet been made under the first eight articles? The proof is simply, so far as this question is concerned, the production in evidence of the orders themselves. There they are to speak for themselves. As yet we have not had one particle of proof of what was said by the President, either

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Second session Fortieth Congress, Senate Journal, pp. 867, 872–873; Globe supplement, pp. 59, 63–71.

before or after he gave those orders or at the time that he gave those orders—not one word. The only foundation now laid for the introduction of this testimony is the production of the orders themselves. The attempt made here is, by the declarations of General Thomas, to show with what intent the President issued those orders; not by producing him here to testify what the President told him, but without having him sworn at all, to bind the President by his declarations not made under oath; made without the possibility of cross-examination or contradiction by the President himself; made as though they are made by the authority of the President.

Now, Senators, what foundation is laid to show such authority, given by the President to General Thomas, to speak for him as to his intent, or even as to General Thomas's intent, which is quite another question. You must find the foundation in the orders themselves, for as yet you have no other place to look for it. Now, what are these orders? That issued to General Thomas is the most material one; but, that I may take the whole, I will read also that issued and directed to Mr. Stanton himself. He says to Mr. Stanton, by his order of February 21, 1868:

"SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipt of this communication.

"You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge."

So much for that. Then the order to General Thomas of the same day is:

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"To Brevet Maj. Gen. LORENZO THOMAS,

"Adjutant-General U. S. Army, Washington, D. C."

There they are; they speak for themselves; orders made by the President to two of his subordinates; an order directing one of them to vacate his office and to transfer the books and public property in his possession to another party, and the order to that other party to take possession of the office, receive a transfer of the books, and act as Secretary of War ad interim. Gentlemen, does that make them conspirators? Is that proof of a conspiracy or tending to have a conspiracy? Does that make General Thomas an agent of the President in such a sense as that the President is to be bound by everything he says and everything he does even within the scope of his agency?

Mr. Stanbery argued at length to show that General Thomas was an officer of the Government performing his duty under order of a superior officer, and in no sense an agent. Furthermore, he argued that no foundation had been laid for the introduction of such testimony.

Mr. Manager Benjamin F. Butler, replying, gave a brief résumé of the actions of the President in relation to Secretary of War Stanton:

He had come to the conclusion to violate the law and take possession of the War Office; he had come to the conclusion to do that against the law and in violation of the law; he had sent for Thomas, and Thomas had agreed with him to do that by some means if the President would give him the order, and thus we have the agreement between two minds to do an unlawful act; and that, I believe, is the definition of a conspiracy all over the world.

Let me restate this. You have the determination on the part of the President to do what had been declared to be, and is, an unlawful act; you have Thomas consenting; and you have therefore an agreement of two minds to do an unlawful act: and that makes a conspiracy, so far as I understand the law of conspiracy. So that upon that conspiracy we should rest this evidence under article seven, which alleges that—

"Andrew Johnson * * * did unlawfully conspire with one Lorenzo Thomas, with intent unlawfully to seize, take, and possess the property of the United States in the Department of War in the custody and charge of Edwin M. Stanton."

And also under article five, which alleges a like unlawful conspiracy not alleging that intent.

Then there is another ground upon which this evidence is admissible, and that is upon the ground of principal and agent. Let us, if you please, examine that ground for a few moments. The President claims by his answer here that every Secretary, every Attorney-General, every executive officer of this Government exists by his will, upon his breath only; that they are all his servants only, and are responsible to him alone, not to the Senate or Congress or either branch of Congress; and he may remove them for such cause as he chooses; he appoints them for such cause as he chooses; and he claims this right to be illimitable and uncontrollable, and he says in his message to you of December 12, 1867, that if any one of his Secretaries had said to him that he would not agree with him upon the unconstitutionality of the act of March 2, 1867, he would have turned him out at once.

Mr. Butler cited as authorities Roscoe's Criminal Evidence (2 Carrington and Payne, p. 232), United States *v.* Goding (12 Wheaton, pp. 469, 470), and Greenleaf on Evidence.

These arguments as outlined were further amplified by Mr. Benjamin R. Curtis, of counsel for the President, and by Mr. Manager John A. Bingham.

And the question being put to the Senate, it was decided, yeas 39, nays 11, that the question proposed by Mr. Manager Butler should be put to the witness.

2232. On March 31, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, was sworn and examined as to a certain visit which he made to the house of Gen. Lorenzo Thomas, of the Army.

The witness having testified that he saw General Thomas at the time of that visit, Mr. Manager Benjamin F. Butler asked:

Had you a conversation with him?

Mr. Henry Stanbery, of counsel for the President, asked the object of the question, to which Mr. Butler replied:

The object is to show the intent and purpose with which General Thomas went to the War Department on the morning of the 22d of February; that he went with the intent and purpose of taking possession by force; that he alleged that intent and purpose; that in consequence of that allegation Mr. Burleigh invited General Moorhead and went up to the War Office. The conversation which I expect to prove is this: After the President of the United States had appointed General Thomas and given him directions to take the War Office, and after he had made a quiet visit there on the 21st, on the evening of the 21st he told Mr. Burleigh that the next day he was going to take possession by force.

Mr. Stanbery[2] thereupon entered an objection.

The Chief Justice[3] said:

The Chief Justice thinks the testimony is competent.

2233. On April 1, 1868[4] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, a witness called by the managers, testified to conversation which he had had with Gen. Lorenzo Thomas, Adjutant-General of the Army, after the said Thomas had been ordered by President Johnson to supersede Secretary of War Stanton and take possession of the office.

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[1] Second session Fortieth Congress, Senate Journal, p. 867; Globe Supplement, p. 59.

[2] The Senate Journal has Mr. William M. Evarts as entering the objection.

[3] Salmon P. Chase, of Ohio, Chief Justice.

[4] Second session Fortieth Congress, Senate Journal, pp. 872, 873; Globe Supplement, pp. 71–72.

Then Mr. Manager Benjamin F. Butler offered this question:

Question. Shortly before this conversation about which you have testified, and after the President restored Major General Thomas to the office of Adjutant-General, if you know the fact that he was so restored, were you present in the War Department, and did you hear Thomas make any statements to the officers and clerks, or either of them, belonging to the War Office, as to the rules and orders of Mr. Stanton or of the office which he, Thomas, would revoke, relax, or rescind in favor of such officers and employees when he had control of the affairs therein? If so, state as near as you can when it was such conversation occurred, and state all he said as nearly as you can.

Mr. William M. Evarts, of counsel for the President, objected to the question as irrelevant and immaterial to any issue in the cause, and as not to be brought in evidence against the President by any support given by the testimony already in.

Mr. Manager Butler argued that the question was justified, because General Thomas was a coconspirator with the President:

You will observe the question carries with it this state of facts: Thomas had been removed from the office of Adjutant-General, for many years under President Lincoln, under the administration of Mr. Stanton, of the War Office. That is a fact known to all men who know the history of the war. Just before he made him Secretary of War ad interim the President restored Thomas to the War Office as the Adjutant-General of the Army. That was the first step to get him in condition to make a Secretary of War of him. That was the first performance of the President, the first act in the drama. He had to take a disgraced officer, and take away his disgrace, and put him into the Adjutant-General's office, from which he bad been by the action of President Lincoln and Mr. Stanton suspended for years, in order to get a fit instrument on which to operate; get him in condition. That was part of the training for the next stage. Having got him in that condition, he being sufficiently virulent toward Mr. Stanton for having suspended him from the office of Adjutant-General, the President then is ready to appoint him Secretary ad interim, which he does within two or three days thereafter.

We charge that the whole procedure shows the conspiracy.

To this Mr. Evarts replied:

The question which led to the introduction of this witness's statements of General Thomas's statements to him, of his intentions, and of the President's instructions to him, General Thomas, was based upon the claim that the order of the President of the 21st of February, upon Mr. Stanton for removal, and upon General Thomas to take possession of the office, created and proved a conspiracy; and that thereafter, upon that proof, declarations and intentions were to be given in evidence. That step has been gained, and, in the judgment of this honorable court, in conformity with the rules of law and of evidence. That being gained, it is similarly argued that if, on a conspiracy proved, you can introduce declarations made thereafter, by the same rule you can introduce declarations made theretofore; and that is the only argument which is presented to the court for the admission of this evidence.

So far as the statements of the learned manager relate to the office, the position, the character, and the conduct of General Thomas, it is sufficient for me to say that not one particle of evidence has been given in this cause bearing upon any one of these topics. If General Thomas has been a disgraced officer; if these aspersions, these revilings are just, they are not justified by any evidence before this court. And if, as a matter of fact, applicable to the situaition upon which this proof is sought to be introduced, the former employments of General Thomas and the recent restoration of him to the active duties of Adjutant-General are pertinent, let them be proved; and then we shall have at least the basis of fact of General Thomas's previous relations to the War Department, to Mr. Stanton, and to the office of Adjutant-General.

And, now, having pointed out to this honorable court that the declarations sought to be given in evidence of General Thomas to affect the President with his intentions are confessedly of a period antecedent to the date to which any evidence whatever before this court brings the President and General Thomas in connection, I might leave it safely there. But what is there in the nature of the general proof sought to be introduced that should affect the President of the United States with any responsibility for these general and vague statements of an officer of what he might or could or would do, if thereafter he should come into the possession of power over the Department?

At the end of the debate the Chief Justice [1] said:

The Chief Justice is of opinion that no sufficient foundation has been laid for the introduction of this testimony. He will submit the question to the Senate with great pleasure, if any Senator desires it. The question is ruled to be inadmissible.

Mr. Jacob M. Howard, of Michigan, a Senator, asked that the question be taken by the Senate; and being put, Shall the question proposed by Mr. Manager Butler be put to the witness? the yeas were 28 and the nays 22.

So the question was put.

2234. An alleged coconspirator was permitted to testify as to declarations of the respondent at a time after the act, the testimony being responsive to similar evidence on the other side.—On April 10, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Lorenzo Thomas, Adjutant-General of the Army, was called as a witness on behalf of the President, and related the circumstances which occurred on February 21, 1868, when, in obedience to the direction of the President, he attempted to supersede Mr. Stanton as Secretary of War.

General Thomas having described his interview with Secretary Stanton, Mr. Henry Stanbery, of counsel for the President, proceeded with the examination:

Q. Did you see the President after that interview?—A. I did.

Q. What took place?

At this point Mr. Manager Benjamin F. Butler interposed an objection, as follows:

I object now, Mr. President and Senators, to the conversation between the President and General Thomas. Up to this time I did not object, as you observe, upon reflection, to any orders or directions which the President gave, or any conversation had between the President and General Thomas at the time of issuing the commission. But now the commission has been issued; the demand has been made; it has been refused, and a peremptory order given to General Thomas to mind his own business and keep out of the War Office has been put in evidence. Now, I suppose that the President, by talking with General Thomas, or General Thomas, by talking with the President, can not put in his own declarations for the purpose of making evidence in favor of himself. The Senate has already ruled by solemn vote, and in consonance, I believe, with the opinion of the Presiding Officer, that there were such evidence of common intent between these two parties as to allow us to put in the acts of each to bear upon the other; but I challenge any authority that can be shown anywhere that, in trying a man for an act before any tribunal, whether a judicial court or any other body of triers, testimony can be given of what the respondent said in his own behalf, and especially to his servant, and a fortiori to his coconspirator. A conspiracy being alleged, can it be that the President of the United States can call up any officer of the Army, and, by talking to him after the act has been done, justify the act which has been done?

Replying to this objection, Mr. Stanbery said:

But, says the learned manager, the transaction ended in giving the order and receiving the order, and you are to have no testimony of what was said by the President or General Thomas, except what was said just then, because that was the transaction; that was the res gestae. Does the learned gentleman forget his testimony? Does he forget how he attempted to make a case? Does he forget, not what took place in the afternoon between the President and General Thomas that we are now going into, but what took place that night? Does he forget what sort of a case he attempts to make against the President, not at the time when that order was given, nor before it was given, nor in the afternoon of the 21st, but

[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Fortieth Congress, Senate Journal, p. 885; Globe Supplement, pp. 137–140.

under his conspiracy counts, the managers have undertaken to give in evidence that on the night of the 21st General Thomas declared that he was going to enter the War Office by force?

That is the matter charged as illegal; and the articles say that the conspiracy between General Thomas and the President was that the order should be executed by the exhibition of force, intimidation, and threats, and to prove that what has he got here? The declarations of General Thomas, not made under oath, as we propose to have them made, but his mere declarations, when the President was absent and could not contradict him-not, as now, under oath, and all the conversation when the President was present and could contradict or might admit. The honorable manager has gone into all that to make a case against the President of conspiracy; and not merely that, but proves the acts and declarations of General Thomas on the 22d; and not only that, but as late as the 9th of March, at the presidential levee, brings a witness, with the eyes of all Delaware upon him [laughter], and proves by that witness, or thinks he has proved, that on that night General Thomas also made a declaration involving the President in this conspiracy, as a party to a conspiracy still existing to keep Mr. Stanton out of office.

Now, how are we to defend against these declarations made on the night of the 21st or the 22d, and again as late as the 9th of March? Does not the transaction run through all that time? How is the President to defend himself if he is allowed to introduce no proof of what he said to General Thomas after the date of the order? May he not call General Thomas? Is General Thomas impeached here as a coconspirator? Is his mouth shut by a prosecution? Not at all. He is free as a witness-brought here and sworn. Now, what better testimony can we have to contradict this alleged conspiracy than the testimony of one of the alleged conspirators; for if General Thomas did not conspire certainly the President did not conspire. A man can not conspire by himself.

The Chief Justice having submitted the question to the Senate, "Is the question admissible?" there appeared 42 yeas, 10 nays. So the question was admitted.

Later, in the examination of the same witness,[1] Mr. Stanbery asked this question:

Did the President at any time prior to or including the 9th of March authorize or direct you to use force, intimidation, or threats to get possession of the War Office?

Mr. Manager Butler objected to the introduction of such testimony. He said that the President had been impeached on February 22, and what directions he had given after that event were not to be a subject of testimony.

Mr. William M. Evarts, of counsel for the President, contended that, as the managers had introduced witnesses to prove what General Thomas said on March 9, it was competent to introduce evidence as to what the President had actually done.

The Senate, without division, admitted the question.

2235. In general during impeachment trials questions as to conversations with third parties, not in presence of respondent, have been excluded from evidence.—On March 8, 1803,[2] in the high court of impeachment during the trial of John Pickering, judge of the United States district court of New Hampshire, Mr. Jonathan Steele was testifying, when, Mr. Joseph H. Nicholson, of Maryland, chairman of the managers for the House of Representatives, addressed the court. He said he wished in case it should be deemed proper by the court, to ask one of the witnesses whether he had conversed with the family physician of Judge Pickering, and what his opinion was as to the origination of his insanity. Mr. Nicholson observed that he had doubts of the propriety of this question, and therefore, in the first instance, stated it to the court.

The court decided the question inadmissible.

Later, on the same day, this witness, in the course of his testimony, was going on to state some conversation he had with Judge Pickering's physician at this time

[1] Senate Journal, p. 886; Globe Supplement, p. 141.

[2] First session Eighth Congress, Annals, pp. 358, 359.

which he was induced to ask in consequence of solicitude to gain true information as to the reported intemperance of the Judge, when he was interrupted by the Court,[1] and informed that this species of testimony had been already decided to be inadmissible.

2236. On July 10, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh was called as a witness for the United States. It was alleged in the articles of impeachment that Marsh, in collusion with the respondent, had effected the appointment of one Evans as post trader at Fort Sill, and that in consideration thereof Marsh had received from Evans certain sums of money which had been shared with the respondent. The witness being examined as to a contract between himself and Evans as to the payment of the above-mentioned sums of money, identified a paper presented to him as that contract. Then these questions were put and answered:

Q. Did Mr. Evans sign that paper with you?—A. He did.

Q. This agreement was reduced to writing in New York City. State whether it was agreed to before it was reduced to writing, and, if so, where. In other words, whether you came to any understanding in Washington before you went to New York City.—A. We came to an understanding as to the amount he was willing to pay, if I would allow him to hold the post and continue the business at Fort Sill.

Q. In that connection, without further questions, give us all that passed between you and Mr. Evans prior to the execution of this contract.

To the last question Mr. Matt. S. Carpenter, of counsel for the respondent, objected, saying:

The Senate, of course, will observe that this calls for a conversation between the witness and a third person, not in our presence, with no pretense that we know anything about it.

The President pro tempore said:

The question is on the admission of the interrogatory.

The question was decided in the negative.

2237. On July 11, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, had been examined and cross-examined, and had testified to sending to the respondent sums of money which he had received in pursuance to his contract with one Evans, the post trader at Fort Sill. Mr. John A. Logan, a Senator from Illinois, proposed this question:

Prior to the sending of the first money, had you said anything to any person or had any person ever said anything to you on the subject of sending money to General Belknap; if so, who was it?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected to the question, but the Senate without division decided that it might be asked.

The witness replied that he had had a conversation with the present Mrs. Belknap. It was before he had sent any money to respondent, but he had sent money to her.

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[1] Aaron Burr, of New York, Vice President, was presiding.

[2] First session Forty-fourth Congress, Senate Journal, p. 969; Record of trial, p. 225.

[3] First session Forty-fourth Congress, Senate Journal, pp. 971–973, Record of trial, pp. 238–241.

Thereupon Mr. Logan asked:

State what the conversation was.

Mr. Manager John A. McMahon objected to the interrogatory, saying:

Even if General Belknap was present, while we might have called it as against him, he can not produce it as in his favor. It is the conversation of a third party. * * * Before the vote is taken, Senators, I desire that all shall understand the precise conversation now called for. It is a conversation between the witness and the present Mrs. Belknap, occurring on the night of the funeral of the second Mrs. Belknap, between the witness and her, not in the presence of General Belknap; a conversation between the two persons on that occasion. Clearly it seems to me the defendant is not at liberty to produce that conversation in his behalf.

The question being taken on the admissibility of the question, there appeared yeas 18, nays 23. So the objection was sustained.

Mr. Henry L. Dawes, a Senator from Massachusetts, then proposed this question:

State all the knowledge or information that General Belknap had, which it is in your power to state, as to the amount of any money sent him or the source whence it came, other than what you have already stated.

Mr. Carpenter having objected, the Senate without division admitted the question.

Mr. John A. Logan proposed this question:

Did you have any agreement with any person other than General Belknap in reference to sending the money you have testified to or any part of it? If so, with whom was such agreement and what was such agreement?

Mr. Manager McMahon objected, and Mr. Manager Elbridge G. Lapham said:

Our objection is that this calls for a conversation with a third person, and is the precise question upon which the Senate has already passed. The witness having stated expressly that he had no conversation with the defendant, the question calls for some express conversation, some expression, agreement, or understanding, and not for an implied or inferential understanding from the acts of the parties.

After argument by managers and counsel, Mr. Frederick T. Frelinghuysen, a Senator from New Jersey, said:

As I understand it, the court, exercising its privilege and against the objection of the respondent, permitted it to be proven that there was a conversation which had relation in some manner to these payments. I think it is the right of the respondent that that conversation should now be given. It was the court, not the respondent, who introduced the fact that there was such conversation that had relation to these payments. I do not think we can fairly exclude the conversation.

Mr. George F. Edmunds, a Senator from Vermont, dissented from the law of the proposition made by Mr. Frelinghuysen.

The Senate, by a vote of 25 yeas, 21 nays, admitted the question.

The witness answered:

I had a conversation with Mrs. Bower, the present Mrs. Belknap, on the night of the funeral. She asked me to go upstairs with her to look at the baby in the nursery. I said to her, as near as I can remember, "This child will have money coming to it after a while." She said, "Yes; my sister gave the child to me, and told me the money coming from you I must take and keep for it." I am not certain about the rest of the conversation. I have in indistinct impression of what was said afterwards. I said, very likely, "All right; but perhaps the father ought to be consulted," and her reply was that if I sent the money to him she would get it any way for the child, or something of that kind. That is as far as I remember it; but I had some understanding; I have sometimes thought that I said something to General Belknap that night. My entire recollection is indistinct about the matter, except her relation of her sister's dying request made an impression on me more than any other part of the conversation.

2238. In the Johnson trial declarations of respondent, made anterior to the act, and even concomitant with it, were held inadmissible as evidence.

Instance wherein a decision of the Chief Justice as to the admissibility of evidence was overruled by the Senate.

The Senate, in the Johnson trial, declined to exclude evidence as to fact on the ground that it might lead to evidence as to declaration.

Leading questions were ruled out during the Johnson trial.

Citation of English precedents as to evidence during the Johnson trial.

On April 11, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was called as a witness on behalf of the President. The witness had testified that between December 4, 1867, and February 4, 1868, he had several interviews with the President relating to Mr. Stanton, Secretary of War. Thereupon Mr. Henry Stanbery, of counsel for the President, asking as to a certain specified interview, propounded this question:

In that interview, what conversation took place between the President and you in regard to the removal of Mr. Stanton?

Mr. Manager Benjamin F. Butler objected to the question.

The Chief Justice[2] said at once, before argument:

The Chief Justice thinks the question admissible within the principle of the decision made by the Senate relating to a conversation between General Thorns and the President;[3] but he will put the question to the Senate, if any Senator desires it.

The managers, having persisted in objection, an argument arose, Mr. Stanbery saying:

When a prosecution is allowed to raise the presumption of guilt from the intent of the accused by proving circumstances which raised that presumption against him, may he not rebut it by proof of other circumstances which show that he could not have had such a criminal intent? Was anything ever plainer than that?

Why, consider what a latitude one charged with crime is allowed under such circumstances. Take the case of a man charged with passing counterfeit money. You must prove his intent; you must prove his scienter; you must prove circumstances from which a presumption arises; did he know the bill was counterfeit? You may prove that he had been told so; prove that he had seen other money of the same kind, and raise the intent in that way. Even when you make such proof against him arising from presumptions, how may he rebut that presumption of intent from circumstances proved against him? In the first place, by the most general of all presumptions—proof of good character generally. That he is allowed to do to rebut a presumption—the most general of all presumptions—not that he did what was right in that transaction, not that he did certain things or made certain declarations about the same time which explained that the intent was honest, but going beyond that through the whole field of presumptions, for it is all open to him, he may rebut the presumption arising from proof of express facts by the proof of general good character, raising the presumption that he is not a man who would have such an intent. * * * Now, what evidence is a defendant entitled to who is charged with crime where it is necessary to make out an intent against him where the intent is not positively proved by his own declarations, but where the intent to be gathered by proof of other facts, which may be

[1] Second session Fortieth Congress, Senate Journal, p. 887; Globe supplement, pp. 150–157.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] See section 2234 of this work.

guilty or indifferent, according to the intent? What proof is allowed against him to raise this presumption of intent? Proof of those facts from which the mind itself infers a guilty intention. But while the prosecution may make such a case against him by such testimony, may he not rebut the case by exactly the same sort of testimony? If it is a declaration that they rely upon as made by him at one time, may he not meet it by declarations made about the same time with regard to the same transaction? Undoubtedly. They can not be too remote, I admit that; but if they are about the time, if they are connected with the transaction, if they do not appear to have been manufactured, then the declarations of the defendant, from which the inference of innocence would be presumed, are, under reasonable limitations, just as admissible as the declarations of the defendant from which the prosecution has attempted to deduce the inference of criminal purpose.

Mr. Stanbery proceeded to cite from the State trials, p. 1065, the trial of Hardy. Replying, Mr. Manager Butler said:

The learned gentleman from Ohio says what? He says "in a counterfeiter's case we have to prove the scienter." Yes, true; and how? By showing the passage of other counterfeit bills? Yes; but, gentlemen, did you ever hear, in a case of counterfeiting, the counterfeiter prove that he did not know the bill was bad by proving that at some other time he passed a good bill? Is not that the proposition? We try the counterfeit bill, which we have nailed to the counter, of the 21st of February; and, in order to prove that he did not issue it, he wants to show that he passed a good bill on the 14th of January. It does not take a lawyer to understand that. That is the proposition.

We prove that a counterfeiter passed a bad bill—I am following the illustration of my learned opponent. Having proved that he passed a bad bill, what is the evidence he proposes? That at some other time he told somebody else, a good man, that he would not paw bad money, to give it the strongest form; and you are asked to vote it on that reason. I take the illustration. Is there any authority brought for that? No.

What is the next ground? The next is that it is in order to show Andrew Johnson's good character. If they will put that in testimony I will open the door widely. We shall have no objection whenever they offer that. I will take all that is said of him by all good and loyal men, whether for probity, patriotism, or any other matter that they choose to put in issue. But how do they propose to prove good character? By showing what he said to a gentleman. Did you ever hear of good character, lawyers of the Senate? Laymen of the Senate, did you ever hear a good character proved in that way? A man's character is in issue. Does he call up one of his neighbor's and ask what the man told him about his character? No; the general speech of people in the community, what was publicly known and said of him, is the point, and upon that went Hardy's case.

* * * * * * *

But, then, look at the vehicle of proof. What is the vehicle of proof? They do not propose to prove it by his acts. When they are offered, I shall be willing to let them go in. Let them offer any act of the President about that time, either prior or since, and I shall not object, although the Senate ruled out an act in Cooper's case. But how do they propose to prove it?" What conversations took place between the President and you?" I agree, gentlemen of the Senate—I repeat it even after the criticisms that have been made—that you are a law unto yourselves. You have a right to receive or reject any testimony. All the common law can do for you is, that being the accumulation of the experience of thousands of years of trial, it may afford some guide to you; but you can override it. You have no right, however, to override the principles of justice and equity, and to allow the case of the people of the United States to be prejudiced by the conversations of the criminal they present at your bar, made in his own defense before the acts done, which the people complain of. That I may, I trust, without offense say, because there is a law that must govern us at any and all times, and the single question is—I did not mean to trouble the Senate with it before, and never will again on this question of conversation—what limit is there? If this is allowable, you may put in his conversations with everybody; you may put in his conversations with newspaper reporters—and he is very free with those, if we are to believe the newspapers. If he has a right to converse with General Sherman about this case and put that in, I do not see why he has not a right to converse with Mack, and John, and Joe, and J. B., and J. B. S., and T. R. S., and X. L. W., or whoever he may talk with, and put all that in.

I take it there is no law which makes a conversation with General Sherman any more competent than a conversation with any other man.

Mr. William M. Evarts, of the President's counsel, said:

And now I should like to look first to the question of the point of time as bearing upon the admissibility of this evidence. Under the eleventh article, the speech of the 18th of August, 1866, is alleged as laying the foundation of the illegal purposes that culminated in 1868, to point the criminality, that is what made the subject of accusation in that article. Proof, then, of the speeches of 1866 is made evidence under this article eleven, that imputes not criminality in making the speech, but in the action afterwards pointed by the purpose of the speech. So, too, a telegram to Governor Parsons, in January, 1867, is supposed to be evidence as bearing upon the guilt completed in the year 1868.

So, too, the interview between Wood, the office seeker, and the President of the United States, in September, 1866, is supposed to bear in evidence upon the question of intent in the consummation of the crime alleged to have been completed in 1868. I apprehend therefore that on the question of time this interview between General Sherman and the President of the United States, in the very matter of the public transaction of the President of the United States changing the head of the War Department, which was actually completed in February, 1868, is near enough to point intent and to show honest purpose, if these transactions, thus in evidence, are near enough to bear upon the same attributed crimes.

There remains, then, only this consideration, whether it is open to the imputation that it is a mere proof of declarations of the President concerning what his motives and objects were in reference to his subsequent act in the removal of Stanton. It certainly is not limited to that force or effect. Whenever evidence of that mere character is offered that question will arise to be disposed of; but as a part of the public action and conduct of the President of the United States in reference to this very office, and his duty and purpose in dealing with it, and on the very point, too, as to whether that object was to fill it by unwarrantable characters tending to a perversion or betrayal of the public trust, we propose to show his consultations with the Lieutenant-General of the armies of the United States to induce him to take the place.

On the other question of whether his efforts are to create by violence a civil war or bloodshed, or even a breach of the peace, in the removal of the Secretary of War, we show that in this same consultation it was his desire that the Lieutenant-General should take the place in order that by that means the opportunity might be given to decide the differences between the Executive and Congress as to the constitutional powers of the former by the courts of law. If the conduct of the President in relation to matters that are made the subject of inculpation, and of inculpation through motives attributed through designs supposed to be proved, can not be made the subject of evidence, if his public action, if his public conduct, if the efforts and the means that he used in the selection of agents are not to be received to rebut the intentions or presumptions that are sought to be raised against him, well, indeed, was my learned associate justified in saying that this is a vital question. Vital in the interests of justice, I mean, rather than vital to any important considerations of the cause.

Mr. Manager James F. Wilson, quoted the Hardy case, over which a dispute had arisen:

My principal purpose is to get before the minds of Senators the truth in the Hardy case as it fell from the lips of the Chief Justice, when he passed upon the question which had been propounded by Mr. Erskine and objected to by the attorney-general. The ruling is in these words:

"LORD CHIEF JUSTICE EYRE. Mr. Erskine, I do not know whether you can be content to acquiesce in the opinion that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner and are not evidence for him, because the presumption upon which declarations are evidence is, that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself. Those declarations, if offered as evidence, would be offered therefore upon no ground which entitled them to credit. That is the general rule. But if the question be—as I really think it is in this case, which is my reason now for interposing—if the question be, what was the political speculative opinion which this man entertained touching a reform of Parliament, I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place.

"Mr. ERSKINE. Just so, that is my question; only that I may not get into another debate, I beg your lordship will hear me a few words.

"LORD CHIEF JUSTICE EYRE. I think I have already anticipated a misapprehension of what I am now stating, by saying that if the declaration was meant to apply to a disavowal of the particular charge made against this man that declaration could not be received; as for instance, if he had said to some friend of his: When I planned this convention, I did not mean to use this convention to destroy the king and his Government, but I did mean to get, by means of this convention, the Duke of Richmond's plan of reform, that would fall within the rule I first laid down; that would be a declaration, which being for him, he could not be admitted to make, though the law will allow a contrary declaration to have been given in evidence. Now, if you take it so, I believe there is no difficulty."

And upon that ruling the question was changed as read by my associate manager, and correctly read by him, and all that followed this ruling of the chief justice and the subsequent discussion was read by my associate manager. The lord chief justice further said:

"You may put the question exactly as you propose."

That is, after discussion had occurred subsequent to the ruling of the chief justice to which I have referred, and in which a change in the character of the original question was disclosed.

"I confess I wished by interposing to avoid all discussion, because I consider what we are doing, and whom we have at that bar, and in that box, who are suffering by every moment's unnecessary delay in such a cause as this.

"Mr. ERSKINE. I am sure the jury will excuse it; I meant to set myself right at this bar; this is a very public place."

Then follows the question—

"Mr. DANIEL STUART examined by Mr. ERSKINE:

"Did you before the time of this convention being held, which is imputed to Mr. Hardy, ever hear from him what his objects were, whether he has at all mixed himself in that business?

"I have very often conversed with him, as I mentioned before, about his plan of reform; he always adhered to the Duke of Richmond's plan."

* * * * * * *

And which declaration came within the exception to the rule laid down by the chief justice. The final question was then put:

"From all that you have seen of him, what is his character for sincerity and truth?

"I have every reason to believe him to be a very sincere, simple, honest man."

To which the attorney-general said:

"If this had been stated at first to the question meant to be asked, I do not see what possible objection I could have to it."

* * * * * * *

That remark applies to the last question. The remark was made after the last question was put; but, as I understand it the two questions are substantially the same and are connected, and the remark of the attorney-general applied to both, as the first was but the basis, the inducement to the last.

* * * * * * *

Now, what is the question which has been propounded by the counsel on the part of the President to General Sherman? It is this:

"In that interview what conversation took place between the President and you in regard to the removal of Mr. Stanton?"

Now, I contend that that calls for just such declarations on the part of the President as fall within the rule laid down by the chief justice in the Hardy case, and therefore must be excluded. If this conversation can be admitted, where are we to stop? Who may not be put upon the witness stand and asked for conversations had between him and the President, and at any time since the President entered upon the duties of the presidential office, to show the general intent and drift of his mind and conduct during the whole period of his official existence?

* * * * * * *

We certainly must insist upon the well known and long established rule of evidence being applied to this particular objection, for the purpose of ending now and forever, so far as this case is concerned, these attempts to put in evidence the declarations of the President, made, it may be, for the purpose of meeting an impeachment by such weapons of defense.

It is offered to be proved now, as the counsel inform us, that the President told General Sherman that he desired him to accept an appointment of Secretary for the Department of War to the end that Mr. Stanton might be driven to the courts of law for the purpose of testing his title to that office.

At the conclusion of the arguments the Chief Justice said:

Senators, the Chief Justice has expressed the opinion that the question now proposed is admissible within the vote of the Senate of yesterday. He will state briefly the grounds of that opinion. The question yesterday had reference to a conversation between the President and General Thomas after the note addressed to Mr. Stanton was written and delivered, and the Senate held it admissible. The question to-day has reference to a conversation relating to the same subject-matter, between the President and General Sherman, which occurred before the note of removal was written and delivered. Both questions were asked for the purpose of proving the intent of the President in the attempt to remove Mr. Stanton. The Chief Justice thinks that proof of a conversation shortly before a transaction is better evidence of the intent of an actor in it than proof of a conversation shortly after the transaction. The Secretary will call the roll.

The question being put, "Is the question admissible?" there appeared yeas 23, nays 28. So the question was ruled out.

Mr. Stanbery next asked:

General Sherman, in any of the conversations of the President while you were here, what was said about the department of the Atlantic?

Mr. Manager Butler objected that this question fell within the ruling just made.

Thereupon Mr. Stanbery proposed the question in this form:

What do you know about the creation of the department of the Atlantic?

Mr. Manager Butler said:

We have no objection to what General Sherman knows about the creation of the department of the Atlantic, provided he speaks of knowledge and not from the declarations of the President. All orders, papers, his own knowledge, if he has any, if it does not come from declarations, we do not object to.

The Chief Justice said:

The counsel for the President will be good enough to state whether in this question they include statements made by the President.

To this Mr. Stanbery replied:

Not merely that; what we expect to prove is in what manner the department of the Atlantic was created; who defined the bounds of the department of the Atlantic; what was the purpose for which the department was arranged.

It was also developed by a question from the Chief Justice that the conversation referred to was prior to the attempted removal of Mr. Stanton.

The question being put, the Senate decided [1] without division that the question was not admissible.

Mr. Stanbery then asked this question:

Did the President make any application to you respecting the acceptance of the duties of Secretary of War ad interim.

Mr. Manager Butler said:

I am instructed, Mr. President, to object to this, because an application can not be made without being either in writing or in conversation, and then either would be the written or oral declaration of the President, and it is entirely immaterial to this issue.

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[1] Senate Journal, p. 888; Globe Supplement, p. 157.

Mr. William M. Evarts said:

Mr. Chief Justice and Senators, the ground, as we understand it, upon which the offer, in the form and to the extent in which our question which was overruled sought to put it, was overruled, was because it proposed to put in evidence declarations of the President as if statements of what he was to do or what he had done. We offer this present evidence as executive action of the President at the time and in the direct form of a proposed devolution of office then presently upon General Sherman.

Mr. Butler objected that under the guise of proving an act it was proposed to get in a conversation.

The question being put, the Senate decided without division that the question was admissible.[1]

The question having been put, and General Sherman having testified that the President had tendered him the office of Secretary of War ad interim on two occasions, Mr. Stanbery then asked:

At the first interview at which the tender of the duties of the Secretary of War ad interim was made to you by the President did anything further pass between you and the President in reference to the tender or your acceptance of it?

In response to a question by Mr. Manager Butler as to the scope of the question, Mr. Stanbery stated that the question was intended to draw out the declarations concomitant with the act.

Mr. Butler thereupon entered an objection to the question on the ground that it contemplated an evasion of the principles of the ruling heretofore made. He said:

My proposition is, objecting to this evidence, that the evidence is incompetent and is based upon first getting in an act which proved nothing and looked to be immaterial, so that it was quite liberal for Senators to vote it in, but that liberality is taken advantage of to endeavor to get by the ruling of the Senate and put in declarations which the Senate has ruled out.

Mr. Evarts argued:

The tender of the War Office by the Chief Executive of the United States to a general in the position of General Sherman is an Executive act, and as such has been admitted in evidence by this court. Like every other act thus admitted in evidence as an act, it is competent to attend it by whatever was expressed from one to the other in the course of that act to the termination of it. And on that proposition the learned manager shakes his finger of warning at the Senators of the United States against the malpractices of the counsel for the President. Now, Senators, if there be anything clear, anything plain in the law of evidence, without which truth is shut out, the form and features of the fact permitted to be proved excluded, it is this rule that the spoken act is a part of the attending qualifying trait and character of the act itself.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 23, nays 29. So the question was ruled out.[2]

Mr. Stanbery then asked:

In either of these conversations did the President say to you that his object in appointing you was that he might thus get the question of Mr. Stanton's right to the office before the Supreme Court?

Mr. Manager Butler objected to this question as leading in form, and as inadmissible within the decisions already made.

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[1] Senate Journal, p. 888; Globe Supplement, pp. 157, 158.

[2] Senate Journal, p. 888; Globe Supplement, p. 158.

The Senate, by a vote of yeas 7, nays 44, decided that the question was not admissible.[1]

Mr. Stanbery then asked:

Was anything said at either of those interviews by the President as to any purpose of getting the question of Mr. Stanton's right to the office before the courts?

Mr. Stanbery explained that the preceding question seemed to have been overruled because of its form, and he now changed the form as he did not want it thrown out on a technicality.

Mr. Manager Butler objected to the question on the ground that it was incompetent under the rules of evidence to offer in another form a question ruled out as leading, saying:

I had the honor to say to the Senate a little ago that all the rules of evidence are founded upon good sense, and this rule is founded on good sense. It would do no harm in the case of this witness; but the rule is founded on this proposition: that counsel shall not put a leading question to a witness, and thus instruct him what they want him to say, and then have it overruled and withdraw it, and put the same question in substance, because you could always instruct a witness in that way. Of course, that was not meant here, because I assume it would do no harm in any form, and the counsel would not do it; but I think the Senate should hold itself not to be played with in this way.

The Senate without division decided that the question should not be admitted.[2]

Thereupon Mr. John B. Henderson, of Missouri, a Senator, proposed this question in writing:

Did the President, in tendering you the appointment of Secretary of War ad interim, express the object or purpose of so doing?

Mr. Manager John A. Bingham, on behalf of the House of Representatives, objected to the question as both leading and incompetent.

The question being submitted to the Senate, "Is the question admissible? there appeared yeas 25, nays 27. So the question was ruled out.[3]

Mr. Stanbery then proposed this question:

At either of these interviews was anything said in reference to the use of threats, intimidation, or force to get possession of the War Office, or the contrary?

Mr. Manager Butler objected to the question, as falling within the rule already established.

The Senate, without division, sustained the objection.[4]

2239. Evidence as to statements of Judge Swayne to prove intention as to residence and made before impeachment proceedings were suggested was the subject of diverse rulings during the trial.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 22, 1905,[5] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Milton Jackson, a witness for the respondent, was examined

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[1] Senate Journal, pp. 888, 889; Globe Supplement, 158, 159.

[2] Senate Journal p. 889; Globe Supplement, p. 159.

[3] Senate Journal, p. 889; Globe Supplement, pp. 159, 160.

[4] Senate Journal, p. 890; Globe Supplement, p. 140.

[5] Third session Fifty-eighth Congress, Record, pp. 3057, 3058.

by Mr. Anthony Higgins, of counsel for the respondent, as to a conversation which he had with Judge Swayne several years previous to the impeachment in reference to the latter's place of residence, and this question was asked:

Q. (By Mr. Higgins.) What did the Judge state at that time about the subject of his residence?

To that I object, Mr. President, The statement of Judge Swayne, which we offered to prove, were excluded, of course, for a different reason, but certainly there is no rule of law which allows the statements of the respondent to be put in evidence in his own behalf. That, of course, is fundamental. No man can prove what he has done or what he has not done by his own statements as to what he did or purposed to do. There is no more fundamental rule of evidence than that the respondent's statements can not be proved in his favor. If that were so, all Judge Swayne would have to do would be to state that he resided in Florida, and that would make him a resident of Florida, or be evidence of his residence there.

Mr. Higgins replied:

I submit to the Senate that this question is eminently proper as a verbal fact, an act of the judge, ante litem motam, before this matter was mooted, years before, in the announcement to his nearest of kin as to his residence at that time. In order to make clear to the Senate the question upon which it is asked to pass, I will say that the authorities of Leon County, Fla., in which is the city of Tallahassee, gave an invitation to Judge Swayne, written and engrossed, to make his residence and home there, and that this was shown to this witness, and that the Judge gave them reasons why he could not accept that offer, because of where he had elected to live. If that is not fair testimony and within the rule, I do not know what is. It was long before this question was ever raised, not with any view of the possibility of any such proceeding as this. The statement is admissible for a double reason—that he was not going to accept that offer; that the offer was made very shortly after the act of Congress was passed, and therefore the question arose at that time; and in rejecting that invitation he did it because he had elected to reside, as the witness will state, elsewhere in his district and with reference to the requirements of that act.

Now, we have made that statement in answer as a substantive part of the defense, that he announced at that time his intention as to where he expected to live as a proper thing for him to do, and it is an act which I submit it is eminently proper for us to be able to prove.

In reply Mr. Manager Perkins argued:

In other words, Mr. President, the offer of the counsel is this when we analyze it: The question being whether Judge Swayne as a matter of fact became a resident of the northern district of Florida, they can prove that by showing by another witness that Judge Swayne said he intended to become a resident. You can prove a fact. You can prove what a man did; what he was bound to do; that he became a resident. How—by showing what he did? No; but by proving that he said to some one else he intended to become a resident.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

I find that in the trial of Andrew Johnson, page 207 of the proceedings, as reported in the Globe, it was offered for the counsel by the respondent to prove in these words:

"We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of Mr. Thomas to perform the duties ad interim; that thereupon Mr. Perrin said: 'Supposing Mr. Stanton should oppose the order?' The President replied: 'There is no danger of that, for General Thomas is already in the office,' etc."

Mr. Manager Butler having objected, Mr. Manager Wilson said:

Mr. President, as this objection is outside of any former ruling of the Senate and is perfectly within the rule laid down in Hardy's case—the celebrated English impeachment case—and cited this ruling from that case, which may be found in 24 State Trials, page 1096:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, because the presumption upon which declarations are evidence is that

no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."

The Chief Justice submitted the question to the Senate whether it should be admitted, and the vote was, yeas 9 and nays 37. So the question was rejected. There you have precedent both English and American.

The Presiding Officer [1] said:

The Presiding Officer will state the question. Counsel for the respondent offered to prove, as affecting the question of his residence, statements made by the respondent to the witness in the year 1894 or 1895 as to where it was his intention to reside. That it the question which is submitted to the Senate.

Mr. HIGGINS. I wish further to say that I intend also to put to the witness the question as to where the Judge stated at the time he did reside.

Mr. MANAGER OLMSTED. That would be equally objectionable.

The PRESIDING OFFICER. And, further, the statements made by Judge Swayne at that time as to where his residence was. Senators in favor of the admission of such testimony will say "aye," opposed "no." [Putting the question.] In the opinion of the Presiding Officer the "ayes" have it. The "ayes" have it. The counsel will ask the question.

On February 23 [2] a witness, Charles F. Warwick, was examined by Mr. Anthony Higgins, of counsel for the respondent, who asked:

Q. Do you know Judge Charles Swayne?—A. Very well.

Q. How long have you known him?—A. Ever since I came to the bar. I think I knew him before that intimately.

Q. Intimately, you say?—A. Intimately.

Q. Do you remember the fact of the act of Congress curtailing his district?—A. I do.

Q. Will you please state whether on or about or after that time, and fix the time yourself, you had any conversation with him, and he with you, concerning where he would make his residence in Florida?

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to that testimony as being irrelevant and incompetent. The declaration of the respondent as to where he intended to reside is, in our judgment, not evidence in this case.

Mr. Porter J. McCumber, a Senator from North Dakota, said:

Mr. President, before submitting the matter to the Senate, I wish counsel would inform the Senate on what principle of law he justifies a proposition to introduce in evidence a self-serving declaration of a party defendant in a criminal proceeding.

Mr. Higgins said:

Mr. President, I had the honor to submit some remarks upon that question yesterday. We contend that such an assertion made before the present impeachment proceedings were mooted or expected, or as the maxim of the law has it ante litem motam, is itself essentially a verbal fact. Residence is made up of two elements—intention and action. Intent without action is futile to make a residence, but intention becomes a most important part of the proposition in the end as to what constitutes residence. As I have said and admitted, alone it will not make it, but it is a part of a whole in which it takes its own due proportion.

Now, if this were a self-serving assertion, made after the fact, if it came into the case in such a way it would be so clearly objectionable that it never would be presented by counsel for the respondent. But we submit it is a most important thing. When the good faith of the conduct of the respondent is in dispute, we bring here a witness of the highest character and standing to prove what at that time was the expressed intention of the respondent in respect to establishing his residence. I think therefore that, while admitting the principle upon which the distinguished Senator raises his question, we have brought this within an exception thereto. If we had expected that this question would be raised again to-day, after it had been disposed of yesterday, we would have come prepared with authorities to submit.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Record, pp. 3145, 3146.

Mr. Manager James B. Perkins, of New York, said:

Mr. President, just a word. I did not again object today because the Senate yesterday, I must confess somewhat to my surprise, allowed a similar question to be answered. Doubtless it was that the legal question involved was not presented by me with the clearness with which it has now been stated by the Senator from North Dakota. The gentleman on the other side misstates the question and avoids the inquiry made by the Senator. It is not can judge Swayne's intention be proved? His intention is a question that perhaps can be proved, but Judge Swayne's intention, no more than any other thing in Judge Swayne's behalf, can be proved by Judge Swayne's own statement.

It is offered to prove here, what? Judge Swayne's intention, by the fact that Judge Swayne said it was his intention. As the Senator from North Dakota properly says, it is an endeavor to prove something in behalf of the defendant by his own statement. There is the inherent vice of the question, and I think the failure perhaps to catch that point yesterday was the reason the ruling was made by the Senate.

Mr. Higgins replied:

Only a word in reply. The learned manager who would confine the evidence of intention to acts, when from the very great case in 3 Washington Report down it is the established law as to citizenship, as to residence, as to domicile, that they are each and every one of them made up of two articles—of intent and of action—and that if you can not prove anything by words you are confined merely in your evidence to acts. That is not the law, with all due respect to my learned friend.

Mr. Manager Olmsted said:

I again call the attention of the Senate to the fact that this precise question was before the Senate of the United States in the impeachment trial of Andrew Johnson, where his counsel offered to prove, for the purpose of showing the intent of the President of the United States, his statements to other parties. There was then cited the celebrated English case of Hardy, reported in 24 State Trials, page 1096, where it was held by the House of Lords:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent"—

Mark the word—

"though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, etc."

Upon the citation of that authority and the argument of the case the United States Senate decided, by a vote of nearly 4 to 1, that such a statement made by the respondent could not be proved by the party to whom he made it.

Mr. Higgins said:

I have not had a chance to reply to that. I agree to that law, for that was not a case of residence, nor of domicile nor of citizenship. It was a case of ordinary criminal conduct, where the intent is inferred from the act. But the difference is laid down in the law, that residence is a mixed question of law and fact; that it is made up of action plus intent, and intent plus action, and therefore it is to be differentiated entirely from Hardy's case, and goes back to another class of authorities entirely.

The Presiding Officer said:

Shall the witness be permitted to answer the question. [Putting the question.] In the opinion of the Presiding Officer the "noes" have it. The "noes" have it, and the answer is excluded.

Later, on the same day,[1] Henry G. Swayne was sworn and examined by Mr. Higgins:

Q. Do you recall the time of the passage of the act of Congress curtailing the northern district of Florida?—A. Yes, sir.

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[1] Record, p. 3153.

Q. July, 1894. Where were your father and family residing at that time?—A. St. Augustine, Fla.

Q. You were not there that year?—A. I was there at that time; that summer.

Q. State what you know as to any facts or acts of Judge Swayne with reference to making his residence at Pensacola.—A. Immediately after the passage of the act, or within a few days thereafter, he left the home in St. Augustine and went to Pensacola, declaring that he was——

Mr. Manager Perkins having interposed, Mr. Higgins said:

I offer to prove by this witness what the judge declared at the time; and I should like to know if the manager objects.

Mr. Manager PERKINS. We object. That is easily answered.

The PRESIDING OFFICER. The Presiding Officer understands that counsel propose to prove the declaration of Judge Swayne made at the time when he left his home in St. Augustine as to where he was going to make his home. * * * The Presiding Officer thinks that may be done. If any Senator desires, he will submit the question to the Senate. * * * This is a declaration made at the time he left his home in St. Augustine as to where he intended to take up his home on leaving the St. Augustine home. * * * If any Senator desires, the Presiding Officer will submit the question to the Senate. [A pause.] The Presiding Officer thinks it part of the res gestae. The Presiding Officer understands that the witness is about to testify to a statement made by Judge Swayne at the time he was giving up his home in St. Augustine; and that the Presiding Officer thinks the witness may state.

Mr. HIGGINS. Please proceed.

A. The statement in full which was made by Judge Swayne at the time, as I recollect it, was that the bill dividing the district or redistricting the State, whichever it was, had just passed Congress and been signed by the President, and that he would be compelled to make his residence within the boundaries of his district, and that he was going to go to Pensacola; and with that declaration he left St. Augustine that summer in the month of July. I was there, having gone down after my collegiate year was over, from Philadelphia, and I, with the other members of the family——

2240. By a majority of one the Senate, in the Johnson trial, sustained the Chief Justice's ruling that evidence as to respondent's declaration of intent, made at the time of the act, was admissible.—On April 13, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Reverdy Johnson, a Senator from Maryland, asked for the recall as a witness of Gen. William T. Sherman, and General Sherman having taken the stand, Mr. Johnson proposed in writing this question:

When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 31st of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?

Mr. Manager John A. Bingham objected to the question as incompetent, in accordance with the rulings of the Senate heretofore made.

The question being taken without argument, "Is the question admissible?" there appeared yeas 26, nays 22. So the question was admitted.

And the witness replied, "Yes."

Thereupon Mr. Reverdy Johnson proposed this question:

If he did, state what he said his purpose was.

Mr. Manager Bingham objected to the question, since it was incompetent for the accused to make his own declarations evidence for himself.

[1] Second session Fortieth Congress, Senate Journal, pp. 693, 894; Globe supplement, pp. 169–173.

The Chief Justice[1] said:

The Chief Justice has already said upon a former occasion that he thinks that, for the purpose of proving the intent, this question is admissible; and he thinks, also, that it comes within the rule which has been adopted by the Senate as a guide for its own action. This is not an ordinary court, but it is a court composed largely of lawyers and gentlemen of great experience in the business transactions of life, and they are quite competent to determine upon the effect of any evidence which may be submitted to them; and the Chief Justice thought that the rule which the Senate adopted for itself was founded on this fact; and in accordance with that rule, by which he determined the question submitted on Saturday, he now determines this question in the same way.

Messrs. Managers Bingham and Butler asked if this was not the same question ruled on Saturday, April 11.

The Chief Justice said:

The Chief Justice does not say that. What he does say is, that it is a question of the same general import, to show the intent of the President during these transactions. The Secretary will read the question again.

* * * * * * *

Senators, you who are of opinion that the question just read, "If he did, state what he said his purpose was," is admissible, and should be put to the witness, will, as your names are called, answer yea; those of a contrary opinion, nay. The Secretary will call the roll.

And the vote being taken, there appeared yeas 26, nays 25. So the question was admitted.

2241. Declarations of the respondent made during the act were admitted to rebut evidence of other declarations, made also during the act, but on a different day.

Instance wherein, during the introduction of evidence, an objection withdrawn by a manager was renewed by a Senator.

On February 15, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, William Marshall was sworn as a witness on behalf of the respondent. During the examination of this witness Mr. Robert G. Harper, counsel for the respondent, asked a question to which objection was made by Mr. Joseph H. Nicholson, of Maryland, one of the managers.

After consultation Mr. Nicholson withdrew the objection, whereupon it was renewed by a member of the court.

Thereupon Mr. Harper, in behalf of the respondent, made the following motion:

Testimony on the part of the prosecution, tending to show from the declarations of the respondent that he had a corrupt intention to pack a jury for the trial of Callender, having been given, he offers in evidence other declarations of his, made during the proceedings, but on a different day, for the purpose of rebutting the former testimony, and of showing that his intentions, in that respect, were pure and even favorable to Mr. Callender.

Thereupon the President[3] said:

This evidence is consented to by the managers. The question is, "Shall it be, on such consent, examined by the court?"

And the question was determined in the affirmative, yeas 32, nays 2.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Eighth Congress, Senate Impeachment Journal, p. 520; Annals, p. 251.

[3] Aaron Burr, of New York, Vice-President, and President of the Senate.

2242. In the Johnson trial the Senate sustained the Chief Justice in admitting as showing intent, on the principle of res gestae, evidence of respondent's verbal statement of the act to his Cabinet.—On April 17,1868,[1] in the-Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gideon Welles, Secretary of the Navy, was sworn and examined as a witness by counsel for the respondent, and testified that he attended a meeting of the Cabinet on the afternoon of February 21 last. At this meeting, after the departmental business had been concluded, and as they were about to separate, the President made a statement.

Objection as to testimony of what the President said being intimated by the managers for the House of Representatives, Mr. William M. Evarts, of counsel for the respondent, made this offer of proof:

We offer to prove that on this occasion the President communicated to Mr. Welles and the other members of his Cabinet, before the meeting broke up, that he had removed Mr. Stanton and appointed General Thomas Secretary of War ad interim, and that upon the inquiry by Mr. Welles whether General Thomas was in possession of the office the President replied that he was; and upon further question of Mr. Welles whether Mr. Stanton acquiesced the President replied that he did; all that he required was time to remove his papers.

Mr. Manager Benjamin F. Butler at once objected.

Mr. President and Senators, as it seems to us, this does not come within any possible proposition of law to render it admissible. It is now made certain that this act Was done without any consultation of his Cabinet by the President, whether that consultation was to be held verbally, as I think is against the constitutional provision, or whether the theory is to be adopted that the President has a right to consult with his Cabinet upon questions of his conduct.

Mr. Manager Butler proceeded to discuss the constitution and functions of the President's Cabinet, holding that strictly the President might only require written opinions of the heads of Departments.

Continuing as to the competency of the evidence, Mr. Butler said:

Now, the question is, after he has done the act, after he has thought it was successful, after he thought Mr. Stanton had yielded the office, can he, by his narration of what he had done and what he intended to do, shield himself before a tribunal from the consequences of that act? It is not exactly the same question which you decided yesterday by almost unexampled unanimity in the case of Mr. Perrin and Mr. Selye, the Member of Congress, on that same day, a few minutes earlier or a few minutes later? They offered in evidence here what he told Mr. Perrin and what he told Mr. Selye; they complicated it by the fact that Mr. Selye was a Member of Congress; and the Senate decided by a vote which indicated a very great strength of opinion that that sort of narration could not be put in.

Now, is this any more than narration? It was not to take the advice of Mr. Welles as to what he should do in the future, or upon any question; it was mere information given to Mr. Welles or to the other members of the Cabinet after they had separated in their Cabinet consultation, and while they were meeting together as any other citizens might meet. It would be as if, after you adjourned here, some question should be attempted to be put in as to the action of the Senate because the Senators had not left the room. Again, I say it was simply a narration, and that narration of his intent and purposes, his thoughts, expectations, and feelings.

I do not propose to argue it further until I hear something showing why we are to distinguish this case from the case of Mr. Perrin, on which you voted yesterday. Mr. Perrin tells you that on the 22d he waited for the Cabinet meeting to break up, and as soon as it broke up he went in with Mr. Selye, and then the President undertook to tell him. You said that was no evidence. Now, when he under-

[1] Second session Fortieth Congress, Senate Journal, pp. 908, 909; Globe Supplement, pp. 222–225.

took to tell Mr. Welles is that any more evidence? I can not distinguish the cases, and I desire to hear them distinguished before I attempt an answer to any such distinction.

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It is said that it is an official act. I had supposed up to this moment—aye, and I suppose now—that there is no act that can be called an official act of an officer which is not an act required by some law or some duty imposed upon that officer. Am I right in my ideas of what is an official act? It is not every volunteer act by an officer that is official. Frequently such acts are officious, not official. An official act, allow me to say, is an act which the law requires, or a duty which is enjoined upon the officer by some law, or some regulation, or in some manner as a duty. Will the learned counsel tell the Senate what constitutional provision, what statute provision, what practice of the Government requires the President at any time to inform his Cabinet or any member of them whatever that he has removed one man and put in another, and that that other man is in office? If there is any such law, it has escaped my attention. I am not aware of it.

* * * * * * *

Now, then, what is offered? Stanton has been removed by the act of the President; and thereupon, without asking advice—because that is expressly waived by the learned counsel last addressing us—not as a matter of advice, the President gives information. Now, how can that information be evidence? How can he make it evidence? The information is required by no law, was given for no purpose to carry out any official duty, was the mere narration of what the President chose to nurate at that time.

Mr. Evarts, in behalf of the respondent, argued:

Now, then, it stands thus: That at a Cabinet meeting held on Friday, the 21st of February, when the routine business of the different Departments was over, and when it was in order for the President to communicate to his Cabinet whatever he desired to lay before them, the President did communicate this fact of the removal of Mr. Stanton and the appointment of General Thomas ad interim, and that thereupon his Cabinet officers inquired as to the posture in which the matter stood, and as to the situation of the office and of the conduct of the retiring officer. Here we get rid of the suggestion that it is a mere communication to a casual visitor which made the staple of the argument yesterday against the introduction of the evidence as to the conversation with Mr. Perrin and Mr. Selye. We now present you the communication made by the President of the United States while this act was in the very process of execution, while it was yet, as we say in law, in fieri, being done.

It being in fieri, the President communicates the fact how this public transaction has been performed and is going on, and we are entitled to that as a part of the res gestse in its sense of a governmental act, with all the benefit that can come from it in any future consideration you are to give to the matter as bearing upon the merits and the guilt or innocence of the President in the premises. It bears, as we say, directly upon the question whether there had been any other purpose than the placing of the office in a proper condition for the public service according to the announcement of the President as his intention when he conversed with General Sherman in the January preceding; and it negatives all idea that at the time that General Thomas to Mr. Wilkeson or to the Dakota Delegate, Mr. Burleigh, was saying or suggesting anything of force, the President was the author of, or was responsible for, his statements. The truth is, it presents the transaction as wholly and completely an orderly and peaceful movement of the President of the United States, as, in fact, it was, and no evidence has been given to the contrary, of any occurrence disturbing that peaceful order and as the situation in which its completion left the matter in the mind of the President up to that point of time.

Mr. Benjamin R. Curtis, also of counsel for the respondent, added:

We are anxious that this testimony now offered should be distinguished in the apprehension of the Senate, as it is in our own, from an offer of advice, or from the giving of advice by the Cabinet to the President. We do not place our application for the admission of this evidence upon the ground that it is an act of giving advice by his councilors to the President. We place it upon the ground that this was an official act done by the President himself when he made a communication to his councilors concerning this change which he had made in one of their number; that that was strictly and purely an official act of the President, done in a proper manner, the subject-matter of which each of those councilors was interested in in his public capacity, and which it was proper or the President to make known to them at the earliest moment when he could make such a communication.

Mr. Curtis further reviewed the Constitutional history of the Cabinet to show that the practice was for the President to rely on the Cabinet, both for consultation and decision, finally saying as to his remarks in making this review:

They are pertinent to the question now under consideration, for they go to show that under the Constitution and laws of the United States as practiced on by every President, including General Washington and Mr. Adams, Cabinet ministers were assembled by them as a council for the purposes of consultation and decision, and of course, when thus assembled, a communication made to them by the President of the United States concerning an important official act which was then in fieri, in process of being executed and not yet completed, is itself an official act of the President, and we submit to the Senate that we have a right to prove it in that character.

The Chief Justice [1] said at the conclusion of the arguments:

Senators, the Chief Justice thinks that this evidence is admissible. It has, as he thinks, important relation to the res gestae, the very transaction which forms the basis of several of the articles of impeachment, and he thinks it also entirely proper to take into consideration in forming an enlightened judgment upon the intent of the President. He will put the question to the Senate if any Senator desires it.

Mr. Aaron H. Cragin, a Senator from New Hampshire, asked that the evidence excluded in the case of Witness Perrin [2] be read. This having been done, Mr. Jacob M. Howard, a Senator from Michigan, proposed this question:

In what way does the evidence the counsel for the accused now offer meet any of the allegations contained in the impeachment?

How does it affect the gravamen of any one of the charges?

To this Mr. Evarts responded:

The Senators will perceive that this question anticipates a very extensive field of inquiry—first as to what the gravamen of all these articles is, and, secondly, as to what shall finally be determined to be the limits of law and fact that properly press upon the issues here; but it is enough to say, probably, as we have every desire to meet the question with all the intelligence that we can command, at the present stage of the matter, without going into these anticipations, that it bears upon the question of the intent with which this act was done, as being a qualification of the act in the President's mind at the time he announces it as complete. It bears on the conspiracy articles and it bears upon the eleventh article, even if it should be held that the earlier articles, upon the mere removal of Mr. Stanton and the appointment of General Thomas, are to cease in the point of their inquiry, intent, and all with the consummation of the acts.

The Chief Justice thereupon said:

The Chief Justice will restate to the Senate the question as it presents itself to his mind. The question yesterday had reference to the intention of the President, not in relation to the removal of Mr. Stanton, as the Chief Justice understood it, but in relation to the immediate appointment of a successor by sending in the nomination of Mr. Ewing. The question to-day relates to the intention of the President in the removal of Mr. Stanton; and it relates to a communication made to his Cabinet after the departmental business had closed, but before the Cabinet had separated. The Chief Justice is clearly of opinion that this is a part of the transaction and that it is entirely proper to take this evidence into consideration as showing the intent of the President in his acts. The Secretary will call the roll.

The question being taken, there appeared, yeas 26, nays 23. So the evidence was admitted.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] See sec. 2244 of this work.

2243. It was decided in the Chase trial that declarations of the respondent after the act might not be admitted to show the intent.—On February 15, 1805,[1] in the high court of impeachment, during the trial of the case of United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, Mr. Joseph Hopkinson, counsel for the respondent, asked of Edward J. Coale, the witness under examination, the following question:

> At the time Judge Chase desired you to make the copy in your hand, did he, or did he not, explain to you his reasons or motives for drawing up the paper from which this copy was made? If yes, what were they?

Mr. Joseph H. Nicholson, of Maryland, one of the managers, objected to the question.

At the suggestion of the President[2] the question was reduced to writing.

Mr. Hopkinson said he thought such questions perfectly legal when they went to show the intention of the accused. "We have heard," said he, "much of the quo animo, and it is perfectly clear that the intention constitutes the guilt of the offense."

Mr. Nicholson said:

> The quo animo is to be collected from the acts of the party. The evidence of his declaration may be shown to prove the quo animo. But I do not consider it to be correct that Judge Chase shall be permitted to give in evidence declarations made at any other time than that when we have stated he made them; otherwise it will always lay in the discretion of the party accused to state declarations made at another time by him for the purpose of justifying any acts he may have committed.

Mr. Luther Martin, counsel for the respondent, said he had ever considered the declaration of the party at the time he was charged with committing a criminal act as competent evidence to show his innocence.

Mr. Nicholson said there was no doubt of it, but that he was not charged with drawing out the paper as a criminal act. Any declaration made by Judge Chase at the time he delivered the opinion of the court may be given in evidence, but any other declarations have nothing to do with the case.

The President said:

> Where was the conversation between the judge and yourself?
> Mr. COALE. At the judge's lodgings.

The question was then taken—

> Is it competent for the counsel for the respondent to put said question to the witness?

And it was determined in the negative, yeas 9, nays 25.

2244. In the Johnson trial the Senate ruled out evidence as to respondent's declarations of intent made after the act.

Comment of the Chief Justice on the Senate's decisions on evidence as to respondent's declarations at or near the time of the act.

On April 16, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Edwin O. Perrin was sworn and examined by counsel on behalf of the respondent. Mr. Perrin testified to an inter-

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[1] Second session Eighth Congress, Senate Impeachment Journal, p. 519; Annals, pp. 242–243.

[2] Aaron Burr, of New York, Vice-President and President of the Senate.

[3] Second session Fortieth Congress, Senate Journal, pp. 905, 906; Globe supplement, pp. 206–208.

view which he had with the President in company with Mr. Selye, a Congressman, on the evening of February 21, 1868.

Mr. William M. Evarts, of counsel for the respondent, asked:

Did you then hear from the President of the removal of Mr. Stanton?

Mr. Manager Benjamin F. Butler at once entered an objection, which caused the counsel for respondent to submit in writing the following:

We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of General Thomas to perform the duties ad interim; that thereupon Mr. Perrin said: "Supposing Mr. Stanton should oppose the order." The President replied: "There is no danger of that, for General Thomas is already in the office." He then added: "It is only a temporary arrangement; I shall send in to the Senate at once a good name for the office."

Mr. Manager Butler said:

I find it, Mr. President and Senators, my duty to object to this. There is no end to declarations of this sort. The admission of those to Sherman and to Thomas was advocated on the ground that the office was tendered to them and that it was a part of the res gestae. This is mere narration, mere statement of what he had done and what he intended to do. It never was evidence and never will be evidence in any organized court, so far as any experience in court has taught me. I do not see why you limit it. If Mr. Perrin, who says that he has heretofore been on the stump, can go there and ask him questions, and the answers can be received why not anybody else? If Mr. Selye could go there, why not everybody else? Why could he not make declarations to every man, aye, and woman, too, and bring them in here, as to what he intended to do and what he had done to instruct the Senate of the United States in their duties sitting as a high court of impeachment?

And Mr. Manager James F. Wilson added:

Mr. President, as this objection is outside of any former ruling of the Senate, and is perfectly within the rule laid down in Hardy's case, I wish to call the attention of the Senate to that rule again, not for the purpose of entering upon any considerable discussion, but to leave this objection under that rule to the decision of the Senate:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, an evidence against a prisoner, and are not evidence for him, because the presumption upon which declarations are evidence is that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself." (24 State Trials, p. 1096.)

If this offer of proof does not come perfectly within that rule, then I never met a case within my experience that would come within its provisions. I leave this objection to the decision of the Senate upon that rule.

In behalf of the admission of the evidence Mr. Evarts said:

It will be observed that this was an interview between the President of the United States and a Member of Congress, one of "the grand inquest of the nation," holding, therefore, an official duty and having access, by reason of his official privilege, to the person of the President; that at this hour of the day the President was in the attitude of supposing, upon the report of General Thomas, that Mr. Stanton was ready to yield the office, desiring only the time necessary to accommodate his private convenience, and that he then stated to these gentlemen: "I have removed Mr. Stanton and appointed General Thomas ad interim," which was their first intelligence of the occurrence; that upon the suggestion, "Will there not be trouble or difficulty?" the President answered (showing thus the bearing on any question of threats or purpose of force as to be imputed to him from the declarations that General Thomas was making at about the same hour to Mr. Wilkeson) that there was no occasion for or "no danger of that, as General Thomas was already in." Then, as to the motive or purpose entertained by the President at the time of this act of providing anybody that should control the War Department or the military appropriations, or by combination with the Treasury Department suck the public funds, or to have,

though I regret to repeat the words as used by the honorable manager, a tool or a slave to carry on the office to the detriment of the public service, we propose to show that at the very moment he asserts, "This is but a temporary arrangement; I shall at once send in a good name for the office to the Senate."

Now, you will perceive that this bears upon the President's condition of purpose in this matter, both in respect to any force as threatened or suggested by anybody else being imputable to him at this time, and upon the question of whether this appointment of General Thomas had any other purpose than what appeared upon its face, a nominal appointment, to raise the question of whether Mr. Stanton would retire or not, and determined, as it seemed to be for the moment, by the acquiescence of Mr. Stanton, was then only to be maintained until a name was sent in to the Senate, as by proof hitherto given we have shown was done on the following day before 1 o'clock.

At the conclusion of argument the Chief Justice [1] said:

Senators, the Chief Justice is unable to determine the precise extent to which the Senate regards its own decision as applicable. He has understood the decision to be that, for the purpose of showing intent, evidence may be given of conversations with the President at or near the time of the transaction. It is said that this evidence is distinguishable from that which has been already introduced. The Chief Justice is not able to distinguish it; but he will submit directly to the Senate the question whether it is admissible or not.

The question being taken on the admission of the testimony, there appeared, yeas 9, nays 37. So the evidence was excluded.

2245. In the Johnson trial the Chief Justice ruled that an official message transmitted after the act was not admissible as evidence to show intent.—On April 15, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, during the presentation of evidence on behalf of the respondent, Mr. Benjamin R. Curtis, of counsel, offered a message of the President to the Senate of the United States, bearing date February 24, 1868.

Mr. Benjamin F. Butler, of the managers for the House of Representatives, objected to the admission of the message as evidence, since it was virtually a declaration of the President after he was impeached, and that could not be evidence Mr. Butler stated that the record as to the impeachment was:

That on the 21st of February a resolution was proposed for impeachment and referred to a committee; on the 22d the committee reported, and that was debated through the 22d and into Monday, the 24th, and the actual vote was taken on Monday, the 24th.

Arguing in support of the objection, Mr. John A. Bingham, of Ohio, one of the managers, said as to the message:

Is it anymore than a volunteer declaration of the criminal, after the fact, in his own behalf? Does it alter the case in law? Does it alter the case in the reason or judgment of any man living, either within the Senate or out of the Senate, that he chose to put his declaration in his own defense in writing? The law makes no such distinctions. I undertake to assert it here, regardless of any attempt to contradict my statement, that there is no law that enables any accused criminal, after the fact, to make declarations, either orally or in writing, either by message to the Senate or a speech to a mob, to acquit himself or to affect in any manner his criminality before the tribunals of justice, or to make evidence which shall be admitted under any form of law upon his own motion to justify his own criminal conduct.

I do not hesitate to say that every authority which the gentlemen can bring into court regulating the rule of evidence in procedures of this sort is directly against the proposition, and for the simple reason that it is a written declaration made by the accused voluntarily, after the fact, in his own behalf.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Fortieth Congress, Senate Journal, p. 898; Globe supplement, pp. 175–178.

Mr. William M. Evarts, of counsel for the President, argued that as the managers had been permitted to put in evidence a resolution of the Senate passed on February 21, and declaring that the President had exceeded his powers, the counsel for the respondent should be permitted to put in the message, which was an answer to that resolution. Mr. Evarts said:

Now, if the crime [the removal of Secretary Stanton] was completed on the 21st of February, which is not only the whole basis of this argument of the learned managers, but of every other argument upon the evidence that I have had the honor of hearing from them, I should like to know what application or relevancy the resolution passed by the Senate on the 21st of February, after the act of the President had been completed, and after that act had been communicated to the Senate, has on the issue of whether that act was right or wrong? And if the fact that it is an expression of opinion relieves the testimony from the possibility of admission, what was this but an expression of the opinion of the Senate of the United States in the form of a resolution regarding a past act of the President? There could be, then, no single principle of the law of evidence upon which this fact put in proof in behalf of the managers could be admitted, except as a communication from this branch of the Government to the President of the United States of its own opinion concerning the legality of his action; and in the same line and in immediate reply the President communicates to the Senate of the United States, openly and in a proper message, his opinions concerning the legality of the act. What would be thought of the Government that, in a criminal prosecution, by way of inculpating a prisoner, should give in evidence what a magistrate or a sheriff had said to him concerning the crime imputed, and then shut the mouth of the prisoner as to what he had said then and there in reply? Why, the only possibility, the only argument for affecting the prisoner with criminality for what had been said to him, was that, unreplied to, it might be construed into admission or submission; and to say that the prisoner when told, "You stole that watch," could not give in evidence his reply, "It was my own watch, and I took it because it was mine," is precisely the same proposition that is being applied here by the learned managers to this communication back and forth between the Senate and the President.

The arguments being concluded, the Chief Justice [1] said:

There is, perhaps, Senators, no branch of the law in which it is more difficult to lay down precise rules than that which relates to evidence of the intent with which an act is done. In the present case it appears that the Senate, on the 21st of February, passed a resolution, which I will take the liberty of reading:

"Whereas the Senate have received and considered the communication of the President stating that he has removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant-General of the Army to act as Secretary of War ad interim: Therefore,

"Resolved by the Senate of the United States, That under the Constitution and laws of the United States the President has no power to remove the Secretary of War and to designate any other officer to perform the duties of the office ad interim."

That resolution was adopted on the 21st of February, and was served, as the evidence before you shows, on the evening of the same day. The message which is now proposed to be introduced was sent to the Senate on the 24th day of February. It does not appear to the Chief Justice that the resolution of the Senate called for an answer, or that there was any call upon the President to answer from the Senate itself; and therefore he must regard the message which was sent to the Senate on the 24th of February as a vindication of the President's act addressed by him to the Senate; and it does not appear to the Chief Justice to come within any of the rules which have been applied to the introduction of evidence upon this trial. He will, however, take pleasure in submitting the question to the Senate if any Senator desires it. [After a pause.] If no Senator desires that the question be submitted to the Senate, the Chief Justice rules the evidence to be inadmissible.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

2246. The Chief Justice was sustained in admitting during the Johnson trial evidence of an act after the fact as showing intent.

Evidence of declarations of respondent after the fact was excluded in the Johnson trial, although related to an act admitted in proof to show intent.

On April 16, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Walter S. Cox, an attorney at law residing in the District of Columbia, was called as a witness on behalf of the respondent. The witness having stated that he was connected professionally with the case of Gen. Lorenzo Thomas, who had been arrested on a warrant based on an affidavit of Edwin M. Stanton, Secretary of War, Mr. Benjamin R. Curtis, of counsel for the respondent, asked:

When and under what circumstances did your connection with that matter begin?

To this question Mr. Manager Benjamin F. Butler objected on the ground of irrelevancy.

The Chief Justice[2] said:

The Chief Justice sees no objection to the question as an introductory question, but will submit it to the Senate if it is desired. [After a pause, to the witness.] You can answer the question.

The witness stated that he was sent for on February 22, and went to the President's House, where he saw the President about 5 p.m. Witness was about to relate what the President said, when Mr. Manager Butler interposed an objection.

This produced from the counsel for the respondent the following written offer:

We offer to prove that Mr. Cox was employed professionally by the President, in the presence of General Thomas, to take such legal proceedings in the case that had been commenced against General Thomas as would be effectual to raise judicially the question of Mr. Stanton's legal right to continue to hold the office of Secretary for the Department of War against the authority of the President, and also in reference to obtaining a writ of quo warranto for the same purpose; and we shall expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment.

Mr. Manager Butler at once objected.

In the course of the arguments Mr. Manager James F. Wilson thus stated the substance of the objection:

Now, I submit to this honorable body that no act, no declaration of the President made after the fact, can be introduced for the purpose of explaining the intent with which he acted. And upon this question of intent let me direct your minds to this consideration—the issuing of the orders referred to constitute the body of the crime with which the President stands charged. Did he purposely and willfully issue an order to remove the Secretary of War? Did he purposely and willfully issue an order appointing Lorenzo Thomas Secretary of War ad interim? If he did thus issue the orders, the law raises the presumption of guilty intent, and no act done by the President after these orders were issued can be introduced for the purpose of rebutting that intent. The orders themselves were in violation of the terms of the tenure of office act. Being in violation of that act, they constitute an offense under and by virtue its provisions, and the offense thus being established must stand upon the intent which controlled the action of the President at the time that he issued the orders. If, after this subject was introduced into the House of Representatives, the President became alarmed at the state of affairs, and concluded that it was best to attempt by some means to secure a decision of the court upon the question of the constitutionality or unconstitutionality of the tenure of office act, it can not avail him in this case. We are

[1] Second session Fortieth Congress, Senate Journal, p. 903; Globe supplement, pp. 197–200.

[2] Salmon P. Chase, of Ohio, Chief Justice.

inquiring as to the intent which controlled and directed the action of the President at the time the act was done; and if we succeed in establishing that intent, either by proof or by presumption of law, no subsequent act can interfere with it or remove from him the responsibility which the law places upon him because of the act done.

Mr. William M. Evarts, of counsel for the respondent, argued:

Mr. Chief Justice and Senators, we have here the oft-repeated argument that the crime against the act of Congress was complete by the papers drawn and delivered by the President; that the law presumes that those papers were made with the intent that appears on their face, which, it is alleged, is a violation of that act; and as that would be enough in an indictment against the President of the United States to affect him with a punishment, in the discretion of the judge, of six cents fine, so by peremptory necessity it becomes in this court a complete and perfect crime under the Constitution, which must require his removal from office, and that anything beyond the intent that the papers should accomplish what they tend to accomplish is not the subject of inquiry here. Well, it is the subject of imputation in the articles; it is the subject of the imputation in the arguments; it is the subject, and the only subject, that gives gravity to this trial, that there was a purpose of injury to the public interest and to the public safety in this proceeding.

Now, we seek to put this prosecution in its proper place on this point, and to show that our intent was no violence, no interruption of the public service, no seizure of the military appropriations, nothing but the purpose by this movement either to procure Mr. Stanton's retirement, as was desired, or to have the necessary footing for judicial proceedings. If this evidence is excluded, then, when you come to them summing up of this cause, you must take the crime of the dimensions and of the completeness that is here avowed, and I shall be entitled before this court and before this country to treat this accusation as if the article had read that he issued that order for Mr. Stanton's retirement, and that direction to General Thomas to take charge ad interim, with the intent and purpose of raising a case for the decision of the Supreme Court of the United States between the Constitution and the act of Congress; and if such an article had been produced by the House of Representatives and submitted to the Senate it would have been a laughingstock of the whole country.

The gentlemen shall not make their arguments and escape from them at the same breath. I offer this evidence to prove that the whole purpose and intent of the President of the United States in his action in reference to the occupancy of the office of Secretary of War had this extent and no more—to obtain a peaceable delivery of that trust from one holding it at pleasure to the Chief Executive, or, in the absence of that peaceable retirement, to have a case for the decision of the Supreme Court of the United States; and if the evidence is excluded you must treat every one of these articles as if the intent were limited to an open averment in the articles themselves that the intent of the President was such as I propose to prove it.

At the conclusion of the arguments, the Chief Justice [1] said:

Senators, the counsel for the President offer to prove that the witness, Mr. Cox, was employed professionally by the President in the presence of General Thomas to take such legal proceedings in the case that had been commenced against General Thomas as would be effectual to raise judicially the question of Mr. Stanton's legal right to continue to hold the office of Secretary for the Department of War against the authority of the President, and also in reference to obtaining a writ of quo warranto for the same purpose, and they state that they expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment. The first article of impeachment, which may, perhaps, for this purpose, be taken as a sample of the rest relating to the same subject, after charging that "Andrew Johnson, President of the United States," in violation of the Constitution and laws, issued the order which has been so frequently read for the removal of Mr. Stanton, proceeds:

"Which order was unlawfully issued with intent then and there to violate the act entitled 'An act regulating the tenure of certain civil offices,'" etc.

The article charges, first, that the act was done unlawfully, and then it charges that it was done with intent to accomplish a certain result. That intent the President denies, and it is to establish that denial by proof that the Chief Justice understands this evidence now to be offered. It is evidence of an

[1] Salmon P. Chase, of Ohio, Chief Justice.

attempt to employ counsel by the President in the presence of General Thomas. It is the evidence so far of a fact; and it may be evidence also of declarations connected with that fact. This fact and these declarations, which the Chief Justice understands to be in the nature of facts, he thinks are admissible in evidence. The Senate has already, upon a former occasion, decided by a solemn vote that evidence of the declarations by the President to General Thomas and by General Thomas to the President, after this order was sent to Mr. Stanton, were admissible in evidence. It has also admitted evidence of the same effect, on the 22d, offered by the honorable managers. It seems to me that the evidence now offered comes within the principle of those decisions; and, as the Chief Justice has already had occasion to say, he thinks that the principle of those decisions is right, and that they are decisions which are proper to be made by the Senate sitting in its high capacity as a court of impeachment, and composed, as it is, of lawyers and gentlemen thoroughly acquainted with the business transactions of life and entirely competent to judge of the weight of any evidence which may be submitted. He therefore holds the evidence to be admissible, but will submit the question to the Senate, if desired.

Mr. Charles D. Drake, of Missouri, having asked for a vote, on the question "shall the proof offered be admitted?" there appeared yeas 29, nays 21. So the proof was admitted.

The witness then testified as to directions which he received from the President to institute legal proceedings to test General Thomas's right to the office of Secretary of War.

Mr. Curtis, of counsel for the respondent, then asked:

What did you do toward getting out a writ of habeas corpus under the employment of the President?

Mr. Manager Butler having objected, the question was referred to the Senate and decided to be admissible; yeas 27, nays 23.[1]

The witness proceeded to describe his efforts in court, saying finally:

But the counsel who represented the Government, Messrs. Carpenter and Riddle, applied to the judge then for a postponement of the examination——

Mr. Manager Butler having questioned this statement, the Chief Justice said:[2]

It is an account of the general transaction, as the Chief Justice conceives, and comes within the rule. The witness will proceed.

The witness, having related how General Thomas was discharged from court, proceeded:

Immediately after that I went, in company with the counsel whom he had employed, Mr. Merrick, to the President's House, and reported our proceedings and the result to the President. He then urged us to proceed——

Here Mr. Manager Butler interposed an objection, and Mr. Manager John A. Bingham called attention to the fact that this was asking for the President's declarations on February 26, two days after his impeachment.

Mr. Evarts, of counsel for the respondent, explained:

If it is to turn on that point, which has not been discussed in immediate reference to this question, we desire to be heard. The offer which the Chief Justice and Senators will remember was read, and upon which the vote of the Senate was taken for admission, included the efforts to have a habeas corpus proceeding taken, and also the efforts to have a quo warranto. The reasons why, and the time at which, and the circumstances under which, the habeas corpus effort was made, and its termination, have been given. Thereupon the efforts were attempted at the quo warranto. It is in reference to that that the President gave these instructions. We suppose it is covered by the ruling already made.

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[1] Globe supplement, p. 201; Senate Journal, p. 904.

[2] Globe supplement, p. 202.

The Chief Justice said: [1]

The Chief Justice may have misapprehended the intention of the Senate; but he understands their ruling to be in substance this: That acts in respect to the attempt and intention of the President to obtain a legal decision, commencing on the 22d of February, may be pursued to the legitimate termination of that particular transaction; and, therefore, the Senate has ruled that Mr. Cox, the witness, may go on and testify until that particular transaction came to a close. Now, the offer is to prove conversations with the President after the termination of that effort in the supreme court of the District of Columbia. The Chief Justice does not think that is within the intent of the previous ruling; but he will submit the question to the Senate, Senators, you who are of the opinion that this testimony should be received will please say "aye;" those of the contrary opinion, "no." [Putting the question.] The question is determined in the negative. The evidence is not received.

Thereupon Mr. Curtis propounded this question:

After you had reported to the President the result of your efforts to obtain a writ of habeas corpus, did you do any act in pursuance of the original instructions you had received from the President on Saturday, to test the right of Mr. Stanton to continue in the office? And if so, state what the acts were.

The Chief Justice at once intimated that under the last vote of the Senate this question was inadmissible; but Mr. John Sherman, a Senator from Ohio, asked that the fifth article of impeachment be read:

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, and on divers other days and times in said year, before the 2d day of March, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

Counsel for the respondent stated that the question had reference to this article.

The Chief Justice, having had the original offer of proof on the part of counsel for respondent read, said:

The discussion and the ruling of the Chief Justice in respect to that question was in reference to the first article of the impeachment. Nothing had been said about the fifth article in the discussion, so far as the Chief Justice recollects. The question is now asked with reference to the fifth article and the intent alleged in that article to conspire. The Chief Justice thinks it is admissible with that view under the ruling upon the first offer. He will, however, put the question to the Senate if any Senator desires it.

Mr. John Conness, a Senator from California, having asked for a vote, there appeared in favor of admitting the question 27 yeas, and against it 23 nays.[2] So the question was admitted.

2247. The Chief Justice admitted during the Johnson trial as showing intent a question as to action by the respondent, although taken after impeachment.—On April 16, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Richard T. Merrick, attor-

[1] Senate Journal, p. 904; Globe supplement, p. 202.

[2] Senate Journal, pp. 904, 905; Globe supplement, pp. 202, 203.

[3] Second session Fortieth Congress, Senate Journal, p. 905; Globe supplement, p. 205.

ney at law, was called as a witness on behalf of the respondent. Witness testified that he had been counsel for Gen. Lorenzo Thomas when the latter was arrested on complaint of Edwin M. Stanton, Secretary of War, at the time of the President's attempt to remove Mr. Stanton and place General Thomas in the office; and that after the action of the chief justice of the supreme court of the District in discharging General Thomas, he saw the President and communicated to him what had transpired.

Then Mr. Benjamin R. Curtis, of counsel for the respondent, proposed a question which, after objection, was presented in an offer of proof:

We offer to prove that about the hour of 12 noon, on the 22d of February, upon the fast communication to the President of the situation of General Thomas's case, the President or the Attorney-General in his presence gave the attorneys certain directions as to obtaining a writ of habeas corpus for the purpose of testing judicially the right of Mr. Stanton to continue to hold the office of Secretary of War against the authority of the President.

Mr. Manager Benjamin F. Butler objected that the witness had been General Thomas's counsel and had not been employed by the President. Therefore this witness's testimony could not be considered evidence of the President's acts or declarations after impeachment.

The Chief Justice [1] said:

The Chief Justice thinks this evidence admissible within the rule already determined by the Senate. He will submit the question to the Senate if any Senator desires it. [After a pause.] The witness may answer the question.

Mr. Curtis then proposed this question:

What, if anything, did you and Mr. Cox do in reference to accomplishing the result you have spoken of?

Mr. Manager Butler having objected, the Chief Justice said:

The Chief Justice thinks it is competent, but he will put the question to the Senate if any Senator desires it. [After a pause, to the witness.] Answer the question.

2248. In impeachment trials witnesses are ordinarily required to state facts, not opinions.

In the Johnson trial a witness was not permitted, as a matter of proof of intent, to state that he had formed and communicated an opinion to respondent.

On February 11, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, and while one Henry Tilghman was under examination, Mr. John Randolph, jr., of Virginia, one of the managers on behalf of the House of Representatives, proposed this question:

You say that when the written opinion of the court was thrown on the table, it produced considerable agitation among the gentlemen of the bar. What did you conceive to be the cause of that agitation?

Mr. Philip B. Key, counsel for the respondent, objected.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Eighth Congress, Senate Impeachment Journal, p. 518; Annals, p. 180.

The President[1] having required the question to be reduced to writing it was read by the Secretary.

Thereupon Mr. James A. Bayard, of Delaware, a Senator, moved that the Senate should withdraw. This motion was then disagreed to.

The question was then put: "Is it competent for the managers to put the said question to the witness?"

It was determined in the negative, yeas 0, nays 34.

2249. On February 12, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, George Hay, being under examination, the following occurred:

The WITNESS. Finding that the judge had made up his mind on that subject, and that the law of Virginia was not considered as obligatory, I had no idea of making any motion to the court founded on the doctrine which he had thus denounced. My opinion before, at that time, and at the present time, the opinion which I expressed officially on a late occasion, is, that where the laws of the United States do not otherwise require or provide——

Mr. Luther Martin, counsel for the respondent, said that he apprehended this testimony was of no kind of consequence.

The WITNESS. I was only about to state the reasons why nothing more was said on that subject, or a motion founded on it.

The PRESIDENT.[3] The Senate object to that sort of testimony. You will please to confine yourself as much as possible to facts.

2250. On April 13, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was called as a witness on behalf of the President, and Mr. Henry Stanbery, of counsel for the President, asked this question:

After the restoration of Mr. Stanton to office, did you form an opinion whether the good of the service required a Secretary of War other than Mr. Stanton; and if so, did you communicate that opinion to the President?

Mr. Manager John A. Bingham at once objected to the question:

Mr. President and Senators, we desire to state very briefly to the Senate the ground upon which we object to this question. It is that matters of opinion are never admissible in judicial proceedings, but in certain exceptional cases, cases involving professional skill, etc.; it is not necessary that I should enumerate them. It is not to be supposed for a moment that there is a Member of the Senate who can entertain the opinion that a question of the kind now presented is competent under any possible circumstances in any tribunal of justice. It must occur to Senators that the ordinary tests of truth can not be applied to it at all; and in saying that, my remark has no relation at all to the truthfulness or veracity of the witness. There is nothing upon which the Senate could pronounce any judgment whatever. Are they to decide a question upon the opinions of forty or forty thousand men what might be for the good of the service? The question involved here is a violation of the laws of the land. It is a question of fact that is to be dealt with by witnesses; and it is a question of law and fact that is to be dealt with by the Senate.

Now, this matter of opinion may just as well be extended one step further, if it is to be allowed at all. After giving his opinion of what might be requisite to the public service, the next thing in order

[1] Aaron Burr, of New York, President of the Senate and Vice-President of the United States.

[2] Second session Eighth Congress, Annals, p. 204.

[3] Aaron Burr, of New York, Vice-President and President of the Senate.

[4] Second session Fortieth Congress, Senate Journal, p. 892; Globe Supplement, pp. 163–166.

would be the witness's opinion as to the obligations of the law, the restrictions of the law, the prohibitions of the law. We can not suppose that the Senate will entertain such a question for a moment. It must occur to the Senate that by adopting such a rule as this it is impossible to see the limit of the inquiry or the end of the investigation. If it be competent for this witness to deliver this opinion, it is equally competent for forty thousand other men in this country to deliver their opinions to the Senate; and then, when is the inquiry to end? We object to it as utterly incompetent.

Mr. Stanbery explained the object of the question:

Mr. Chief Justice and Senators, if ever there was a case involving a question of intention, a question of conduct, a question as to acts which might be criminal or might be indifferent according to the intent of the party who committed them, this is one of that class. It is upon that question of intent (which the gentlemen know is vital to their case, which they know as well as we know they must make out by some proof or other) that a great deal of their testimony has been offered, whether successfully or not I leave the Senate to determine; but with that view much of their testimony has been offered and has been insisted upon. That is, it has been to show with what intent did the President remove Mr. Stanton. They say the intent was against the public good, in the way of usurpation, to get possession of that War Office and drive out a meritorious officer, and put a tool, or as they say in one of their statements a slave, in his place.

Upon that question of conduct, Senators, what now do we propose to offer to you? That the second officer of the Army—and we do not propose to stop with him—that this high officer of the Army, seeing the complication and difficulty in which that office was, by the restoration of Mr. Stanton to it, formed the opinion himself that for the good of the service Mr. Stanton ought to go out and some one else take the place. Who could be a better judge of the good of the service than the distinguished officer who is now about to speak?

But the gentlemen say what are his opinions more than another man's opinions, if they are merely given as abstract opinions? We do not intend to use them as abstract opinions. The gentlemen did not read the whole question. It is not merely what opinion had you, General Sherman; but having formed that opinion, did you communicate it to the President, that the good of the service required Mr. Stanton to leave that Department; and that in your judgment, acting for the good of the service, some other man ought to be there.

This is no declaration of the President we are upon now. This is a communication made to him to regulate his conduct, to justify him, indeed to call upon him to look to the good of the service, and to be rid, if possible, in some way of that unpleasant complication. Anyone can see there was a complication there that must in some way or other be got rid of; for look at what the managers have put in evidence!

During the arguments Mr. Roscoe Conkling, a Senator from New York, submitted in writing this question:

Question. Do the counsel for the respondent offer at this point to show by the witness that he advised the President to remove Mr. Stanton in the manner adopted by the President, or merely that he advised the President to nominate for the action of the Senate some person other than Mr. Stanton?

Mr. Stanbery replied that counsel for the President did not propose either, but proposed to show that General Sherman gave his opinion for the good of the service, and for that good thought that somebody else ought to be in the office.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 15, nays 35. So the question was excluded.

2251. On July 10, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, testified that he had communicated to the Military

[1] First session Forty-fourth Congress, Record of trial, pp. 229, 230.

Affairs Committee of the House of Representatives certain facts in regard to the post tradership at Fort Sill. Thereupon Mr. Manager John A. McMahon asked:

There has been a criticism made upon your communicating this matter to the Military Committee instead of communicatmg it through the regular channels to the Secretary of War. State your views of that question.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected, on the ground that it might swear away an argument of the defense; but when the managers stated that a similar question had been put to another witness by Mr. Carpenter and admitted by the court the objection was withdrawn.

Thereupon Mr. George F. Edmunds, a Senator from Vermont, said:

I object to that question myself, if counsel do not. I do not think the time of the court ought to be wasted with that sort of evidence.

Thereupon Mr. Manager McMahon withdrew the question.

2252. It was decided in the Belknap trial that a question to a witness might not be so framed that the answer might imply an opinion.

Instance wherein a President pro tempore ruled on evidence during an impeachment trial.

On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was examined by Mr. Matt. H. Carpenter, of counsel for the respondent, who asked this question:

Was there any corrupt agreement or any agreement between you and Mr. Belknap in regard to being appointed post trader at Fort Sill?

Mr. Manager John A. McMahon said:

We object to the word "corrupt." Say "any agreement." I think by using the word "corrupt" you are asking an opinion of the witness. The objection we make is that the question calls for an opinion as to the character of the agreement instead of calling for the agreement itself.

The President pro tempore[2] said:

The Chair sustains the objection.

2253. In the Swayne trial the opinions of witnesses, including answers to questions of mixed law and facts, were excluded.—On February 11, 1905, in[3] the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, A. H. D'Alemberte, was under examination, when Mr. Manager James B. Perkins, of New York, asked this question:

I ask the witness if Judge Swayne, to his knowledge, was in 1900 to 1903 a resident of the county of which he was collector and in which Pensacola is situated?

Mr. Anthony Higgins, of counsel for respondent, objected, saying:

It is a question of law. We have no objection to the witness stating, but desire to have him state, every fact he knows about the movements or the residence of Judge Swayne, or where he actually or bodily was, but to ask a mere conclusion of law is, we think, improper.

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[1] First session Forty-fourth Congress, Record of trial, p. 236.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Third session Fifty-eighth Congress, Record, p. 2394.

The Presiding Officer [1] said:

The question is, Was the respondent, to the witness's knowledge, a resident of Pensacola? The witness may answer the question.

The WITNESS. To my knowledge, he was not.

Q. (By Mr. Manager PERKINS). Was Judge Swayne a resident of Pensacola during that time?

Mr. John M. Thurston, of counsel for the respondent, objected, saying:

Mr. President, we are not objecting to their asking this witness whether or not in any particular year, month, week, or day Judge Swayne was in Pensacola. That would be a proper question. It would ask for a fact. But they are asking for a conclusion which can only result from the consideration of many facts related to the law.

The Presiding Officer said:

The witness is asked really for his opinion whether Judge Swayne was a resident at a certain place. If this witness can be so asked, any number of witnesses can be asked the question, and the decision of it would then depend upon the opinion of witnesses.

The question of residence is one of mixed law and fact, and must be determined, as the Presiding Officer thinks, by the Senate upon the proved circumstances and facts of the case and not upon the opinion of witnesses resident in that part of the country. So the question is excluded.

2254. On February 21, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, William A. Blount, was under examination by Mr. John M. Thurston, of counsel for the respondent, when this question was propounded by Mr. Charles A. Culberson, a Senator from Texas:

Q. What was the manner of Judge Swayne as to anger or resentment in imposing sentence in the contempt proceedings?—A. That depends entirely upon the viewpoint of the man who was listening to him. I believed that he was right. It seemed to me——

Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, I object to that. It is not an answer to the question. The witness is giving an opinion.

The Presiding Officer [1] said:

The witness may state how he regarded the appearance of the judge in imposing this sentence.
* * *

The Presiding Officer was about to say that he did not think the witness should make any comment in answering any question as to whether he thought the judge was right or not.

2255. On February 22, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness for the respondent, Thomas F. McGowin, was examined by Mr. John M. Thurston, of counsel for the respondent:

Q. You heard all that was said?—A. I did; all that the judge said.

Q. Yes; all that the judge said. What was the general appearance of Judge Swayne in the delivery of these remarks?—A. As I recall it, I thought the judge spoke with a little more than ordinary deliberation and calmness and firmness, and the impression that was created on my mind was that——

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

Mr. President, I object to the impression created on the witness's mind. What he is entitled to testify to are facts that occurred there at that time.

The Presiding Officer [1] said:

Let the last phrase be stricken out. The witness can not testify to the impression made on his mind.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, p. 2985.

[3] Third session Fifty-eighth Congress, Record, p. 3049.

2256. In the Belknap trial objection was successfully made to an opinion of a subordinate officer as to evidence of the character of respondent's administration.—On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Nelson H. Davis, Inspector General of the Army, was examined as a witness on behalf of the respondent, and Mr. Matt. H. Carpenter, of counsel for the respondent, having ascertained that witness had been in the Army during respondent's entire administration and had been holding constant official relations with him, asked:

From all you know of the subject, and from all you know of General Belknap, I ask you what has been the general character of his administration of the War Department?

Mr. Manager George A. Jenks at once objected:

The objection I make to that is that a witness must testify to character instead of to the specific acts of this man, or general acts. He must know what has been said by those who are familiar with his administration in that office, instead of how has he done the business.

Mr. Manager George F. Hoar said:

We understand also that it should be the opposite of the particular offense charged. If a man is charged with adultery, his reputation for chastity; if he is charged with perjury, his reputation for veracity. We suppose the question should be, "What is the reputation of the Secretary for official integrity?" * * * We do not understand that it is competent to prove by a subordinate officer in the Army, as an expert, the general character of the administration of a great officer of state. There is no such thing as an expert in such an administration. We object to the question unless it is limited to the reputation of the Secretary for official integrity.

Mr. Carpenter said:

We shall claim when we come to sum up this case that the general management of the War Department by General Belknap is a proper subject of consideration; that if they could establish this particular charge we could still prove the general management and official conduct of the Department, and then appeal to the Senate upon the whole record of the administration of that office whether this man shall be driven out into a little corner of his life or whether his whole conduct in the office is to be considered.

The Senate, without division, decided that the question should be admitted.

2257. A witness was permitted in the Belknap trial to give in answer a conclusion derived from a series of facts.—On July 10, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was examined by the managers and testified as to payments of money to the respondent from remittances received from one Evans, who had been appointed post trader at Fort Sill through witness's efforts in collusion with respondent. The witness had testified to sending remittances to respondent by express, when Mr. Manager John A. McMahon asked:

Did General Belknap know where these moneys came from that you were sending to him?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected, saying:

I object to that question. That calls for a conclusion, not for a fact. * * * A conclusion may be drawn from a correspondence running through years, and a dozen conversations; but it is a conclusion always. If you ask him what he told General Belknap, or what Belknap ever said to him, that calls for a fact; but to ask him whether he must have known such a thing calls for conclusion.

The question being submitted to the Senate, it was held, without division, to be admissible.

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[1] First session Forty-fourth Congress, Senate Journal, p. 977; Record of trial, p. 261.

[2] First session Forty-fourth Congress, Journal, p. 969; Record of trial, p. 226.

2258. In the Johnson trial the Senate sustained the Chief Justice in admitting as evidence of a general practice tabular statements of documents relating to particular instances.—On April 15, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered in evidence certain certified documents from the Navy Department, being in the nature of tabular statements of the results shown by the records as to appointments and removals of officers. Mr. Curtis described what was offered as follows:

The documents I offer are not full copies of any record. They are, therefore, not strictly and technically legal evidence for any purpose. They are extracts of facts from those records. Allow me, by way of illustration, to read one, so that the Senate may see the nature of the document:

"NAVY AGENCY AT NEW YORK.

"1864, June 20. Isaac Henderson was, by direction of the President, removed from the office of navy agent at New York, and instructed to transfer to Paymaster John D. Gibson, of United States Navy, all the public funds and other property in his charge."

We do not offer that as technically legal evidence of the fact that is there stated; but having in view simply to prove, not the case of Mr. Henderson, with its merits and the causes of his removal, etc., all of which would appear on the records, but the practice of the Government under the laws of the United States; instead of taking from the records the entire documents necessary to exhibit his whole case, we have taken the only fact which is of any importance in reference to this inquiry. If the Senate consider that they must apply the technical rule of evidence, we must get the records and have the records copied, and of course, for the same reason, readmitted.

There was objection on the part of the managers, but after argument the Chief Justice[2] said:

The counsel for the President propose to offer in evidence two documents from the Navy Department, exhibiting the practice which has existed in that Department in respect to removals from office. To the introduction of this evidence the honorable managers object. The Chief Justice think that the evidence is competent in substance, but that the question of form is entirely subject to the discretion of the Senate and of the Senate alone. The whole question, therefore, is submitted to the Senate. Senators, you who are of opinion that this evidence should be received will, as your names are called, answer "yea;" those of the contrary opinion, "nay."

And there appeared yeas 36, nays 15. So the document was admitted.

2259. A summary by counsel of the contents of documents was held to be in the nature of argument and not admissible as evidence.—On February 23, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the presentation of evidence, offered certificates from certain clerks of United States circuit courts, showing the dates at which the respondent had held court.

Then Mr. Thurston said:

For the convenience of the court and notification to the managers as to what we claim these certificates show, I will ask to have printed in the Record a list compiled by us from the certificates showing the various dates in a brief and concise form in the nature of a calendar, and also showing our computations of the number of days covered by them.

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[1] Second session Fortieth Congress, Senate Journal, pp. 899, 900; Globe supplement, pp. 183–186.

[2] Salmon P. Chase, Chief Justice.

[3] Third session Fifty-eighth Congress, Record, p. 3163.

Mr. Manager Henry W. Palmer, of Pennsylvania, objected, saying:

Mr. President I submit that the certificates when printed will show what they contain, and their computation is what we object to.

The Presiding Officer [1] said:

That is a part of the argument, and the Presiding Officer thinks should be withheld until the argument is commenced.

2260. In impeachment trials public documents are admitted in evidence for what they may be worth.

Ruling by the Vice-President as to evidence in an impeachment trial.

On February 15, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, Mr. Joseph Hopkinson, counsel for the respondent, offered in evidence a certificate of the clerk of the circuit court of Pennsylvania, to show that at the trial of Fries, in 1799, there were eighty-six civil suits depending.

Also a copy of the indictment on the first trial of Fries.

Also a part of a charge delivered by Judge Iredell at the term when Fries was tried, taken from Carpenter's report of that trial, page 14.

Mr. George W. Campbell, of Tennessee, one of the managers, intimating some objection to receiving this paper in evidence,

The President [3] said it might be read as a report of the case; but what credit it would deserve it would be for the court to determine.

2261. On January 11, 1831,[4] in the high court of impeachments during the trial of the cause of The United States *v.* James H. Peck, the counsel for the respondent introduced as a witness Samuel D. King, a clerk in the General Land Office, to prove certain official records of that office relating to land grants in the Province of Louisiana.

The respondent was on trial for unlawfully oppressing Luke E. Lawless, whom he had imprisoned for contempt in criticizing in the public prints the action of respondent as judge in a case relating to a land grant.

Mr. James Buchanan, of Pennsylvania, chairman of the managers for the House of Representatives, objected to the introduction of the documents, alleging that they referred to land grants in a portion of the territory different from that in which the case in question had arisen, and that they did not show the practice in upper Louisiana, which was the region to which the pending trial related.

Mr. Jonathan Meredith, counsel for the respondent, said:

We produce it as a public document from the proper repository. It purports to be a genuine document, and it shows, as we shall contend, that the same regulations applied to the whole province.

On the question, "Shall these documents be given in evidence?" there appeared yeas 40, nays 0.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Second session Eighth Congress, Annals, p. 243.

[3] Aaron Burr, of New York, Vice-President and President of the Senate.

[4] Second session Twenty-first Congress, Senate Impeachment Journal, p. 334; Report of trial of James H. Peck, pp. 274, 275.

2262. In the Johnson trial a message of President Buchanan, published as a Senate document, was admitted in evidence.—On April 15, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered, with a view of showing the practice of the Government with reference to appointments to and removals from office, a message of President Buchanan, from the published Executive documents of the Senate.

Mr. Manager Benjamin F. Butler objected:

> The difficulty that I find with this message, Senators, is, that it is the message of Mr. Buchanan, and can not be put in evidence any more than the declaration of anybody else. We should like to have Mr. Buchanan brought here under oath, and to cross-examine him as to this.

The question being taken, the Senate decided, without division, that the evidence should be admitted.

2263. In the Johnson trial the managers were not required, in submitting a letter of respondent, to also submit accompanying but not necessarily pertinent documents.—On April 2, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager James F. Wilson, of Iowa, offered in evidence a certain letter of President Johnson to Gen. U. S. Grant, wherein were two portions referring to accompanying documents:

> GENERAL: The extraordinary character of your letter of the 3d instant would seem to preclude any reply on my part; but the manner in which publicity has been given to the correspondence of which that letter forms a part and the grave questions which are involved induce me to take this mode of giving, as a proper sequel to the communications which have passed between us, the statements of the five members of the Cabinet who were present on the occasion of our conversation on the 14th ultimo. Copies of the letters which they have addressed to me upon the subject are accordingly herewith enclosed.
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> * * * * * * *
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> There were five Cabinet officers present at the conversation, the detail of which, in my letter of the 28th ultimo, you allow yourself to say, contains "many and gross misrepresentations." These gentlemen heard that conversation and have read my statement. They speak for themselves, and I leave the proof without a word of comment.

Mr. Wilson stated in introducing the letter that the special object of the managers in introducing it was to show the President's own declaration of an intent to prevent the Secretary of War, Mr. Stanton, from resuming the duties of the office, notwithstanding the action of the Senate and the requirements of the tenure of office bill.

Mr. Henry Stanbery, of counsel for the President, entered an objection which was, by direction of the Chief Justice, reduced to writing, as follows:

> The counsel for the President object that the letter is not in evidence in the case unless the honorable managers shall also read the enclosures therein referred to and by the letter made part of the same.

In support of the objection, Mr. Stanbery argued:

> The managers read a letter from the President to use against him certain statements that are made in it, and perhaps the whole; we do not know the object. They say the object is to prove a certain intent with regard to the exclusion of Mr. Stanton from office. In the letter the President refers to

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[1] Second session Fortieth Congress, Senate Journal, p. 900; Globe supplement, p. 191.

[2] Second session Fortieth Congress, Senate Journal, pp. 874, 875; Globe supplement, pp. 80–83.

certain documents which are inclosed in it as throwing light upon the question and explaining his own views. Now, I put it to honorable Senators: Suppose he had copied these letters in the body of his letter, and had said just as he says here, "I refer you to these; these are part of my communication," could any one doubt that these copies, although they come from other persons, would be admissible? He makes them his own. He chooses to use them as explanatory of his letter. He is not willing to let that letter go alone; he sends along with it certain explanatory matter. Now, you must admit, if he had taken the trouble to copy them himself in the body of his letter, they must be read. Suppose he attaches them, makes them a part, calls them "exhibits," affixes them, attaches them to the letter itself by tape or seal or otherwise, must they not be read as part of the communication, as the very matter which he has introduced as explanatory, without which he is not willing to send that letter? Undoubtedly. Does the form of the thing alter it? Is he not careful to send the documents not in a separate package, not in another communication, but inclosed in the letter itself, so that when the letter is read the documents must be read? It seems to me there can not be a question but that they must read the whole and not merely the letter; for it was the whole that the President sent to be read to give his views, and not merely the letter unconnected with these documents.

Mr. Manager John A. Bingham argued against the objection:

We claim that we are under no obligation by any rule of evidence whatever, in introducing a written statement of the accused, to give in evidence the statements of third persons referred to generally by him in that written statement. In the first place, their statements, we say, would not be evidence against the President at all. They would be hearsay. They would not be the best evidence of what the parties affirmed. The matter contained in the letter of the President shows that the papers, without producing them here, have relation to a question of fact between himself and General Grant, which question of fact, so far as the President is concerned, is affirmed in this letter by himself and for himself, and concludes him; and we insist that if forty members of his Cabinet were to write otherwise it could not affect this question. It concludes him; it is his own declaration , and the matter of dispute between himself and General Grant, although it is referred to in this letter, is no part of the matter upon which we rely in this accusation against the President.

Mr. Bingham admitted that if the letters referred to contained a statement relating to the matter with which they charged the President, and if the letter now sought to be introduced showed a statement from them adopted by the President himself in regard to the matter, the objection of respondent's counsel would be well taken.

The question was taken, "Shall the objection of the counsel by the President to the evidence proposed to be offered be sustained?" and there appeared yeas 20, nays 29.

So the objection was overruled and the letter was admitted as presented.

2264. Instance in the Swayne case wherein a witness was permitted to testify as to the nature of a document which was on record in the trial.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 23, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Charles A. Culberson, a Senator from Texas, submitted a series of questions to a witness for the respondent, W. A. Blount:

Q. Were you counsel for O'Neal in the contempt proceedings against him before Judge Swayne?—A. I was.

Q. Did you raise a question of jurisdiction of the court in those proceedings? If so, please state such question fully and how it was raised.—A. I raised the question by a demurrer.

[1] Third session Fifty-eighth Congress, Record, p. 3147.

Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, while ordinarily we would have no objection to the answer which we anticipate, yet the O'Neal case is all here of record, and objection was made yesterday to our asking the witness Greenhut as to the injury he received and which was exhibited in court at the time of that trial. The objection was based upon the fact that the complete record being here we could not go outside of it. Therefore in return I make the same objection that the record of the O'Neal case shows every proceeding that was had therein, including any objection that may have been taken to the jurisdiction.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

Before that is done, may I make a suggestion? This is a very different matter from the testimony which was sought to be brought out by Greenhut. There the attempt was to prove by him the extent of his injuries in a street combat, with no evidence that the facts as to which he was to testify had been before the court. Our objection was not because of the fact that it was in the record, but that it was proposed to prove something as in excuse for the judge which had not been before him at the trial of the case, while here this witness is asked to testify to what occurred at the trial of the contempt case.

The Presiding Officer, said:

Shall the witness answer the question? [Putting the question.] In the opinion of the Presiding Officer the ayes have it. [A pause.] The ayes have it, and the witness will answer.

2265. Instance in the Swayne trial wherein, with the concurrence of counsel, the managers introduced without oral testimony a certified copy of a court record.

In the Swayne trial, evidently by written stipulation between managers and counsel, certified copies of records were used in the same way as the original might have been used.

On February 14, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Samuel L. Powers, of Massachusetts, said:

I offer in evidence, Mr. President, a certified copy of the court record in what is known as the "O'Neal case." This record is made up of what is known as the complaint upon which the order of attachment in this contempt case was issued, and also a demurrer to the original complaint, which appears to have been disposed of, and also the affidavit of the respondent, which is an answer to the complaint, together with other documents, showing the disposition of that case.

It has been agreed between counsel for the respondent and the managers that this record may go into evidence without being read before the court. It is very long and would occupy possibly an entire session if it were read. But I assume, Mr. President, in order to have it go into evidence without being read, it is necessary that we should have the permission of the court to do so. So I tender this record with the request that it become a part of the evidence in this case and be printed as such without first being read to the court.

After the presentation of the affidavits, Mr. Augustus O. Bacon, a Senator from Georgia, said:

Mr. President, before the manager proceeds, as he says he will call only one witness, I desire to know whether the affidavits and such other matters as were included in these answers are offered and accepted as evidence without testimony being given from the stand? I simply wish the information.

Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, there is no objection on the part of the respondent.

I will state, Mr. President, in respect to that matter, that this is the first trial in this court that I am aware of where a stenographic record of what occurred in another court has been presented here.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, pp. 2540, 2551.

In the Peck case, seventy-five years ago, the testimony of what occurred in Judge Peck's court was entirely dependent upon the oral testimony of the witnesses who were present at that trial. It has seemed to counsel for the respondent that they were fortunate in the O'Neal case that a stenographic record had been made and preserved, and that it could be presented here, so that this court would know precisely what had occurred there.

I think therefore it is better that it should go in in that form, even though without the sanction of an oath in this tribunal.

2266. On February 21, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness on behalf of the respondent, was under examination by Mr. John M. Thurston, of counsel for the respondent, when these questions were asked:

Q. Of the original contempt charge. I ask, you now directly as to the other defendant in it, Mr. Paquet.—A. Judge Paquet first appeared in answer to the citation with counsel, and objected to the proceeding upon the ground that Judge Swayne did not have jurisdiction, as the transaction in which counsel were engaged was not an official transaction of an officer of the court. Judge Swayne overruled that contention, and Judge Paquet asked for time in which to make an answer. Thereupon he sued out a writ of prohibition from the circuit court of appeals, which was heard before that court and denied, and then he appeared in the circuit court before Judge Swayne and filed a paper, which was an apology and a purging of the contempt, as I understood, though the paper speaks for itself.

Q. (By Mr. Thurston.) What followed that?—A. Thereupon he was discharged without punishment.

Mr. Thurston then said:

We offer in evidence a certified transcript of that portion of the record in the case, merely asking to have read the paper in which Judge Paquet confessed and purged himself of contempt.

This certified transcript was as follows:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA, AT PENSACOLA—IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST LOUIS P. PAQUET.

Now comes Louis P. Paquet, respondent in the above-entitled matter, and says:

That upon full and mature consideration of his actions and conduct in the matter referred to in the motion, made as the basis of the above-entitled proceedings, through excessive zeal in behalf of his clients, he did so act that this honorable court was justified in believing that the said actions were committed in contempt thereof and as showing disrespect therefor. That respondent regrets exceedingly the course taken by him in this matter, and now appears in court and requests that he be permitted to apologize for his behavior and file with the records in the above-entitled cause this paper.

LOUIS P. PAQUET, *Respondent.*

Filed March 31, 1902.

F. W. MARSH, *Clerk.*

IN THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA—THE UNITED STATES *v.* LOUIS P. PAQUET.

This cause coming on to be heard, on the application of Louis P. Paquet to withdraw his answer in the above-entitled cause, and the submission of his explanation and apology by the said defendant—

It is now ordered that the said defendant do have leave to withdraw his answer heretofore filed and to subtract the same from the files of this court, and that this court do accept the said apology and statement filed on March 31, 1902, and the said defendant is hereby discharged from the rule to show cause, heretofore granted against him.

Done this April 1, A. D. 1902.

CHAS. SWAYNE, *Judge.*

(Endorsement: United States *v.* Louis P. Paquet. Order. Filed April 2, 1902. F. W. Marsh, clerk.)

[1] Third session Fifty-eighth Congress, Record, pp. 2983, 2984.

UNITED STATES OF AMERICA, *Northern District of Florida:*

I, F. W. Marsh, clerk of the district court of the United States for the northern district of Florida, hereby certify that the foregoing is a true and correct copy of an original paper or document filed in the cause therein specified in said court on the day therein set forth, as the same remains of record and on file in said court.

Witness my hand and the seal of said court at the city of Pensacola, in said district, this 3d day of February, A. D. 1905.

[Seal.]

F. W. MARSH, *Clerk.*

Mr. Manager Henry W. Pahner, of Pennsylvania, said:

We object to that paper. It has never appeared in evidence in this case. The original has never been seen, and whether any such paper exists we do not know. We object to this extract from the minority report, because it was never in the case. * * * The first place where that paper ever appeared is in the minority report. It has never been seen by anybody except perhaps the people who made the minority report. I say it was never offered in evidence in any place, I should like to see the original, if you have it.

Mr. Thurston replied:

This is certified to by the clerk of the court as being a part of the record, and I think, if you will permit me, I have in my pocket the stipulation with the managers that certified copies of records may be produced and used in evidence in the same manner that the original documents could be.

The Presiding Officer [1] said:

The Presiding Officer thinks an official copy of the proceedings in court is proper evidence; and as to the other question, whether this is evidence or not, three parties were proceeded against for contempt. It was one proceeding. The action of the court with regard to two of them has been introduced in evidence, and the Presiding Officer thinks that the action of the court in regard to the third of the persons complained of for contempt can properly be admitted.

2267. By a close vote, after elaborate argument, the record of Congressional debates was admitted during the Swayne trial as having a bearing on the construction of a law.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 23, 1905,[2] in the Senate sitting for the impeachment of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the introduction of evidence, presented and asked to have incorporated in the Record certain extracts from the official debates of Congress. He explained:

These are the debates on three separate occasions when the provisions of law relating to the payment of expenses for travel and attendance of judges holding court outside of their districts were under consideration. We offer it as a part of the parliamentary history of the enactment of these laws and as having some bearing upon their construction.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, objected, saying:

Mr. President, the honorable counsel for the respondent offers certain extracts from the Congressional Record purporting to contain some portions of the debates at various times upon provisions of pending bills, which subsequently became statutes, relating to the payment of expenses of district judges for the purpose, as he states, of construing those acts of Congress. To that we object, first, that it is not competent nor proper in the construction of a statute to consider the debates in Congress, and, second, that if

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, pp. 3164–3167.

admitted, it would require us in rebuttal to produce all the other portions of the debates, and then to call all those Members of Congress who are not present to ascertain their views upon the construction of the statute for which they then voted. Upon that I will take a very few minutes to refer the Presiding Officer and the Senate to what seems to me to be an entirely conclusive authority upon the subject.

It was decided in The United States *v.* Freight Association (166 U. S., p. 260), as stated in the syllabus:

"Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body."

Mr. Justice Peckham delivered the opinion of the court. On page 318 he said:

"Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the Members of each House in relation to the meaning of the act. It can not be said that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various Members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (United States *v.* Union Pacific R. R. Co., 91 U. S., 72; Aldridge *v.* Williams, 3 How., 9, Taney, Chief Justice; Mitchell *v.* Great Works Milling and Manufacturing Co., 2 Story, 648; Queen *v.* Hertford College, 3 Q. B. D., 693.)

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it passed."

Now, Mr. President, you will readily see from the few disjointed remarks in the body at the other end of the building, the bill coming before it for the first time, one Member taking an offhand view of a paragraph and saying so and so, and another saying something else, and the great body who vote for it saying nothing, it is improper—and the Supreme Court has so held, and so have the courts of England—that it is absolutely improper to look into the debates for the purpose of construing an act of assembly. You will see at once that in order to do full justice to the subject it would be necessary to call all those Members who did not vote and ascertain their views; which would amount to taking a new vote in the House of Representatives to determine upon the construction of an act of assembly, the construction of which is proper matter for the courts, and in this instance for the Senate sitting as a court.

Mr. Thurston argued:

We offer to prove that on April 24, 1896, when this provision was before the Senate of the United States, the meaning of the clause was discussed on the floor of the Senate, and growing out of that discussion, and for the avowed purpose of making its meaning explicit, an amendment was attached to the clause in the Senate declaring, in substance, that nothing but actual expenses or moneys actually expended should be allowed the judges. That amendment was put on in the Senate. It went to conference and was rejected by the conference report, thereby, as we claim, determining that it was not the sense of the Congress of the United States that this allowance should be of moneys actually expended by the judges.

We further claim that in the proceedings of the House of Representatives, while a similar provision was under consideration on January 27, 1903, an amendment was offered, the purport of which was to prohibit the allowance to these judges of any traveling expenses where they had not actually made the expenditure of money; in other words, to prohibit them from certifying under the law to their traveling expenses when they had been riding free; and that amendment, made for that specific purpose, was rejected by the House, thereby showing, as we contend, the clear intention of Congress to allow the judges to certify and receive necessary or reasonable traveling expenses whether they paid the money out or not.

We further propose to show that in the House of Representatives on January 27, 1903, while a similar provision was under consideration * * * that the House of Representatives on the date I have last named, in further consideration of this appropriation, took proceedings whereby an amendment was

offered to prevent the judges of the courts of the United States from receiving free railroad transportation, which amendment by the House of Representatives was rejected, thereby attesting, as we believe, the opinion or construction of the House of Representatives that the provision of the law permitted judges to receive from the Treasury of the United States reasonable traveling expenses whether they paid their fare or rode free.

Mr. Anthony Higgins, also of counsel for respondent, argued:

Mr. President, in the first place, there are two classes of legislative proceedings incorporated in this offer, as I understand. The one referred to by my colleague in the beginning of his remarks on this offer is where we offered to show the parliamentary history of the clause in the act of June 11, 1896, which is an offer to show an amendment proposed by a Senator, and the adoption thereof in the Senate, and afterwards a conference report, in which the amendment adopted by the Senate was stricken out and a substitute for the same enacted; and in that shape the act of 1896 became a law.

Now, quite apart from the question of the admissibility of debates as to the construction of a statute is the principle that applies on this offer, for I find it laid down by the Supreme Court in the case of The United States *v.* Johnson (124 U. S., 237–253), which supports this proposition:

"In like manner cogent and persuasive is the construction placed by either or both of the two Houses of Congress by legislation and in debate upon the statute."

The syllabus of that case is as follows:

"The joint resolution of Congress of March 31, 1868 (5 Stat., 251) affords evidence that the practice of the Secretary of the Treasury prior to that date not to cover into the Treasury the sums received from the sale of captured and abandoned property, but to retain them in the hands of the Treasurer in order to pay them out from time to time on the order of the Secretary, was known to Congress and was acquiesced in by it, as to what had been previously done; and all this brings the practice within the well-settled rule that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In other words, Mr. President, those legislative proceedings will make plain that the construction by a Senator upon the act of Congress under which district and circuit judges are paid when absent from their homes in the one case or their districts in the other holding court—that the construction which the learned managers place upon that act was the one which was sought by a Senator in that debate to place upon that statute in express words, and the Senate passed the amendment, and the conference committee struck it out. The Senate amendment, which was virtually a proviso that no expenses should be certified other than those that were actually incurred, was stricken out, and in place of it the last section of the act of 1891, creating the circuit court of appeals, was substituted for it, which said that when these sums were paid to the judge by the marshal they should be allowed to the marshal in his accounts. That clearly comes within the case of The United States *v.* Johnson and of the acquiescence by Congress. It is a much stronger case; it is more than an acquiescence by Congress in the construction, for it is by legislation making the statute in terms to be what excludes the construction that was sought to be put on it by a specific amendment to that effect.

That is a different thing from the mere opinions that are expressed by Members of either House of Congress at the time when a bill is in consideration before it; it is a part of the legislative history of the act, the amendment adopted by the Senate and its being stricken out in conference, and another feature added to the law in substitution for it being a part of our offer in what we seek to prove.

Now, Mr. President, I submit to the Senate that the principle which has been adduced in the case of The United States *v.* Freight Association (166 U. S.) is not applicable to the case that is now before the Senate. It is not simply and merely a question as to what is the construction that would be put upon the act in question by a court; it is not a question as to the construction that will be put upon it by any member of this tribunal. The question, we respectfully submit, is whether or no this statute admits of a doubtful construction and is open to more than one opinion. If a statute is ambiguous, if it has been loosely drawn, if it is not clearly and without any uncertainty of one construction, and therefore not open to construction, then we have authority as old as Judge Story, and coming from authority as high as his, that in a case involving the accounts of an officer under such a statute any doubts are to be resolved in favor of the officer; and by a line of authority in the Supreme Court of the United States, followed frequently and numerously in the circuit courts and in the Supreme Court of the United States, we have a

long line of authority that where a statute is in the least degree open to construction, and in many cases, Mr. President, where it has not been open to construction a long-continued construction of it by the executive officers of the Government has been held to be cogent, to be persuasive, to be decisive.

I had not expected to go into the presentation of that line of authority on this particular question—the question as to whether or no you would admit debates in Congress. Those debates, Mr. President, under the principle which I have now ventured to enunciate—and I do not suppose it will be disputed—go to the point that if the Congress itself in the debates placed a different construction upon this act from what the learned managers place upon it, there could be no crime in this respondent in placing a like construction upon it; that what here was said, and in another body in debate, as to what was the understanding of Congress as to the meaning of this act when Congress was in the process of enacting it, and again and again in repeated years on appropriation bills in identical terms this same statute has been brought up again and again in debate, that what was said there and then by Members of Congress as to the received construction of this act, totally different from that of the honorable managers, goes to show that this could not have been a statute that was not open to a difference of construction and opinion.

Mr. Manager Olmsted replied:

The long line of authorities which the counsel has cited seem to resolve itself down to the case of Johnson * * * in which the recitals in a joint resolution were accepted as evidence, in accordance with the well-known principle of law that the recital in the preamble of a public act of Parliament of a fact is evidence to prove the existence of the fact, not the debates in the House or in the Senate when the joint resolution was passed, but the joint resolution itself. That is the English and American doctrine.

I will simply add one more authority and rest. In the case of The United States against The Union Pacific Railroad (91 U. S., 72), Mr. Justice Davis, delivering the opinion of the court, said, on page 79:

"In construing an act of Congress we are not at liberty to recur to the views of individual Members in debate nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."

The Presiding Officer said:

The Presiding Officer will submit this question to the Senate: Counsel for the respondent propose to offer certain extracts from the Congressional Record, including debates in the House and Senate, votes in the House and Senate, for the purpose, as stated, of showing the history of the enactment by which the United States judges holding court out of their districts are entitled to expenses and as throwing light upon the true construction of the act. [Putting the question.] In the opinion of the Presiding Officer the noes have it.

Mr. John C. Spooner, a Senator from Wisconsin, demanded the yeas and nays, and the same being taken, there appeared, yeas 34, nays 33. So the evidence was admitted.

2268. The Senate declined to admit in the Belknap trial testimony taken before a House committee and published as a public document.

Instance wherein a Senator objected to evidence which was not objected to by managers or counsel.

On July 6, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, H. T. Crosby was sworn and examined by the managers and was asked if he had any recollection that General Hazen had testified before the Military Affairs Committee of the House of Representatives in regard to the post tradership at Fort Sill. The witness responded in the affirmative. Then Mr. Manager John A. McMahon asked:

Did General Belknap, to your knowledge, know that the testimony had been given by General Hazen before the Military Committee in regard to Fort Sill?

[1] First session Forty-fourth Congress, Senate Journal, p. 961; Record of trial, pp. 186–189.

To this witness replied that he thought General Belknap (the respondent) did know, but this was only an impression which rested on no facts that he could recall.

Mr. Manager McMahon then said:

We propose to show, and we now offer to test the question, the testimony of General Hazen before the Military Committee of the House on the 22d day of March, 1872, and we propose to supplement that with the orders issued from the War Department on the 25th day of March, 1872, which was a very good order, but did not quite reach the Fort Sill case. We offer it now, and desire that the testimony of General Hazen, as published in an official document, shall be read.

Mr. Matt. H. Carpenter, of counsel for the respondent, did not object, but said:

It is testimony taken not only not in this Chamber, but taken in pais. * * * The particular point I want to suggest to the consideration of the manager only is this, that I never heard one man tried on testimony given in some other tribunal. Without proof that the witness was dead or could not be called, and that the party was present and cross-examined him, it can not be done in a civil case. I suggest to the managers that it would be remarkable if you could read a deposition taken somewhere else.

After discussion, Mr. John Sherman, a Senator from Ohio, said:

I should like to ask the witness a question through the Chair. Did General Belknap read or hear the testimony of General Hazen?

The witness said:

I do not know, sir.

Mr. Sherman also asked:

I will ask whether that testimony of General Hazen was published in the public journals and brought to the knowledge of General Belknap.

The witness replied:

I do not know.

Mr. Sherman objected to the introduction of the testimony at this stage of the proceedings.

Later, during the examination of Gen. Irvin McDowell by Mr. Manager McMahon, the following occurred:

Q. In the conversation between you and General Belknap, besides referring to this article in the New York Tribune, did you refer to the fact that General Hazen had testified before the Military Committee?—A. I think that I mentioned the fact that I learned from General Garfield that General Hazen had done so. I think General Belknap told me that General Hazen had done so and had said substantially the same thing. I think General Belknap was indignant at General Hazen having done so instead of having come to him. I think he thought he owed it to him to have made this statement to him personally instead of going elsewhere.

The managers then offered as evidence this order:

[Circular.]

WAR DEPARTMENT,
Washington City, March 25, 1872.

I. The council of administration at a post where there is a post trader will from time to time examine the post trader's goods and invoices or bills of sale; and will, subject to the approval of the post commander, establish the rates and prices (which should be fair and reasonable) at which the goods shall be sold. A copy of the list thus established will be kept posted in the trader's store. Should the post trader feel himself aggrieved by the action of the council of administration, he may appeal therefrom through the post commander to the War Department.

II. In determining the rate of profit to be allowed, the council will consider not only the prime cost, freight, and other charges, but also the fact that while the trader pays no tax or contribution of any kind to the post fund for his exclusive privileges, he has no lien on the soldiers' pay, and is without the security in this respect once enjoyed by the sutlers of the Army.

III. Post traders will actually carry on the business themselves and will habitually reside at the station to which they are appointed. They will not farm out, sublet, transfer, or sell or assign the business to others.

IV. In case there shall be at this time any post trader who is a nonresident of the post to which he has been appointed, he will be allowed ninety days from the receipt hereof at his station to comply with this circular or vacate his appointment.

V. Post commanders are hereby directed to report to the War Department any failure on the part of traders to fulfill the requirements of this circular.

VI. The provisions of the circular from the Adjutant-General's Office of June 7, 1871, will continue in force except as herein modified.

By order of the Secretary of War.

E. D. TOWNSEND,
Adjutant-General.

Then Mr. Manager McMahon said:

Now, if the Senate please, we propose to offer the testimony of General Hazen, as taken before the committee, for this reason and this purpose: We find from two different sources that General Belknap is advised of the fact and becomes indignant with the knowledge that General Hazen has testified to the existence of certain abuses at Fort Sill which lay directly within his province to correct.

Mr. Matt. H. Carpenter, while not objecting formally, said:

You do not prove by anybody that General Belknap ever read that testimony to know what it was. The indignation arose from the fact that he had been talking before a committee when he ought to have gone through directer channels, through the Army.

Mr. Sherman having persisted in his objection, the question was submitted to the Senate.

Mr. Roscoe Conkling, a Senator from New York, asked:

Is that the testimony upon which the Senate is asked to vote that the respondent here was charged with a knowledge of this testimony so as to admit it as a declaration made to him?

Mr. Manager George F. Hoar replied:

I understand that General McDowell's testimony is that General Belknap said to him that General Hazen had testified in substance to the same matters which were contained in the New York Tribune article. * * * Therefore stating to him a knowledge of the substance of General Hazen's testimony. Now, if he had that knowledge of the substance of General Hazen's testimony, it tends to show that he knew that these periodical payments of money which came to him from Marsh were payments of money that had come to Marsh from the post trader. If I am in error as to the extent to which General McDowell's statement went, I can be corrected by referring to it. In other words, if General Belknap was receiving once every three months a sum of money from Marsh in New York, it is important for the Senate to know whether Belknap was informed that those moneys were moneys which were being improperly paid in consequence of this bargain of the post trader at Fort Sill to Marsh; in other words, that he knew where the money he was receiving came from. The article in the New York Tribune contains a distinct assertion of those payments by Evans to Marsh, and, as I understand it, the testimony of General Hazen contains in substance the same thing. It is therefore important not as proving the truth of anything that General Hazen said, but as proving that the Secretary of War was notified that such thing was said at that time.

The question being taken, the Senate declined to admit the testimony, yeas 20, nays 31.

2269. Testimony taken before a House committee and seen by respondent was admitted in the Belknap trial, not as evidence of the fact but as a partial foundation for an inference.—On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Hon. Hiester Clymer, chairman of the Committee of the House of Representatives which had reported the evidence against the respondent, was examined as a witness on behalf of the United States. The witness was shown the manuscript copy of the testimony given by one Caleb P. Marsh before his committee, and, after he had identified it, was asked by Air. Manager John A. McMahon:

After the testimony of Mr. Marsh was taken, state what action your committee took in regard to it so far as the Secretary of War was concerned.

To this question Mr. Matt. H. Carpenter, of counsel for the respondent, objected.

Mr. McMahon explained the objects of the introduction of the testimony:

We propose to put in evidence the fact that the witness Marsh was examined; that his testimony was reduced to writing; that the Secretary of War was officially notified of the fact; that he appeared; that the testimony was read over to him; that he took time to consult; that he finally came in and presented his resignation to the committee, from which we shall draw our inferences as fax as the situation permits. That is all. * * *

Mr. George G. Wright, a Senator from Iowa, asked of the manager:

Do I understand that the managers propose to introduce this testimony and follow it by the single proposition that thereupon the Secretary of War resigned, and thereby ask the Senate to draw a conclusion, or that there was anything said by him or done by him other than the mere resignation?

To this Mr. McMahon replied:

I have already stated that we expect to show that the investigation was continued from one hour in the day until another and then continued until the next day, and that while they were waiting for the matter the resignation was brought in and handed to the committee; and I accept the statement of the distinguished counsel, if he desires it in, for the express purpose of preventing his being impeached. If he desires to prove that fact, I have not any objection certainly.

Mr. Roscoe Conkling, a Senator from New York, asked of the manager:

Shall I understand the managers to propose either to read at large the testimony of Marsh or to have that testimony received here and go upon the record, all for the purpose of proving that after it was delivered the respondent resigned his office? Is that the scope of this proposal, or is it intended to put into the case what Marsh testified in another form on another occasion, that that testimony may speak in this trial?

Mr. Manager McMahon replied:

Mr. President, I will answer the honorable Senator. It is offered in part only for the purpose which the honorable Senator from New York has eliminated from my remarks. The entire purpose is to show that substantially the same testimony as has been given here, not a different statement, but substantially the same statement as has been made here, was read over to the Secretary of War as a charge by one of the coordinate branches of the Government, to which he made no statement under oath or otherwise, and that the substantial facts therein stated having been brought to his knowledge and read without dispute, we are entitled to draw two inferences, the one from his resignation and the other from his failure to deny the facts therein stated, whatever they may have been

Thereupon Mr. Jeremiah S. Black, of counsel for the respondent, said:

That is, you want to use it as a confession.

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[1] First session Forty-fourth Congress, Senate Journal, p. 974; Record of trial, pp. 245–249.

To this Mr. McMahon replied:

If you put it in that severe light, probably yes.

Mr. Montgomery Blair, of counsel for the respondent, said:

I ask the attention of the Senate to the scope of the question which is now to be acted upon, and I put it to this body to say whether any legitimate conclusion such as the counsel for the Government seeks to draw from the conduct which he seeks to prove here would be authorized by the proof. The whole object of the gentleman is to show that in consequence of similar proof being offered before the Committee on War Expenditures and being made known to the defendant in this case he thereupon resigned his commission as Secretary of War, and he admits that at the time this resignation was put in it was done in consequence of an understanding which then was had that thereby impeachment or an action of this kind which is now here pending would be avoided.

Mr. Manager McMahon here interposed:

You misunderstand me. I say if you can prove that, I have no objection.

Mr. Blair continued:

Well, I understand that that is the proof which is to be offered, and is the nature of the case to which the managers now invite this court. Now, I ask the court to consider the state of proof to which the managers invite your attention, and to say whether or not any such conclusion as they seek to have you draw from it could be legitimately drawn. They ask you to draw a conclusion from the fact that the Secretary of War on seeing the proof resigned his office. I ask this court if that is a confession of guilt, or whether anybody in his senses could draw such a conclusion from it, even if it were not accompanied with the facts which we intend to prove if the matter is gone into. We intend to show that the reason of the resignation was that we wanted to avoid this trial, and had reason to believe that the committee before whom this testimony was taken concurred with us in the belief that that would be an avoidance of this trial. Now, take the whole scope of the case, because here is voluminous testimony to be offered and to be considered, and I ask the Senate to consider now before we go into it whether or not any such conclusion as the managers seek to draw from that can be legitimately drawn.

The question being taken, the Senate without division decided to admit the question.

The witness then answered the question, stating that the respondent was shown the testimony of Marsh, that he did not reply to it, and that he sent to the committee information of his resignation as Secretary of War.

Then Mr. Manager McMahon said:

Now we offer in evidence the testimony, the original paper, that was taken before the committee. * * * I offer it in evidence because, of course, it is impossible for this court to know to what extent the defendant was implicated by this testimony unless we know just exactly what the testimony was; and the strength of the inference, or its weakness, must of course be determined by the strength or weakness of the charges and the directness of the testimony.

Mr. Carpenter, of counsel for the respondent, having intimated but not formally made an objection, Mr. Roscoe Conkling, a Senator from New York, said:

Shall I understand that it is now proposed to offer here for any purpose the testimony delivered by Marsh before the committee of the House? If it is, if nobody else does, I raise an objection to that, on the ground that it is incompetent; and I ask for the yeas and nays upon it.

Mr. Francis Kernan, a Senator from New York, asked:

Is the object to have it read as evidence in this case, or read as a communication made to Mr. Belknap?

Mr. Manager McMahon replied:

To have it read precisely upon the principle that the article in the New York Tribune of February 15, 1872, was read, as a charge of certain matters therein stated, but not as evidence of the truth of anything therein stated. Every lawyer, I think, can see the difference.

Mr. Thomas F. Bayard, a Senator from Delaware, asked:

What is the object and intent of this offer?

Mr. Manager McMahon replied:

I think, the honorable Senator from Delaware will remember that in my answer to the remark of the Senator from New York who sits farthest from me [Mr. Kerman] I stated distinctly the object and purpose of this offer, not as evidence to this court of the truth of any fact therein stated, but simply for the purpose of showing that at a particular time certain charges from an authorized source were made against the defendant, which were read to him for the purpose of ascertaining what action he took after this was communicated to him.

Mr. Bayard asked further:

Is it the object of the present inquiry to corroborate or discredit the testimony of Marsh, the witness, or to establish any fact therein referred to, or solely to prove what was the action or conduct of Mr. Belknap when the fact that such charges had been made against him was so made known to him?

Mr. Manager McMahon replied:

Mr. President, the question put to the managers is as follows: "Is it the object of the present inquiry to corroborate or discredit the testimony of Marsh?" In the first place, I will answer in detail that it is to corroborate Mr. Marsh in just this far, not as evidence of any facts stated therein, but when the charge was made by Marsh the Secretary of War by his conduct admitted the truthfulness of it.

Secondly, "Or to establish any fact therein referred to." Not as evidence of any fact therein referred to except in this way, when the fact is charged against the defendant, to draw a conclusion as to its truthfulness or untruthfulness by the action of the Secretary of War in regard to it.

"Or solely to prove what was the action or conduct of Mr. Belknap when the fact that such charges had been made against him was so made known to him." It is solely for that purpose; but from that we draw our conclusion as to the truthfulness or untruthfulness of the charge there stated, but do not seek to establish any minor details on that point.

Mr. Carpenter, arguing against the admission of the evidence, said:

If it is competent to introduce this testimony given by Marsh before the House committee simply because Belknap did not say anything in reply to it, is it not competent to introduce here every newspaper article that has charged him, from Maine to California, with being guilty of this offense, and with being a thief and all that sort of thing, to which he has, under direction of counsel, never opened his mouth, to which he has never written a reply, of which he has never taken the slightest notice? Upon what principle could you introduce the deposition of this witness simply because it was read to the defendant and he said nothing, and exclude a newspaper article which you could show he had seen and to which he had said nothing? We did not care when the article from the New York Tribune was offered to object for certain reasons. It was very doubtful in our mind whether that was legal testimony; but we did not care to object to it. But here is an offer made now the result of which, if sustained, is that if they can show that a newspaper has published an article charging him with being a thief in this particular, calling him all the hard names they can think of in consequence of these charges made here, and that he read it and threw it down, making no remark, that would be as competent as this testimony. It must be borne in mind that that committee had no jurisdiction over Mr. Belknap. Mr. Belknap could have no trial before that committee. A few things maybe mentioned in apolitical trial that would not be proper in a court of law. It was well known that that committee was of an opposite political faith, and it was not expected that much justice would be done to Mr. Belknap or any other Republican; and any lawyer, I think, who had been consulted by Mr. Belknap would have given him the advice

which he did receive, and that was to let the committee alone till they got through, and then see what their charges amounted to. But if the managers can introduce this evidence upon the ground that it was read to him and he said nothing, I submit that every newspaper article which can be shown to have been seen by him is evidence if they can also show that he read it and made no reply.

The question on the admission of the testimony being taken, the Senate decided, yeas 24, nays 14, that it should be admitted.

On July 19 [1] John S. Evans, post trader at Fort Sill, was examined as a witness, and was asked this question by Mr. Carpenter, of counsel for the respondent:

Mr. Evans, after you went back to Fort Sill with your appointment would you have reduced your prices but for the contract made with Marsh?

Mr. Manager McMahon objected, and the Senate, without division, excluded the question.

Mr. Carpenter then said:

Now, Mr. President, following the example of the managers, I offer here in partial corroboration of this witness his examination before the committee of the House, in which he swore distinctly that he would not have made the change of a shilling and that he never would have put prices down until he was compelled by the commission of officers that had jurisdiction.

Mr. Manager McMahon said:

This matter is considered to be ruled out under the decision already made, I take it. If the Senate will not let him swear to it here in open court, they certainly will not allow you to corroborate him in that way.

After argument, during which Mr. Carpenter quoted the words of Mr. Manager McMahon as to the Marsh testimony, wherein he stated that the object was to corroborate Marsh's oral testimony to a qualified extent, the question was taken, and the Senate, without division, excluded the testimony.

2270. Although Judge Swayne had been a voluntary witness before the House investigating committee, the Senate decided that the record of his testimony was prohibited by statute from use in the trial.

Discussion as to the status of the Senate as a court during an impeachment trial.

An argument that an impeachment trial is not a criminal proceeding.

As to whether or not there is a distinction between a misdemeanor and a high misdemeanor.

Instance of an appeal from the decision of the Presiding Officer on a question of evidence during the Swayne trial.

On February 14, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry W. Palmer, of Pennsylvania, made the following offer of testimony in support of the articles relating to respondent's alleged improper use of a railway car:

The managers offered to prove that the respondent on the 28th day of November, 1904, at the city of Washington, D. C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement.

[1] Senate Journal, p. 982; Record of trial, p. 281.

[2] Third session Fifty-eighth Congress, Record, pp. 2536–2540.

Mr. John M. Thurston, of Nebraska, objected to the introduction of this evidence, claiming that it was prohibited by section 859 of the Revised Statutes:

No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony.

Mr. Thurston said:

Judge Swayne did appear; he was examined and cross-examined, and, speaking a little outside of the record, I know that these questions the managers propose to ask him relate mostly, if not wholly, to his answers made on his cross-examination. But, Mr. President, the law of Congress does not distinguish between a man who comes before Congress or a committee of his own volition and a man who is haled there by process. The prohibition of the statute is as broad as human language can make it. It was designed for a wise and beneficent purpose, and no thought, in our judgment, ought to be had here by the managers in this case against our objection of attempting to override that statute of the Congress of the United States. * * * Mr. President, just a word or two in reference to this last suggestion, which is one which I had not expected to hear—that this trial is not a criminal proceeding. What is it, Mr. President? It has been held through all the history of impeachment trials to be in accordance with trials of persons charged with crimes. The verdict to be rendered in the case is one of "Guilty" or "Not guilty" —a verdict which is only appropriate in a criminal proceeding. Punishment is not of life, or limb, or liberty, but, sir, it is a far graver one, in my judgment, than any of those would be. It is a punishment of so grave a character that it can only be inflicted, under the Constitution of the United States, on being found guilty of high crimes or misdemeanors, and yet the gentleman says, with apparent sincerity, that this is not a criminal proceeding. You are trying this man here on a charge that he is guilty of a high crime or a high misdemeanor, and yet you say it is not a criminal proceeding.

Now, Mr. President, Charles Swayne, as the record shows, appeared before the House subcommittee and was sworn as a witness, and testified there. Afterwards, at another session of the committee, be again appeared, and was again examined and cross-examined before the same tribunal on another day. Did you ever hear in any court of justice the theory, when a man has been sworn as a witness on one day, that you needed to swear him again on the next day in the same case?

Mr. Manager Palmer said:

The offer is to prove that Judge Swayne voluntarily appeared before a subcommittee of the House Judiciary Committee and made a voluntary statement in his own defense. He was not a witness; he was not summoned; and his statement was entirely voluntary. * * * On this occasion he read a typewritten statement, which occupies thirteen pages of the record. After his statement was read certain questions were asked him based on allegations that were made in his statement; and the questions that were asked him, that we now offer to prove, were based on suggestions made in his statement. The questions were asked by members of the committee to clear up some things that Judge Swayne had stated in his written statement. Now, we offer this testimony in entire good faith. * * * I say we offer this testimony in entire good faith. We are not pettifogging; we are not endeavoring to get before the Senate testimony which is not testimony; but we offer it because we believe it is testimony, because it is competent testimony, and because it is the admission of the respondent here, a judge of a Federal court, who, in his own defense, made a voluntary statement, and he ought not to be objecting to it now here, as we believe. * * * No, sir; it was not under oath. To state the fact exactly as it is, Judge Swayne appeared before the committee, and this conversation occurred. On a previous occasion this testimony was given, or at least this statement was made on the last hearing that was had. On a previous hearing, several months before, Judge Swayne appeared and raised some question about some testimony that was given as to his residence. It was said to him by a member of the committee, "There is one man in the United States who knows all about this subject," and Judge Swayne said: "Do you mean me?" The committeeman said: "Yes; I mean you." Judge Swayne said: "Do you wish to have me sworn?" It was said to him: "That is entirely voluntarily with you; you can be sworn if you desire to be sworn." Then he held up his hand, and was sworn.

That was at the hearing some months before. At the last hearing he appeared and read this typewritten statement, which, I say, occupies thirteen pages of the record, and that statement led to the inquiry made by a committeeman, which elicited the information which we now ask to give here. He was not sworn at that time. He had been sworn some months before on a different proposition at his own request or on his own volition.

Now, the reason for this statute is plain. It protects a witness who is compelled to testify to matters which might criminate him. In this case the offer is to show that Judge Swayne appeared voluntarily before the committee—and that is admitted—that he was not a witness summoned to appear, but that he appeared voluntarily, and made a statement and argument in his own defense. Something he said in that argument attracted the attention of a member of the committee who interrogated him and elicited the matter contained in the offer.

The statement is evidence here, first, because this is not a criminal proceeding against the respondent. If he has committed any crime, he can be punished for it in another proceeding. This is a proceeding in which, if Judge Swayne were convicted, he would not be punished as for a crime, but the extent of the punishment would be removal from office. It is a proceeding calculated to keep the judiciary unsullied and pure. It is the only method by which a judge who violates the tenure on which his office is held can be removed. His commission runs that he is to hold this office "during good behavior;" and the only tribunal on earth in which that question can be settled is this august tribunal.

We are here to ascertain whether Judge Swayne has behaved himself well, and whether he is fit to hold this office. This is not a criminal trial; it is not a criminal prosecution; it is not followed by a sentence of any court. All that you can do under the Constitution is to deprive him of his office. If he has committed any offense the Constitution provides that he can be tried for that in another proceeding, and punished if he is found guilty.

The second reason why this is evidence is because he was not summoned to testify before the House committee, but appeared voluntarily to make a statement in his own defense. * * * Mr. President, I wish to call attention to the section of the Constitution of the United States under which this proceeding is had. I said that this was not a criminal prosecution. Did anybody ever hear that a man could be twice tried and convicted for the same offense? If the first trial is a criminal prosecution, then, of course, he could not be tried and convicted again. The provision of the Constitution is this:

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."

Now, I say that is an amazing proposition that this judge who appeared and made a voluntary statement in his own defense should be objecting here now on the ground that it might incriminate him.

The Presiding Officer [1] ruled:

The general proposition that the admissions of a defendant may be proved does not seem to the Presiding Officer to apply to this case. The statute is that—

"No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony."

Now, without deciding technically whether this is testimony which was given by a witness before a committee, or whether it is proposed to use it in a criminal proceeding, or in a court, the Presiding Officer thinks that the intention of the statute is such as to make this evidence inadmissible.

Mr. Joseph W. Bailey, a Senator from Texas, asked that the question be submitted to the Senate.

[1] Orville H. Platt, of Connecticut, Presiding Officer.

Mr. Bailey said:

If the court please, section 103 of the Revised Statutes provides that—

"No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." (See sec. 859.)

Plainly the purpose of that statute was to enable the committees of either House, or either House itself, to compel the attendance and the testimony of any witness, and it provides, contrary to the rule of law not obtaining in the courts, that the witness shall not be permitted to decline to testify upon the ground that it might disgrace him or tend to render him infamous. Having deprived him of the privilege which he would enjoy before the courts of this country, and having compelled him to testify before its committees, even to his own infamy or disgrace, Congress very wisely then provided that such testimony should not be adduced against him in any criminal proceeding in any court.

But, Mr. President, this is not a criminal proceeding within that statute, and this, in my opinion, is not a court within the meaning of that statute. The Constitution may seem to contemplate that we shall sit as a court when we try the President, because it provides that the Chief Justice of the United States shall preside at such a trial. Whether that was intended, as has been suggested by some, to protect the President against the rulings of the Vice-President, who might succeed to the Presidency in the event of the President's conviction and removal, or whether it was intended, as has been suggested by others, to secure a more certain and a more correct interpretation of the law, I do not undertake at this time to decide.

My own opinion is that the reason which prevailed upon the framers of the Constitution to provide that the Chief Justice shall preside over the Senate when it tries the President on impeachment charges was that the Vice-President might be suspected of having a deep and peculiar personal interest in the result of such a trial. But whether one or the other was the reason, it can not be successfully contended that this is a court within the meaning of section 859, or if it shall be held that this is a court, then it can not be contended that this is a criminal proceeding within that section.

The very provision of the Constitution under which we are proceeding negatives the idea that this is a criminal action, because it expressly provides that no matter what our judgment may be, it only excludes the incumbent against whom it may be pronounced from the honorable office which he holds, and it leaves to the ordinary administration of the criminal jurisprudence of the country the punishment for his criminal acts. * * * Mr. President, a judge, in my opinion, may be impeached without being guilty of a crime. He holds his office by a different tenure from that under which other civil officers of the Government enjoy. He holds his office during good behavior, and more than one of the charges in this very case are not a crime. No penalty is denounced against the violation of that provision of the statute which provides that a judge shall reside in the district for which he is appointed, and that his failure to do so shall be a high misdemeanor.

That term is new in legal vernacular. I know of no law books which furnish a distinction between a misdemeanor and a high misdemeanor. Certainly the Constitution does not. Congress has not seen fit to affix a penalty of any criminal nature to this very provision itself, and obviously the whole purpose that Congress had in mind when it declared that a failure to reside in the district for which the judge had been appointed was a high misdemeanor, was that his failure to do so should be an impeachable offense.

I put this case to the court and all the honorable members of it. Suppose there should be nothing before this body but the naked question. Does the honorable judge reside in his district? The law says that if he does not, he is guilty of a high misdemeanor. Does any member of the court doubt that if counsel for the respondent or the respondent himself were to rise in this court and say, "I do not reside in my district," there would be the slightest hesitancy in finding him guilty on that charge? Yet, sir, that charge is not a crime, and no Senator will contend that he could be prosecuted in the courts and punished for his failure to reside in his district. It is declared by law, it is true, to be a high misdemeanor, but it is not a crime, because there is no penalty attached to it by the law. Again, sir, suppose a judge should arbitrarily and maliciously disbar an attorney, does any Senator doubt that he could be, and ought to be impeached? And yet, sir, there is no criminal statute in that behalf provided.

The respondent was not a witness, within the meaning of the statute, when examined before the committee of the House. As has well been suggested by my learned brother near me, whenever a party

to a proceeding voluntarily takes the stand, he must be presumed to know the nature of it, and when he volunteers his testimony everything he says can be used. There are States under whose system of criminal jurisprudence the defendant himself may testify. He can not be called by the State; he can not be compelled to take the witness stand in his own behalf, and if he fails or refuses to do so it is error, and reversible error, for the prosecuting attorney to refer to that fact. But when the accused does take the witness stand in his own behalf, then he is not simply permitted to testify to what he thinks may be to his own benefit. He can be cross-examined, and all he says must be received and considered by the jury as testimony in the case.

When the respondent in this case voluntarily appeared before a committee of the House, with a full knowledge of the nature of its inquiry, and proceeded to state any of the facts, it was within the power and duty of that committee to interrogate him as to all the facts, and when he had made his statement there it does not lie with him to claim immunity under this statute.

I believe that the protection afforded by section 859 was made necessary and proper by section 103.

Having deprived the witness of a privilege as ancient almost as courts of justice, it was just and proper that he should not be exposed to prosecution and conviction upon his own testimony, which he had been compelled to give.

I do believe, further, that this is a court within the meaning of that statute. I am sure that this is not a criminal proceeding within the meaning of the statute, because the respondent might be found guilty of a charge that would terminate his office, although he were guilty of no crime.

I am further sure that the respondent in delivering his testimony before the committee of the House was not a witness within the reason or the protection of the statute, and I am still more certain that if he shall be deemed a witness he must be treated as a witness who came voluntarily to testify and whose testimony may be used against him.

Further discussion having been prevented by reference to the rules, the Presiding Officer put the question: "Is the evidence admissible?" and there appeared yeas 28, nays 45. So the evidence was not admitted.

On February 16, 1905,[1] as the managers were about to conclude the presentation of testimony, Mr. Manager David A. De Armond, of Missouri, referred again to the subject of the respondent's statements before the House committee, and suggested a reconsideration of the former decision of the Senate:

Mr. President, if it can be shown, and it appears of record, so that the showing is not difficult if it exists, that Judge Swayne made any statement before the House committee before the oath was administered to him by that committee as a witness, we shall interpose no objection to such statement. But we do object to any statement that he made before that committee after he was sworn as a witness. * * * I do not desire to add anything to the argument I made the other day on this same question, except to call the attention of the Senate to one provision of the Constitution of the United States. It was urged here the other day that this is not a criminal proceeding, and that Judge Swayne, is not charged with or being tried for a crime. I wish simply to call attention to a section of the Constitution, it being the last portion of section 2 of Article III. I read:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

On motion of Mr. Joseph W. Bailey, a Senator from Texas, and by a vote of yeas 53, nays 18, the doors were closed for consideration of the admissibility of the evidence heretofore ruled out.

On February 20[2] the Presiding Officer announced in the Senate sitting for the trial:

Before the reading of the Journal the Presiding Officer will announce that at the last session of the Senate in the trial of the impeachment the question of evidence was decided, namely, the proposal of the managers to introduce statements by Judge Swayne made before the committee of the House of Representatives, and it was decided that such statements were inadmissible. The vote by which it was decided will appear upon the reading of the Journal.

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[1] Record, pp. 2720, 2721.

[2] Record, p. 2899.

The Journal being read, it appeared that on the question—

Are the statements made by Judge Swayne before the committee of the House of Representatives admissible as evidence?

It was determined in the negative yeas 29, nays 47.

2271. In proving the contents of lost letters the Senate, in the Belknap trial, permitted the witness to be interrogated generally as to the import of a series of letters.

Instance of a ruling by the President pro tempore on a question of evidence during an impeachment trial.

On July 10, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh was called as a witness for the United States, and was questioned as to sums of money which he had sent to the respondent, and as to letters that had passed between them. He testified that he had destroyed all letters and telegrams, although he had received such from the respondent, directing how the money should be forwarded. After this testimony Mr. Manager John A. McMahon said to the counsel for the respondent:

Gentlemen, we have served a notice upon you to produce the letters which have passed between these parties, and, of course, we are ready now to receive them, or to offer evidence of their contents.

The notice was read as follows:

All letters, telegrams, and communications from said Caleb P. Marsh to you in regard to the appointment of post trader at Fort Sill or elsewhere.

All letters from said Marsh to you concerning the management, conduct, or removal of the post trader at Fort Sill.

All letters or telegrams from said Marsh to you in any way connected with the forwarding to you of money, certificates of deposits, drafts, etc.

All letters from said Marsh to you informing you of the state of accounts between him and yourself, particularly the letter informing him of a change in the amount of the annual payment to be made to you by him some time in the spring of 1872.

The time covered by this notice is from June 1, 1870, to March 2, 1876. The dates more particularly referred to are those specified in the seventeenth specification set forth in the fourth article of the impeachment articles filed against you.

Mr. Matt. H. Carpenter, of counsel for the respondent, said:

This notice, as far as it calls for letters touching the management of affairs at Fort Sill, calls for what were official letters, and may be found at the War Department. We have no other letters called for by the notice.

Thereupon Mr. Manager McMahon proceeded to ask questions to elicit proof as to the contents of the letters from witness to respondent, finally asking:

Now, give us the contents, as near as you can remember, or the substance, of one of these letters, without the date?

To this Mr. Carpenter objected, saying:

The rule is perfectly well settled that if an instrument is called for and not produced they may prove the contents of it. There is no doubt about that; but to ask the witness what was the general substance of letters without regard to date is not proving any instrument whatever. I deny that you can take a witness up here and pull a drag-net over the correspondence of business men for years and ask "what was the general purport of your correspondence?" That will not do. That is too indefinite. They will have to introduce the particular letter, and if they do not have it they must account for its

[1] First session Forty-fourth Congress, Senate Journal, p. 968; Record of trial, pp. 220–222.

loss, either by them or by us, and they may then prove the contents of that particular paper; but having shown that a particular paper is lost they can not ask the witness upon the general tenor of all these letters without regard to their date. When the question was put distinctly to this witness as to what were the contents of the letter which accompanied the first remittance, he said he did not remember. Now, if there is any other particular letter which they can locate in the mind of the witness and prove by him its contents, that of course is not objected to; but the question, "what is the general substance of letters, "without regard to their dates, is not proving a particular paper; it is proving at large what was the substance of a general correspondence. That can not be done. You must prove it by introducing every letter by itself. If you have not got the letter, then you must account for its loss and prove its contents, not by proving what was the general tenor of 40 papers. It is for the court to say what the general tenor of them is, after they know each letter, and we are to have the substance of each letter as near as the witness can give it.

Mr. Manager McMahon's argument was:

What we desire to prove is this: We may call his attention to the particular date, but we go further and ask, Was there a general form in which you sent them, or was there any particular letter of which you may remember the substance? The idea is that we have got to go through these 14 different occasions when money was sent, and if he does not remember the contents of a particular letter, therefore it is not competent to testify to the contents of all of them as to his best impression! I understand that the rules of evidence are based upon a knowledge of human nature, upon a knowledge of the infirmities of human nature, and that a witness who has transacted business of this kind, when the documents are in the possession of the defendant, when he undertakes to state here the substance of their contents, is entitled to state it without saying that it was the contents of the letter of the 1st of November or the 6th of October or the 9th of October, 1874. I think I have said all upon this question that the occasion demands.

The President pro tempore having submitted the question to the Senate, it was decided without division that the interrogatory should be admitted.

The witness having, in response to the question, stated the general tenor of one of these letters, this question was asked:

Q. (By Mr. Manager McMahon.) After you had dispatched a letter like that, what letter would you get in return? Give us the contents of one of his letters that you can remember.

Mr. Carpenter said:

I want formally to make the game objection. I suppose, of course, it will be overruled, but I want to make the same point here as upon the former question.

The President pro tempore [1] said:

The Chair will take it as the sense of the Senate that the objection is overruled.

The question having been answered, another question was asked:

Q. (By Mr. Manager McMahon.) State whether, after shipping the money to him by express, you informed him of that fact; and if so, how.

Mr. Carpenter having objected, the President pro tempore submitted the question to the Senate.

Mr. Simon Cameron, a Senator from Pennsylvania, demanded the yeas and nays, which were refused.

Thereupon, without division, the Senate decided the evidence admissible.

Witness having stated that he sent the express receipt by mail when he sent the remittance, Mr. Manager McMahon asked:

State whether you received any reply; and if so, in what shape.

[1] T. W. Ferry, of Michigan, President pro tempore.

Mr. Carpenter, having ascertained that the question did not relate to a specific, transaction, objected.

The Senate admitted the question.

Later Mr. Manager McMahon asked:

When you inclosed one of these certificates of deposit to him, state what was the substance of the letter which you did send to him accompanying the certificate.

Mr. Carpenter having objected unless a particular certificate was specified, the President pro tempore said:

The Chair overrules the objection. The witness will answer the question.

Soon after, Mr. Manager McMahon asked: [1]

When you delivered the money to him [the respondent] you stated that you at first delivered him $1,500 quarterly, and after the lapse of one and a half or two years $1,500 semiannually. State now whether you failed to deliver to him exactly at the time the amount that you were to deliver to him; and if so, why.

Mr. Carpenter said:

I want to object to that question, Mr. President. It is as disagreeable to me to seem to be captious about objections as it is disagreeable to the Senate to have me captious, but the insidious manner in which the facts of this case are sought to be kept out of view, while some deductions and conclusions are forced in as their substitute, is, although very ingenious and very artful and very gradual, yet perfectly apparent. We ought to have the questions so put to the witness that he will understand and that we shall understand precisely what transaction is being referred to. Now, you call his attention to no particular transaction at all; you do not name a place and do not fix a date; you do not determine any particular transaction; and yet you are trying in that way to float him over all of them, when in the only instance in which you put the question direct you did not get what you wanted to get, and I suppose that is the reason why the manager is now seeking to generalize. But it is an improper way, as I believe, to lead this witness. The manager knows perfectly well how to put the proper questions in a direct examination, not fix him between this bowlder and that rock, and lead him from step to step and over gulch and gulf, as he is doing by this method of examination. This is too big a thing to be played on a small mere game. Let us have it out; let us have the facts. This is too big a court to be trifled with by that method of examination. Here is a man put on the stand to swear to we all know what. Why do not they let him swear to it? Why do not they put him right straight forward and let us have these facts in their natural order, and not dragged out one after the other in this indirect and, as I think, improper way?

Mr. Manager McMahon said:

Mr. President, it is a matter of great deprivation to the House of Representatives, no doubt, that the able gentleman (and I say it in all seriousness and earnestness) does not sit here to conduct the case of the Government for it, but that is one of those accidents which we can not prevent, for the simple reason that he fails to be a Member of the House. The House has selected us to try this case, and while we concede to the gentleman (and we concede it honestly, not in any other except the fairest meaning) great ability in his profession and a full understanding of all the points of law and a full knowledge of all the details of practice and a full aptitude in all the details of nisi prius trials, yet we most respectfully submit to the Senate that we, however humble, appear here trying this case on our side, and if the gentleman will but possess his soul in patience for a little while the time will come when he can double this witness up all over four or five times with his unusual skill, and he can bring out all this truth that we are now so insidiously suppressing. He can then make it appear that his

[1] Senate Journal, p. 969; Record of trial, pp. 223, 224.

client is innocent, and that all this that we are introducing as testimony has nothing whatever to do with this case. A little patience now, a little of that which we have exercised, and the time will come when all these material facts in this case, all this hidden truth, can be brought out in the full sunlight that we have had in the last three or four days. Now, we propose, and we must be allowed that privilege, to put the questions to the witness. I never knew that right interfered with before.

The Senate, without division, decided that the question should be put to the witness.

2272. In the Johnson trial the Chief Justice was sustained in admitting as evidence the warrant and papers in a legal proceeding to which respondent was related, but not a party directly.—On April 13, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. R. J. Meigs, clerk of the supreme court of the District of Columbia, was called on behalf of the respondent and testified that on February 22 he affixed the seal of the court to a warrant for the arrest of Lorenzo Thomas. The said Thomas was Adjutant-General of the Army and had been arrested on complaint of Edwin M. Stanton, Secretary of War, who made affidavit that Thomas had been appointed by respondent to take illegal possession of the office of Secretary of War.

The testimony as to the issuance of the warrant having been read, Mr. Henry Stanbery, of counsel for the President, proposed to introduce as evidence the warrant and affidavit on which the warrant was issued.

To this Mr. Manager Benjamin F. Butler objected.

I have the honor to object, Mr. President, to the warrant and affidavit of Mr. Stanton being received as evidence in this cause. I do not think Mr. Stanton can make testimony against the President by any affidavit that he can put in, or for him by any proceedings between him and Lorenzo Thomas. I do not think the warrant is relevant to this case in any form. The fact that Thomas was arrested has gone in, and that is all. To put in the affidavit upon which he was arrested certainly is putting in res inter alios. It is not a proceeding between Thomas and the President; but this is between Thomas and Stanton, and in no view is it either pertinent or relevant to this case or competent in any form, so far as I am instructed.

Mr. William M. Evarts, of counsel for the President, said:

Mr. Chief Justice and Senators, the arrest of General Thomas was brought into testimony by the managers and they argued, I believe in their opening, before they had proved it, that that was what prevented General Thomas using force to take possession of the War Office. We now propose to show what that arrest was in form and substance by the authentic documents of it, which are the warrant and the affidavit on which it was based. The affidavit, of course, does not prove the facts stated in it; but the proof of the affidavit shows the fact upon which, as a judicial foundation, the warrant proceeded. We then propose to follow the opening thus laid of this proceeding, by showing how it took place and how efforts were made on behalf of General Thomas by habeas corpus to raise the question for the determination of the Supreme Court of the United States in regard to this act.

* * * * * * *

It has already been put in proof by General Thomas that before he went to the court upon this arrest he saw the President and told him of his arrest, and the President immediately replied "that is as it should be;" or "that is as we wish it to be, the question in court." Now, I propose to show that this is the question that was in the courts, to wit, the question of the criminality of a person accused

[1] Second session Fortieth Congress, Senate Journal, p. 893; Globe supplement, pp. 166–168.

and this civil-tenure bill. And I then propose to sustain the answer of the President, and also the sincerity and substance of this his statement already in evidence, by showing that this proceeding, having been commenced as it was by Mr. Stanton against General Thomas, was immediately taken hold of as the speediest and most rapid mode, through a habeas corpus, in which the President or the Attorney-General, or General Thomas acting in that behalf, would be the actor, in order to bring at once before this court, the supreme court of the District, the question of the validity of his arrest and confinement under an act claimed to be unconstitutional, with an immediate opportunity of appeal to the Supreme Court of the United States then in session, from which at once there could have been obtained a determination of the point.

At the conclusion of the argument the Chief Justice [1] said:

The Chief Justice think the affidavit upon which the arrest was made is competent testimony, as it relates to a transaction upon which Mr. Thomas has already been examined, and as it may be material to show the purpose of the President to resort to a court of law. He will be happy to put the question to the Senate if any Member desires it. [No Senator being heard to speak.] Read the affidavit.

But before the reading began, Mr. John Conness, a Senator from California, demanded that the question be put to the Senate. This being done, there appeared, yeas 34, nays 17. So the reading of the warrant and affidavit in evidence was permitted.

2273. On April 13, 1868, [2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, R. J. Meigs, clerk of the supreme court of the District of Columbia, had testified as to the issuance of the warrant for the arrest of Lorenzo Thomas on the affidavit of Edwin M. Stanton, and the warrant and affidavit had been admitted as evidence.

Then Mr. Henry Stanbery, of counsel for the President, asked:

Have you got the docket entries as to the disposition of the case of The United States *v.* Lorenzo Thomas, and if so will you produce and read them?

Mr. Manager Benjamin F. Butler objected to the evidence as incompetent.

The Chief Justice [1] said:

The Chief Justice thinks that this is a part of the same transaction, and is competent evidence; but he will put the question to the Senate if any Senator desires it. [After a pause.] The witness will answer the question.

2274. Instance in the Belknap trial wherein a document not pertinent on its face was admitted to prove the negative of a pertinent proposition.— On July 8, 1876, [3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. John A. McMahon, of the managers on the part of the House of Representatives, proposed the introduction as evidence of this letter, as bearing on the charge that the respondent had a corrupt arrangement with Marsh and Evans, who were interested in the post tradership at Fort Sill:

[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Fortieth Congress, Senate Journal, p. 895; Globe supplement, pp. 173, 174.

[3] First session Forty-fourth Congress, Record of trial, p. 208.

General Orders, No. 89.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
"Washington, October 12, 1872.

The opinion of the Acting Attorney-General upon the following questions is published for the information and guidance of all concerned:

"DEPARTMENT OF JUSTICE,
"Washington, October 3, 1872.

"SIR: I have duly considered the questions which you ask the Attorney-General in your letter of the l1th instant, and which are as follows:

"Where persons such as post traders, contractors, and others have been allowed by proper authority to erect buildings to facilitate their business upon a military reserve, with no restriction as to the term during which they shall be allowed to remain—

"1. Are such buildings, after the removal of the trader, contractor, or other person from the reserve, still his personal estate, and as such has he the right to dispose of them by rent, lease, or sale to other persons?

"2. Does not such property become part of the realty after the appointment of a trader is revoked or a contractor has fulfilled his contract, or any event happens which dissolves their business connection with the reserve?

"By the order of the Secretary of War of June 17, 1871 (a copy of which you inclose to me), it is provided that 'post traders appointed under the authority given by the act of July 15, 1870, will be furnished with a letter of appointment from the Secretary of War, indicating the post to which they are appointed.'

"They will be permitted to erect buildings for the purpose of carrying on their business upon such part of the military reservation or post to which they may be assigned as the commanding officer may direct, such buildings to be within convenient reach of the garrison.

"They will be allowed the exclusive privilege of trade upon the military reserve to which they are appointed, and no other person will be allowed to trade, peddle, or sell goods, by sample or otherwise, within the limits of the reserve.

"They are under military protection and control as camp followers.

"Buildings erected by post traders on a military reserve, in conformity to this order, are erected for the mutual benefit of the Government and the trader, and are not to be regarded as buildings would be erected by trespassers, or even by tenants under leases, in which no provision is made therefor; but they are erected under a license from the Government and for the mutual benefit of both parties. Under these circumstances I am of opinion that by the proper construction of the license these buildings were not intended to become a part of the realty after their erection; but were to continue the property of the traders, and, lest therefore when a trader is removed from his post, I have no doubt that he has a right to remove the building from the place where it was erected; and that when removed he can dispose of the materials as his own property. But it is very clear that the license to erect such buildings is a purely personal one, and is granted for one purpose only. Therefore, under such licenses, the person so erecting the building would have no right to rent or lease the same or even to sell it to another post trader without permission of the military authorities, but his rights are confined solely to that of removing the building from the reserve. Undoubtedly the property in such a building might, with the approval of the commanding officer, be transferred to another post trader, and such permission would have the same force as a license to a new post trader to erect such a building at that spot.

"I return you the papers inclosed.

"I have the honor to be, sir, your very obedient servant,

"CLEMENT HUGH HILL,
"Acting Attorney-General.

"Hon. William W. Belknap,
"Secretary of War."

Mr. Matt. H. Carpenter, of counsel for the respondent, objected to the letter as without relevancy and having no possible bearing on the case.

Mr. Manager McMahon said:

We have asked the Adjutant-General for a copy of every order that has been issued since the Grierson complaint in regard to post traders for the purpose of proving a negative, but a very important negative in this case, and that is for the purpose of proving that every order that the Secretary of War issued, by a coincidence of good luck, failed to hit the case of Marsh and Evans.

The President pro tempore having submitted the question to the Senate, the evidence was admitted without division.

2275. In the Belknap trial testimony cumulative as to the fact but not as to the intent of respondent was admitted.—On July 8, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon proposed the introduction as evidence of certain letters wherein a complaint had been made through the Solicitor of the Treasury that Evans, the post trader at Fort Sill, was clandestinely selling spirituous liquors, and the following letters in reply thereto:

WAR DEPARTMENT,
Washington City, November 2, 1871.

SIR: I have the honor to reply to your letter of the 28th ultimo on the subject of the illegal introduction of spirituous liquors, etc., into the Indian country by Evans & Co., and other parties, that previous to the 28th ultimo, on which date Evans, post trader at Fort Sill, was authorized to take to that post monthly ten gallons of brandy and ten gallons of whisky for the use of the officers there, no permit had been given him or the other parties referred to to introduce any liquors into that country.

Very respectfully, etc.,

W. W. B.,
Secretary of War.

THE SOLICITOR OF THE TREASURY DEPARTMENT.

WAR DEPARTMENT, *November 8, 1871.*

SIR: In further response to your letter of the 28th ultimo on the subject of the alleged illegal introduction of liquors, etc., into the Indian country by certain persons, among others Evans & Co., of Fort Sill, I have the honor to inform you that Mr. John S. Evans, post trader at Fort Sill, through his friends, denies having taken liquor into the Indian country without authority. Mr. Evans was appointed to the post tradership on October 10, 1870, and holds it in his own name and not in that of Evans & Co., and no complaint has ever been made against him by the military authorities at Fort Sill, he having been regarded a good and law-abiding business man.

I therefore request that no proceedings be commenced against him without a thorough investigation of the charges that he has been engaged in such practices shows they were well founded.

Very respectfully, etc.,

W. W. BELKNAP,
Secretary of War.

TO THE SOLICITOR OF THE TREASURY.

The respondent was charged in the articles of impeachment with having appointed Evans corruptly and with sharing in connection with one Marsh in a tribute paid by Evans in consideration of the appointment.

Mr. Matt. H. Carpenter, of counsel for the respondent, said:

I object to all that proof. It does not go, so far as I can ascertain, to sustain any charge made in these articles at all, nor is it evidence of anything necessary for them to prove so far as I can see. They certainly do not state any reason why this should be received. One of the managers says he wants to

[1] First session Forty-fourth Congress, Senate Journal, p. 965; Record of trial, pp. 204–206.

prove by it that Evans was there acting as post trader and that Belknap knew it. As they have shown the fact that Belknap appointed him, it is pretty good evidence that he knew that Evans was appointed. There is no question made here that Belknap did not know that he was the post trader there; not the slightest. * * * You have proved by the only testimony which can prove it—to wit, the record of his appointment—that he was appointed. After you have proved the record of a judgment in a court of record, you can not call witnesses to prove that the judgment was rendered, because that is cumulative. You have introduced conclusive evidence, and I have said to you that we do not deny it; we make no point upon it. Of course the Secretary knew that Evans was post trader.

Mr. Manager McMahon said:

The letters which we now offer by way of introduction to subsequent letters are letters which make certain specific charges against the post trader, John S. Evans. The theory of this prosecution is, and up to this point tolerably well sustained, that John S. Evans was appointed through the influence of Caleb P. Marsh and in pursuance of a corrupt bargain between them, the profits of which were equally divided between Marsh and the Secretary of War; that the Secretary of War did actually and personally receive his share of the fruits of this arrangement no man who has any regard for testimony can doubt. The great question for this tribunal is whether he received it knowingly, under such circumstances that any officer of honesty and integrity ought to have known where this money was coming from.

The particular point, therefore, to be investigated is the conduct of the Secretary of War. Whenever this particular post trader is affected, from whom he is receiving his gains, the particular point is to discover how the Secretary of War acts. What he may say is very direct and positive testimony, but it is not anymore direct and positive than what he may do. * * * We have introduced conclusive evidence that John S. Evans was, in fact, the post trader, but whether the Secretary of War had forgotten the fact in the multitude of his different appointments is another important fact in this case which we propose to show had not occurred; that he had not forgotten that John S. Evans was the post trader, but, on the contrary, that he was receiving testimony as to John S. Evans's good character, supporting and sustaining John S. Evans all along.

The President pro tempore submitted the question to the Senate, who decided without division that the evidence should be admitted.

2276. The Senate in the Belknap trial declined to admit evidence of a fact occurring after respondent had ceased to hold the civil office.

Instance of a ruling by the President pro tempore on a question of evidence in an impeachment trial.

On July 8, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, E. D. Townshend, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent, when the latter proposed to offer in evidence a certain circular general order, issued March 7, 1876, from the War Department, and sent to every post in the United States directing the officers to examine whether the post traders were satisfactory; and, if not, to state that fact or to have them removed; and that in pursuance of the order, at Fort Sill on the 11th of April, 1876, there was a meeting of the officers and every one of them recommended the reappointment of Mr. Evans.

Mr. Manager William P. Lynde said:

We object to the introduction of that circular in evidence. It bears date, I think, 7th of March, after the resignation of Mr. Belknap, and has nothing whatever to do with the case now before the court so far as we can see. * * * It seems that this investigation was not had until Mr. Belknap had sent in his resignation and vacated the office of Secretary of War. He had made the appointment previously, it is true, on the recommendation of the officers at Fort Sill, when he was Secretary of War; but

[1] First session Forty-fourth Congress, Senate Journal, p. 965; Record of trial, pp. 209–211.

he refused to make it until Mr. Marsh threw in his interest and influence with the Secretary of War, who, had informed Mr. Evans that he had already promised this appointment to Mr. Marsh. That the officers at Fort Sill found no fault with Mr. Evans and excused him of the high charges which he made for the goods which he sold to the officers and soldiers on the ground that he was paying $12,000 a year bonus we are informed by the letters of the commanding officers at the post and by the other evidence we have introduced in the trial. Therefore that these same officers should, subsequent to the resignation of the Secretary of War, when this matter was under investigation and when Mr. Evans was no longer called upon to pay this bonus of $12,000, have sufficient confidence in his integrity to recommend his continuance in that position, makes nothing in favor of the accused in this case. We therefore claim that it has no pertinency to the issue before the Senate, and ask that it may be excluded.

Mr. Montgomery Blair, of counsel for the respondent, said:

Mr. President and Senators, the court will observe that there are two theories here; one by the prosecution and one by the defense, and they recur at every stage of this case. Yesterday we had this battle with the managers, they assuming that we knew of these arrangements, of the existence of this contract, and were receiving knowingly this money. Of course they think that theory is true, and of course they think there is no other theory in the case. But there is another which we mean to make good to this court, and it is that we knew nothing of the consideration whatever; that this appointment was made in perfect good faith; that so far as we knew the law was being executed, and when failure of its execution was called to our attention we got the advice of our officers, those who were most familiar with this case, and got their remedies and applied them. They would think the argument to be on their side that we ought to have immediately removed this man, broken up his establishment, and turned him out, as the President did when the fact was finally brought to his attention and it was published that this contract existed. Let the Senate assume, as we infer they will assume, that the Secretary of War knew nothing of this transaction between these other parties; and that this man executed his duties faithfully. That he did execute them faithfully and that he was a good officer, we think is proved by the unanimous recommendation of the officers and soldiers at this post. We want now to show to the court that this officer, notwithstanding all the charges which were made, was recognized as a good and proper officer, and did his duty so satisfactorily that every officer at the post recommended his reappointment. We think this competent proof. We think this proper to go before the Senate as a circumstance to weigh in their judgment upon this case.

The President pro tempore having submitted the question, "Shall the circular be admitted?" the question was determined in the negative without division.

Thereupon Mr. Carpenter offered the recommendation made by the council of administration, which convened at Fort Sill on March 7, 1876.

Mr. Manager John A. McMahon objected.

The President pro tempore [1] said: [2]

On the same principle decided by the Senate, the Chair sustains the objection, the paper being subsequent to the resignation of the Secretary of War. * * * The Chair * * * decided it on the principle that it was subsequent to the date of resignation, and on that the Chair ruled. The Chair will, however, submit the question to the Senate, if desired, Shall this paper be admitted?

The question was determined in the negative without division.

2277. Judge Swayne being charged with submitting false certificates of expenses, evidence tending to show that other judges had submitted similar certificates was excluded.

Letters from other judges stating their construction of the law as to expenses were not admitted in behalf of Judge Swayne, charged with submitting false certificates.

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[1] T. W. Ferry, of Michigan, President pro tempore.

[2] Record of trial, p. 211.

A statement signed by the Secretary of the Treasury, but not under seal, summarizing the contents of official documents, was objected to as evidence in the Swayne trial.

Objection that new matter in respondent's answer, not responsive to any charge in the articles, should not lay a foundation for the introduction of evidence.

On February 23, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the introduction of testimony, made the following offer:

I now offer in evidence certified statements from the Treasury of the United States showing in detail the number of days in each year from April 1, 1895, down to March 31, 1903, during which the several circuit and district judges of the United States were attending court away from home or out of their districts, and showing the amount of expenses for travel and attendance to which each and all of them certified and received.

I make this offer as tending to show from an analysis of the certificates and accounts the contemporaneous judgment which has been placed upon the statute in question by the action of many of the judges of the courts of the United States, and also by the administrative officers of the Treasury Department.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, objected, saying:

I desire that it be noted on the record that what this paper purports to be, as stated in the caption, is this:

"Statement showing amounts paid to United States circuit judges as expenses claimed while attending circuit courts of appeals away from their residences, and amounts paid to United States district judges as expenses claimed while holding court out of their own said courts, being in the first circuit."

And then there is one for each of the other eight circuits. * * * To that I offer the objection, which I will ask the Secretary to read:

The Secretary read as follows:

First. It is not responsive to any allegation contained in any of the articles of impeachment.

Second. If the subject-matter of the offer in any way relates to averments contained in the answers of respondent to the first, second, and third articles of impeachment, nevertheless, the said averments are not responsive to any charge contained in the articles of impeachment and present no issue for determination in this cause.

Third. The offer of respondent is only to show that the judges named did receive for their expenses an amount equal to $10 a day in the aggregate, but does not include an offer to prove that they did not actually expend as much as, or more than, the amount charged by the honorable judges to the Government as their said expenses of travel and attendance in holding court, and the evidence is therefore immaterial and irrelevant.

Fourth. That it is not averred in the answer nor offered to prove that the respondent, either at the time of or prior to the alleged false certification of his expenses in 1897, had consulted or conferred with or taken the opinion or had knowledge of the action of any of the judges referred to in the offer.

Fifth. It is not competent for respondent, in his own defense, to prove the usage or practices of other judges in other courts, particularly as it is not offered to show that he had knowledge thereof.

Sixth. If respondent has been guilty, as charged, of falsely certifying his expenses and collecting upon his own certificate an excessive amount from the Government, it is no justification for him to show that he subsequently ascertained that others had been guilty of the same offense.

Seventh. The certificates offered from the Treasury Department are not under its seal as required by the statute to make them admissible in evidence.

Eighth. The statements offered are not copies of any official papers or records remaining in the Treasury Department, but consist of some figures and data purported to have been made up after the consideration of such papers and records. They do not purport to show the amounts of expenses certified

[1] Third session Fifty-eighth Congress, Record, pp. 3169–3174, 3176.

by the judges named therein, nor whether they were more or less than $10 a day. They show merely the amounts alleged to have been paid in each instance, without stating whether the said amount was more or less than the amount certified by the judge to have been expended. They do not include the certificate of the judge nor the account of the marshal who paid him. They are partial and incomplete, and not authorized by any statute to be used as evidence.

Ninth. The offer contains an unwarranted insinuation that other judges have collected from the Government for expenses sums greater than they actually expended, but without showing or offering to show what amounts they actually did expend, or certified as having been expended, and if received, will necessitate the calling of all of the said judges, as a matter of justice to them and to all the people of the United States, for the purpose of rebutting the said insinuation contained in the offer.

Mr. Manager Olmsted then said:

Mr. President, if I may be permitted to speak upon this point, there is nothing in any article of impeachment making any reference whatever to any Federal judge save only this respondent, who is himself charged in the first article with having in 1897 falsely certified to the amount of his expenses and received the money upon his said certificate. In his answer, after admitting that he did make that certificate, but denying in rather a vague way its falsity, he says, on page 27 of this record—it is the last paragraph on the page—

"respondent says that he is fortified and confirmed in his honest belief that the construction so placed by him, etc., was and is right * * * by the fact that he is informed"—

Now, in 1905, nine years after he made that certificate, he is informed—

"and verily believes, and as the records of the Treasury Department will show, that many of the circuit judges of the United States and district judges did the same thing."

That, I submit, Mr. President, is new matter, not responsive to anything in the charge and having no proper place in the respondent's answer, and evidence under it is inadmissible upon the ruling of the Presiding Officer and of the Senate made upon the 14th instant upon our offer to prove the inconvenience to suitors and counsel of the absence of the respondent from his district. It was ruled inadmissible. That evidence was responsive to new matter inserted in the answer of the respondent, but the answer itself in that particular was not responsive to any averment in the articles of impeachment.

I want, just at this point, Mr. President, to state that the honorable counsel for the respondent took us to task for making a written offer embracing an admission made by the respondent, to which they objected. He took us to task in terms of great indignation for trying to get before the Senate matter in an improper way. I call your attention to these three exhibits attached to their answer, and ask what words of condemnation are strong enough to apply to the introduction in that manner of what is intended to be evidence in advance of the hearing of the case for the purpose of influencing the court in its decision? Upon the ruling I have already cited, and upon every authority, this evidence would have to be rejected for that reason.

But next, Mr. President, the offer is only to show that the judges named in those papers did, in certain instances, receive for their expenses as much, or a sum equal to $10 for each day if divided by the number of days. But it is not offered to show—the statement offered does not even refer to the subject, and respondent makes no offer to show—that those judges, nor any of them, did not actually expend that sum, and this is, I say, a cowardly insinuation against honorable judges—the dragging of their names in the mire without any attempt to prove that they have been guilty of any offense whatever.

Of course, Mr. President, if a judge is holding court in New Orleans, where, as I know from very recent experience, people may reasonably expend a good deal more than $10, or in New York, or in Chicago, or in San Francisco, and if his expenses amounted to $12.50 to $15 a day, he could get not to exceed $10; and so, of course, this statement would show that what he got amounted to $10. That is the maximum fixed by the law, but it is not the slightest evidence that he did not expend the money. They do not offer to introduce the certificates showing what his actual expenses were. So I say, that, lacking that essential element, it is not evidence at all in this case.

It is not pretended that this respondent at the time of making his certificate in 1897 knew the opinion of or consulted any other judge in the United States.

In regard to the fifth objection, Mr. President, it is not competent for the respondent in his own defense to prove the usage or practice of other courts or other counties. I propose to submit a very high authority. In the celebrated trial of Prescott in Massachusetts, made notable by the eminent

array of counsel and managers involved, Judge Prescott, the probate judge, entitled upon one side of the court to take fees, was charged with taking more than the law permitted him.

In one case the excess was $1.98, and in another article some $39 of excessive fees were involved. He was convicted upon both charges. He offered to prove the usage of other courts and other counties throughout the State for the purpose of showing his intent to have been an honest one and in accordance with the practice throughout the State. That offer was made by Mr. Samuel Hoar and supported by himself and Daniel Webster, but they were completely overthrown in their argument by Mr. Manager Shaw—the same Mr. Shaw who afterwards became chief justice of the supreme court of Massachusetts, and, in the opinion of many men, secured a place in the history of the jurisprudence of this country second only to that of Chief Justice Marshall. I ask that the court will hear the offer which was made by Mr. Hoar in that case:

The Secretary read as follows:

The counsel for the respondent read the motions when put into writing, as follows, viz:

"1. And now the counsel for the respondent move that, in order to rebut the charge of willful and corrupt misconduct, they may be permitted to prove that at the time of the respondent's appointment to office there did exist, and continually since has existed, in the probate offices of the several counties in this Commonwealth a practice according to which, in cases of application for administrotion, certain official papers are prepared and executed and certain official acts done and performed which are not particularly enumerated in the statute called the 'fee bill,' and fees paid therefor, and to show the usual amount of such fees.

"2. And now the counsel for the respondent move that, in order to rebut the charge of willful and corrupt misconduct, they may be permitted to prove that at the time of the respondent's appointment to office there did exist, and continually since has existed, in the probate offices of the several counties of this Commonwealth a practice according to which, in cases of application for administration, certain official papers are prepared and executed and certain official acts done and performed which are not particularly enumerated in the statute of the Commonwealth, commonly called the 'fee bill.'"

Mr. President, to make this as brief as possible, that offer having been elaborately argued by those eminent gentlemen, was rejected by a vote of more than 2 to 1. Judge Prescott was convicted and removed from office upon those two articles. If this respondent has been guilty of any offense it is no excuse for him to say that somebody else did the same thing in later years, and in some other court; and in any event his offer does not include anything tending to show improper conduct by any other judge.

But again, that paper is not offered under the seal of any Department. It is not so authenticated as to be admissible in evidence. It does not purport to be a copy of any record in any Department. It is simply a lot of figures made up by somebody purporting to have been abstracted or extracted from certain documents, we know not what. It certainly does not show that any other judge ever certified to $10 of expenses when his actual expenses were less.

Now, when we offered the three certificates showing Judge Swayne's certificates and the action thereon we were required by the honorable counsel for the respondent to put in the whole record, the marshal's account, the action of the Treasury, Department—every paper on file. These papers which they offer are not evidence in any proceeding on earth and would not be received in any court in Christendom.

Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, I must confess to my surprise at the last objection raised by the learned manager. It is true, I find, that the certificate to these statements is not attested by the seal of the Treasury Department, but it is signed by the Secretary of the Treasury; and the only effect of that objection would be to require us to have the seal put to this paper between this time and the next meeting of this body. I hardly suppose that the learned managers will stand on that. An objection which merely goes to the authentication and which does not dispute its genuineness, it seems to me, is hardly worthy of either this tribunal or this grave proceeding. Nor have I supposed that either side in the prosecution of this case would undertake to put unnecessary tasks upon the other or lengthen the proceedings.

The learned manager said that the counsel for the respondent had compelled the managers to put in evidence certain certificates of the judge when they put in their Treasury statements in support of

the articles against Judge Swayne—the first, second, and third. We put no compulsion upon them that I remember. They took their own course, and a very proper course. They rely upon their allegation of the untruthfulness of the certificate, and of course they put in the certificate. It would have been open to us to have loaded up this record with all of these papers from the Treasury Department and to have brought the originals here to the extreme disturbance of the public business. But, as we supposed, contributing to the need of dispatch of the Senate under its present conditions, we have got a succinct statement which gives all the material facts; for, Mr. President, behind the certificate here, as to every item, it is presumable, and there certainly is in the Treasury Department, certain other evidence. The course of proceeding in this case, as shown by the very certificate put in by the managers, is that at the end of a session of court held by a judge away from his home, at the circuit court of appeals, or away from his district in the district court, he presents his certificate to the marshal, stating the number of days and the amount of expenses, which he certifies to, and on that the marshal pays to him the amount and takes his receipt, which, under the form prescribed by the Department of Justice, is at the bottom of the certificate. A form of that was presented by my colleague only a few moments ago and admitted without objection.

That certificate is by the statute made the voucher upon which the marshal is reimbursed for his payment to the judge; and, as I shall call attention to, the statute requires that he shall be repaid—that he shall be allowed his account. The marshal then presents such item with the other items going to make up his account, his entire account, under the act of 1875, which we put in evidence here this afternoon, to the United States judge for that court. In the particular cases, we have an object lesson here in the certificate introduced by the managers in condemnation of Judge Swayne, that there the marshal of Texas in two instances presented that account before the local judge, Judge Bryant, who did not sit in two certain trials growing out of the failure of a bank because he was interested in the matter in some way, and Judge Swayne held two long trials, one in one year and the other in another year, and made these certificates.

Now, the marshal presented his account to Judge Bryant, and, under the statute, the United States attorney for that district was at that time required to be present and his presence to be noted upon the record. The marshal's account had to be sworn to. The judge's certificate is prescribed, and the statute prescribes that he shall approve or disapprove of that account, as shall be according to law and as may be just.

So you have now the act of the marshal in paying the judge, and the act of the local judge in approving the account in the presence of the district attorney, who is there when he approves it in order to protect the United States. All that happens in the very district where the expenditures are made and where the judge knows and the district attorney knows and the marshal knows, each of their own knowledge, as to what is the amount of expenses that would be involved in a residence there. The account then goes with the marshal's to the Department of Justice, under the terms of the act which will be printed in the Record to-morrow, and is there audited, in the first instance, by the Auditor of the Department of Justice. From there, after the lapse of sixty days, it goes to the Treasury Department and is audited by the Auditor for the State and other Departments. It is then subject to the disallowance of the Comptroller, either of his own motion or upon its being brought before him.

You have, therefore, Mr. President, in this case the act in succession of six executive officers in confirmation or disallowance of such accounts. These certificates show that there has not been a single account disallowed by all of these officers; that from the beginning to the end there has been no objection made under the terms of this statute to the construction placed upon it by Judge Swayne, namely, that the certificate under which the payments were made were those that allowed a certificate of $10 a day irrespective of the fact as to whether that amount was actually expended or not. * * * I ask the learned manager if this fraud, which is a fraud before this Senate, was not such a fraud when it was brought before Judge Bryant? If it is a fraud now, it was a fraud then; and was there anything that has been proved by these witnesses that Judge Bryant did not know of his own knowledge? Did he reside in Tyler? I do not care. If he did, he knew it because he lived there. Did he reside elsewhere? Then he had to go away from his home, though in his district, to be sure, when he held court in Tyler, and he knew what it cost him just as much as Judge Swayne knew. Did not the district attorney know it? Did not the marshal know it? And does the learned counsel pretend to say that because of the terms of this certificate, as prescribed by the acts of 1891 and 1896, if that was a crime, it was not the duty of that district attorney to present Judge Swayne to his grand jury and have him indicted;

that it was not the duty of Judge Bryant to bring it to the attention of the district attorney; that it was not the duty of the marshal to protest? Is it possible that there is any fraud that can exist within the jurisdiction of the Auditor of the Department of Justice, of the Auditor of the Treasury Department, of the Comptroller of the Treasury that they can not unkennel and uncover, and that it is not their duty to do it?

No, Mr. President, it can not be held in the face of that that any such construction could be put by them upon the act of 1891 and the act of 1896 as to these fees. They did not abandon their duty; they do not stand here as convicted of any such absence or lack of it. What they did do was to say, "We are concluded by the certificate because we can not go behind it; we are concluded by the certificate because the statute intended to make it an allowance when the judge certified it, irrespective of what the actual expenses were."

The Senate will perceive, Mr. President, therefore, that the admissibility of these certificates rest upon something else than the mere act of the circuit and district judges of the United States in their several and respective actions in the amounts they certified under this statute. It brings up as a ground of admissibility of these certificates the contemporary construction placed by the executive officers upon the certificates of the judges as made from time to time. The form in which we have presented it is compendious. It is stripped of every unnecessary matter of evidence, which would merely load it up with lumber. It is brought down to the naked skeleton of facts of what is vital; but it puts before the Senate all of the evidence, coupled with the acts of Congress, that is necessary, and is in no sense unfair to the managers, because it apprises them of everything that they might desire to know.

Mr. President, I had hoped that this discussion would be left to the final argument; and for my colleague and myself we are willing that that course should be pursued now. I would stop at once any further discussion of this subject and leave it until the final argument to complete then what I have already said, so as not to take up the time of the Senate; but that offer does not seem to meet with the views of the learned managers, and I am compelled, therefore, to go into the discussion of the case—I say of the case—as made now by this objection to our certificates.

What we contend, Mr. President, is that the proper construction of these acts of Congress of 1891 and 1896 as to judges holding court away from their homes or out of their districts, is the one placed upon it by Judge Swayne; and that is they were authorized to certify their expenses at $10 a day as an allowance or compensation for such services. I shall endeavor to be very brief. The act is:

"That any justice or judge who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides"—

And, mutatis mutandis, it is the same in the case of a district judge when he holds court out of his district—

"shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed $10 per clay, and such payments shall be allowed the marshal in the settlement of his accounts with the United States."

The prior state of the law was that the Judge for such service was paid his actual expenses upon vouchers filed with his accounts. This will not be disputed, I presume, and I have assumed that there is no doubt as to the state of the law.

The true construction of these statutes is that Congress intended that a judge rendering such service should be paid $10 a day as an allowance for compensation for the service. That such is the true construction of the act will appear from its provisions, as shown by its language, and from the changes wrought thereby.

What is meant by "reasonable expenses" as used in the act? It was changed, Mr. President, from "actual expenses" and, therefore, presumably on its face does not mean "actual expenses." * * * Understand, Mr. President, I am arguing that this evidence is admissible because of the contemporary construction placed upon the statute by the officers, and that the statute is one which will bear construction, that it is open to construction. If it is not open to construction, if it is so clear, as the managers contend, that there is no doubt about it, in such case as that the authorities would not apply.

I must therefore make a case where it is apparent upon the face of the statute that it is doubtful and is uncertain, and hence I am compelled to go to that task if this question is to be determined on its merits. I regret it very much.

All the expenses must not merely be reasonable. The term "expenses incurred in travel" is easily defined, but it is difficult to place limits upon the term "attendance." Certainly it can reasonably be held to include (1) many expenses which might not be included under the word "actual" as construed by the accounting officers of the Government; (2) many expenses not incurred in attendance, but caused by attendance, and (3) the expenses are "not to exceed $10 a day."

What light does this provision taken in connection with the words "for travel and attendance," throw upon the true construction of the words "reasonable expenses?" If a judge spends $13 one day and $7 another, shall he certify $20 for the two days, or only $10 for the one day and $7 for the other, and $17 in all? * * * I had very nearly completed, Mr. President, the argument I was submitting about the fact that contemporary construction applies because the statute itself is one that is loosely drawn. If the words "not to exceed $10 a day" are given a hard and fast interpretation, then it must be held to mean in the case to which I have already referred that it is not to exceed $10 for any one day, and so in this instance supposed the judge would certify $17 and lose $3. That is, if he expended $7 one day and $13 another, he could only certify to the $7 that he spent that day, and only $10 for the day he spent $13; but even the learned managers will not contend that that is the construction. Why? Because it is "for travel and attendance." Oh, they say, going about large districts, you have got to have traveling expenses, and a man will spend $20 or $30 a day sometimes in traveling and all that; but what becomes, then, of your construction that it is $10 from day to day?

But, again, Mr. President, did the word "reasonable" mean an amount not as fixed by the judge's certificate, but as determined by the personal habits of the judge, and, indeed, the state of his health, or the individual limitations of his physical needs?

But light is shed upon the meaning of the words "reasonable expenses," as used in the act, by its provisions fixing who shall determine what expenses are reasonable.

That takes me to what I have already submitted, namely, a contemporary construction, in which it is said that the amounts shall be allowed to the marshal in his accounts, and the sum on the certificate shall be paid by the marshal.

I assume, again, in answer to the suggestion of the Senator from Virginia (Mr. Daniel), that it is by no means clear. On the contrary, I think it is clearly the other way; that under this act the certificate of the judge is conclusive; that is, that it is irrebuttable and irreversible, because the statute makes it so. I submit to the Senate, as a most serious matter, that it is not irreversible where there is knowledge that a fraud has been committed; and I can add nothing to what I have already said as to the case where the district attorney, the marshal, and the judge all have knowledge of it.

Mr. President, not detaining the Senate longer on that, I appeal to a case that is higher authority, I submit, than the one cited by the learned manager from an impeachment trial in Massachusetts; and that is the case of The United States *v.* Hill, where the doctrine of cotemporary construction was applied to a statute nothing like as ambiguous and loosely drawn and uncertain as the one now under consideration here. That case was where a clerk of the district court of the United States for the district of Massachusetts had not returned in his emoluments his fees for naturalization papers.

Mr. Manager Olmsted concluded the argument—

In the first place, the act itself does not vest any power or discretion in Judge Bryant, or the marshal, or anybody else except the judge who certifies, for it provides:

"For reasonable expenses for travel and attendance of district judges directed to hold court outside of their districts, not to exceed $10 per day each, to be paid on written certificates of the judges, and such payment shall be allowed the marshal in settlement of his account with the United States."

Provided the judge certified to a sum not to exceed $10 a day, what marshal had the right to sit on the account? I would not like to be that marshal. He would have been in jail for contempt inside of thirty minutes. What judge had a right to pass upon it? What Treasury official had a right to pass upon it? No one. The judge makes a certificate as to his expenses; and if it does not exceed $10 a day it is paid without question, and must be.

Now, in this offer of evidence there is not a word about the amount expended by any other judge. It is not pretended in there that any judge did not expend every dollar for which he was reimbursed by the Government. There is not anything in there about the construction of any official. We do not know whether their expenses exceeded $10 or not. We only know they did not get more than $10 for any one day.

Now, one word more about the absence of the seal from that paper. Of course there is no seal on it, and it is not a question of waiting until to-morrow for them to get a seal on it. There can not be a seal on it. The Department can only put the seal on certified copies of papers or documents in the Department, which that is not. The act of Congress provides:

"Copies of any books, records, papers, or documents in any of the Executive Departments authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."

That is not a copy of any record or any document or any book. It is some figures taken off by somebody, and we do not know who, and it simply shows the amounts paid to the judges therein named. There is no insinuation, except by counsel, that any one of these honorable judges charged or certified to any amount in excess of his actual expenses. There is nothing upon which to base the insinuation that a judge, having expended two or three or five dollars a day, certified that the expenses were $10 and collected the money from the Government.

On the same day, at the evening session, the question of the admissibility of the evidence was put by the Presiding Officer: [1]

The Presiding Officer thinks it becomes the duty of the Presiding Officer again to submit to the Senate the question with regard to the admission of evidence offered by counsel for respondent, which was submitted when a quorum of the Senate was not present, but when a quorum of the Senators sworn in the impeachment trial was present.

Counsel for the respondent offer in evidence certain statements of the Secretary of the Treasury, not under seal, purporting to show amounts paid to United States circuit judges as expenses claimed while attending circuit courts of appeals away from their residences and amounts paid to United States district judges as expenses claimed while holding court out of their own districts or while attending circuit courts of appeals away from their residences.

The question is, Shall the statement referred to be admitted in evidence? [Putting the question.] The "noes" appear to have it. The "noes" have it, and the statement is not admissible.[2]

Mr. Thurston then said:

Mr. President, I should like to have the Reporter read my two previous offers, which I desire to remake in the same terms I did before, and let the ruling be had upon them.

The Reporter read as follows:

Mr. THURSTON. Mr. President, we offer and ask to have incorporated in the record the opinion of the three circuit judges of one circuit, construing the law under which articles 1, 2, and 3 are framed. To be perfectly fair, I will state that this is in the shape of a letter, and has been written recently. On the question of offering it, I do not care to state to whom it is addressed or what judges sign it, but I offer it as an opinion of those judges on this question. The date of it is February 6, 1905.

The PRESIDING OFFICER. The Presiding Officer will exclude that paper.

Mr. THURSTON. I ask to have my second offer read.

The Reporter read as follows:

Mr. THURSTON. We offer in addition thereto similar opinions contained in letters of about the same date, signed by fifteen members of the Federal judiciary. They are all the same.

Mr. MANAGER PALMER. If they are similar——

The PRESIDING OFFICER. For what purpose?

Mr. THURSTON. For the same purpose that I offered the single letter.

The PRESIDING OFFICER. For what purpose?

Mr. THURSTON. For the purpose of showing the construction placed by these judges on the statute under which articles 1, 2, and 3 are framed.

The PRESIDING OFFICER. The Presiding Officer will exclude those papers.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] A short time previously the yeas and nays had been taken on this question, showing 10 votes for admission and 34 for exclusion. This vote showed the absence of a quorum, and therefore was of no effect, except as indicating the division of opinion.

2278. The Senate in the Belknap trial admitted evidence of an act which, in substance, amounted only to a refusal of respondent to confess culpability.—On July 8, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, E. D. Townshend, Adjutant General of the Army, a witness for the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent, and asked what the finding of the court-martial was in the case of Capt. George T. Robinson, of the Tenth Cavalry, and especially for a letter addressed by the said Robinson to W. W. Belknap, Secretary of War, and dated St. Louis Barracks, Mo., April 2, 1875. Mr. Carpenter explained the purpose of this evidence:

This man Robinson was, as I understand, court-martialed and sentenced by the court to be dismissed the service. He was at the St. Louis Barracks at the time; and after the finding by the court was sent on to Washington to be approved by the Secretary of War he wrote a letter to the Secretary substantially stating the allegations which are now made in these articles and by the testimony offered by the managers, and containing what we regard as a blackmailing appeal to the Secretary of War, that he must disapprove of the findings of that court or the writer would take steps to disclose what he says existed in regard to the tradership at Fort Sill. (It was for transactions in connection with this tradership that the respondent was impeached.) Thereupon General Belknap examined the papers in the case, found that the proceedings were regular, that the court was justified in its finding, and he approved the finding and cashiered the captain, and filed this of record.

Mr. Manager George F. Hoar objected to the evidence:

Mr. President, it seems to me that that act of the Secretary of War affords no evidence or presumption of his innocence. A blackmailing officer, himself convicted by court-martial, sent to the Secretary a certain threat and demanded certain action. If the Secretary of War had acceded to his demand, he would have put himself in the power of that officer forever; and the acceding to that demand or concealing the letter from the persons about him in the War Department would have been a confession of guilt. On the contrary, the exhibition of the letter and the going on with the court-martial was denial. All, therefore, that it is offered to show from the conduct of the Secretary of War is that in April, 1875, being charged with this offense, he denied it and did not confess it; in other words, he seeks to make evidence for himself by proving a denial, which is the substance of his own conduct.

The question on the admission of the paper being submitted to the Senate, they decided, yeas 21, nays 18, that it should be received. So the objection was overruled.

2279. In the Belknap trial the Senate, by a bare majority, admitted, to show intent, evidence that respondent had not inquired into newspaper charges reflecting on his subordinates.—On July 10, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Whitelaw Reid, editor of the New York Tribune, was called as a witness for the United States, and examined as to a certain article which appeared in the Tribune as to the relations of the respondent with the post tradership at Fort Sill. In the course of the examination Mr. Manager John A. McMahon asked:

You can state now whether at any time, personally or by letter, the Secretary of War addressed you any communication to find out your authority for the statements in that article.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected that the testimony sought was wholly immaterial and irrelevant to the case.

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[1] First session Forty-fourth Congress, Senate Journal, p. 966; Record of trial, pp. 212, 213.

[2] First session Forty-fourth Congress, Senate Journal, p. 967; Record of trial, pp. 218, 219.

Mr. Manager McMahon argued:

We do not know at this stage of the objection whether the witness will say "yes" or will say "no," and therefore the argument must be directed on the hypothesis that he may answer either way, and at this stage of the inquiry, if it is admissible in case he should answer either way, it is, of course, competent, and I think it is competent no matter how it may be answered. Why? Here is an article charging the existence of a grievance at Fort Sill, the payment of a tribute by one man to another for being kept in the place. We have already called Mr. Smalley, who wrote the article, and proved by him that no inquiry was made of him as to the authorship of that article, and that there was no general conversation had in regard to it. We now propose to go to the headquarters, to the fountain, and inquire whether anything was said to the editor of the paper in regard to this matter; and for this purpose I do not care what the answer maybe. If the answer is "yes," we desire the communication, whatever it may have been; if the answer is "no," our argument will be, in my judgment, equally strong, if not stronger, than it would be if we had the direct communication.

Now, I will put it on the hypothesis that the witness will answer "yes." Are we not entitled to know what the Secretary of War said when such a thing as this was published? I need not argue that question. Suppose now that he will answer "no;" are we not entitled to a knowledge of the fact as we propose to prove it here that, although these charges were publicly made in regard to the management of affairs at Fort Sill, the names having been given, the parties being specified, and one of the parties specified being, as we shall show, at that time an intimate personal friend of the Secretary of War, at no stage of the proceedings was any inquiry made by the Secretary of War from any person who would have any right to speak in regard to the source of the information of the facts stated in that communication? We draw our argument from that, and I have no objection to stating it. Our argument is this, that his conduct in that matter is the conduct of a guilty man; it is the conduct of a man who knows that the facts exist; of a man who knows all about the statement's in the New York Tribune article, and he does not me to go to anybody to find out the authority.

Mr. Carpenter said:

The rule, of course, must be the same here as it would be in the trial of any criminal case in a court of law, and is this Senate to establish the rule that, as often as a newspaper contains a libel upon an individual, that individual must go and shoot the editor, or must sue him for libel, or demand his authority for the article, or stand convicted of the charge? That is the question. They propose to convict this man of everything said in that article because he did not go and make a row about it, because he did not go and demand the authority upon which it was published, bring a libel suit, or shoot the editor. The man who is perfectly conscious of integrity in the matter never runs after such articles—at least there is no law that compels him to do so, and there is no law of presumption against him if he refuses to do it. I should be surprised to see any judicial court establish such a rule, and I should be anxious and curious to see how many of the Senators now sitting in the view of the Chair would be on their way for about five hundred editors within the next twenty-four hours. If it is a good rule against the Secretary of War, it is a good rule against any public man or any private citizen, and as often as any one of you Senators see a libel upon you in regard to any subject you must "jump for" the editor or you confess your guilt.

The President pro tempore having submitted the question, "Shall the managers be permitted to propound said interrogatory to the witness?" it was decided in the negative without division.

Then this question was asked:

Q. (By Mr. Manager McMahon.) Did you receive any communion from General McDowell in regard to this article in the New York Tribune?

Mr. Carpenter objected to the question.

Mr. Manager McMahon said:

Mr. President, I simply propose to show that at the time this thing occurred a communication was addressed, and to call for that and have it handed to me. Then I propose to have General McDowell

recalled, and to refresh his recollection by the contents of that letter. I do not propose to offer it now. * * * Am I not entitled to prove a certain letter which I desire to use in the progress of this case, and to identify it as the letter which the witness has received from a certain person in due course of mail?

The question being submitted to the Senate, they decided without division that the interrogatory might be propounded.

Later, during the same day,[1] Gen. William B. Hazen was called as a witness on behalf of the United States, and Mr. Manager McMahon asked:

State, if you know, who furnished the information upon which the New York Tribune article was published.

This question was later modified to this form:

After the publication of this article in the New York Tribune, state whether the Secretary of War, officially or otherwise, made any inquiry of you in regard to the truth of the statements contained in that article.

Mr. Carpenter objected.

Mr. McMahon explained:

From our own standpoint, amusing the testimony which we have already given to be correct, which we have a right to do, we have heretofore proven that the article in the New York Tribune was brought to the knowledge of General Belknap. We have to-day proven that General Belknap had ascertained that the authority for those changes was General Hazen, who had Fort Sill within his lines and who had troops stationed there. We have had from another source that General Belknap was exceedingly indignant * * * because General Hazen had represented it to a committee instead of to him. Now, this is the inference we want to draw from it: There is no libel in the New York Tribune article upon Secretary Belknap; on the contrary, if you will read that article you will find that it expressly excludes the Secretary from participation in this matter, and says that he knows nothing about it. It is no libel upon him in a newspaper, which is a subject upon which my friend is so sensitive, and upon which the counsel made the point, and very properly, that a man should not every time run and see the author of a newspaper article; but here are charges put in this article, coming from an officer whose name is not given, but then at the bottom of it is stated that these charges are made on the authority of a high officer under the Government in the Army. Here is the Secretary of War not charged, not implicated, no libel put upon his character, no stain upon him, but a grievance, a monstrous grievance, is called to his attention, one that demanded the immediate arm of the Government to remedy if it were true. While I submit to the decision that was made a while ago in regard to the testimony of Mr. Whitelaw Reid, and did not propose to argue it at that time, I say that it is the very highest kind of testimony upon a question like this, that when these charges are made in a public newspaper, not against this gentleman who is upon trial, but against certain other individuals, and public attention is called to them, an extract from a letter quoted with quotation marks to indicate that it is an extract from an officer at that point, and then that is fathered by a leading officer in the Army—I say we have a right to show, as we propose now to show, that instead of hunting up whether these things are true or not, instead of endeavoring as an officer of the Army to correct these evils, he cloaks them, does not inquire even when he knows the officer who is the authority for this statement, or the officer commanding this particular post. He shuts his eye to the transaction and goes nowhere for information. He goes neither to Mr. Smalley, who wrote the article, nor to Mr. Reid, who published it, nor to General Hazen, who was the authority for it, and as we shall show hereafter, he neither goes to Evans nor to Caleb P. Marsh to learn anything about it.

Are there no inferences to be drawn from these facts? Is it not the best kind of testimony when we have got the peculiar case that we have here? Then what are your relations, Mr. Secretary, or what were your relations to this man? Was Mr. Marsh privately milking him and dividing with you and you knew it? The inference is almost irresistible that he was aware of all these facts. He knew that General Hazen was the man who was responsible for this statement, and yet he neither corrects the abuses nor calls upon General Hazen in any shape or form.

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[1] Senate Journal, pp. 969, 970; Record of trial, pp. 228, 229.

Mr. Carpenter argued:

The testimony has already shown that Belknap was indignant at Hazen because he had violated the regulations of the Army and had not communicated what he pretended to know as a fact through the military channels, as it was his duty to do, but poured it out into the bosom of a congressional committee. The testimony also shows that Belknap did go to work investigating this matter through the proper channels. He wrote a letter to Grierson, who was in command of the post, and to Evans, and to others there, in regard to the matter. The letter of Mr. Grierson making his report is on the 18th of February. It was received about ten days after that, and the order correcting the whole thing was made on the 25th of March.

Is it possible that Mr. Belknap is to be condemned here because he did not select that particular method of investigation which the managers wish he had selected? He went to work regularly and efficiently. He did not wish to imitate the irregular conduct of General Hazen. Because Hazen had violated his duty and the regulations of the Army, it was not necessary that Belknap should also violate his duty, nor was it necessary that he should chase the newspaper or chase any correspondent of a newspaper; but he set immediately to work investigating through the regular military channels, where officers made their reports upon their character as officers and where if they were untrue they could be court-martialed for their untruth; not anonymous correspondence in newspapers, but regular official investigation, and on the 25th of March the whole matter was cured by the order of that date.

That is the state of facts. The question put to the witness is, Did General Belknap go to you about this matter? They might as well call any other man in Washington and ask, "Did he go to you about it." Belknap was under no obligation to go to General Hazen. He went through the regular channel to the commander of the post. General Hazen was not the commander of that post, and if General Hazen had known anything of irregularities there while he was in command of the post the regulations of war made it his duty to communicate it through the military authorities, not through political and congressional channels, but to make it directly through the official military channels. Then it could be corrected according to the discipline of the Army.

The question being put, "Shall the managers be permitted to propound the said interrogatory?" there appeared ayes 19, noes 18. So the interrogatory was propounded.

2280. In the Peck trial a witness was not permitted to testify to general public opinion on a subject not closely related to respondent's act.

Instance wherein, during an impeachment trial, the respondent personally examined a witness.

On January 11, 1831,[1] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness, Robert Walsh, was under examination, when this question was asked by the respondent himself:

Do you or not know that at and before the time of the publication there was a general belief in the State of Missouri that many claims to lands in that State, under Spanish grants, were fraudulent?

The publication referred to was an opinion by Judge Peck in a case relating to Spanish grants, the case of Soulard's heirs, published in a newspaper in St. Louis. The impeachment arose from the fact that Judge Peck had punished for contempt one Lawless, who had published a criticism of the opinion.

Mr. James Buchanan, of Pennsylvania, chairman of the managers for the House of Representatives, objected to the question. It was argued in behalf of the objection that in the trial of a district judge, for the imprisonment of a citizen without law and unjustly, the high court of impeachment might not be led off to

[1] Second session Twenty-first Congress, Senate Impeachment Journal, p. 333; Report of trial of James H. Peck, pp. 269–273.

the trial of fraudulent land claims in Missouri, and to the trial of them by common rumor. There would be no end to such an inquiry.

In opposition to the objection it was urged by Mr. Jonathan Meredith, counsel for the respondent, and by the respondent himself, that they were prepared to prove fraud in particular cases, and especially fraud by Soulard. It was proper to show what facts the court had in mind when the proceedings against Lawless was had. If the judge believed that the publication by Lawless contained a misrepresentation of the opinion as to the grants, and tended to show them of a fair character, might he not have rightly considered it his duty to repress such an attempt.

Arguing for the managers Mr. Henry R. Storrs, of New York, asked if rumor was evidence in any cause. Suppose, moreover, that it could be proved that there were ten thousand fraudulent land claims in Missouri. What bearing had that on the question of the impeachment. The question was whether Mr. Lawless fairly represented the opinion delivered by the judge, or whether the judge might commit him for a contempt in publishing such an article. Admit even that the claim of Soulard was fraudulent, that claim was not in issue now and the high court was not trying its merits.

The question being put: "Shall this interrogatory be put to the witness?" there appeared yeas 141 nays 27.

2281. In the Peck trial the person alleged to have been oppressed by respondent was required to testify as to acts of his own implying malice against the respondent after the said alleged oppression.—On January 11, 1831,[1] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness on behalf of the managers, Luke E. Lawless, was under cross-examination by counsel for the respondent. The respondent was on trial for unlawfully oppressing Lawless by imprisoning him for contempt for criticizing in the public prints a decision by respondent as judge in a case relating to a claim of Soulard's heirs.

Lawless had been imprisoned for an article signed "A Citizen" and published in a St. Louis paper in 1826. Mr. Jonathan Meredith, counsel for the respondent, now produced several newspaper articles published after the publication of 1826, and some published as late as 1830, and proposed this question:

> Are you the author of all or either of the articles contained in the newspapers now handed to you relating to the respondent?

Mr. James Buchanan, of Pennsylvania, chairman of the managers on behalf of the House of Representatives, objected to the question, on the ground that a witness on cross-examination might not be compelled, if the publications were reprehensible, to accuse himself. It was also urged by Mr. George McDuffie, of South Carolina, one of the managers, that the letters were wholly external to the case, for it could not be supposed that Judge Peck, in imprisoning Lawless, could have had foresight of these publications. They had nothing to do with the question as to whether or not Judge Peck was guilty of illegally imprisoning a citizen.

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[1] Second session Twenty-first Congress, Senate Impeachment Journal, p. 334; Report of trial of James H. Peck, pp. 275–277.

Mr. Meredith contended that in a case of libel or slander subsequent words or libels might be given in evidence to show quo animo the words were spoken or the libel written. He referred in support of this to Second Saunders on Pleading and Evidence, page 382.

On behalf of the managers it was urged that the authority cited might be applicable if Mr. Lawless were on trial for a libel, but could any authority be produced to prove that a witness under examination might be called on to establish his own guilt, if there be any, by his own testimony? Was not this directly in face of the constitutional provision that no person should be compelled to be a witness against himself? Should a judge be permitted to drive a man by oppression into the public newspapers for redress and then be allowed to use those very publications for the purpose of proving the existence of malice in the author previous to the date of his punishment.

Mr. Meredith said:

I am perfectly aware that we are not now trying Mr. Lawless for a libel. The argument and the authority were merely analogical—they both apply to this case. The principle is the same as in a case of libel. One of the great questions in this cause is the question of misrepresentation. After we have shown the misrepresentation it may be necessary, perhaps, to go a step further and show that it was intentional. We take that step when we show subsequent attacks upon the respondent, of which Mr. Lawless was the author. Is not this the object of such evidence in the case of a libel? And why should it not be as competent in a case of this kind, where intention is the question? It matters not at what subsequent period these publications were made. * * * They relate back to the original publication, and show the design and intention of the author. Again, does the lapse of time at all affect the second view with which this testimony is offered? Mr. Lawless is a witness in this cause. He has testified before this court, and one inquiry, and a main inquiry, is with what temper is he here as a witness? And do not these publications, if he be the author of them, go to evince that temper and feeling?

On the question, "Shall this interrogatory be put to the witness?" there appeared, yeas 28, nays 13.

2282. The witness having testified that a report of a speech was made partially by others as well as by himself, the report was not admitted in evidence.

Instance of a ruling by the Chief Justice on a question of evidence during the Johnson trial.

On April 3, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler offered in evidence a report of a speech of the President printed in a newspaper.

Mr. William M. Evarts, of counsel for the President, objected to the admission of the report as evidence on the ground that the reporter Hudson, who had been examined, had testified that a portion of the speech had been printed from notes taken by another reporter.

After discussion the Chief Justice[2] said:

The managers offer a report made in the Leader newspaper of Cleveland as evidence in the cause. It appears from the statement of the witness Hudson that the report was not made by him wholly from his own notes, but from his own notes and the notes of another person whose notes are not produced, nor is that person himself produced for examination. Under these circumstances the Chief Justice thinks that that paper is inadmissible. Does any Senator desire a vote of the Senate on the question?

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[1] Second session Fortieth Congress, Senate Journal, p. 880; Globe supplement, pp. 106, 107.

[2] Salmon P. Chase, of Ohio, Chief Justice.

Mr. Charles D. Drake, of Missouri, having asked for a vote of the Senate, the question was taken on admitting the paper as evidence, and there appeared, yeas 35, nays 11. So the report was admitted.

2283. Judge Swayne being charged with wrongfully committing persons for contempt, testimony as to the condition of the jail was ruled out as immaterial.—On February 16, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Charles M. Coston, a witness on behalf of the managers, was questioned by Mr. Manager David A. De Armond, of Missouri, as to the acts of the respondent in committing certain persons for contempt, and this question was asked:

Q. Well, where were they in the county jail?—A. They were in a room next to what they call "the prisoner department of the jail." This jail is a brick building, two stories in height. There is an entrance——

Mr. John M. Thurston, of counsel for the respondent, here intervened, objecting:

Mr. President, is Judge Swayne, this respondent, to be answerable for the manner in which the imprisonment was conducted in the absence of any testimony tending to show that he gave any directions with respect to it? If not, we object to this feature of the testimony.

Mr. Manager De Armond said:

Mr. President, the object of the inquiry was to ascertain where they were confined and how they were confined—something about the jail and the accommodations, or the lack of accommodations, that they had in the jail, in a general way, and the punishment that they endured under this sentence of the court. * * * We think it is material to the issue to show what the punishment inflicted upon them was, and to leave the court, in passing upon the matter with all the testimony upon the subject before the court, to determine how far the judge knew that such accommodations or lack of accommodations would be their lot in sentencing them—whether it was a proper sentence as to the amount of punishment or whether it was excessive. We are getting at the animus of the judge. * * * I think upon the question whether the sentences were excessive or not—as to that branch of it—it would be competent for the respondent to show, if he could show, that the imprisonment was not for an unusually long time; that the punishment was not excessive, if, as a matter of fact, the persons sentenced to the jail were taken to quarters which were commodious and clean and if there were no especially contaminating influences from the low class of criminals confined in the same jail at the same time; if they were the only occupants, for instance, and were in the rooms or apartments of the sheriff or keeper of the jail, instead of being in with the common criminals—I believe that would be competent for the respondent to offer in the case. It seems to me it is competent for those prosecuting the case to show the kind of confinement, the kind of place to which he sentenced them, bearing upon the question whether he had the right to send them there at all, and whether the punishment was excessive in sending them there for that length of time. That is all I wish to say about that.

For information, I ask the President whether I am to understand the ruling to be that all questions in regard to the jail are to be excluded? I do not wish to ask questions simply for the sake of asking them, of course.

The Presiding Officer[2] said:

The Presiding Officer does not see that the question as to the character of the jail or the way in which the persons sentenced for contempt were confined there is proper. It can not be said that Judge

[1] Third session Fifty-eighth Congress, Record, pp. 2718, 2719.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

Swayne is responsible for that without some evidence is adduced showing that the judge directed something to be done which was improper. * * * The Presiding Officer thinks that it is not material to this issue to prove the condition of the jail. If any Senator so desires, the Presiding Officer will submit the question to the Senate.

On February 20,[1] during examination of a witness, Simeon Belden, by Mr. Manager De Armond, the following occurred:

Q. What was done with you?—A. I was locked up in the jail.

Q. What part of the jail—in a cell or not?

Mr. THURSTON. Wait a moment. We interpose the same objection that we made the other day. Nothing that possibly happened in and about that jail or the manner or method of the confinement of the witness could be chargeable to Judge Swayne.

Mr. Manager DE ARMOND. Mr. President, when the matter was up before, what we were trying to show was the general condition of the jail and the general way in which the prisoners were handled or cared for there. Now, I am asking simply a narrative. There was a sentence pronounced against this gentleman and Mr. Davis, and I am asking what was done in the carrying out of that sentence. I suppose, if the sentence had not been carried out at all, it would be competent for the respondent to show it, and I think it is certainly competent for us to show whether it was carried out and how it was carried out. I do not mean in the way of going into the details or description about the jail, but what was done with these men.

The PRESIDING OFFICER. Anything more than that they were imprisoned for a certain length of time?

Mr. Manager DE ARMOND. Well, I desire to show where they were put, where they were changed to—without going into the matter of details—and how long they were kept there.

The PRESIDING OFFICER (to the witness). Answer the question.

A little later,[2] while Mr. Manager De Armond was examining a witness, Michael Murphy, the following occurred:

Q. State whether or not you were in charge of the jail when General Belden and Mr. Davis were brought there by the United States marshal or deputy marshal.—A. Yes, sir; I was in charge of the jail.

Q. Was there a commitment brought with them?—A. To the best of my knowledge; yes, sir.

Q. State what you did with them.—A. I——

Mr. THURSTON. One moment. We object to this. We did not insist very hard on our right to this objection while Mr. Belden was testifying, but it is certain that what took place in that jail, its condition, the way the prisoners slept, the way they were fed, the way they were treated, could not be used to prejudice the court against Judge Swayne unless they first laid the foundation for it by showing that he was responsible for it or directed it.

The PRESIDING OFFICER. That was the opinion of the Presiding Officer on a former day, but the questions which were asked Mr. Belden were allowed on the ground that they were a narrative of what occurred. The Presiding Officer does not think that evidence showing that the condition of the jail was an improper one is admissible unless it be shown that it was known to Judge Swayne and that was part of his motive in committing them there.

Mr. Manager DE ARMOND. I was not going to ask the witness about the general condition of the jail. I was going to ask questions practically the same as those asked General Belden; about what was done with them.

The PRESIDING OFFICER. What is the purpose of the questions?

Mr. Manager DE ARMOND. To show the punishment they endured.

The PRESIDING OFFICER. Unless there is something unusual in the character of the jail which was known to Judge Swayne, the Presiding Officer thinks the evidence is inadmissible.

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[1] Record, pp. 2906, 2907.

[2] Record, p. 2908.

2284. Decisions as to relevancy of testimony during the Peck trial.—On December 23, 1830,[1] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness, Luke Edward Lawless, was under cross-examination by Mr. William Wirt, counsel for the respondent. The witness, in a communication signed "A Citizen," and published in a St. Louis paper, had criticised an opinion delivered by Judge Peck in the case of Soulard's heirs. The judge was now on trial for punishing Lawless for contempt.

Mr. Wirt asked a question, reduced to writing, as follows: The witness is asked to refer to such parts of the opinion of the respondent in Soulard's case as support the first specification in the article signed "A Citizen."

Mr. James Buchanan, of Pennsylvania, of the managers on the part of the House of Representatives, objected that the question was irrelevant. The court had before them, he said, the publication of the witness, in which he had placed his assumptions in one column, and the passages in the opinion from which they were deduced in another column.

Mr. Wirt responded that the managers in opening the case had argued that there had been no misrepresentation of the opinion in the letter; and the question which he had asked was useful in determining the truth or lack of truth in the claim of the managers.

The question having been read to the court, the Vice-President put the question: "Shall this interrogatory be put to the witness?" and it was determined in the affirmative, yeas 32, nays 10.

2285. On December 22, 1830,[2] in the high court of impeachment during the trial of the cause of The United States *v.* James H. Peck, while a witness, Luke Edward Lawless, was under cross-examination, Mr. Jonathan Meredith, counsel for the respondent, put the following interrogatory:

> What was your contract for professional compensation in the case of Soulard's heirs?

It was for criticism of Judge Peck's decision in the case of Soulard's heirs that the witness had been punished by Judge Peck, and it was because of this punishment that the impeachment proceedings had been instigated.

The question being objected to by the witness and also by the managers for the House of Representatives, the question was put: "Shall this interrogatory be put to the witness?" and decided in the negative, yeas 19, nays 23.

2286. On January 10, 1831,[3] in the high court of impeachment during the trial of the cause of The United States *v.* James H. Peck, a witness, Josiah Spalding, was asked the following question by Mr. Jonathan Meredith, counsel for the respondent:

> What are the terms in which Mr. Lawless, according to general reputation, is in the habit of speaking of courts, both in their presence and out of court?

Judge Peck was on trial for the punishment of Mr. Lawless for contempt of court in criticising in a newspaper an opinion by the judge.

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[1] Second session Twenty-first Congress, Senate Journal, p. 329; Report of the Trial of James H. Peck, pp. 122–125.

[2] Senate Impeachment Journal, p. 328, second session Twenty-first Congress.

[3] Second session Twenty-first Congress, Senate Impeachment Journal, p. 332; Report of trial of James H. Peck, pp. 261–263.

Mr. James Buchanan, of Pennsylvania, chairman of the managers, objected to the portion of the question contained in the words "and out of court."

Mr. Meredith admitted that he should not have asked the question had he not thought he had the assent of the managers.

The court, by a vote of yeas 3, nays 39, sustained the objection.

2287. General decisions during the Johnson and Belknap trials as to relevancy of testimony.

Instances of decisions by the Chief Justice on questions of evidence during the Johnson trial.

On April 15, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered in evidence a letter of McClintock Young, Acting Secretary of the Treasury, removing Richard Coe from the office of appraiser at Philadelphia.

Mr. Manager Benjamin F. Butler objected to the proposed evidence as irrelevant. The letter, it was true, showed the direction of the President that the act be done; but if it were admitted it would be necessary to investigate whether or not the Acting Secretary or even the President might make the removal without consent of the Senate.

Mr. Curtis argued as to the act of Mr. Young:

He says that he proceeds by the order of the President, and I take it to be well settled judicially and practically that wherever the head of a Department says he acts by the order of the President he is presumed to tell the truth, and it requires no evidence to show that he acts by the order of the President. No such evidence is ever preserved, no record is ever made of the direction which the President gives to one of the heads of Departments, as I understand, to proceed in a transaction of this kind. But when a head of a Department says "by order of the President I say so and so" all courts and all bodies presume that he tells the truth.

The Chief Justice [2] ruled:

The Chief Justice thinks that this evidence is admissible. The act of a Secretary of the Treasury is the act of the President unless the contrary be shown. He will put the question to the Senate, however, if any Senator desires it. [After a pause.] The evidence is admitted.

2288. On April 20, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of the examination of Alexander W. Randall, Postmaster-General, proposed certain questions which were objected to. As a result of this the Chief Justice [2] said:

The honorable manager appears to the Chief Justice to be making a statement of matters which are not in proof, and of which the Senate has as yet heard nothing. He states that he intends to put them in proof. The Chief Justice therefore requires that the nature of the evidence that he proposes to put before the Senate shall be reduced to writing as has been done heretofore. He will make the ordinary offer to prove, and then the Senate will judge whether they will receive the evidence or not.

Thereupon Mr. Manager Butler submitted this offer:

We offer to show that Foster Blodgett, the mayor of Augusta, Ga., appointed by General Pope, and a member of the constitutional convention of Georgia, being, because of his loyalty, obnoxious to

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[1] Second session Fortieth Congress, Senate Journal, p. 899; Globe supplement, p. 183.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] Second session Fortieth Congress, Senate Journal, p. 915; Globe supplement, pp. 240–242.

some portion of the citizens lately in rebellion against the United States, by the testimony of such citizens an indictment was procured to be found against him; that said indictment being sent to the Postmaster-General, he thereupon, without authority of law, suspended said Foster Blodgett from office indefinitely, without any other complaint against him and without any hearing and did not send to the Senate the report of such suspension, the office being one within the appointment of the President by and with the advice and consent of the Senate; this to be proved in part by the answer of Blodgett to the Postmaster-General's notice of such suspension, being a portion of the papers on file in the Post-Office Department upon which the action of the Postmaster-General was taken, a portion of which have been put in evidence by the counsel of the President, and that Mr. Blodgett is shown by the evidence in the record to have always been friendly to the United States and loyal to the Government.

Mr. William M. Evarts, of counsel for the respondent, objected to this evidence as wholly irrelevant to this case. The evidence concerning Foster Blodgett was produced on the part of the managers, and on their part was confined to his oral testimony that he had received certain commissions under which he held the office of postmaster at Augusta; that he had been suspended in that office by the Executive of the United States in some form of its action, and there was a superadded negative conclusion of his that his case had not been sent to the Senate. In taking up that case the defense offered nothing but the official action of the Post-Office Department, coupled with the evidence of the head of that Department that it was his own act, without previous knowledge or subsequent direction of the President of the United States. In that official order, thus a part of the action of the Department, it appears that the ground of it was an indictment against Mr. Blodgett. A complaint was made that that indictment was not produced. The managers having procured it, having put it in evidence, they now propose to put in evidence his answer to that indictment or to the accusation made before the Postmaster-General.

After argument Mr. Manager Butler modified the question so as to stand as follows:

The defendant's counsel having produced from the files of the Post-Office Department a part of the record showing the alleged causes for the suspension of Foster Blodgett as deputy postmaster at Augusta, Ga., we now propose to give in evidence the residue of said record, including the papers on file in the said case, for the purpose of showing the whole of the case as the same was presented to the Postmaster-General before and at the time of the suspension of the said Blodgett.

Mr. Evarts said:

Our objection to that offer, as we have already stated, is that it does not present correctly the relation of the papers.

The Chief Justice said:

The Chief Justice will submit the question to the Senate. The original offer to prove has been withdrawn. The offer which has just been read has been substituted. Senators, you who are of opinion that the evidence now proposed to be offered should be received will say aye; contrary opinion, no. [Putting the question.] The noes have it. The evidence is not received.

2289. On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William. B. Hazen, a witness on behalf of the United States, was recalled, and in the course of cross-examination, Mr. Matt. H. Carpenter, of counsel for respondent, asked:

Is it according to discipline in the Army for an officer to publish scandal of the President which he knows nothing about except from hearsay?

[1] First session Forty-fourth Congress, Senate Journal, pp. 973, 974; Record of trial, p. 245.

Mr. Manager John A. McMahon said:

I must at this point enter an objection. It seems that my friend here is pursuing the old line, having the old misapprehension that every now and then crops out in this case. The misapprehension is that he is trying General Hazen and not General Belknap.

Mr. Carpenter argued:

Mr. President, this witness has been laboring for months to get up this impeachment for his own vindication. He comes back here to-day for explanation, and I am doing everything in my power to assist his purpose. I want to show what his motives have been; I want to show that they are utterly groundless; I want to show that he has violated all the proprieties and all the duties of his official station by the hand he has taken in this matter and his anxiety to fan public sentiment against General Belknap, who has never done him an injury in his lifetime, and who had shown him so many favors that General Sherman objected to his giving him another; and that is the man who repeats gossip against the President and against the then Secretary of War, and publishes it in letters over his own name.

The Senate, without division, decided the question inadmissible.

2290. On January 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Hon. Hiester Clymer, chairman of the committee of the House of Representatives which had taken the testimony on which the impeachment was based, was examined as a witness for the United States, and then was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent. Mr. Carpenter asked:

How long has the committee been engaged in investigating the affairs of the War Department?

Mr. Manager John A. McMahon objected, saying:

I only want to understand how far this is to go. If any inference is be drawn from any investigation held there that there is nothing else in this matter but what has been charged, we shall claim to put in the testimony which has been taken, which we shall certainly claim throws a good deal of light on other transactions and on this. We have carefully excluded them up to this point.

The question being put to the Senate, the interrogatory was admitted without division.

Very soon thereafter, the witness was reexamined by the managers, and Mr. Manager McMahon asked:

Had your committee taken any other testimony except Mr. Marsh's at the time that the House ordered the impeachment of Mr. Belknap and notified the Senate to that effect?

Mr. Carpenter having challenged the question, Mr. McMahon stated that it was put to rebut the presumption raised by the former question. If that was pertinent, this was.

After discussion the question was put: "Shall this interrogatory be admitted," and there appeared, ayes 11, noes 16, no quorum.

Thereupon, to save time, Mr. McMahon withdrew the question.

2291. On July 11, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, was under examination, when the following questions were asked, and the following colloquy took place between Mr. Matt. H. Carpenter, of counsel for the respondent, and Messrs. Managers John A. McMahon and Elbridge G. Lapham:

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[1] First session Forty-fourth Congress, Senate Journal, p. 975; Record of trial, pp. 254, 255.

[2] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, p. 243.

Q. (By Mr. Manager McMahon). Your wife has been subpoenaed as a witness to attend this tribunal?—A. Yes, sir.

Q. I desire you to state now whether she is able to attend.

Mr. CARPENTER. What is the object of that?

Mr. MANAGER MCMAHON. We want to know from the witness whether she is able to attend.

Mr. CARPENTER. We object. What has that to do with this case whether she is well or sick?

Mr. Manager MCMAHON. We have a right to send for her if she is able to come. Let the objection be passed upon by the Senate.

The PRESIDENT pro tempore. The counsel object to the question propounded by the managers. Shall the question be admitted?

The question was determined in the affirmative.

Q. (By Mr. Manager McMahon.) State whether your wife is able to be present in court to be examined as a witness.—A. She is not; she is very ill.

Q. Have you the certificate of a surgeon to that effect?—A. I have.

Q. Whose certificate is it?—A. Dr. Alfred L. Loomis.

Mr. CARPENTER. Will the managers state now what the object of that testimony is?

Mr. Manager LAPHAM. It is to inform the Senate the reason why we do not call Mrs. Marsh.

Mr. CARPENTER. Is it proposed to raise any presumption against the defendant?

Mr. Manager LAPHAM. We shall argue that hereafter.

Mr. CARPENTER. We will take her testimony that was given before the committee if the managers want that, or consent to have her deposition taken. We want to completely repel the presumption that Mrs. Marsh being ill is any evidence of our guilt.

Mr. Manager MCMAHON. The managers here decline to do that. I do not agree with them in that matter. The counsel will make his application to the Senate personally.

2292. Testimony admitted in the Swayne trial as material, although objected to as not bearing directly on the issues.—On February 21, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness called on behalf of the respondent, was examined by Mr. John M. Thurston, of counsel for the respondent, and was questioned as to a suit known as the Florida McGuire case, the following being one of the questions:

During the first week of the court what steps did you take, if anything, to inform yourself as to the probability of the case being tried and as to when it might be reached upon the docket?

Mr. Manager David A. De Armond, of Missouri, objected:

We think it is an immaterial matter what steps he took to ascertain when the case would be for trial and what he did about it. He is not a party to the record nor a party to the proceeding that we are trying.

Mr. Thurston said:

Mr. President, we propose to show that the defendants in that case prepared themselves for trial, got out their list of witnesses, were ready for trial when the case was reached, and that they had a right to demand from the judge that he should not grant any postponement of that trial unless upon legal cause shown.

Mr. Manager DE ARMOND. I suggest in regard to that matter that the persons upon the other side are the persons whose conduct should be inquired about. What the defendants in that Florida McGuire case did or what they thought certainly are not matters for which the attorneys upon the other side could be held responsible. It is not inquiring anything about the attorneys of Florida McGuire—the parties who are proceeded against for contempt—but it is inquiring about what the attorneys upon the other side did, and what the attorneys upon the other side thought, and why the attorneys upon the other side did or thought certain things.

[1] Third session Fifty-eighth Congress, Record, p. 2980.

The Presiding Officer said: [1]

Does the Presiding Officer understand that that was stated in the trial of that case?

Mr. THURSTON. Yes, Mr. President. I also propose to show it for another purpose. It is part of the res gestae of this proceeding that has been gone into in detail and in such a manner that we might have objected at every step, but which, in deference to the desire of this court to proceed as rapidly as possible, we did not take advantage of.

The PRESIDING OFFICER. The Presiding Officer thinks the question may be asked.

2293. On February 21, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness on behalf of the respondent, was examined as to a suit known as the Florida McGuire case by Mr. John M. Thurston, of counsel for the respondent:

Q. On that trial were there any witnesses called by Florida McGuire or her counsel or examined on her side who did not live in Pensacola, either upon or in the immediate vicinity of the Rivas tract?—A. So far as I know, not. I have to answer that this way: That a good many of these witnesses are known to me only in a general way, and I know generally where they reside. I do not know them personally, but I think that they all reside within a mile of the courthouse in Pensacola.

Q. How long, in your judgment, would it have taken the United States marshal to have subpoenaed them all as witnesses?—A. If they had all been at home at the time they could have been subpoenaed in an hour and a half or two hours.

Mr. THURSTON. We offer this original praecipe for witnesses in that case. It is the original document which was identified the other day, and we ask, for the purpose of making up the record, that the certified copy may go in instead.

Mr. Manager David A. De Armond, of Missouri, said:

We ask what is the object of offering this paper? What is it for? What do counsel expect to prove by it?

Mr. THURSTON. The object is to disprove the testimony of Judge Belden, who was very clearly brought to state that the only reason they decided to discontinue the Florida McGuire case was that they needed forty or fifty witnesses, many of them living at a distance, and that they could not possibly secure them from the time of Saturday afternoon, when court adjourned, to Monday morning, when the case was to be called. * * * I have now shown that upon the reincarnation of the Florida McGuire case the same case between the same parties was tried out in full in the same court, and that on that trial they only asked on behalf of Florida McGuire for twelve witnesses by subpoena, and that they all lived, and that all the witnesses they produced lived, right there. It is in line with our insistence that here was a conspiracy against the dignity and the honor of the court by its officers; and that it is a mere subterfuge in their testimony to claim that they discontinued that case because they had a multitude of witnesses who could not be obtained, when the fact was, as we propose to show and insist, that their discontinuance of that case resulted solely and alone because they were held and taken to task for their conspiracy and for their contempt.

Mr. Manager DE ARMOND. Mr. President, the statement of the witness, Belden, was that they had forty or fifty witnesses for the trial, which was expected to take place in November, and that it would be impossible to get them for Monday, with notification upon the Saturday preceding.

This, now, is a paper which purports to be a list of some of the witnesses called for and used upon a trial which took place some time the next year in the suit brought over again—in another suit. It does not at all follow from the fact that this paper contains a list of twelve names that they did not have forty or fifty witnesses for the trial before, nor does it follow that the names of all the witnesses are contained upon the paper, or that they did not need or did not use any other witnesses upon the second trial. So it is an immaterial sort of paper, we think.

The Presiding Officer [1] said:

The Presiding Officer thinks the paper bears on the question, although it is not conclusive.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, p. 2982.

Chapter LXX.

IMPEACHMENT AND TRIAL OF WILLIAM BLOUNT.

2294. The impeachment of William Blount, a United States Senator, in 1797.

The proceedings of the Blount impeachment were set in motion by a confidential message from the President of the United States.

In the Blount case the House voted to impeach on the strength of the matter contained in a letter proved to be in respondent's handwriting.

In the Blount impeachment case it was ruled that evidence should be taken before the House, and not before the Committee of the Whole.

In the Blount impeachment case the House seems to have distrusted its power to authorize the Speaker to administer oaths.

The House excused one of its Members from voting on any question connected with the impeachment of a brother.

Forms of the resolutions impeaching William Blount and directing the carrying of the impeachment to the bar of the Senate.

The Blount impeachment was carried to the bar of the Senate by a single Member of the House.

On July 3, 1797,[1] a confidential message was received in the House from the President of the United States, who transmitted a letter purporting to have been

[1] First session Fifth Congress, Journal (supplemental); p. 76, Annals, p. 439.

written by William Blount, a Senator of the United States for the State of Tennessee, to one James Carey, interpreter for the United States to the Cherokee Nation of Indians, for the purpose of seducing him from his duty and trust, in furtherance of certain unlawful designs. The message and papers were referred to a committee composed of Messrs. Samuel Sitgreaves, of Pennsylvania; Abraham Baldwin, of Georgia; Samuel W. Dana, of Connecticut; John Dawson, of Virginia, and William Hindman, of Maryland.

On July 6[1] Mr. Sitgreaves reported from the committee the following resolution:

Resolved, That William Blount, a Senator of the United States from the State of Tennessee, be impeached of high crimes and misdemeanors.

This report was on the same day considered in a Committee of the Whole House. Mr. Sitgreaves stated that the President had been advised by the law officers of the Government that the letter was evidence of crime; that the crime was of the denomination of a misdemeanor; and that William Blount, being a Senator, was liable to impeachment. In conformity with this opinion, the letter had been transmitted to the House. There was debate as to whether or not a legislator was an officer liable to impeachment, after which Mr. Sitgreaves made a statement[2] as to the forms of procedure:

As to the form of proceeding necessary to be taken on this occasion, he would state what the opinion of the committee was as to this matter. They supposed it would be first proper for that House to determine that the gentleman in question should be impeached. This being done, that a Member of that House should go to the bar of the Senate and impeach the person, in the name of the House and of the people of the United States, and state that the House of Representatives will proceed to draw out specific articles of charge against him. According to the case, they require that he shall be sequestered from his seat, be committed, or be held to bail. When this is done, a committee will be appointed to draw articles of impeachment.

The reason, Mr. S. said, why some steps should be taken at present was that means should be taken to secure the person of the offender, either by confinement or by bail, since it was the opinion of the law officers of Government that he could not be arrested by ordinary process. He could not be arrested by the Senate; they could send for him (as he understood they had done) by the Sergeant-at-Arms, to take his seat in the House; but when the House adjourned, they had no further power over him until an impeachment was made against him.

Gentlemen said there was no danger of escape. If it were not improper to state what had taken place out of doors, it might be said that there had already been an attempt at an escape. Besides, if no investigation were now to take place, how were they to come to a knowledge of the plot which gentlemen seemed so desirous to come to a knowledge of? When they had determined to make the impeachment, and an oral declaration was made of it to the Senate, when they were ready to go home, they might go, and exhibit the charges at the next session, when they should have leisure fully to consider the subject.

Mr. John Rutledge, jr., of South Carolina, who had attended the trial of Warren Hastings, approved the form of procedure, but suggested that the handwriting of Mr. Blount should be proven, and submitted a motion to that effect.

The chairman[3] suggested that the proof should be taken in the House, and this opinion prevailed, it being urged that the Committee of the Whole did not have the power of taking evidence. The committee accordingly arose.

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[1] Journal, p. 70, Annals, pp. 448–458.

[2] Annals, p. 455.

[3] George Dent, of Maryland, Chairman.

In the House the Speaker[1] suggested the propriety of calling in a magistrate, as the Speaker had no power to administer an oath except in the case of qualifying the Members of the House. A motion to authorize the Speaker to administer the oath was disagreed to, 29 yeas, 53 nays.[2]

Then it was[3]

Ordered, That William Barry Grove, Abraham Baldwin, Joseph McDowell, and Nathaniel Macon, Members of this House, be examined upon oath, at the bar of this House, touching their knowledge of the handwriting of William Blount, a Senator of the United States for the State of Tennessee; and that Reynold Keene, esq., one of the judges of the court of common pleas for the county of Philadelphia, and also one of the aldermen of the city of Philadelphia, in the State of Pennsylvania, administer the said oath.

The said Members were then sworn, and, being interrogated by the Speaker, severally answered that they believed the letter to be in the handwriting of William Blount.

It was then

Ordered, That the testimony of the said Members be reduced to writing by the Clerk, and that the same be referred to the Committee of the Whole House, to whom was committed the report of the committee to whom was referred the message of the President of the United States of the 3d instant.

On July 7[4] the Speaker laid before the House a letter from Thomas Blount, a Member from North Carolina, and brother of William Blount, praying that he might be excused from voting on any question arising in the course of the impeachment proceedings. Thereupon it was

Ordered, That the said Thomas Blount be excused from voting on any question relating to the impeachment, now pending in this House, of William Blount, a Senator of the United States for the State of Tennessee.

On July 7,[5] also, the Committee of the Whole reported and the House agreed to the resolution that William Blount be impeached.

Then Mr. Sitgreaves moved an order which, with modification, was agreed to as follows:

Ordered, That Mr. Sitgreaves do go to the Senate, and, at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, impeach William Blount, a Senator of the United States, of high crimes and misdemeanors; and acquaint the Senate that this House will in due time exhibit particular articles against him, and make good the same.

2295. Blount's impeachment continued.

In the Blount impeachment, following the precedent of the Hastings trial, the House did not send the articles to the Senate with the impeachment.

In the first impeachment the House followed English precedents to the extent of requiring the sequestration of the respondent from his seat in the Senate.

It was suggested by Mr. Albert Gallatin, of Pennsylvania, that the articles

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[1] Jonathan Dayton, of New Jersey, Speaker.

[2] Annals, p. 458.

[3] Journal, p. 71.

[4] Journal, p. 72; Annals, p. 458.

[5] Journal, p. 72; Annals, p. 459.

of impeachment should be prepared and presented with the impeachment. To this the reply was made: [1]

Mr. Sitgreaves said that the mode which he proposed was the same which was practiced in the case of Mr. Hastings. Mr. Burke went up to the House of Lords and impeached him in words similar to those now proposed to be used. Some time afterwards, the articles of impeachment having been drawn, Mr. Burke again went up to the House of Lords and exhibited them. Mr. S. spoke also of a work lately published, in continuation of Judge Blackstone's Commentaries, which had a chapter on parliamentary impeachment, and pointed out this as the proper mode of procedure. He had also looked into the proceedings on the trial of the Earl of Macclesfield, and found the same course was taken. It was true that in the case of a public officer of the State of Pennsylvania, which perhaps his colleague might have in his eye, the articles of impeachment were exhibited at the same time that the impeachment was made.

On motion of Mr. Sitgreaves it was:

Ordered, further, That Mr. Sitgreaves do demand that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for the appearance of the said William Blount to answer to the said impeachment.

It was objected that it was not necessary to follow so closely the English precedents, since capital punishment could not follow a conviction on impeachment in this country. Therefore it would be unnecessary to confine the one impeached. But the House agreed to the order, ayes 41, noes 30.[2]

2296. Blount's impeachment, continued.

Form used in delivering the Blount impeachment at the bar of the Senate.

Upon the impeachment of William Blount the Senate took him into custody and required bonds for his appearance, and informed the House thereof.

Form of report to the House of an impeachment carried to the bar of the Senate.

On July 7,[3] while the Senate was engaged in proceedings for the expulsion of the said William Blount for the offense set forth in the message of the President, Mr. Sitgreaves appeared with the following message from the House:

Mr. President, I am commanded, in the name of the House of Representatives and of all the people of the United States, to impeach William Blount, a Senator of the United States, of high crimes and misdemeanors, and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

I am further commanded to demand that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for his appearance to answer the said impeachment.

Thereupon the Senate agreed to the following:

Pursuant to a message from the House of Representatives of the United States by Samuel Sitgreaves, esq., a Member of that House, that they, in their own name, and in the name of all the people of the United States, have impeached William Blount, a Member of the Senate, of high crimes and misdemeanors; and that, in due time, they will exhibit articles against him and make good the same; and they having demanded that the said William Blount be sequestered from his seat in this House, and that the Senate take order for his appearance to answer to the said impeachment:

Resolved, That the said William Blount be taken into custody of the messenger of this House until he shall enter into recognizance, himself in the sum of $20,000, with two sufficient sureties in the sum of $15,000 each, to appear and answer such articles of impeachment as may be exhibited against him.

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[1] Annals, p. 459.

[2] Annals, p. 462.

[3] Senate Journal, p. 388; Annals, p. 39.

Whereupon Mr. Blount named his sureties, and they were satisfactory to the Senate.

The President then named Mr. Blount and his sureties, who arose while the recognizance was read, and, being approved by the Senate, it was executed in their presence.

On the same day Mr. Sitgreaves returned to the House and reported:[1]

That, in obedience to the order of this House, he had been to the Senate, and in the name of this House and of all the people of the United States, had impeached William Blount, a Senator of the United States, of high crimes and misdemeanors, and had acquainted the Senate that this House will, in due time, exhibit particular articles against him and make good the same.

And, further, that he had demanded that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for his appearance to answer to the said impeachment.

On July 8,[2] it was ordered by the Senate:

Ordered, That the Secretary of the Senate notify the House of Representatives that, in consequence of their message of yesterday, by the Hon. Mr. Sitgreaves, one of their Members, they have caused William Blount to recognize, in the sum of $20,000 principal, with two sureties in the sum of $15,000 each, to appear and answer to the impeachment mentioned in their message.

2297. Blount's impeachment, continued.

In the Blount impeachment the drawing up of the articles was confided to a select committee, with power to procure testimony.

In the Blount impeachment the House, after discussion, empowered the committee drawing the articles to sit during the recess of Congress.

On the same day and succeeding day, in the House, the following resolutions appear to have been agreed to:[3]

Resolved, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, and that the said committee have power to send for persons, papers, and records.

Resolved, That the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, be authorized to sit during the recess of Congress.

Resolved, That the said committee be instructed to inquire, and by all lawful means to discover, the whole nature and extent of the offense whereof the said William Blount stands impeached, and who are the parties and associates therein.

The privilege of sitting during the recess was the subject of considerable debate, but precedents from English practice and from trials in South Carolina and Pennsylvania were cited.

Messrs. Sitgreaves, Baldwin, Dana, Dawson, and Robert Goodloe Harper, of South Carolina, were appointed to prepare and report articles of impeachment.

2298. Blount's impeachment, continued.

After his expulsion from the Senate William Blount was surrendered by his bondsmen, and gave bonds anew to answer to the impeachment.

On July 8,[4] in the Senate, the trial of William Blount terminated with his expulsion.

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[1] House Journal, p. 73.

[2] Senate Journal, p. 390; Annals, p. 40.

[3] House Journal, p. 74; Annals, pp. 463–466. The Journal appears to be defective in its record as to these resolutions, but the Annals seem to make certain that these resolutions were agreed to.

[4] Senate Journal, p. 392; Annals, p. 44.

On this, Mr. Butler, in behalf of himself and Mr. Thomas Blount, the other surety, surrendered the person of William Blount, the principal, to the Senate, and requested to be discharged from their recognizance. Whereupon, it was

Ordered, That they be discharged from their recognizance, and that the Secretary enter an indorsement on the back of the bond as follows:

"And now, to wit, on this 8th day of July, 1797, the Hon. Thomas Blount and Pierce Butler, esqs., came into the Senate and surrendered William Blount, esq., for whom they became bound yesterday.

On motion,

Resolved, That William Blount be taken into the custody of the Messenger of this House until he shall enter into recognizance, himself in the sum of $1,000, with two sufficient sureties in the sum of $500 each, to appear and answer such articles of impeachment as may be exhibited against him by the House of Representatives on Monday next.

A message was sent informing the House of Representatives of this action.[1]

On July 10 the Senate Journal records: [2]

Agreeably to the order of the Senate the within-mentioned William Blount having entered into recognizance, I have returned the same into the office of the Secretary of the Senate.

Ordered, That it be entered on the Journal of the Senate that William Blount failed making his appearance this day, agreeably to the recognizance entered into on the 8th instant.

2299. Blount's impeachment, continued.

A recess of Congress intervened between the impeachment of Blount and the framing of the articles of impeachment.

On July 10,[3] in the House, it was:

Ordered, That Mr. Dana be excused from serving on the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, and that Mr. Bayard be appointed of the said committee in his stead.

On July 10 the Congress adjourned until the second Monday in November next.

2300. Blount's impeachment, continued.

The committee appointed to prepare articles of impeachment in the Blount case reported the evidence, and later the articles.

The articles of impeachment in Blount's case were considered by the House and not by the Committee of the Whole.

After considering English precedents the House chose the managers of the Blount impeachment by ballot.

In choosing managers by ballot the House guarded against complications in case more than the required number should have a majority.

A manager in impeachment proceedings is excused from service by authority of the House.

The managers carry the articles of impeachment to the Senate in accordance with a resolution agreed to by the House.

On December 4, 1797,[4] at the second session of Congress, Mr. Sitgreaves from the committee appointed to prepare articles of impeachment, submitted a report from which the injunction of secrecy was removed, and which was read in

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[1] House Journal, p. 74.

[2] Senate Journal, p. 393; Annals, p. 44.

[3] House Journal, p. 75.

[4] Second session Fifth Congress, Journal, pp. 96, 97; Annals, pp. 672–679.

the House on December 5 and ordered to lie on the table. This report did not embody the articles of impeachment, but simply set forth the facts, documents, subpoenas, etc., resulting from the investigation.[1]

On January 18 and 22, 1798,[2] Mr. Sitgreaves submitted supplementary reports, one presenting an additional deposition and the other two letters received by the committee. They were read to the House and ordered to lie on the table.

On January 25, 1798,[3] Mr. Sitgreaves, from the committee, reported the articles of impeachment, which were considered in Committee of the Whole, and on January 29 were agreed to by the House.

Thereupon, on motion of Mr. Sitgreaves:

Resolved, That eleven managers be appointed, by ballot, to conduct the said impeachment on the part of this House.

As to the method of appointment there was some debate.[4]

Mr. Sitgreaves said, with respect to the manner of appointing managers, he left it to the discretion of the House. The British House of Commons appointed their managers of impeachment by ballot, as they did all their large committees. In this House a different course was taken with respect to committees; they were always appointed by the Speaker, except specially ordered otherwise. The former committee on this business was appointed by the Speaker. He was not disposed to deviate from the usual practice. If, however, any gentleman wished to move that they be appointed by ballot, such a motion, he supposed, would be in order.

Mr. Albert Gallatin, of Pennsylvania, thought the rule directing the appointment of committees did not apply in the present case. It was true that managers of conferences of the Senate were thus chosen, but he thought there was an essential difference between the two cases. Managers of conferences reported to the House similarly with committees, and in fact they were a committee, though called by a different name. But managers of an impeachment on the part of this House appeared to him to be quite a different thing. They were not to make a report to the House which might be affirmed or negatived; they were the representatives of the House, and what they did would be final. Under this impression, in order to take the sense of the House upon the business, he moved that the managers be elected by ballot.

The motion that the managers be appointed by ballot was agreed to by the House.

On January 30[5] Mr. Sitgreaves, in view of the fact that the House should determine whether the choice should be determined by majority or plurality, offered the following resolution, which was agreed to:

Resolved, That in the ballot for managers to conduct the impeachment against William Blount, on the part of this House, a majority of the whole number of votes shall be necessary to a choice; and if it should happen that more than eleven members shall have a majority, that, in that case, the eleven highest in votes shall be considered as chosen; and if any two or more having a majority of votes should be equal in number, so as that the plurality can not be determined among them, the same shall be decided by a new ballot, subject to the preceding rules.

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[1] For the report in full, with exhibits, see Annals, vol. 5, part 2, pp. 2319–2415.

[2] Journal, pp. 135, 144; Annals, pp. 847, 890.

[3] Journal, pp. 149–153; Annals, pp. 919, 947–951.

[4] Annals, p. 952.

[5] Journal, p. 154; Annals, p. 953.

Proceeding to ballot, the House, on this and the succeeding day, chose the following managers:

Messrs. Sitgreaves; James A. Bayard, of Delaware; Harper; William Gordon, of New Hampshire; Thomas Pinckney, of South Carolina; Dana; Samuel Sewall of Massachusetts; Hezekiah L. Hosmer, of New York; John Dennis, of Maryland; Thomas Evans, of Virginia; and James H. Imlay, of New Jersey.

Mr. Baldwin, who had been elected a manager, was excused by the House.

On February 2 [1] it was—

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of all the people of the United States against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

2301. Blount's impeachment continued.

The ceremonies of presenting to the Senate the articles of impeachment of William Blount in 1797.

Rules established by the Senate to prescribe ceremonies for receiving House managers presenting articles in Blount's case.

Form of proclamation made in the Senate on attendance of House managers to present articles of impeachment against William Blount.

Upon receiving notice from the House that the managers would present articles against William Blount, the Senate set a time and informed the House thereof.

The managers who presented the articles impeaching William Blount were attended by some Members of the House.

Announcement of the chairman of the House managers in presenting to the Senate the articles against William Blount.

The manager having read the articles impeaching William Blount, the Sergeant-at-Arms received them and laid them on the Senate table.

Form of declaration of Vice-President upon presentation of articles of impeachment in Blount's case.

On February 5,[2] in the Senate, the following rules were agreed to:

Resolved, That the Doorkeeper of the Senate be, and he is hereby, invested with the authority of Sergeant-at-Arms, to hold said office during the pleasure of the Senate, whose duty it shall be to execute the commands of the Senate, from time to time, and all such process as shall be directed to him by the President of the Senate.

Resolved, That for regulating the proceedings of the Senate in cases of impeachment the following rule be adopted, viz:

When the House of Representatives, or managers by them appointed for that purpose, shall attend the Senate to present articles of impeachment, the President of the Senate shall cause proclamation to be made in the form following, viz:

All persons are commanded to keep silence while the Senate of the United States are receiving articles of impeachment against—, on pain of imprisonment.

And shall then signify to the managers that the Senate are ready to receive the articles of impeachment, which, having been read by one of the managers, shall be received by the Secretary; and the managers shall thereupon be informed by the President that the Senate will take proper order on the subject, of which due notice will be given to the House of Representatives.

After which the Secretary shall read said articles of impeachment and enter the same on the Journals of the Senate.

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[1] House Journal, p. 160.

[2] Senate Journal, p. 433; Annals, p. 498.

On February 7,[1] in the Senate, a message, ordered to be sent by the House, was received from the House by its clerk, who said:

Mr. President: The House of Representatives have resolved that articles agreed by the House to be exhibited by them, in the name of themselves and of all the people of the United States, against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers, Messrs. Sitgreaves, Bayard, Harper, Gordon, Pinckney, Dana, Sewall, Hosmer, Dennis, Evans, and Imley, appointed to conduct the said impeachment.

On motion,

Resolved, That the Senate will, at 12 o'clock this day, be ready to receive articles of impeachment against William Blount, late Senator of the United States from the State of Tennessee, to be presented by the managers appointed by the House of Representatives.

This was the same day communicated to the House by a message borne from the Senate by its Secretary.[2]

Mr. Sitgreaves having stated that it was usual on all solemn occasions like this for the House to give sanction to its managers by an attendance at the time, the managers of the impeachment, accompanied by some of the Members of the House, accordingly went up to the Senate for the purpose of exhibiting the articles of impeachment against William Blount.[3]

Later, in the Senate,[4] a message was announced from the House of Representatives by the above-mentioned managers, who, being introduced, and all but the chairman being seated,[3] Mr. Sitgreaves, their chairman, addressed the Senate as follows:

Mr. Vice-President: The House of Representatives having agreed upon articles in maintenance of their impeachment against William Blount for high crimes and misdemeanors, and having appointed on their part managers of the said impeachment, the managers have now the honor to attend the Senate for the purpose of exhibiting the said articles.

The Vice-President then ordered the Sergeant-at-Arms to proclaim silence, after which he notified the managers that the Senate was ready to hear the articles of impeachment; whereupon,

The chairman of the managers read the articles of impeachment, and they were received from him at the bar by the Sergeant-at-Arms and laid on the table.

The Vice-President[5] then said:[3]

Gentlemen, managers on the part of the House of Representatives: The Senate will take such order on the articles of impeachment which you have exhibited before them as shall seem to them proper, of which due notice will be given to the House of Representatives.

Upon which the managers and Members attending then retired.

2302. Blount's impeachment continued.

The articles in impeachment of William Blount.

The articles in the Blount impeachment were signed by the Speaker and attested by the Clerk.

The articles of impeachment in the Blount case appear in the House Journal on the day of their adoption, and in the Senate Journal on the day of their presentation.

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[1] Senate Journal, p. 435; Annals, p. 498.

[2] House Journal, P. 163.

[3] Annals, p. 970.

[4] Senate Journal, p. 435; Annals, p. 499.

[5] Thomas Jefferson, of Virginia, Vice-President.

The Secretary of the Senate then read the articles of impeachment, as follows:

ARTICLES EXHIBITED BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, IN THE NAME OF THEMSELVES AND OF ALL THE PEOPLE OF THE UNITED STATES, AGAINST WILLIAM BLOUNT, IN MAINTENANCE OF THEIR IMPEACHMENT AGAINST HIM FOR HIGH CRIMES AND MISDEMEANORS.

ARTICLE 1. That, whereas the United States, in the months of February, March, April, May, and June, in the year of our Lord 1797, and for many years then past, were at peace with His Catholic Majesty, the King of Spain; and whereas, during the months aforesaid, His said Catholic Majesty and the King of Great Britain were at war with each other; yet the said William Blount, on or about the months aforesaid, then being a Senator of the United States, and well knowing the premises, but disregarding the duties and obligations of his high station, and designing and intending to disturb the peace and tranquillity of the United States, and to violate and infringe the neutrality thereof, did conspire, and contrive to create, promote, and set on foot, within the jurisdiction and territory of the United States, and to conduct and carry on from thence, a military hostile expedition against the territories and dominions of His said Catholic Majesty in the Floridas and Louisiana, or a part thereof, for the purpose of wresting the same from His Catholic Majesty, and of conquering the same for the King of Great Britain, with whom His said Catholic Majesty was then at war as aforesaid, contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof.

[Then follows article 2, reciting that the said William Blount "did conspire and contrive to excite the Creek and Cherokee nations of Indians then inhabiting within the territorial boundary of the United States, to commence hostilities against the subjects and possessions of His Catholic Majesty," and article 3, reciting that the said Blount did "further conspire and contrive to alienate and divert the confidence of the said Indian tribes or nations from the said Benjamin Hawkins, the principal temporary agent aforesaid, and to diminish, impair, and destroy the influence of the said Benjamin Hawkins with the said Indian tribes, and their friendly intercourse and understanding with him, contrary to the duty of his trust and station as a Senator of the United States, and against the ordinances and laws of the United States, and the peace and interests thereof;" and article 4, reciting a similar attempt to seduce James Carey from his duty; and article 5, reciting similar efforts to foment disaffection among the Cherokee Indians toward the Government of the United States.]

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter, any further articles, or other accusation, or impeachment, against the said William Blount, and also of replying to his answers, which he shall make unto the said articles, or any of them, and of offering proof to all and every the aforesaid articles, and to all and every other articles of impeachment, or accusation, which shall be exhibited by them, as the case shall require, do demand that the said William Blount may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials, and judgments may be thereupon had and given, as are agreeable to law and justice.

Signed by order and in behalf of the House.

JONATHAN DAYTON, *Speaker.*

Attest:

JONATHAN W. CONDY, *Clerk.*

These articles of impeachment appear in full in the Journals of both the House and Senate, in the House Journal on January 29,[1] the day of their adoption, and in the Senate Journal on February 7,[2] the day they were presented and read.

[1] House Journal, p. 151.

[2] Senate Journal, p. 435.

2303. Blount's impeachment continued.

Form of oath administered to Senators sitting for the impeachment of William Blount.

The Senate decided in the Blount impeachment that the oath might be administered by the Secretary and President without authority of law.

The Senate decided in the Blount impeachment that the Secretary, should administer the oath to the President, and the President to the Senators.

On February 9[1] the Senate considered the report of a committee appointed to determine the mode of administering oaths in cases of impeachment. This committee reported the following:

Resolved, That the oath or affirmation required by the Constitution of the United States to be administered to the Senate, when sitting for the trial of impeachment, shall be in the form following, viz:

"I. A B, solemnly swear (or affirm, as the case may be), that in all things appertaining to the trial of the impeachment of ——— ——— I will do impartial justice, according to law."

Which oath or affirmation shall be administered by the Secretary to the President of the Senate, and by the President to each member of the Senate.

On motion that the report be amended by adding thereto these words "and that a bill be brought in conformable thereto," there were yeas 8, nays 20. Then, by a vote of 22 yeas to 6 nays, the resolution was agreed to as reported. On February 14[2] the Senate postponed a bill regulating certain proceedings in case of impeachment, and on February 20 the bill failed to pass.

2304. Blount's impeachment, continued.

Form of the writ of summons issued for the appearance of William Blount to answer articles of impeachment.

Rule of the Senate prescribing method of service of writ of summons on William Blount.

In the Blount impeachment the Secretary was directed to serve the summons sixty days before the return day.

The Senate in its writ of summons in the Blount impeachment fixed respondent's appearance at the next session of Congress.

The Senate communicated to the House its form of summons in the Blount impeachment, and it was entered in the House Journal.

In the Blount impeachment the House, in conference, asked of the Senate an earlier return day of the summons, but the request was denied.

Instance of a conference on a subject of procedure in an impeachment.

On March 1[3] the Senate concluded consideration of the report made on February 27 by Mr. Samuel Livermore,[4] of New Hampshire, from the committee to whom the subject had been recommitted on February 23, and, by a vote of yeas 22, nays 5, agreed to it as follows:

The committee to whom was recommitted the report of the committee appointed to prepare rules of proceeding in the case of the impeachment against William Blount, report, in part, that a writ of summons issue, directed to the said William Blount, in the form following:

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[1] Senate Journal, p. 438; Annals, p. 503.

[2] Senate Journal, pp. 441, 448.

[3] Senate Journal, pp. 447, 448; Annals, p. 514.

[4] The other members of the committee were Messrs. James Ross, of Pennsylvania, and Richard Stockton, of New Jersey.

"UNITED STATES OF AMERICA, *ss:*

"The Senate of the United States of America to William Blount, late a Senator of the United States for the State of Tennessee, greeting: Whereas the House of Representatives of the United States of America did, on the 7th day of July last past, in their own name, and in the name of all the people of the United States, impeach you, the said William Blount, of high crimes and misdemeanors before the Senate of the United States: And whereas the said House of Representatives did, on the 7th day of February, of the present year, exhibit to the Senate their articles of impeachment against you, the said William Blount, charging you with high crimes and misdemeanors, therein specially set forth (a true copy of which articles of impeachment is annexed to this writ), and did demand that you, the said William Blount, should be put to answer the said crimes and misdemeanors; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice—you, the said William Blount, are therefore summoned to be and appear before the Senate of the United States of America, at their Chamber, in the city of Philadelphia, in the State of Pennsylvania, on the third Monday of December next, at the hour of 11 of that day, then and there to answer the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States shall make in the premises, according to the Constitution and laws of the said United States. And hereof you are in nowise to fail. Witness, the honorable Thomas Jefferson, esq., Vice-President of the United States of America, and President of the Senate thereof, at the city of Philadelphia, the 1st day of March, in the year of our Lord 1798, and of the independence of the United States the twenty-second.

"Which summons shall be signed by the Secretary of the Senate.

"That the said summons shall be served on the said William Blount by the Sergeant-at-Arms of this House, or a special messenger, who shall leave a true copy of the writ and the articles annexed with the said William Blount, if he can be found, showing him the original; or at the usual place of residence of the said William Blount, if he can not be found. Which messenger shall make return of the writ of summons, and of his proceedings in virtue thereof, to the Senate, on the appearance day therein mentioned.

"And that a message be sent to the House of Representatives, giving information that the Senate have directed the said writ to be issued, and of the day mentioned therein for the appearance of the said William Blount."

It was then

Resolved, That the Secretary of the Senate do issue the summons hereinbefore directed, and that service thereof be made sixty days at the least before the return day mentioned in the said writ of summons.

This report was communicated to the House by message and appears in full on the Journal of that body.[1] The following order was then agreed to:

Ordered, That the said proceedings of the Senate be referred to the managers appointed on the part of this House to conduct the said impeachment against William Blount, with instructions to inquire and report whether any, and, if any, what, provisions are necessary to be made by law for regulating proceedings in cases of impeachment.

On April 6[2] Mr. Sitgreaves, from the managers, reported the following resolutions, which were agreed to:

Resolved, That a conference be desired with the Senate on the subject of their resolution of the 1st of March last, relative to the impeachment of William Blount, and that the managers appointed to conduct the said impeachment be the managers for this House at the proposed conference.

Resolved, That the managers of this House do request, at the said conference, that the Senate will appoint a day, during the present session of Congress, for the return of the summons directed by their resolution of the 1st of March aforesaid, to be issued to the said William Blount.

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[1] House Journal, p. 211.

[2] House Journal, pp. 253, 254; Annals, pp. 1376, 1377.

On April 9,[1] in the Senate,

Resolved, That they do agree to the proposed conference, and that Messrs. Ross and Livermore be managers at the same on the part of the Senate.

On April 13,[2] Mr. Bayard, from the managers appointed on the part of the House, submitted the following report, which was laid on the table:

That they laid before the conferees appointed by the Senate the resolution of the 6th instant, requesting the appointment of a day during the present session of Congress for the return of the summons against the said William Blount, the reasons upon which the said resolution was founded; and were assured by the conferees that the said request and the reasons for making it, suggested by the managers, should be reported and submitted to the Senate.

This report was ordered to lie on the table.

In the Senate, on April 16,[3] Mr. Ross, from the conferees, made a report; whereupon, it was

Resolved, That it is not, at this time, expedient to alter the return day of the summons directed to be issued to William Blount, so as to make it returnable in the present session of Congress as requested by the managers of the House of Representatives, there being no certainty that it will continue long enough to afford reasonable time for a proper service and return of this process.

On April 16[4] this resolution was communicated to the House by message, and was read and ordered to lie on the table.

2305. Blount's impeachment, continued.

In Blount's impeachment the return of service of the summons was filed in the Senate before the day set for the appearance.

In the Blount impeachment a letter from respondent's attorneys announcing their readiness to attend was filed in the Senate before the day set for appearance.

In the Senate on December 6, 1798,[5] in the next and third session of the Congress, "the return of service on the summons to William Blount, made by the Sergeant-at-Arms, pursuant to the resolution of the Senate of the 1st of March last, was read." This is the entry of the Senate Journal, which does not give the return in full.

Then the President communicated a letter from Jared Ingersoll, esq., stating that he, together with A. J. Dallas, esq., were employed as counsel for William Blount, and that they were ready to attend the trial when ordered by the Senate. This letter does not appear in full in the Senate Journal.

2306. Blount's impeachment, continued.

A manager of an impeachment having accepted an incompatible office, the House chose a successor.

The chairman of managers of an impeachment having ceased to be a Member, the next in order succeeded to the chairmanship.

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[1] Senate Journal, p. 469; Annals, p. 537.

[2] House Journal, p. 261; Annals, p. 1412.

[3] Senate Journal, p. 472; Annals, p. 541.

[4] House Journal, p. 263.

[5] Third session Fifth Congress, Senate Journal, p. 558; Annals, p. 2190.

In the House, on December 13,[1] Mr. Harper, in the absence of Mr. Bayard, "the present chairman" of the managers,[2] offered the following, which was agreed to:

Resolved, That another Member be appointed, by ballot, as one of the managers to conduct the impeachment against William Blount, in the room of Mr. Sitgreaves, appointed a commissioner of the United States, under the sixth article of the treaty of amity, commerce, and navigation, with Great Britain.

The House accordingly chose Mr. John Wikes Kittera, of Pennsylvania.

2307. Blount's impeachment, continued.

The Senate, by message, informed the House that the summons had been served on William Blount and a return made thereon to the Secretary's office.

Rules adopted by the Senate for reading the return, calling the respondent, and entering appearance or default in the first impeachment.

In the first impeachment the Senate by rule described itself as a court of impeachment.

Impeachment trials in the Senate have from the first been recorded in a separate journal.

Form used by the Sergeant-at-Arms in calling William Blount to appear and answer articles of impeachment.

Form of return of writ of summons in Blount impeachment.

William Blount appeared neither in person nor by attorney to answer the articles of impeachment.

The House did not attend the return of summons to William Blount to appear and answer articles of impeachment.

In the Senate on December 13:[3]

Ordered, That the Secretary notify the House of Representatives that the summons issued by order of the Senate of the United States against William Blount, on the 1st day of March last, to appear at their bar on the third Monday of December instant and answer to the impeachment made by the House of Representatives, for high crimes and misdemeanors, has been duly served on the said William Blount by the Sergeant-at-Arms, and a return thereon is made to the office of the Secretary of the Senate.

This message was received in the House on the same day.

On December 17,[4] in the Senate, Messrs. James Ross, of Pennsylvania; Jacob Read, of South Carolina, and Samuel Livermore, of New Hampshire, were appointed to report rules for conducting the trial of impeachment and reported—

That the legislative and executive business of the Senate be postponed, and that the Senate form itself into a court of impeachment by taking the oath prescribed by a resolution of this House on the 9th of February, last.

After the oath has been administered to the President and Senate, the process which, on the 1st of March last, was directed to be issued and served upon William Blount, and the return made there-

[1] Third session Fifth Congress, House Journal, p. 406; Annals, pp. 2440, 2441.

[2] Mr. Bayard was second on the committee of managers and apparently succeeded to the position without election, although such usage was not incorporated in the rule until 1804.

[3] Senate Journal, p. 563; Annals, p. 2194.

[4] Senate Journal, p. 565; Annals, p. 2196.

upon, shall be read. The officer who served the process shall be sworn to the truth of the return thereof. The defendant, William Blount, shall be called to appear and answer the articles of impeachment exhibited against him. If he appears, his appearance shall be recorded. If he does not appear, his default shall be recorded.

The House of Representatives shall be notified of the appearance or default of the defendant, William Blount, and that the Senate will be ready at 12 o'clock to-morrow to receive the managers appointed by that House, and to take further order in this trial.

The report was adopted, and the Senate "formed itself into a court of impeachment accordingly." The daily Journal of the Senate does not record the proceedings of the court of impeachment, but they were as follows on this day: [2]

On this day the Senate formed itself into a high court of impeachment, in the manner directed by the Constitution, and the oath prescribed was administered to the Senators present. The process issued on the 1st of March last against William Blount, together with the return made thereon, was read, and the return was sworn to as follows:

"James Mathers, Sergeant-at-Arms of the Senate of the United States, maketh oath that, in obedience to the within summons, he did repair to the usual place of residence of the within-named William Blount, at Knoxville, in the State of Tennessee, and on the 27th day of August, in the present year, did then leave a true copy of the said writ of summons, and of the articles of impeachment annexed, with the wife of the said William Blount, he not being to be found; and that, on the next day, meeting with the said William Blount at the Blue Springs, the deponent showed and read the said original writ to the said William Blount, and informed him that he had left a copy at the usual place of his residence.

"JAMES MATHERS."

The doors of the court were then opened by order of the President, and by his order the Sergeant-at-Arms called the said William Blount three several times, in the words following, to appear and answer:

"Hear ye! Hear ye! Hear ye!

"William Blount, late a Senator from the State of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives."

William Blount not appearing, the court adjourned till 12 o'clock to-morrow.

2308. Blount's impeachment, continued.

The House being informed that William Blount had failed to appear and answer the articles, instructed the managers to ask of the Senate time to prepare proceedings.

After William Blount had failed to appear and answer, counsel were admitted on his behalf.

William Blount having failed to appear and answer, the House, after discussing English precedents, declined to ask that he be compelled to appear.

The House declined to instruct its managers as to further proceedings after William Blount had failed to appear and answer.

In the House on December 18,[3] a message was received from the Senate notifying the House that William Blount, impeached of high crimes and misdemeanors before the Senate, by this House, though he had been duly summoned, had not

[1] The Senate kept in journal form a "Record of the Proceedings of the High Court of Impeachment on the Trial of William Blount," which was published separately at a later date. Senate Journal, Eighth Congress, pp. 484–491.

[2] Annals, p. 2245.

[3] House Journal, p. 415; Annals, p. 2458.

appeared at the bar of the Senate at the time appointed; and that the Senate would be ready to receive the managers at 12 o'clock this day, to take further order in this trial.

On motion of Mr. Harper, this message was referred to the managers of the impeachment, who had leave to sit during the session of the House.

Later, on the same day, Mr. Harper reported, and in accordance therewith it was—

Resolved, That the said managers do attend before the Senate, at 12 o'clock this day, and request a further day for preparing their proceedings in the said impeachment.

In the Senate, on December 18,[1] Messrs. Ross, Livermore, and Stockton were appointed a committee to take into consideration and report what rules were necessary to be adopted on the trial of the impeachment.

On the same day the Senate resolved itself into a court of impeachment, wherein occurred the following proceedings: [1]

The President communicated a letter, signed "Jared Ingersoll and A. J. Dallas," praying to be admitted to appear as counsel for the defendant. It was accordingly so ordered, and that the House of Representatives be informed thereof.

The managers on the part of the House of Representatives and the defendant's counsel appeared at the bar.

On motion of Mr. Harper (in the absence of Mr. Bayard, the chairman), in behalf of the managers, that further time be allowed them to prepare their proceedings in the case, it was,

"Ordered, That they have time till Monday next, at 12 o'clock, for that purpose."

The court adjourned till that time.

In the House, on December 20,[2] Mr. Harper submitted the report of the managers, which was as follows:

That, pursuant to the resolution of this House, of the 18th instant, they did attend before the Senate of the United States, and request a further day for preparing their proceedings in the said impeachment; whereupon, a further day was granted till Monday next, at 12 o'clock.

That the managers, having carefully considered the subject, are of opinion that it is neither consistent with the solemnity which ought to attend this high constitutional proceeding, nor with the principles, which, as far as they have been able to discover, have invariably obtained in impeachments, and all other trials of a criminal nature, to proceed to trial against the defendant in this case in his absence;, and that the said William Blount, having failed to make personal appearance, as has been notified to the House by the above-mentioned message from the Senate, the next step, on the part of this House, ought to be a motion before the Senate that further order be taken by them for compelling his personal appearance at their bar, to answer to the articles of impeachment exhibited against him by this House.

The managers, however, do not think it proper for them to take a step involving so important a principle without the direction of the House, for the purpose of obtaining which, they beg leave to submit to its consideration the following resolution:

"Resolved, That the managers appointed, on the part of this House, to conduct the impeachment against William Blount, late a Senator of the United States, be instructed to request, at their next attendance before the Senate, that further order be taken for compelling the personal appearance of the said William Blount, to answer to the articles of impeachment exhibited against him on the part of this House."

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[1] Annals, p. 2245.

[2] House Journal, pp. 416, 417; Annals, pp. 2469–2487.

On the next day the House debated the report at length. It appeared that the managers were nearly unanimous in favor of their report, but it was vigorously assailed in the House. Mr. Harrison G. Otis, of Massachusetts, opposed:

Mr. Otis said he did not know what had been the rule observed in similar cases in England; he had not had leisure to examine; nor did he think we ought to be bound by British precedents in a case of this kind. It is, said he, a new case, and he saw no difficulty in determining to prosecute this man to conviction, and in obtaining for him the punishment which he deserves. There is some analogy between this process and a process (well known in common law) against a man's property, distinct from his person. Every one knows that such a prosecution is a prosecution of forfeiture. For instance, we libel a vessel, and notice is given to all the parties to defend. If they do not appear, judgment and execution are obtained.

The present process is against the office of William Blount; it has nothing to do with his person; he is afterwards liable to a prosecution at common law for any crime which he may have committed.

Mr. Samuel W. Dana, of Connecticut, also supported this view:

Let gentlemen who say that a person, in a case like the present, should be required to appear, answer, if a sentence can neither affect a man's person nor his property, why he should appear in person? If a man were liable to be punished with imprisonment, fine, or ransom, his person ought to be secured; and it is because courts will have security, that in such cases persons are either imprisoned or held by efficient bail is refused, it is where it does not afford a sufficient security. Is any such security required in this case? asked Mr. Dana, There is not. The process would be a rare one if the party were required to appear.

The Constitution, continued Mr. Dana, has proceeded on a different principle. The process in cases of impeachment in this country is distinct from either civil or criminal—it is a political process, having in view the preservation of the Government of the Union. Impeachments under the British Government are wholly different from impeachments carried on under this Government. The Constitution proceeds on the high authority of public opinion and of the high value of reputation to every man who is a candidate for public office, and that the declaration of public reprobation, expressed by the constitutional organ, is one of the severest punishments. It considers that the punishment of fine and imprisonment may be endured, but that public abhorrence is not to be borne.

The punishment in this case therefore is wholly a declaration of public opinion, not only that the person receiving it has proved himself unworthy of his present office, but that there is such a baseness attached to his character as to render him unfit for any office in future. Taking the matter up in this view, the propriety of not considering the offense as criminal will clearly appear. Were the offense to be considered as a crime merely, the judgment of the court should involve the whole punishment; whereas, it has no connection with punishment or crime, as, whether a person tried under an impeachment be found guilty or acquitted, he is still liable to a prosecution at common law. This process therefore is perfectly sui generis—equally unknown to the British Government or to this country.

Upon this view of the subject, Mr. Dana said his opinion was, that the House ought to instruct the managers, but in a way directly opposite to that proposed by the resolution under consideration.

Mr. Dana also cited the case of Robert Tresylliam and others, tried before the British House of Lords in 1388, in support of his opinion, but it was alleged in opposition that this precedent had been highly censured by English law writers.

Mr. Harper defended the report of the managers:

It had been the practice, from the earliest records of our jurisprudence to the present time, that a man shall never be tried in his absence for a criminal offense. Gentlemen say the reason of this is, that he may be ready to receive judgment. If so, it would be foolish, because the court might direct the person of a criminal to be brought before them to receive sentence as well as they could do it before his trial. What, then, said he, is the reason? Ask the great sages of the English law, and they will give an answer very different from his learned friends. They will say that it is because a man ought always to be face to face with his judges and accusers; that no witness ought to be heard against a man, or his life or property put in jeopardy, without his personal presence; and so sacred is the principle held that a man is not permitted to depart from it. This is not a solitary instance in which personal

convenience is sacrificed to natural convenience; this is frequently the case, in order to make sure the barriers which protect individual security. It is in this respect that our jurisprudence is chiefly distinguished from the inquisitorial proceedings of former times, where a man might be found guilty of the highest crimes without knowing who were his accusers, witnesses, or judges. It is by this sacred maxim that no man can be put in jeopardy without being confronted by his accusers. And shall we, said he, depart from this principle? Why shall we do this? Because the judgment to be awarded in this case does not extend to person or property? Is the judgment less than if it affected person of property? Gentlemen will not say so. They will say that a man's reputation is the dearest possession which he can enjoy; and certain he was that gentlemen who are opposed in opinion to him on this subject would sooner be deprived of their property or personal liberty than lose their fame and reputation. It was, in his opinion, the highest punishment that could be inflicted upon a man of worth.

The House disagreed to the resolution proposed by the managers, yeas 11, nays 69.

Mr. Samuel Sewall, of Massachusetts, one of the managers, in order that there might be positive instructions from the House, proposed this resolution:

Resolved, That the managers appointed on the part of this House for conducting the impeachment against William Blount proceed in the prosecution of the said impeachment, although William Blount should not appear in person to answer to the same.

It was urged against this resolution that it was improper to give any instructions at all and that the Senate should be left to proceed as they should think proper.

The resolution was disagreed to, ayes 37, noes 46.

2309. Blount's impeachment, continued.

Rule adopted by the Senate for the trial of William Blount in 1797.

The rule providing for the putting in of the answer or plea in the Blount case.

The rules in the Blount case provided that respondent's answer should be communicated to the House of Representatives.

The Senate rules in the Blount case required that respondent's answer should be spread on the journal.

The Senate rules in the Blount case provided that all questions arising should be decided in secret session and by yeas and nays.

Form of oath and mode of examination of witnesses prescribed in the Blount impeachment.

It was provided in the Blount case that Senators called as witnesses should be sworn and testify standing in their places.

The Senate communicated to the House its rules for the trial of William Blount; and they appear in the House Journal.

The Senate decided that the counsel for William Blount need not file any warrant of attorney or other written authority.

During proceedings in impeachment before the Senate the President pro tempore presides during temporary absence of the Vice-President.

In the Senate, on December 20,[1] Mr. Ross, from the committee appointed to prepare rules, made a report which, after amendment, was on December 21 agreed to, as follows:

Resolved, That at the next opening of the court of impeachment the President shall inquire whether the managers have any request to make before the counsel of the defendant are called on to put in his answer.

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[1] Senate Journal, p. 566; Annals, p. 2197.

If no motion or request is made, the defendant's counsel shall be required to put in his answer or plea to the articles of impeachment.

The answer or plea shall be read by the Secretary and entered by him on the Journal.

A copy of the defendant's answer or plea shall be communicated to the House of Representatives by the Secretary.

The President shall then inform the managers that the Senate is ready to hear any reply or motion which they may think proper to make.

All questions, arising in the course of the trial, shall be decided with closed doors. The decisions shall be by ayes and noes, which shall be entered upon the Journal. When the question is decided, the doors shall be opened, the parties called in, and the result made known to them by the President.

Witnesses shall be sworn by the Secretary, and shall take the following oath:

"I, A, B, do swear (or affirm, as the case may be) that the evidence I will give to this court, touching the impeachment of William Blount, now here depending, shall be the truth, the whole truth, and nothing but the truth. So help me God."

Witnesses shall be examined by the party producing them, and then cross-examined in the usual form. If a Senator wishes any question to be asked, it shall be put by the President.

If Senators are called as witnesses, they shall be sworn, and give their testimony standing in their places.

It was also—

Ordered, That the Secretary inform the House of Representatives that the Senate, taking into their care the ordering of the trial of William Blount, late a Senator of United States from the State of Tennessee, on Monday, the 24th of December instant, have prepared some rules to be observed at said trial, which they have thought fit to communicate to the House of Representatives.

The message was accordingly delivered in the House, and the rules appear in full in the House Journal of December 21.[1]

On December 24[2] the Senate resolved themselves into a court of impeachment whereupon the proceedings were as follows:

The managers and counsel attended as on the 18th instant.

On the motion of Mr. Harper, in behalf of the managers, that the counsel exhibit and file the power, or powers, by which they are authorized to appear in behalf of William Blount, and that the managers be furnished with a copy thereof.

Mr. Dallas, one of the counsel, exhibited sundry letters to the President, which, he alleged, contains the powers and also the confidential instructions of Mr. Blount to his counsel.

The court was cleared in order to take into consideration the motion made by the managers of the impeachment; and, on the motion that it be ruled,

"That the court having, on the 18th day of the present month, admitted Jared Ingersoll and A. J. Dallas, esqs., to appear and plead for William Blount, to the impeachment now pending against him, and the court having then been satisfied that the said counsel were duly authorized to appear for the said William Blount, are of opinion that it is not necessary that any warrant of attorney, or other written authority, be now filed in this court."

It was determined in the affirmative, 20 to 2.

The managers and counsel being again admitted, the President[3] stated to them the opinion of the court on the motion of the managers, and returned to Mr. Dallas the letters by him exhibited, unopened.

The President then asked the managers if they had further motion to make prior to permission to the counsel for the defendant to file a plea on his behalf.

To which the managers replied in the negative.

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[1] House Journal, p. 416.

[2] Annals, p. 2246.

[3] It is evident that in the absence of the Vice-President the President pro tempore presided. The Vice-President had not attended this session at this time. Senate Journal, p. 567.

2310. Blount's impeachment, continued.

The plea filed by counsel of William Blount in answer to the articles of impeachment.

William Blount, in his plea, demurred to the jurisdiction of the Senate to try him on impeachment charges.

William Blount pleaded that he was not, at the time of pleading, a Senator; and that a Senator was not impeachable as a civil officer.

The plea of William Blount being received by the House of Representatives, was referred to the managers.

Whereupon the President notified to the counsel that they were permitted to file their plea, which was done by Mr. Ingersoll and read by the Secretary as follows:

UNITED STATES *v.* WILLIAM BLOUNT.

UPON IMPEACHMENT OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, OF HIGH CRIMES AND MISDEMEANORS.

IN THE SENATE OF THE UNITED STATES, DECEMBER 24, 1798.

The aforesaid William Blount, saving and reserving to himself all exceptions to the imperfections and uncertainty of the articles of impeachment, by Jared Ingersoll and A. J. Dallas, his attorneys, comes and defends the force and injury, and says, that he, to the said articles of impeachment preferred against him by the House of Representatives of the United States, ought not to be compelled to answer, because he says that the eighth article of certain amendments of the Constitution of the United States, having been ratified by nine States, after the same was, in a constitutional manner, proposed to the consideration of the several States of the Union, is of equal obligation with the original Constitution, and now forms a part thereof, and that by the same article it is declared and provided, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

That proceedings by impeachment are provided and permitted by the Constitution of the United States, only on charges of bribery, treason, and other high crimes and misdemeanors, alleged to have been committed by the President, Vice-President, and other civil officers of the United States, in the execution of their offices held under the United States, as appears by the fourth section of the second article, and by the seventh clause of the third section of the first article, and other articles, and clauses contained in the Constitution of the United States.

That although true it is, that he, the said William Blount, was a Senator of the United States, from the State of Tennessee, at the several periods in the said articles-of impeachment referred to; yet, that he, the said William, is not now a Senator, and is not, nor was at the several periods, so as aforesaid referred to, an officer of the United States; nor is he, the said William, in and by the said articles, charged with having committed any crime or misdemeanor, in the execution of any civil office held under the United States, or with any malconduct in civil office, or abuse of any public trust, in the execution thereof.

That the courts of common law, of a criminal jurisdiction, of the States, wherein the offenses in the said articles recited are said to have been committed, as well as those of the United States, are competent to the cognizance, prosecution, and punishment, of the said crimes and misdemeanors, if the same have been perpetrated, as is suggested and charged by the said articles, which, however, he utterly denies. All which the said William is ready to verify, and prays judgment whether this high court will have further cognizance of this suit, and of the said impeachment, and whether he, the said William, to the said articles of impeachment, so as aforesaid preferred by the House of Representatives of the United States, ought to be compelled to answer.

JARED INGERSOLL.
A. J. DALLAS.

On request of Mr. Harper, in behalf of the managers, that they be allowed a further delay, to wit, until Thursday sennight, to file their replication, it was allowed and the court adjourned to that time.

On December 26[1] a message from the Senate, by their Secretary, announced:

Mr. Speaker, the counsel in behalf of William Blount, by permission of the Senate, having filed their plea, I am directed to communicate a copy thereof to the House of Representatives.

This plea, as above given, appears in full in the Journal of the House. It does not appear from the Senate Journal that the Senate itself ordered this message sent. If the court of impeachment ordered it sent, the fact is not noted in the proceedings. But under the rule the Secretary would send it without further order of the Senate or court.

The House:

Ordered, That the said message be referred to the managers appointed on the part of this House to conduct the impeachment against William Blount, with instructions to proceed thereon as they shall deem advisable.

2311. Blount's impeachment, continued.

The House sent to the Senate a replication to respondent's plea; and his counsel presented a rejoinder.

The replication of the House was signed by the Speaker and attested by the Clerk.

In the Blount impeachment the rejoinder on behalf of respondent was signed by his attorneys.

In the Blount impeachment the replication was presented by the House managers, but was read by the Secretary of the Senate.

In the Blount impeachment the Senate dispensed with the requirement for yeas and nays on questions of adjournment and on allowing further time for the parties.

On December 31,[2] in the House, Mr. Bayard, from the managers appointed on the part of this House to conduct the impeachment against William Blount, to whom was referred, on the 26th instant, a message from the Senate communicating a copy of the plea filed by the counsel in behalf of the said William Blount, with instructions to proceed thereon, as they shall deem advisable, made a report, which he delivered in at the Clerk's table, where the same was twice read and agreed to by the House, as follows:

That the replication annexed be put into the said plea on behalf of this House, and that the managers be instructed to proceed to maintain the said replication at the bar of the Senate, as such time as shall be appointed by the Senate:

"The replication of the House of Representatives of the United States, in their own behalf, and also in the name of the people of the United States, to the plea of William Blount, to the jurisdiction of the Senate of the United States, to try the articles of impeachment exhibited by them to the Senate against the said William Blount:

"The House of Representatives of the United States, prosecuting, on behalf of themselves and the people of the United States, the articles of impeachment exhibited by them to the Senate of the United States against the said William Blount, reply to the plea of the said William Blount, and say, that the matters alleged in the said plea are not sufficient to exempt the said William Blount from answering the said articles of impeachment, because they say that, by the Constitution of the United States, the House

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[1] House Journal, p. 419; Annals, p. 2491.

[2] House Journal, p. 423; Annals, p. 2551.

of Representatives had power to prefer the said articles of impeachment, and that the Senate have full and the sole power to try the same: Wherefore, they demand that the plea aforesaid of the said William Blount be not allowed, but that the said William Blount be compelled to answer the said articles of impeachment."

It does not appear from the Journals of either the Senate or House that this replication was transmitted to the Senate by message before it was presented in the court of impeachment by the managers.

In the Senate, on January 3, 1799,[1] it was

Resolved, That in all questions of adjournment of the court of impeachment, as also in all questions on a motion that further time be allowed to the parties, the taking the question by yeas and nays be dispensed with.

Also on January 3 the Senate resolved itself into a court of impeachment, the proceedings of which are recorded: [2]

The court being opened, and the managers and counsel being present,

Mr. Bayard, chairman of the managers, in behalf of the House of Representatives, offered a replication, which was read by the Secretary as follows:

"The replication of the House of Representatives of the United States, in their own behalf. [Here follows the text of the replication as given above.]

"Signed by order, and in behalf of the House.

"JONATHAN DAYTON, *Speaker.*

"Attest:

"JON. W. CONDY, *Clerk.*"

Mr. Ingersoll, counsel for the defendant, thereupon presented a rejoiner, which was read by the Secretary, as follows:

"UNITED STATES *v.* WILLIAM BLOUNT.

"In the Senate of the United States.

"And the aforesaid William Blount, by Jared Ingersoll and Alexander J. Dallas, his attorneys, Says that the matter by him before alleged, which he is ready to verify, is sufficient reason in law to show that this court ought not to hold jurisdiction of the said impeachment, and the articles therein set forth; which said matter so as aforesaid by him alleged, the said House of Representatives not having denied or made answer thereto, he prays the judgment of this honorable court, whether they will hold further jurisdiction of the said impeachment or take cognizance thereof, and whether the said William Blount shall make further answer thereto.

"JARED INGERSOLL.
"A. J. DALLAS.

"January 3, 1799."

It does not appear that this rejoinder was transmitted by message to the House.

2312. Blount's impeachment, continued.

In the Blount impeachment it was arranged that the managers should open and close in arguing respondent's plea in demurrer.

Mr. Bayard, the chairman, having communicated with Mr. Ingersoll, the leading counsel for the defendant, it was agreed between them that the managers should proceed in the argument first on the part of the prosecution, and that the right to reply should belong to the managers, whereupon,

Mr. Bayard rose and proceeded.

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[1] Senate Journal, p. 568; Annals, p. 2199.

[2] Annals, p. 2248.

At the conclusion of his address Mr. Ingersoll, on behalf of the defendant, moved [1] for further time to reply, and it was allowed until 11 o'clock the next day to which time the court adjourned.

On January 4,[1] the court having convened, Mr. Dallas, in behalf of the defendant, spoke during that day's sitting.

On January 5 [2] the court convened again, Mr. Ingersoll speaking further in defense. Mr. Ingersoll having concluded, Mr. Harper,[3] of the managers, closed.

After Mr. Harper had closed his observations, the Vice-President inquired of the managers if they had any further observations to offer, on which Mr. Bayard, in their behalf, requested permission to withdraw for a few moments; and, returning into the court, he replied in the negative.

The argument touched upon five points, although on two of these little stress was laid.

2313. Blount's impeachment continued.

Discussion as to the right to demand a trial by jury in a case of impeachment.

(1) The plea of the respondent had set forth that the power of impeachment as established in the original Constitution had been limited by the eighth amendment. Mr. Bayard, of the managers, answering this, contended that it had no bearing on the question of jurisdiction in this case, whatever it might have should there be a trial. But he further urged that if the contention of the plea were well founded there would be an end of the judicial character of the Senate and it must part with the power expressly given it by the Constitution to try all impeachments. The same rule of construction would require jury trials in courts-martial.[4]

In reply on this point Mr. Dallas, speaking for the respondent, said:

> The honorable manager had misunderstood the object of the plea when he supposed it asserted a right to a trial by jury in cases properly impeachable, since the clause to which he referred was merely inserted to show that, unless this was a case in which an impeachment would lie, the party was entitled to a trial by jury in the ordinary courts having cognizance of the matters charged.

2314. Blount's impeachment continued.

Argument that impeachment should not fail simply because the offense may be within jurisdiction of the courts.

(2) The plea that the courts of law were competent to try the cause was answered by Mr. Bayard [1] by calling attention to the fact that no court at common law could give judgment of disqualification; and that was the just punishment for the offenses alleged.

He also said:

> In the second place, if the suggestion were true it would not be effectual, because by the seventh clause of the seventh section of the first article of the Constitution delinquents shall be liable both to the punishment upon impeachment and that inflicted in the courts of common law. It is no objection to say that the courts have cognizance of the offense, because it is expressly provided that the one punishment shall not be an exemption from the other.

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[1] Annals, p. 2262.

[2] Annals, p. 2278.

[3] Annals, p. 2318.

[4] Annals, p. 2250.

2315.—Blount's impeachment continued.

In the Blount impeachment the managers contended, although in vain, that all citizens of the United States were liable to impeachment.

The law of Parliament was referred to in 1797 in discussing the power of impeachment.

(3) The first point of essential importance in the contending arguments of managers and counsel related to the nature of the power of impeachment. Mr. Bayard showed that in no places had the Constitution defined the cases or described the persons who should be objects of impeachment.[1] This, like other portions of the Constitution, left one to seek in the common law the answer to the questions.

The question,[2] therefore, is, what persons, for what offenses, are liable to be impeached at common law? And I am confident, as to this point, the learning and liberality of the counsel will save me the trouble of argument, or the citation of authorities, to establish the position that the question of impeachability is a question of discretion only, with the Commons and Lords. Not that I mean to insist that the Lords have legal cognizance of a charge of a capital crime against a commoner, but simply that all the King's subjects are liable to be impeached by the Commons, and tried by the Lords, upon charges of high crimes and misdemeanors. And this, sir, goes to the extent of the articles exhibited against William Blount. And for my part I do not conceive it would have been sound policy to have laid any restriction as to person upon the power of impeaching.

It is not difficult to imagine a case in which the punishment it imposes would be the most suitable which could be inflicted. Let us suppose that a citizen not in office, but possessed of extensive influence, arising from popular arts, from wealth or connections, actuated by strong ambition, and aspiring to the first place in the Government, should conspire with the disaffected of our own country, or with foreign intriguers, by illegal artifice, corruption, or force, to place him in the Presidential chair. I would ask, in such a case, what punishment would be more likely to quell a spirit of that description than absolute and perpetual disqualification for any office of trust, honor, or profit under the Government; and what punishment could be better calculated to secure the peace and safety of the State from the repetition of the same offense?

Mr. Dallas, counsel for the respondent, combated this proposition at length. It was contrary to the "principles of the Federal Compact:"[3]

For although it is in some of its features Federal, in others it is consolidated; in some of its operations it affects the people as individuals; in others it applies to them in the aggregate as States; yet, in every view, all the powers and attributes of the National Government are matters of express and positive grant and transfer; whatever is not expressly granted and transferred must be deemed to remain with the people, or with the respective States; and as the motive for establishing the Federal Constitution arose from the want of a competent national authority in cases in which it was essential for the people inhabiting the different States to act as a nation, so far the people gave power to the Federal Government; but the delegation of that power is evidently limited by the reason which produced it.

Mr. Dallas asserted that the United States, as a nation distinguished from the States, had no common law, and that it would be unwise to apply the theory of impeachments taken "from the dark and barbarous pages of the common law" to the existing situation, since it would render the Government dependent upon the laws and usages of a foreign country. The same doctrine would also give the Federal courts jurisdiction beyond the enumerated cases. The doctrine was also inconsistent with the general policy of the law of impeachments, which was to afford a means of reaching offenders who could not be reached by the ordinary

[1] Annals, p. 2251.

[2] Annals, p. 2254.

[3] Annals, p. 2263.

tribunals. The doctrine was also inconsistent with a fair construction of the terms of the Constitution itself:

The operative words[1] are express: "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."—Art. 2, sec. 4. The previous clauses are only descriptive of the power and distributive of its exercise; declaring that the sole power to institute and the sole power to try impeachments shall belong to the branches of the Legislature respectively. They contain no description of the persons liable to impeachment, nor of the offenses for which the impeachment may be brought. To suppose that they include a jurisdiction over all persons, for all offenses, is to annihilate the trial by jury where a punishment more severe than death to an honorable mind may be inflicted; it is to overthrow all the barriers of criminal jurisprudence; for every petty rogue may be tried by impeachment before this high court for every offense within the indefinite classification of a misdemeanor.

The reason of the thing, as well as the expression, shows, however, that the offender must be a civil officer to vest the jurisdiction of impeachment. For every other offender a competent punishment is provided in the ordinary tribunals; but, in the case of a public officer, no sentence strictly judicial, in any common law court, can affect the tenure of his office. In the business of offices, to appoint, to reappoint, or to abstain from reappointing are attributes and exercises of Executive authority; the ordinary judicial authority can not exercise them, nor restrain or regulate their exercise by the proper magistrate. Hence arose the necessity of the judgment in case of a conviction on impeachment, which, by declaring that the delinquent officer shall be removed, and that he shall never be reappointed, affixes, in effect, a check or limitation to the general power of the Executive.

But, if civil officers are not exclusively contemplated, why limit the judgment on impeachment simply to a removal and disqualification? The common law maxim says that no man shall be twice tried for the same offense; and if the Senate may, on any charge against any offender, try the whole merits of the accusation and defense, why restrain them from pronouncing the whole judgment? Why multiply trials, and parcel out jurisdictions, when one trial, one jurisdiction, would accomplish every purpose of justice? There is an appearance of absurdity in the doctrine that can not be overlooked. A private citizen who holds an office may be impeached on the speculation that, at some period of his life, it is possible he should be appointed a public officer. And if any sentence is pronounced it must, in his case, be a perpetual disqualification; whereas, in the case of a man actually in office, the sentence may only extend to a present removal.

Again, if the bare designation of the party who should impeach, and of the party who should try impeachments, creates a jurisdiction over all persons for all offenses, why should the subsequent clause specially name the President, Vice-President, and all civil officers of the United States? They would certainly be included in the general authority; and it can be no answer to say that it was with a view, imperatively, to command their removal on conviction, because the restricted judgment of the Senate points emphatically at their case—a removal from office and a perpetual disqualification. Would not those officers be removed or disqualified for any offense for which a private citizen might be disqualified on impeachment, though it is not one of the enumerated offenses? It is here, likewise, to be remarked that the persons subject to removal are to be "civil officers of the United States," excluding all idea of affecting the station of State officers; and yet State officers as well as private citizens are liable to impeachment before this Senate, according to the present claim of jurisdiction.

Mr. Ingersoll also argued on this point in support of the contention of his colleague.

In concluding for the managers, Mr. Harper replied:[2]

The learned counsel who first replied to my colleague took great pains and displayed much ability to show the pernicious and absurd consequences which would result from adopting the penal common law of England, or the penal code of any State, as a rule of conduct for the Federal Government. But this was merely fighting a phantom; for my colleague contended for no such thing, nor is it in the least necessary for our purpose. We do not wish the Federal Government to adopt the penal laws of England

[1] Annals, p. 2267.

[2] Annals, p. 2298.

or of any particular State in the Union, but we contend that when a term, borrowed from the law of England, is introduced without comment or explanation into our Constitution or our statutes, every question respecting the meaning of that term must be decided by a reference to the code from whence it was drawn in the same manner as a term in chemistry, or any other science, being introduced into one of our statutes or constitutions, must be explained by a reference to the writers on that science. Surely this is a different thing from adopting the penal code of England or of any particular State as a rule of conduct for the Federal Government.

Mr. Harper further said: [1]

Nor can I conceive how the universal extent of the power of impeachment, contended for by my honorable colleague, is contrary to the spirit, the objects, or the policy either of the law of impeachment or of the Federal Constitution. The use of the law of impeachment is to punish, and thereby prevent, offenses which are of such a nature as to endanger the safety or injure the interests of the United States; and the object of the Federal Constitution was to provide for that safety and to protect those interests. Such offenses may be committed as well by persons out of office as by persons in office; and although the punishment can go no further than removal and disqualification, which restriction was, perhaps, wisely introduced in order to prevent those abuses of the power of impeachment which had taken place in another country, yet it may often be extremely important to prevent such offenders from getting into office, as well as to remove them when they are in; and it is, therefore, as consistent with the policy of impeachments and the principles of the Federal compact to punish them in the one case as in the other. This doctrine, it is further said, would enable Congress to interfere with the State governments by impeaching their officers. But those impeachments must be founded on offenses against the United States; and if such offenses were committed by State officers, I can not see why they ought not to be punished as well as in any other case. Surely they would not be less dangerous. If the convictions in such impeachments could remove men from State offices, or disqualify them for holding such offices, there might be something in the objection; but that could not be the case, since the removal and disqualification apply to offices under the General Government alone. * * * But the learned counsel for the defendant have told us that the power of impeachment is limited in the Constitution itself by the restriction which it imposes on the power of punishment. The power of punishment on conviction by impeachment is restricted, say they, to "removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the United States;" and it would be absurd to impeach, try, and convict a man who held no office from which he could be removed, and could, of consequence, be not otherwise affected than by a disqualification to hold in future offices which he, perhaps, never had a prospect of obtaining. Of this absurdity the Constitution can not be supposed to be guilty; and therefore it could not have intended to subject to the power of impeachment any persons except those who actually hold offices and may be punished by removal.

But where, Mr. President, did the honorable counsel for the defendant learn that disqualification to hold any office of trust, honor, or profit under the Government of our country is no punishment? Would either of those honorable gentlemen think it no punishment in his own case?

2316. Blount's impeachment, continued.

Elaborate argument of the question whether or not a Senator is a civil officer within the meaning of the impeachment clause of the Constitution.

(4) The fourth branch of the discussion involved an inquiry as to whether or not—it being assumed that only officers of the United States might be impeached—a Senator was an officer within the meaning of the Constitution.

Mr. Bayard, for the managers, contended that he acted as a legislator, an executive magistrate, and a judge. The ordinance of Congress for establishing a government for the Northwest Territory, passed in 1787, had contemplated members of the legislature as officers. This use of the word "office" was contemporaneous with the formation of the Constitution.

[1] Annals, p. 2299.

Furthermore, he contended that a Senator was not only an officer, but was an officer within the meaning of the Constitution itself. He then discussed the following portions as confirmatory of this view:

Article I, section 3, clause 7; Article I, section 6; Article I, section 9, clause 7; Article II, sections 3 and 4.

As to two of these provisions he said: [1]

The first of these is the third section of the second article, which declares that the President shall commission all officers of the United States; and as it is clearly not designed that he should commission a Senator, it will be inferred that a Senator is not to be considered as an officer.

I humbly trust I can show, that it was not the intention of the Constitution that these words should take effect in their full extent; and I shall submit that they ought to be understood according to the subject to which they apply.

A commission is simply an evidence of authority delegated to a particular person. And surely it is proper that that evidence should show from the same source from which the appointment is derived. By the Constitution the President is made the fountain of office. The officers, properly speaking, under the United States are all appointed by him; and it was right, therefore, as the general power of appointing was given to him, that he should also have the general power of commissioning.

It is certain that it was intended that the power of commissioning should not exceed that of appointing, because the President does not commission anyone whom he does not appoint. The provision in question was not intended to define who should be considered as officers, but to introduce a plain and just rule of policy that the power of appointing and commissioning should reside in the same person. The practice under this constitutional regulation, explains its meaning and extent. It is clearly not true that he commissions all officers of the United States. He is an officer himself, and so expressly denominated throughout the second article, and yet he has no commission. It is equally clear that the Vice-President is an officer, and yet not commissioned. Again, the Speaker of the House of Representatives is an officer, as I shall have occasion to show hereafter, but has no commission. And there are also a variety of subordinate officers, appointed by heads of Departments and courts of justice, whom the President does not commission. I am therefore justified in concluding that it does not follow, because a person has no commission from the President, that therefore he is not to be considered as an officer.

There is another objection of a similar nature, arising from the provision in the sixth section of the first article, of which it is probable much use will be made. That section declares that no person holding an office under the United States shall be a Member of either House during his continuance in office. It will therefore be said, if the place of a Senator is an office, this clause is repugnant and absurd.

This provision, I humbly apprehend, has the same limits with the one which I have just adverted to. The intention of it was to erect a barrier between the Executive and legislative departments; to prevent Executive patronage from influencing legislative councils. It was designed therefore to apply solely to the officers of Executive appointment. I am not much disposed, sir, to place reliance in an argument upon so great a subject, upon nice distinctions or verbal criticism; but I think I shall be excused for paying some attention to the peculiar language of the clause in question. The regulation is that no person holding an office under the United States shall be a Member of either House during his continuance in office. The United States here means the Government of the United States, for the United States grants no office but through the Government. Now, it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government can not be said to be under it. Besides, a Senator does not derive his authority from the Government. The Senatorial power is an emanation of the State sovereignties; it is coordinate with the supreme power of the United States; in its aggregate, it forms one of the highest branches of the Government. Giving every effect to this section, it would only prove that a Senator is not an officer under the Government of the United States, but still he may be an officer of the United States; and give me leave to say that the distinction which I have here taken is supported by the variance of language to be found in another part of the Constitution.

[1] Annals, p. 2258.

Mr. Bayard also cited the law of March 1, 1792, enacting that in case of vacancy in the office of President the Speaker of the House of Representatives should exercise the office, as showing that in legislative interpretation the Speaker is an officer.

Mr. Dallas, in replying, discussed the articles of the Constitution referred to by Mr. Bayard, especially to show that a distinction could not be drawn between "officers of" and "officers under" the United States. The two terms, in his view, were used indiscriminately.

There were no words in the Constitution extending the impeaching power to a Senator: [1]

The second section of the second article provides, that "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." The President having then power to appoint all the officers of the United States, including military as well as civil officers; the third section of the same article, declaring that "he shall commission all the officers of the United States;" and the fourth section, providing for the removal of all civil officers excluding military officers, on impeachment and conviction; it would seem inevitably to result that no man is an officer of the United States unless he has been appointed and commissioned by the President; and that, therefore, unless he is so appointed and commissioned, he can not be an object of impeachment. Here Mr. Dallas requested that it might be remembered that the provision respecting impeachments was a part of the Executive article of the Constitution; and was immediately connected with the arrangements for making appointments, and issuing commissions, under the authority of the President.

Then Mr. Dallas proceeded to inquire, Does the President nominate or commission Senators or Representatives? No; nor does the Constitution, in any part of it, term them officers, or call their representative station an office. But the honorable manager has said that the latitude to which this position extends would render it necessary that the President should issue a commission to himself, to the Vice-President, and to the Speaker of the House of Representatives, since they are all expressly denominated officers. The Constitution, however, is not chargeable with this absurdity. The President and Vice-President have their commissions from the Constitution itself, and the speaker of the House of Representatives is emphatically an officer of the House, not of the United States. But the objection affords an opportunity to illustrate the meaning of the Constitution. It is provided that the President shall commission all officers, and that all civil officers shall be removed on impeachment and conviction; but the President does not commission himself and the Vice-President, and therefore as it was intended to affect them by the impeachment power, it became necessary expressly to name them. The President does not commission Senators and Representatives; but it was not intended to affect them by the impeachment, and therefore they are not named.

Mr. Dallas continued to analyze various parts of the Constitution, and argued from the operation of them that a legislator never was considered as an officer of the United States, in the ordinary or constitutional acceptation of the term. The sixth section of the first article contains the following passage: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office." Nothing could more strongly mark the discrimination between a legislator and an officer than the language which is here used. It is declared that no member holding any office shall be a member of either House while he continues in office. If a member was deemed an officer, the phraseology would doubtless have been, "no member holding any other office." Again let it be supposed that previously to the amendment of the Constitution (which merely provides that no law varying the compensation for the services of Senators and Representatives shall take effect until an election of Representatives has intervened) the pay of Senator had been increased by an act of Congress, could not a Representative, who had assisted in passing the act, be chosen a Senator before the expiration of the two years for which he was originally elected?

[1] Annals, pp. 2271–2274.

Again let it be supposed that a new State was erected and admitted into the Union; if a Senator is an officer, the office of Senator for the new State would be created during the time for which Congress, who created it, was elected; and yet might not a member of that Congress be chosen a Senator for the new State, before the expiration of the time for which he was elected a Representative? When, for instance, Kentucky was separated from Virginia, and erected into a State, was not a Representative elected for Virginia, residing within the boundaries of Kentucky, eligible immediately as a Senator of Kentucky, though he resigned his Representative seat before the term of his election had elapsed?

The first section of the second article likewise pointedly distinguishes between a legislator and a public officer, declaring "that no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." If Senators or Representatives were considered as persons holding offices of profit or trust under the United States, it was superfluous to specify them at all; or, if named, it would have been correct to say, "no Senator or Representative, or person holding any other office of trust or profit," etc. But it is important also to remark that here, where the Constitution intends to work a disqualification, as to Senators and Representatives, they are expressly named; and no sound reason can be offered why they should not have been equally named, if the Constitution had intended to subject them to impeachment. * * * But, Mr. D. contended, that, independent of all precedent and authority, the distinction was founded upon the very nature of a free Government. The legislature is, in theory, the people; they do not themselves assemble, but they depute a few to act for them; and the laws which are thus made are the expressions of the will of the people. Over their Representatives the people have a complete control, and if one set transgress they can appoint another set, who can rescind and annul all previous bad laws. But the power of the people is only to make the laws; they have nothing to do with executing them; they have nothing to do with expounding them; and hence arises the diversity in the modes of remedying any grievance which they may suffer from the conduct of their Representatives or agents. If a legislator acts wrong, he may be expelled before the term for which he was chosen has expired; he may be rejected at the next periodical election; and the laws which he has sanctioned may be repealed by a new representation. But if an executive, or a judicial magistrate, acts wrong, the people have no immediate power to correct; prosecution and impeachment are the only remedies for the evil. Then, it is manifest, that, by the power of impeachment, the people did not mean to guard against themselves, but against their agents; they did not mean to exclude themselves from the right of reappointing, or pardoning; but to restrain the Executive magistrate from doing either with respect to officers whose offices were held independent of popular choice.

The argument that every person who executes an authority is in fact an officer was, in Mr. Dallas's opinion, too broad. The Speaker of the House of Representatives was an officer of the House, but not of the United States. And it was only on being chosen to the chair that he acquired the denomination of officer, contradistinguished from the character of Member.

Mr. Dallas continued further:[1]

From a just consideration of the principles of our Government, it was thus manifest that the moment there was a departure from the immediate choice of the people, the law of impeachment became necessary to secure them from the favoritism, or perverseness of the Executive Magistrate. Impeachment, he observed, is, with respect to executive and judicial officers, what expulsion is with respect to the members of the legislature. As expulsion enables the people to decide whether they will restore the evicted Member to their service, a conviction on impeachment enables the Representatives of the people to decide whether the delinquent shall be partially or totally excluded from the honors and emoluments of public office. But the very circumstance of declaring that a pardon shall not avail in cases of impeachment, though a reelection shall avail in cases of expulsion, demonstrates (as was before intimated) that the people did not mean to guard against the exercise of their own sovereignty, but against an abuse of the power delegated to their agents.

Mr. Ingersoll, speaking also in behalf of the respondent, discussed the extent of the power of impeachment under the Constitution, which, as he claimed,[2] was restricted to the President, Vice-President, and civil officers of the United States, for

[1] Annals, p. 2275.
[2] Annals, p. 2282.

malconduct in office. He stated that he should afterwards endeavor to make it appear that Senators were not the objects of this power, not being comprehended under the designation of civil officers of the United States.

After discussing the limited powers granted by the Constitution, he said: [1]

My position is that the clause in question was intended and operates for the purpose of designating the extent of the power of impeachment, both as to the offenses and the persons liable to be thus proceeded against. It will be of use here to recollect that the Constitution had previously provided for the purity of the legislature in the second clause of the fifth section of the first article by empowering each House to punish its Members for disorderly behavior, and, with the concurrence of two-thirds, to expel a Member. No clause similar to that which is introduced into some of the State constitutions (that a member expelled and then returned is not liable to be expelled again for the same offense) is to be met with in the Constitution of the United States; and therefore the Senate has an unlimited power to expel any Member they shall deem unworthy their society.

Here, then, I flatter myself, the dispute admits of a clear solution—is reduced within a narrow compass, and brought to a point.

It is a rule of construction that every part of an instrument be, if possible, made to take effect and every word operate in some shape or other.

There are but two constructions suggested as possible—the one for which the honorable managers contend, to wit: That the fourth section of the second article was intended as an imperative injunction upon the Senate that when judgment was rendered against a civil officer of the United States it should be for removal from office; the other, that for which we, as counsel for the defendant, insist—that is, that it was intended to designate the extent of the practice of proceeding by impeachment, specifying who are the persons to be proceeded against, and for what offenses. If, then, I am able to show that the words of the fourth section of the second article will not have any effect or operation at all, unless they receive the construction for which I contend; if I establish these premises, the inference will necessarily follow that the construction for which the honorable managers contend is not well founded, and that the construction for which we contend is the true meaning of the Constitution in this particular. To this fair, short, and decisive test be the appeal.

He then proceeded to give emphasis to the word "further" in the Constitution, and to show that disqualification for office necessarily implied removal: [2]

It is impossible to pronounce a judgment that a man shall be incapable of holding an office and not remove him. The incapacity takes effect immediately. It is coeval with the judgment. There is not any interval between the judgment pronounced and the disqualification and incapacity. It is of course ridiculous to say that the fourth section of the second article was introduced to make it imperative upon the Senate to remove from office on conviction, when it was previously made so imperative that it was impossible to avoid pronouncing a judgment that would operate a removal from office. As it is thus clear beyond the possibility of doubt that the fourth section of the second article was not introduced for the purpose suggested by the honorable managers, which I have considered, and as no third construction has been attempted on either side, I infer that the construction contended for by the counsel for the defendant is well founded, to wit: That the fourth section of the second article was intended for the purpose of designating the extent of the power of proceeding by impeachment, at least so far as respects the persons liable to be thus proceeded against.

Further, if anything further be necessary upon a matter so very plain, if, as the honorable managers insist, all persons are within the extent of this mode of proceeding, why make it imperative on the Senate to remove civil officers only? Why make it absolutely imperative to remove the marshal of a district, whose sphere of influence is comparatively inconsiderable, and leave a general at the head of an army or an admiral in the command of a navy? Would not the public security be much more endangered by leaving a man convicted of high crimes and misdemeanors in these situations than those of many civil offices? It may be said that these military characters are liable to be proceeded against by courts-martial. Be it so; that consideration is a good reason why they should not be considered as within the power of impeachment, as we assert to be the case; but none at all for not removing them on conviction,

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[1] Annals, p. 2283.

[2] Annals, p. 2286.

if they are within the provision of the Constitution in this particular. And if Senators were within the power of proceeding by impeachment, would it not also have been made imperative upon the Senate to remove them, who have a veto upon every bill proposed to be passed into a law and every nomination for appointment to office?

I add, that I conceive the proceedings by impeachment are restricted not only to civil officers, but that the only causes cognizable in this mode of proceeding are malconduct in office.

Proceeding to consider whether or not Senators are "civil officers of the United States," after quoting Blackstone's definition, "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging," Mr. Ingersoll called attention to the fact that an officer excluded from his office might obtain admission by mandamus proceedings. Might a Senator avail himself of these remedies? This question he answered in the negative.

To be an officer of the Government one must receive a commission from the Executive. A Senator was not such an officer. Nor was there force in the argument that a Senator had a judicial as well as an executive character. All those qualities of his position emanated from the same source as his legislative qualities.

He said on another point:

Senators and Members of the House of Representatives have one set of words appropriated to them in the Constitution—civil officers, other terms; as thus, "office," "appointment," "commission," "removal;" Senator, or one of the House of Representatives, "Member," "election," "expulsion," "seat vacated."

What interpretation shall we give to the sixth section of the fourth article? "No person holding any office under the United States shall be a Member of either House during his continuance in office;" and yet a Senator is, ipso facto, it is said, an officer of the United States. Identity is incompatibility. The exception of a Senator is implied, say the honorable managers; but how do they show it? Is not this section to be understood as importing that the character of a Member of either House and that of an officer of the United States are, by the Constitution, distinct and incompatible? The distinction is observed throughout. Can the Clerk of this House, or the Clerk of the other House, be proceeded against by impeachment? I conceive not; because they are not appointed nor commissioned by the United States Government, or by the Executive thereof, but by the respective Houses. I believe that not an instance can be found in the Constitution of the United States in which a Senator is classed under the denomination of an officer, or civil officer of the United States.

Some observation was made on the ninth section of the first article of the Constitution of the United States, "that no person holding any office of profit or trust under the United States should, without the consent of Congress, accept of any present from any king, prince, or foreign state." Might a Senator, one in so important a public situation, accept of a present from a foreign state? No, I answer. The power of expulsion is a sufficient check. The impropriety of the measure would be a sufficient guard. The laws, in consonance with the Constitution of the United States, distinguish between the Members of the legislature and the officers of the United States, and also of the several States.

In the first volume of the laws of the United States, page 18, section 3, it is provided "that all members of the State legislatures, and the executive and judicial officers of the several States, shall take an oath to support the Constitution;" and by section 2 it is provided "that the Members of the Senate and House of Representatives," and by section 4, "that all officers of the United States" shall take the same oath, distinguishing between the Members of either House and the officers of the United States. In the constitution of the State of Pennsylvania, of New York, of Massachusetts, and of New Hampshire the same distinction of language is observed. The distinction is equally familiar in the English law. In the first volume of Blackstone's Commentaries, page 368, it is said "that the oath of allegiance must be taken by all persons in any office, trust, or employment;" yet members of either House are not considered as included. On page 374 of the same volume it is declared "that no denizen can be of the Privy Council, or either House of Parliament, or have any office of trust, civil or military." Such, I believe, has been the universal understanding of the expressions until the present prosecution.

[1] Annals, p. 2291.

It is a rule of construction that when a law is only doubtful, arguments ab inconvenienti are most powerful. The rule will apply, with equal propriety, to the construction of a constitution. If the most numerous branch, already, I repeat it, sufficiently formidable, may proceed by impeachment against a Senator—at their will doom to temporary disgrace any Member—this would form an engine of immense additional weight in their hands. I know that it is not always an objection against intrusting power that it may be abused; but when it is unnecessary to make the trust, and the danger great, the risk ought not to be incurred.

In concluding for the managers, Mr. Harper joined issue [1] with Mr. Ingersoll as to the intent of the clause relating to impeachments:

But admitting, Mr. President, that the power of impeachment is restricted by the Constitution to officers of the Government of the United States, still I contend that a Senator of the United States, a Member of this honorable body, is an officer of the Government, in the constitutional meaning of the word, and consequently liable to impeachment on the doctrine of the learned counsel themselves.

The learned counsel have, indeed, contended by their plea and in their arguments that none but civil officers are liable to impeachment by the Constitution; but in this they are plainly contradicted by the Constitution itself. They found their argument on that clause which provides "that the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." But this clause is, evidently, not restrictive, but imperative. It does not point out what persons or what officers shall be liable to impeachment, but expressly orders that such and such officers, when convicted on impeachment, shall be punished to the extent, at least, of removal from office. The former clause had declared that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold or enjoy any office of honor, trust, or profit, under the United States," leaving the Senate to apportion the punishment, according to its discretion, within those limits. They might censure the person convicted, suspend him for a limited time, or disqualify him perpetually for certain offices, or for all offices during a certain period. But beyond absolute removal and perpetual disqualification for all offices they could not go. This was fixed as the utmost limit of their power and of their discretion.

It was judged, however, that in case of the President, Vice-President, or any civil officer the punishment ought not to be less than removal, though it might be more, according to circumstances. This provision was, therefore, inserted. Its object, manifestly, is, not to designate the persons who shall be liable to impeachment, but to prevent the Senate, in the exercise of their discretion, from retaining in a civil office a person convicted of "treason, bribery, or other high crimes and misdemeanors." As to the distinction here made between civil officers and other officers, there is no need to examine or defend it. It may, however, be supposed to have arisen from an opinion, certainly well founded, that, under certain circumstances, there might be danger or great inconvenience in removing from his command a military officer, whom, nevertheless, it might be very proper to censure or suspend, or even to disqualify for some particular offices. As to military officers, therefore, a complete discretion was left to the Senate; but not in the case of civil officers, to whom the same reasons could not apply. They, on conviction, must be removed. Military officers may be removed or not, according to circumstances.

He further contended that a Senator was an officer in the sense of the Constitution, and after exhaustively considering the definitions of the term "office," he said: [1]

The manner in which the term "office" is used by legal writers, and their formal definitions of it, support the interpretation which I have drawn from its received and common acceptation. Without going into a detail on this point, which might be tedious, let it suffice, Mr. President, to refer to Blackstone, who has been justly relied on by the learned counsel for the defendant, as a standard authority on subjects of this kind. Speaking of "offices," in the second volume of his Commentaries, page 36,

[1] Annals, p. 2302.

[2] Annals, p. 2307.

as cited by the learned counsel who preceded me, that great writer lays it down that "offices are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging." Now, let me ask, is not a seat in this honorable body "a public employment?" Has not the Member "a right to exercise this employment, and to receive the emoluments thereunto belonging?" Surely to answer in the negative would be a strange abuse of language.

The learned counsel who immediately preceded me has contended that a Senator can not be considered as an "officer," because there could be no quo warranto to remove him from his place if he held it improperly, nor mandamus to place him in it if unjustly kept out. But surely this can not be a well-founded argument, for, if it be, it applies as well to the President, the Judges, the Secretaries, and the Commander in Chief of the Army as to a Senator. Not one of them could be removed by quo warranto or replaced by mandamus. Did anyone ever hear of a quo warranto to remove a colonel of a regiment? Was a quo warranto ever brought in England against the Chancellor of the Exchequer or a Secretary of State, or a Lord of the Admiralty? Certainly not, and yet that these are officers will not be denied. The truth is, Mr. President, that the doctrine of quo warranto and mandamus, as far as it relates to officers, is confined exclusively to certain local municipal officers of a subordinate nature, who are placed, by the common law of England, under the superintendence of the supreme court of justice; to which, from the nature of their offices, recourse could most conveniently and effectually be had for their punishment, their removal, or their reinstatement. But this reason did not extend to the great officers of the State, of the Army, or the Navy, or to any of their subordinates. They could best be punished, removed, and replaced in a different manner and by a different authority. To them, therefore, nobody ever dreamt of extending the power of the supreme courts by quo warranto and mandamus, and yet nobody ever, on this account, thought of denying that they were "officers," which, however, would be just as reasonable as to contend that a Senator of the United States is not an "officer," because he can not be removed by a quo warranto or admitted by mandamus. I admit that it would be absurd to talk of an office from which a man could not be removed, however flagitious his conduct; or into which, when entitled to it, and improperly kept out, he had no means of obtaining admission. But a Senator may be removed by a vote of expulsion, and if duly elected, but not returned, may obtain his seat by a petition to the Senate.

I conceive, therefore, that no argument can be more destitute of foundation than that which would divest a seat in this honorable body of the quality of an "office," because it is not within the scope of writs of mandamus and quo warranto.

If from Blackstone, Mr. President, we turn to our own laws, our own writers, and even our own constitutions, we shall equally find that a seat in the legislature is considered as an "office."

After discussing the legislator as an officer, especially in the light of the State and national constitutions and laws, especially discussing one clause of the National Constitution—[1]

A clause from the sixth section of the first article, in the following words, has also been relied on:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a Member of either House during his continuance in office."

I am ready to admit, Mr. President, with my honorable colleague, who opened the case, that this clause wears an aspect more hostile to our construction of the term "office" than any other part of the Constitution, but I contend with him that the Constitution, like all other instruments, must be construed in each separate part of it, secundum subjectam materiem, according to the subject-matter of each part, and in such a manner as to effectuate every part and render the whole consistent. These rules of construction will not be denied. When this clause comes to be analyzed and tried by these rules, it will, I think, appear satisfactorily that our construction is not infringed by it.

What is the object of this clause? It is threefold: First, to prevent a blending of the different departments of Government—the legislative, executive, and judicial—by uniting their functions in the hands of the same individual, which would be contrary to the spirit of the Constitution; secondly,

[1] Annals, p. 2312.

to prevent the executive from acquiring an undue influence in the legislature, by appointing its most active and able Members to offices which must be held at his pleasure, and, thirdly, to take away from aspiring or avaricious Members the temptation to create offices or increase their emoluments, which might arise from the expectation of speedily filling those offices themselves. What description of officers was it necessary to exclude from the legislature in order to effect these three objects? First, those whose duties might be incompatible with a strict and regular attendance in the legislature; secondly, those who derive their appointments from the Executive, and, thirdly, those whose offices are of a nature to be considered as lucrative—to be sought after on account of their pecuniary emoluments. It is evident that some one or other of these characteristics belongs to every description of officers, except "legislative"—to military, to executive, judicial, and diplomatic. It is to be presumed that the Constitution here used the word "office" in that sense, and that only, which was necessary in order to effectuate its intentions, and consequently that the clause extends to those officers only whom it was the intention of the Constitution to exclude from the legislature. The clause therefore is to be understood as if, instead of the general expressions, "any civil office," "any office," "it had said, "any other civil office," "any other office." This will render the whole Constitution consistent with itself and with the well-established meaning of language. In the clause relative to commissions we have an instance where, in order to prevent the Constitution from pronouncing a palpable absurdity, it was necessary to explain the general term "all officers," so as to mean "all officers appointed by the President." If the general expression may be controlled by the subject-matter and intent in one case, it may in another, and certainly the subject-matter and intent could not speak more strongly against the general expression in the former, or in any other case, than in this.

If this reasoning be well founded, it follows that the clause in question proves nothing against our doctrine of a Senator being an officer in the sense of the Constitution. It only proves that the Constitution, being obliged to use the same word in application to different matters, and for different purposes, has used it generally and left it to be explained by a reference to the intent and subject-matter, instead of explaining it by express modifications. The object here was to exclude certain officers from the legislature, and the term is used generally; but it by no means follows, from thence, that Members of the legislature are not themselves officers.

Also another argument was answered: [1]

An objection has also been drawn from the supposed intention with which the power of impeachment was established by the Constitution. The sole object of this power, it is said, was to provide a remedy against the favoritism or obstinacy of the Supreme Executive Magistrate, by affording a means of removing from office improper persons, whom he might be inclined to retain in place to the detriment of the nation. This necessity does not exist, we are told, with respect to members of the legislature who are removable by the people themselves at stated periods, and to whom, consequently, the power of impeachment ought not to extend.

But this can not be the sole object of the power of impeachment, because the President himself is liable to be impeached, as well as the officers whom he appoints. So also is the Vice-President. And yet these two great officers axe appointed by the people themselves, in a manner far more direct and immediate than Senators and removable at shorter periods. If the power of impeachment be, as the learned counsel insist, intended as an aid to the control which the people, by the right of election, have over their public servants, or to supply the place of that control where it does not exist, surely there is much stronger reason for its extending to Senators than to the President or Vice-President, for Senators are much farther removed from the power of the people and the control of elections than those officers. They are elected for a much longer period; their election being made by legislative bodies, who are chosen by the people for other purposes and, for a considerable time, is far less influenced by popular opinion or popular feelings than that of the President, who is chosen by electors elected for that sole purpose, and selected, in almost every instance, according to their known attachment to the favored candidate. The election of the President and Vice-President therefore partakes far more of the nature of a popular election than that of Senators. Indeed, of all the component members of our Government the Senate, both in the mode of its appointment and the term of its duration, is intended

[1] Annals, p. 2315,

to be, and actually is, the most permanent and independent—the furthest elevated above the region and the influence of those storms whereby a popular government must sometimes be agitated. God forbid, Mr. President, that I should find fault with these ingredients in the composition of the Senate or do anything which could tend in the least to diminish their efficiency. I consider them as among the most valuable principles of the Constitution.

And finally he urged: [1]

But the effect of an impeachment, it is said, may be produced in another manner, more conformable to the dignity of the Senate. The same majority of two-thirds which can convict on an impeachment may also expel, and thus an improper person may be driven from the Senate. But, in the first place, he can not be thus kept out in future; for, though the Senate may expel, it can not disqualify. And if we suppose the case (which may very well happen) of a great and wicked man, supported by a strong party in the legislature of his own State, he may return again, after being expelled and may go on in the commission of "high crimes and misdemeanors," in the very station which gives him the greatest means of committing them with effect.

In the second place, an offender has a much better chance to escape from an expulsion than from an impeachment. Where the offense is of a very dark and complicated nature, consists in transactions or plots carried on at a distance or in many places at once, and of consequence can not be brought to light and fully substantiated without a laborious, long-continued and systematic inquiry, it must be admitted that the aid of a prosecutor will be necessary, and that the Senate of itself and for the mere purpose of expulsion will be little disposed to undertake so tedious and disagreeable a task.

2317. Blount's impeachment, continued.

In the Blount case it was conceded that a person impeached might not avoid punishment by resignation.

(5) As to the status of Mr. Blount at the time of the argument, Mr. Bayard said: [2]

It is also alleged in the plea that the party impeached is not now a Senator. It is enough that he was a Senator at the time the articles were preferred. If the impeachment were regular and maintainable when preferred, I apprehend no subsequent event, grounded on the willful act, or caused by the delinquency of the party, can vitiate or obstruct the proceeding. Otherwise the party, by resignation or the commission of some offense which merited and occasioned his expulsion, might secure his impunity. This is against one of the sagest maxims of the law, which does not allow a man to derive a benefit from his own wrong.

Speaking for the respondent, Mr. Dallas said: [3]

It is among the less objections of the cause that the defendant is now out of office, not by resignation. I certainly shall never contend that an officer may first commit an offense and afterwards avoid punishment by resigning his office; but the defendant has been expelled. Can he be removed at one trial and disqualified at another for the same offense? Is it not the form rather than the substance of a trial? Do the Senate come, as Lord Mansfield says a jury ought, like blank paper, without a previous impression upon their minds? Would not error in the first sentence naturally be productive of error in the second instance? Is there not reason to apprehend the strong bias of a former decision would be apt to prevent the influence of any new lights brought forward upon a second trial?

2318. Blount's impeachment, continued.

The Senate decided that it had no jurisdiction to try an impeachment against William Blount, a Senator.

The Senate notified the House that it had made a decision in the Blount case and set a time for receiving the managers and rendering judgment.

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[1] Annals, p. 2317.

[2] Annals, p. 2261.

[3] Annals, p. 2293.

The House did not attend its managers during the Blount impeachment, even at the judgment.

Form of judgment pronounced by the Vice-President in the Blount impeachment.

Judgment being given in the Blount impeachment, the managers submitted to the House a report in writing.

The Senate delivered to the managers for transmission to the House an attested copy of its judgment in the Blount case.

On January 7[1] the Senate resolved itself into a court of impeachment, and the following resolution was offered:

That William Blount was a civil officer of the United States within the meaning of the Constitution of the United States, and therefore liable to be impeached by the House of Representatives;

That as the articles of impeachment charge him with high crimes and misdemeanors, supposed to have been committed while he was a Senator of the United States, his plea ought to be overruled.

This resolution was debated in the court of impeachment until January 10,[2] when it was disagreed to, yeas 11, nays 14.

On January 11,[3] it was determined by a vote of 14 yeas and 11 nays, the division of Members being exactly as on the preceding day:

The court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that the said impeachment is dismissed.

It was further ordered by the court of impeachment:

Ordered, That the Secretary notify the House of Representatives that the Senate will be ready to receive the managers of the House of Representatives and the counsel of the defendant on Monday next, at 12 o'clock, to render judgment on the impeachment against William Blount.

The Journal of the Senate has no record of this order; but it was received in the House the same day as a message from the Senate.[4]

On January 14,[5] the managers alone attended, the House going on with the transaction of its business. The court being opened and silence being proclaimed, the parties attending, judgment was pronounced by the Vice-President as follows:

Gentlemen, managers of the House of Representatives, and gentlemen, counsel for William Blount: The court, after having given the most mature and serious consideration to the question, and to the full and able arguments urged on both sides, has come to the decision which I am now about to deliver.

The court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that the said impeachment is dismissed.

Copies of the judgment were delivered to the managers and to the counsel for the defendant, respectively.

After which they withdrew; and, on motion, the court adjourned without day.

On the same day, in the House,[6] Mr. Bayard, from the managers appointed on

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[1] Senate Journal, p. 568; Annals, p. 2318.

[2] Annals, p. 2318.

[3] Annals, p. 2319.

[4] House Journal, p. 430.

[5] House Journal, pp. 431, 432. Annals, pp. 2648, 2319

[6] House Journal, pp. 431, 432.

the part of this House to conduct the impeachment against William Blount, made a further report, which was read, as follows:

That agreeably to the notification of the Senate they attended at their bar to hear their judgment upon the plea of the said William Blount, and that the President of the Senate pronounced judgment upon the said plea, a copy whereof was ordered to be delivered to the managers and is annexed to this report.

"UNITED STATES OF AMERICA, FRIDAY, JANUARY 11, 1799. HIGH COURT OF IMPEACHMENT.

"UNITED STATES V. WILLIAM BLOUNT.

"The court is of opinion, etc. [Here follows the decision as given above.]

"Attest:

"SAM A. OTIS, *Secretary*."

The report and copy were ordered to lie on the table.

Chapter LXXI.

THE IMPEACHMENT AND TRIAL OF JOHN PICKERING.

2319. The impeachment and trial of John Pickering, judge of the United States district court for New Hampshire, in 1803.

The impeachment proceedings against Judge Pickering were set in motion by a message from the President.

The committee recommended and the House voted the impeachment of Judge Pickering on the strength of certain ex parte affidavits.

The House decided to proceed in the Pickering impeachment, although the session and the Congress neared an end.

The Pickering impeachment was carried to the Senate by a committee of two.

Forms of resolutions for impeachment of Judge Pickering and directing the carrying of the same to the Senate.

On February 4, 1803,[1] a message was received from the President of the United States transmitting a "letter and affidavits exhibiting matter of complaint against John Pickering, district judge of New Hampshire, which is not within executive cognizance."

The message was read, and with the accompanying papers, was referred to a committee composed of Messrs. Joseph H. Nicholson, of Maryland; James A. Bayard, of Delaware; John Randolph, jr., of Virginia; Samuel Tenney, of New Hampshire, and Lucas Elmendorf, of New York.

[1] Second session Seventh Congress, Journal, p. 322; Annals, p. 460.

Accompanying the message were the following documents: (1) A letter from Albert Gallatin, Secretary of the Treasury, to the President, stating that it appeared that Judge Pickering, in a suit wherein the revenue was concerned, had "acted in a manner which showed a total unfitness for the office," and which showed "some legislative interference absolutely necessary;" (2) a letter from John S. Sherburne, United States district attorney for New Hampshire, to the Secretary of the Treasury, transmitting affidavits and making a statement as to the conduct of the judge; (3) affidavits of Thomas Chadbourne, Jonathan Steele, Daniel Humphrey, John Wentworth, Joseph Whipple, and R. C. Shannon setting forth specific acts of said judge. These affidavits were taken ex parte.[1]

On February 18[2] Mr. Nicholson submitted the report of the committee:

That from the face of the said depositions it appears that the said John Pickering has been guilty of high misdemeanor in the exercise of his judicial functions, and recommend the adoption of the following resolution:

"Resolved, That John Pickering, judge of the district court of the district of New Hampshier, be impeached of high crimes and misdemeanors."

On March 2[3] the report was considered by the Committee of the Whole, who recommended concurrence in the report, after a debate which is very briefly reported and during which the principal question seems to have been the advisability of proceeding in the case at so late a period in the session. A proposition to postpone the resolution to the next session was disagreed to, ayes 9, noes 43.

The House agreed to the resolution, yeas 45, nays 8.

Thereupon it was

Ordered, That Mr. Nicholson and Mr. Randolph be appointed a committee to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Judge Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same.

Ordered, That the committee do demand that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

2320. Pickering's impeachment, continued.

Ceremonies of presenting the Pickering impeachment at the bar of the Senate.

Form of declaration by House committee in presenting the impeachment of Judge Pickering in the Senate.

Verbal report made by the House committee on returning from presenting in the Senate the impeachment of Judge Pickering.

Proceedings and resolutions adopted by the Senate in taking order on the presentation of the Pickering impeachment.

The impeachment of Judge Pickering was presented in the Senate on the last day of the Seventh Congress.

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[1] These documents were published with the report of the committee. Copies are rare, but may be found in the Library of Congress.

[2] Second session Seventh Congress, House Report, p. 252; Journal, p. 351; Annals, p. 544.

[3] Journal of House, pp. 383, 384; Annals, p. 642.

On March 3,[1] in the Senate, a message was received from the House of Representatives by Mr. Nicholson and Mr. Randolph, as follows:

Mr. President, we are commanded, in the name of the House of Representatives and of all the people of the United States, to impeach John Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same.

We are further commanded to demand that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

Then they withdrew.

On the same day, in the House,[2] Mr. Nicholson reported verbally:

That, in obedience to the order of the House, the committee had been to the Senate, and, in the name of the House of Representatives and of all the people of the United States, had impeached John Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and had acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

And, further, that the committee had demanded that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

On the same day, in the Senate,[3]

Ordered, That the message received this day from the House of Representatives respecting the impeachment of John Pickering, judge of a district court, be referred to Messrs. Tracy [Uriah, of Connecticut], Clinton [De Witt, of New York], and Nicholas [Wilson C., of Virginia].

Later on this day Mr. Tracy reported from the committee the following resolution and preamble, which were agreed to by the Senate:

Whereas the House of Representatives have this day, by two of their Members, Messrs. Nicholson and Randolph, at the bar of the Senate, impeached John Pickering, judge of the district court for the district of New Hampshire, of high crimes and misdemeanors; and have acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same,

And have likewise demanded that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given the House of Representatives.

Resolved, That the Secretary of the Senate notify the House of Representatives of this resolution.

On the same day a message announcing this resolution was received in the House.[4]

And later on the same day, March 3, 1803, both House and Senate adjourned sine die, the term of the Seventh Congress having expired.

2321. Pickering's impeachment, continued.

At the beginning of the Eighth Congress the House continued the Pickering impeachment by appointing a committee to prepare articles.

The Eighth Congress met in its first session on October 17, 1803, it being the day appointed by law. The proceedings against Judge Pickering were continued from the point where they had been interrupted by the expiration of the Seventh Congress.

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[1] Senate Journal, p. 284; Annals, p. 267.

[2] House Journal, p. 387.

[3] Senate Journal, p. 285; Annals, p. 268.

[4] House Journal, p. 392.

On October 20,[1] in the House, Mr. Nicholson stated that during the last session the House had voted an impeachment against John Pickering, judge of the district court for New Hampshire, for high crimes and misdemeanors. But the impeachment had been voted at so late a period of the session as rendered it impossible to act then finally upon it. In order that it might be now acted upon, and the impeachment proceed, he moved the adoption of the following:

Resolved, That a committee be appointed to prepare and report articles of impeachment against John Pickering, district judge of the district of New Hampshire, who was impeached by this House during the last session of high crimes and misdemeanors; and that the said committee have power to send for persons, papers, and records.

The committee were appointed as follows: Messrs. Nicholson, John Randolph, jr., Roger Griswold, of Connecticut; Peter Early, of Georgia, and Samuel Thatcher, of Massachusetts.

2322. Pickering's impeachment, continued.

The Senate declined to order compulsory process to compel the appearance of Judge Pickering, but authorized a committee to examine the subject.

On October 27,[2] in the Senate, the following resolution was proposed, but was laid on the table:

Resolved, That a committee be appointed to prepare the process to compel the attendance of John Pickering to answer the charge exhibited against him by the House of Representatives at their last session.

On November 14[3] the Senate resumed consideration of the resolution above given and, having amended it, agreed to it as follows:

Resolved, That a committee be appointed to inquire if any, and what, further proceedings at present ought to be had by the Senate respecting the impeachment of John Pickering, made at the bar of this Senate by two Members of the House of Representatives on the last day of the last session of Congress.

The following committee were appointed: Uriah Tracy, of Connecticut; Stephen R. Bradley, of Vermont; Abraham Baldwin, of Georgia; Robert Wright, of Maryland, and William Cocke, of Tennessee.

2323. Pickering's impeachment, continued.

The House considered the articles of impeachment of Judge Pickering in Committee of the Whole House.

The articles of impeachment of Judge Pickering were enrolled after they were agreed to by the House.

In the Pickering impeachment the House decided that the managers should not be appointed by the Speaker or by viva voce vote, but by ballot.

The House having excused a Member elected manager in the Pickering case, another was chosen by ballot.

Form of resolution directing the carrying of the articles of impeachment of Judge Pickering to the Senate.

Form of resolution directing that the Senate be informed of the appointment of managers and that they will carry articles to the Senate.

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[1] First session Eighth Congress, House Journal, p. 411; Annals, p. 380.

[2] Senate Journal, p. 303; Annals, p. 27.

[3] Senate Journal, p. 310; Annals, p. 75.

It does not appear that the message announcing the appointment of managers of the Pickering impeachment included their names.

On December 27 [1] Mr. Nicholson, from the committee appointed to prepare articles of impeachment, presented them to the House; and having been read, the same were referred to a Committee of the Whole House.

On December 30 [2] the articles were considered in Committee of the Whole and, being reported therefrom without amendment, were agreed to by the House. They appear in full in the Journal. During the proceedings [3] on the articles Mr. Samuel Tenney, of New Hampshire, called for the reading of several depositions to show that Judge Pickering had sustained a respectable character and that his recent conduct had arisen from insanity. In reply Mr. Nicholson said that the House had determined that they would impeach, and it was therefore the present duty to furnish the Senate with the articles. Mr. Nicholson further said that he was informed from respectable sources that Judge Pickering was habitually intoxicated. The articles were agreed to without division.

On motion of Mr. Nicholson, according to the Annals,[4] the articles were ordered to be enrolled, in correspondence with the practice of the House. The Journal does not mention this.

It was then ordered that eleven managers be appointed on the part of the House. A discussion arose as to the manner of selection. A motion that they be appointed by the Speaker was decided in the negative. Then it was decided that they be appointed by ballot, although several Members, notably Mr. Nicholson, urged that they should be elected by viva voce vote.

It does not appear that a special rule was made to govern the balloting, which was presumably conducted under the then existing rule of the House.

The following were chosen managers: Messrs. Nicholson, Early, Caesar A. Rodney, of Delaware; William Eustis, of Massachusetts; John Randolph, jr., of Virginia; Roger Griswold, of Connecticut; Samuel L. Mitchill, of New York; George W. Campbell, of Tennessee; William Blackledge, of North Carolina; John Boyle, of Kentucky, and Joseph Clay, of Pennsylvania.

On motion,

Ordered, That Mr. Roger Griswold be excused from serving as one of the managers appointed to conduct the said impeachment; and that the House do now proceed, by ballot, to the appointment of another manager to serve in his stead.

Thereupon Mr. Thomas Newton, jr., of Virginia, was chosen.

On January 3, 1804,[5] it was

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves, and of all the people of the United States, against John Pickering, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

Ordered, That a message be sent to the Senate, to inform them that this House have appointed managers, on their part, to conduct the impeachment against John Pickering, and have directed the

[1] House Journal, p. 503.

[2] House Journal, p. 507.

[3] Annals, pp. 794, 795.

[4] Annals, p. 795.

[5] House Journal, pp. 511, 512; Annals, p. 797.

said managers to carry to the Senate the articles agreed upon by the House, to be exhibited in maintenance of their impeachment against the said John Pickering; and that the Clerk of this House do go with the said message.

On the same day in the Senate: [1]

A message from the House of Representatives informed the Senate that the House have appointed managers, on their part, to conduct the impeachment against John Pickering, judge of the district court of the United States for the district of New Hampshire, and have also directed the said managers to carry to the Senate the articles agreed upon by the House of Representatives to be exhibited against the said John Pickering.

It does not appear that the message announced the names of the managers.

2324. Pickering's impeachment, continued.

The Senate decided, in the Pickering case, that it would take order for respondent's appearance only after articles had been exhibited.

The Senate committee concluded, in the Pickering case, that there was no impeachment before the Senate until articles were exhibited.

It was concluded by a Senate committee in Pickering's impeachment that the Senate had no power to take into custody the body of the accused.

A notification to the accused with a copy of the articles was deemed, in the Pickering impeachment, all the process necessary.

A Senate committee concluded, in the Pickering impeachment, that respondent might answer in person, by attorney, or not at all.

In the Pickering case the Senate committee concluded that after service of notice of the articles, the Senate might proceed to trial whether respondent entered appearance or not.

The Senate committee advised, in Pickering's case, that the Senate had the sole power to regulate forms, substances, and proceedings when acting as a court of impeachment.

On the same day in the Senate, after the receipt of the above message, a report submitted by Mr. Tracy, from the committee appointed to inquire as to further proceedings, was submitted as follows: [2]

That they find the following facts, which have an immediate relation to the subject committed to them, viz: "On the last day of the last session of Congress two Members of the House of Representatives came to the Senate, and in the name of the House, and of all the people of the United States, verbally impeached John Pickering, district judge of the district of New Hampshire, of high crimes and misdemeanors, without any specification; and likewise, they verbally acquainted the Senate that the said House of Representatives would in due time exhibit particular articles of impeachment against him, the said Pickering, and make good the same. And they verbally demanded that the Senate should take order for the appearance of the said John Pickering, to answer to the said impeachments;" and that said verbal declaration of impeachment was committed by the Senate to a select committee, who reported thereon, in the following words, viz: *"Resolved,* That the Senate will take proper order thereon (that is, of the verbal impeachment aforesaid), of which due notice shall be given to the House of Representatives," of which resolution, the Secretary of the Senate gave information to the House of Representatives.

With these facts in view, your committee have attended to the constitutional powers vested in the Senate as a court of impeachment, and they find that "judgment in case of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States;" and that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." Hence your committee

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[1] Senate Journal, p. 332.

[2] Senate Journal, p. 332; 1 Annals, p. 224.

suppose that no power is constitutionally vested in the Senate to take into custody, or hold the body of the person impeached for trial; but that a notification to the party of the impeachment, with a copy of the articles exhibited, is all the process requisite in the case; and that it is optional with the party to appear in propria persona, by attorney, or not at all; and that after the notice given as aforesaid, it is competent for the Senate to proceed to a trial and judgment on said impeachment, whether the party shall appear by himself, his attorney, or not at all. And although your committee would not in the smallest degree interfere with the House of Representatives, in the manner of instituting the process of impeachment, since the sole right of impeaching is vested by the Constitution in that House, yet they believe the Senate, in common with other courts, have the sole power, while acting as a court of impeachment, to regulate all forms as well as substance of impeachments which shall be presented to them, and all proceedings to be had thereon. They therefore are of opinion that at present no further proceeding ought to be had by the Senate respecting the verbal impeachment of John Pickering, made at the bar of the Senate by two Members of the House of Representatives, on the last day of the last session of Congress; and that in strict and proper construction of the Constitution, there is no impeachment before the Senate, until exhibited to them by the House of Representatives, in written articles.

On a full view of the subject, the committee respectfully submit for the consideration and adoption of the Senate the following resolution, viz:

"Resolved, That the Senate can not with propriety take any order upon the verbal notification to them by the House of Representatives, on the last day of the last session of Congress, that they did impeach John Pickering of high crimes and misdemeanors. And that all proceedings thereon by the Senate must be deferred until written articles shall, in due form, be presented by said House of Representatives."

It does not appear that the above resolution was formally agreed to by the Senate.

2325. Pickering's impeachment, continued.

Rule of the Senate prescribing forms and ceremonies for receiving managers in presenting articles of impeachment against Judge Pickering.

The Senate organized as a court before receiving the articles in the Pickering case.

The oath administered by the Secretary to the President and by him to the Senators in the Pickering impeachment.

The Senate set a day and hour for receiving the managers to exhibit articles impeaching Judge Pickering, and informed the House thereof.

The Senate appointed a committee to search the Journals for precedents for the Pickering impeachment.

The same committee further reported the following resolution:

Resolved, That, at 12 o'clock tomorrow, the Senate will resolve itself into a court of impeachment, at which time the following oath or affirmation shall be administered by the Secretary to the President of the Senate, and, by him, to each member of the Senate, viz: "I, ———, solemnly swear (or affirm, as the case may be), that, in all things appertaining to the trial of the impeachment of John Pickering, judge of the district court of the district of New Hampshire, I will do impartial justice, according to law;" which court of impeachments, being thus formed, will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment, in the name of themselves and of all the people of the United States, against John Pickering, judge of the district court for the district of New Hampshire, pursuant to notice given to the Senate this day by the House of Representatives, that they had appointed managers for the purposes aforesaid.

Ordered, That the Secretary lay this resolution before the House of Representatives.

It was further

Ordered, That a committee be appointed to search the Journals and report precedents in cases of impeachments; and that Messrs. Tracy, Bradley, Baldwin, Wright, and Cocke, to whom it was referred on the 14th of November last, to consider and report, if any, what further proceedings ought to be had by the Senate, respecting the impeachment of John Pickering, by this committee.

On January 4,[1] in the House, the following message was received from the Senate:

Mr. Speaker: I am directed to inform this House that the Senate will, at 12 o'clock this day, be ready to receive articles of impeachment against John Pickering, judge of the district court of the United States for the district of New Hampshire, to be presented by the managers appointed by this House.

2326. Pickering's impeachment continued.

The Senate prescribed by rule the ceremonies for receiving the House managers to present articles of impeachment against Judge Pickering.

Form of proclamation made by the Sergeant-at-Arms, under direction of the President, when the managers presented articles in the Pickering impeachment.

Articles of impeachment being exhibited against Judge Pickering, the President of the Senate was directed by rule to state that order would be taken and the House would be notified.

On January 4,[2] in the Senate, before it resolved itself into a court of impeachment, Mr. Tracy, from the committee appointed to examine precedents, reported the following:

Resolved, That, after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against John Pickering, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation; who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachment, articles of impeachment against John Pickering, judge of the district court for the district of New Hampshire."

After which the articles shall be exhibited; and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

The resolution was agreed to.

2327. Pickering's impeachment continued.

In the Pickering trial a Senator, who as a Member of the House had voted for impeachment, was challenged, but voted.

Thereupon Mr. John Quincy Adams, of Massachusetts, offered the following:

Resolved, That any Senator of the United States, having previously acted and voted as a Member of the House of Representatives, on a question of impeachment, is thereby disqualified to sit and act, in the same case, as a member of the Senate, sitting as a court of impeachment.

It was agreed that this motion should lie for consideration.

An appendix to the records of the court of impeachment has the following:[3]

Early in the trial a question was raised as to the propriety of those gentlemen, viz, Samuel Smith, Israel Smith, and John Smith, of New York, who were during the last session Members of the House of Representatives, and voted here upon the question for impeaching Judge Pickering, sitting and voting as judges upon the trial.

Mr. Smith, of New York, wished to be excused.

Mr. S. Smith declared that he would not be influenced from his duty by any false delicacy; that he, for his part, felt no delicacy upon the subject, the vote he had given in the other House to impeach

[1] House Journal, p. 513.

[2] Senate Journal, pp. 382, 383; Annals, p. 225.

[3] Annals, p. 368.

Judge Pickering would have no influence upon him in the court; his constituents had a right to his vote, and he would not by any act of his deprive or consent to deprive them of that right, but would claim and exercise it upon this as upon every other question that might be submitted to the Senate whilst he had the honor of a seat.

All these men appear as voting during the trial.

2328. Pickering's impeachment continued.

In the Pickering impeachment the Senate organized itself as a court before receiving the articles.

The Journal of the Pickering trial was kept separate from the regular Senate Journal.

Ceremonies of presenting the articles against Judge Pickering before the high court of impeachment.

In the Pickering impeachment the chairman of the managers read the articles and then delivered them at the table of the Senate.

The articles impeaching Judge Pickering, with signature of the Speaker and attestation of the Clerk.

The chairman of the managers reported verbally to the House after having presented in the Senate the articles impeaching Judge Pickering.

On this day, January 4,[1] the Senate resolved itself into a court of impeachment. The ordinary Senate Journal merely records this fact, but does not contain the record of the court's proceedings.[2]

On February 20, 1805,[3] the Senate resumed consideration of the motion for printing the Journals of their proceedings, while sitting for the purpose of trying impeachments, and agreed to it as follows:

Resolved, That the proceedings of the Senate while sitting for the purpose of trying impeachments shall be published in the same manner in which the legislative proceedings are now published; and this resolution shall have relation to all proceedings in trials of impeachments which have heretofore taken place.

The Senate having resolved itself into a court of impeachment, proceeded agreeably to its resolution to organize the court.[4]

The Secretary administered the following oath to the President:

You solemnly swear that, in all things appertaining to the trial of the impeachment of John Pickering, judge of the district court of the district of New Hampshire, you will do impartial justice, according to law.

The President administered the oath, respectively, to Messrs. Adams, Armstrong, Anderson, Bailey, Baldwin, Bradley, Breckenridge, Brown, Cocke, Condit, Ellery, Franklin, Hillhouse, Jackson, Olcott, Pickering, Potter, Israel Smith, Samuel Smith, John Smith, Tracy, Venable, Wells, and Worthington; and the affirmation to Messrs. Logan, Maclay, and Plumer.

A message was received from the House of Representatives.

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[1] Senate Journal, p. 333.

[2] The Senate, however, kept in Journal form a record of "The trial of John Pickering, etc., on a charge exhibited to the Senate of the United States for high crimes and misdemeanors," which was published later. Senate Journal, Eighth Congress, pp. 493–507.

[3] Second session Eighth Congress, Annals, p. 63.

[4] Annals, p. 319.

The managers on the part of the House of Representatives, Messrs. Nicholson, Early, Rodney, Eustis, John Randolph, jr., Samuel L. Mitchill, George W. Campbell, Blackledge, Boyle, Joseph Clay, and Newton, were admitted; and Mr. Nicholson, the chairman, announced that they were the managers instructed by the House of Representatives to exhibit certain articles of impeachment against John Pickering, district judge of the district of New Hampshire.

They were requested by the President to take seats assigned them within the bar.

The Sergeant-at-Arms was directed to make proclamation, in the words following:

Oyes! Oyes! Oyes! All persons are commanded to keep silence on pain of imprisonment while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachments, articles of impeachment against John Pickering, judge of the district court of the district of New Hampshire.

The managers then rose, and Mr. Nicholson, their chairman, read the articles, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against John Pickering, judge of the district court of the district of New Hampshire, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ARTICLE 1. That whereas George Wentworth, surveyor of the district of New Hampshire, did, in the port of Portsmouth, in the said district, on waters that are navigable from the sea by vessels of more than 10 tons burden, on the 15th day of October, in the year 1802, seize the ship called the *Eliza,* of about 285 tons burden, whereof William Ladd was late master, together with her furniture, tackle, and apparel, alleging that there had been unladen from on board of said ship, contrary to law, sundry goods, wares, and merchandise, of foreign growth and manufacture, of the value of $400 and upwards, and did likewise seize on land within the said district, on the 7th day of October, in the year 1802, two cables of the value of $250, part of the said goods which were alleged to have been unladen from on board the said ship as aforesaid, contrary to law; and whereas Thomas Chadbourn, a deputy marshal of the said district of New Hampshire, did, on the 16th day of October, in the year 1802, by virtue of an order of the said John Pickering, judge of the district court of the said district of New Hampshire, arrest and detain in custody for trial before the said John Pickering, judge of the said district court, the said ship, called the *Eliza,* with her furniture, tackle, and apparel, and also the two cables aforesaid;

And whereas by an act of Congress, passed on the 2d day of March, in the year 1789, it is among other things provided that "upon the prayer of any claimant to the court that any ship or vessel, goods, wares, or merchandise so seized and prosecuted, or any part thereof, should be delivered to such claimant, it shall be lawful for the court to appoint three proper persons to appraise such ship or vessel, goods, wares, or merchandise, who shall be sworn in open court, for the faithful discharge of their duty; and such appraisement shall be made at the expense of the party on whose prayer it is granted; and on the return of such appraisement, if the claimant shall, with one or more sureties to be approved of by the court, execute a bond in the usual form to the United States for the payment of a sum equal to the sum of which the ship or vessel, goods, wares, or merchandise so prayed to be delivered and appraised and moreover produce a certificate from the collector of the district wherein such trial is had and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the ship or vessel so claimed have been paid or secured in like manner as if the goods, wares, or merchandise, ship or vessel, had been legally entered, the court shall, by rule, order such ship or vessel, goods, wares, or merchandise, to be delivered to the said claimant;" yet the said John Pickering, judge of the said district court of the said district of New Hampshire, the said act of Congress not regarding, but with intent to evade the same, did order the said ship called the *Eliza,* with her furniture, tackle, and apparel, and the said two cables, to be delivered to a certain Eliphalet Ladd, who claimed the same, without his, the said Eliphalet Ladd, producing any certificate from the collector and naval officer

of the said district that the tonnage duty on the said ship or the duties on the said cables had been paid or secured, contrary to his trust and duty as judge of the said district court, against the law of the United States and to the manifest injury of their revenue.

ART. 2. That whereas, at a special district court of the United States, began and held at Portsmouth on the 11th day of November, in the year 1802, by John Pickering, judge of said court, the United States, by Joseph Whipple, the collector of said district, having libeled, propounded, and given the said judge to understand and be informed that the said ship *Eliza,* with her furniture, tackle, and apparel, had been seized as aforesaid, because there had been unladen therefrom, contrary to law, 2 cables and 100 pieces of check, of the value of $400, and having prayed in their said libel that the said ship, with her furniture, tackle, and apparel, might by the said court be adjudged to be forfeited to the United States and be disposed of according to law; and a certain Eliphalet Ladd, by his proctor and attorney, having come into the said court, and having claimed the said ship *Eliza,* with her tackle, furniture, and apparel, and having denied that the said 2 cables and the said 100 pieces of check had been unladen from the said ship contrary to law, and having prayed the said court that the said ship, with her furniture, tackle, and apparel, might be restored to him, the said Eliphalet Ladd, the said John Pickering, judge of the said district court, did proceed to the hearing and trial of the said cause thus pending between the United States on the one part, claiming the said ship *Eliza,* with her furniture, tackle, and apparel, as forfeited by law, and the said Eliphalet Ladd on the other part, claiming the said ship *Eliza,* with her furniture, tackle, and apparel, in his own proper right; and whereas John S. Sherburne, attorney for the United States in and for the said district of New Hampshire, did appear in the said district, as his special duty it was by law, to prosecute the said cause in behalf of the United States, and did produce sundry witnesses to prove the facts charged by the United States in the libel filed by the collector as aforesaid in the said court, and to show that the said ship *Eliza,* with her tackle, furniture, and apparel, was justly forfeited to the United States, and did pray the said court that the said witnesses might be sworn in behalf of the United States, yet the said John Pickering, being then judge of the said district court, and then in court sitting, with intent to defeat the just claims of the United States, did refuse to hear the testimony of the said witnesses so as aforesaid, produced in behalf of the United States, and without hearing the said testimony so adduced in behalf of the United States in the trial of the said cause did order and decree the said ship *Eliza,* with her furniture, tackle, and apparel, to be restored to the said Eliphalet Ladd, the claimant, contrary to his trust and duty as judge of the said district court, in violation of the laws of the United States and to the manifest injury of the revenue.

ART. 3. That whereas it is provided by an act of Congress, passed on the 24th day of September, in the year 1789, "that from all final decrees of the district court in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of $300 exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district;" and whereas on the 12th (lay of November, in the year 1802, at the trial of the aforesaid cause between the United States on the one part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, as forfeited for the cause aforesaid, and the said Eliphalet Ladd on the other part, claiming the said ship *Eliza*, with her furniture tackle, and apparel, in his own proper right, the said John Pickering, judge of the said district of New Hampshire, did decree that the said ship *Eliza*, with her tackle, furniture, and apparel, should be restored to the said Eliphalet Ladd, the claimant; and whereas the said John S. Sherburne, attorney for the United States in and for the said district of New Hampshire, and prosecuting the said cause for and on the part of the United States, on the said 12th clay of November, in the year 1802, did, in the name and behalf of the United States, claim an appeal from said decree of the district court to the next circuit court to be held in the said district of New Hampshire, and did pray the said district court to allow the said appeal, in conformity to the provisions of the act of Congress last aforesaid, yet the said John Pickering, judge of the said district court, disregarding the authority of the laws and wickedly meaning and intending to injure the revenues of the United States and thereby to impair their public credit, did absolutely and positively refuse to allow the said appeal, as prayed for and claimed by the said John S. Sherburne in behalf of the United States, contrary to his trust and duty of judge of the district court, against the laws of the United States, to the great injury of the public revenue, and in violation of the solemn oath which he had taken to administer equal and impartial justice.

ART. 4. That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge, yet the said John Pickering, being a man of loose morals and intemperate habits, on the 11th and 12th days of November, in the year 1802, being then judge of the district court in and for the district of New Hampshire, did appear on the bench of the said court for the administration of justice in a state of total intoxication, produced by the free and intemperate use of intoxicating liquors; and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States; and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge and degrading to the honor of the United States.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said John Pickering; and also of replying to his or any answers which he shall make to the said articles, or any of them; and of offering proof to all and every other articles, impeachment, or accusation which shall be exhibited by them as the case shall require, do demand that the said John Pickering may be put to answer the said high crimes and misdemeanors; and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Signed by order and in behalf of the House.

NATHANIEL MACON, *Speaker.*
JOHN BECKLEY, *Clerk.*

He then delivered the articles at the table; whereupon,

The President notified the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives, and they withdrew.

The court adjourned to 12 o'clock to-morrow.

In the House,[1] on the same day, Mr. Nicholson, from the managers appointed on the part of this House to conduct the impeachment against John Pickering, judge of the district court of the United States for the district of New Hampshire, reported that the managers did this day carry to the Senate the articles of impeachment agreed to by this House on the 30th ultimo, and the said managers were informed by the Senate that their House would take proper measures relative to the said impeachment, of which this House should be duly notified.

2329. Pickering's impeachment continued.

In the Pickering case the rules were reported directly to the court of impeachment and agreed to therein.

Form of summons prescribed to command appearance of respondent in the Pickering impeachment.

Form of precept prescribed by the Senate to be indorsed on the writ of summons to Judge Pickering.

In the Pickering case the Senate provided for issuing subpoenas of a specified form on application of managers or of respondent or his counsel.

In the Pickering impeachment the subpoenas were directed to the marshal of the district wherein the witness resided.

The forms of summons and subpoena in the Pickering case were communicated to the House and entered on its Journal.

Form of direction to the marshal for service of subpoenas in the Pickering trial.

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[1] House Journal, p. 515; Annals, p. 802.

On January 5[1] the Senate in high court of impeachments assembled, and the President administered the oath to Mr. Jonathan Dayton, of New Jersey.

On January 9,[2] in the high court, Mr. Tracy reported from the committee appointed to examine precedents and prepare forms. The Senate Journal makes no mention of this or other proceedings of the court, although the committee was appointed by the Senate.

On January 10 and 11[3] the report was considered in the high court, and amendments were voted on and agreed to. The yeas and nays were taken, although it does not appear in what way they were ordered.

On January 12[4] the report was agreed to as follows:

Resolved, That a summons issue, directed to the said John Pickering, in the form following: "
United States of America, sct*:*

"The Senate of the United States of America, in their capacity of a court of impeachments, to John Pickering, judge of the district court for the district of New Hampshire, greeting:

"Whereas the House of Representatives of the United States of America did, on the 4th day of January, exhibit to the Senate, then sitting as a court of impeachments, articles of impeachment against you, the said John Pickering, charging you with high crimes and misdemeanors, therein specially set forth in the words following, viz: [Here insert the articles]; and did demand that you, the said John Pickering, should be put to answer the accusations of high crimes and misdemeanors as set forth in said articles; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice. You, the said John Pickering, are therefore hereby summoned to be and appear before the Senate of the United States of America in their capacity of a court of impeachments, at their Chamber in the city of Washington, on the 2d day of March next, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States, acting in their said capacity of a court of impeachments, shall make in the premises, according to the Constitution and laws of the said United States. Hereof you are not to fail."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this 12th day of January, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

Which summons shall be signed by the Secretary of the Senate and sealed with their seal, and served by James Mathers, Sergeant-at-Arms to the Senate, who shall serve the same pursuant to the directions given in the next following resolution:

Second. *Resolved*, That a precept shall be indorsed on said writ of summons in the form following, viz:

"United States of America, *ss:*

"The Senate of the United States, in their capacity of a court of impeachments, to James Mathers, Sergeant-at-Arms to the Senate, greeting:

"You are hereby commanded to deliver to and leave with John Pickering, esq., district judge of the district of New Hampshire, if to be found, a true and attested copy of the within writ of summons, together with a like copy of this precept, showing him both; or in case he can not with convenience be found, you are to leave true and attested copies of the said summons and precept at his usual place of residence; and in whichever way you perform the service, let it be done at least thirty days before the appearance day mentioned in the said writ of summons. Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day therein mentioned in said writ of summons."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this 12th day of January, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

Which precept shall be signed by the Secretary of the Senate and sealed with their seal.

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[1] Annals, p. 322.

[2] Annals, p. 323; Senate Journal, p. 335.

[3] Annals, p. 323.

[4] Annals, pp. 323, 325.

Third. *Resolved,* That the Secretary of the Senate be, and he is hereby, directed to pay the necessary expenses arising upon the process aforesaid, after the same shall be allowed by the President of the Senate for the time being, out of the fund appropriated to defray the contingent expenses of the two Houses of Congress, and the Secretary of the Senate is hereby authorized and directed to advance out of said fund, to said James Mathers, for his traveling expenses, the sum of two hundred dollars, to be by said James Mathers accounted for in a final settlement for his services.

Fourth. *Resolved,* That the Secretary of the Senate do acquaint the House of Representatives of the foregoing resolutions, and deliver to them a copy of the same.

Mr. Tracy, from the committee last mentioned, further reported in part, and the report was amended, as follows:

Resolved, That whenever application shall be made to the Secretary of the Senate for a subpoena or subpoenas for witnesses by the House of Representatives, either by their managers of the impeachment or in any other proper way, or by the party impeached or his counsel, acknowledged as such by the Senate sitting as a court of impeachments, he shall issue to such applicant a subpoena or subpoenas in the following form, viz:

"To [here name the witnesses and residence] greeting: You and each of you are hereby commanded, laying aside all excuses, to appear before the Senate of the United States, in their capacity of a court of impeachments, on the ——— day of ———, at the Senate Chamber, in the city of Washington, then and there to testify your knowledge in the cause which is before said court of impeachments for trial, in which the House of Representatives have impeached John Pickering, judge of the district court for the district of New Hampshire, of high crimes and misdemeanors. Fail not."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this ——— day of ———, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

Which shall be signed by the Secretary of the Senate and sealed with their seal.

Which subpoenas shall be directed in every case to the marshal of the districts where such witnesses reside, to serve and return.

Resolved, That the Secretary of the Senate do issue twelve subpoenas for witnesses in the above form for the use of the said Pickering, with blanks therein for such witnesses as he, the said Pickering, may think proper to summon, which Subpoenas shall be delivered by the Sergeant-at-Arms to him at the time he shall serve the summons aforesaid on the said Pickering.

As amended, the report was agreed to, yeas 23, nays 5.

It was then—

Ordered, That the Secretary lay these resolutions before the House of Representatives.

The above resolutions were communicated to the House by message on this day,[1] and on January 13 were read and laid on the table. The resolutions of the Senate are printed in full in the House Journal.

On January 13[2] the high court appears to have agreed on a "form of direction to the marshal for the service of the subpoena:"

[L. S.] THE SENATE OF THE UNITED STATES OF AMERICA, SITTING AS A COURT OF IMPEACHMENTS.

To the Marshal of the District of ———:

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington this ——— day of ———, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

It does not appear that this form was communicated to the House of Representatives.

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[1] House Journal, pp. 531, 533, 534.

[2] Annals, p. 326.

2330. Pickering's impeachment continued.

Returns of the Sergeant-at-Arms on the summons and a subpoena in the Pickering trial were read in the court before the return day.

On February 9,[1] in the high court, the following returns were filed:

United States of America, *ss:*

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, in obedience to the within summons, did proceed to the house of the within-named John Pickering on the 25th day of January, in the year 1804, and did then and there leave a true copy of the said writ of summons, together with a true copy of the articles of impeachment annexed, with him, the said John Pickering.

JAMES MATHERS.

United States of America, *ss:*

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, did, on the twenty-sixth day of January, in the year one thousand eight hundred and four, proceed to the house of the within-named Michael McClary and served this subpoena by reading the same and leaving with him a copy thereof.

JAMES MATHERS.

On February 20 these returns were read in the high court.

2331. Pickering's impeachment continued.

Rules adopted by the Senate as a court to govern the trial of Judge Pickering.

The Senate sitting as a court did not communicate to the House the rules for governing the trial.

By the rules for the Pickering trial the President of the Senate was given general authority to direct forms of proceeding not otherwise provided for.

Form of oath taken by the Sergeant-at-Arms and entered on the record, on the making of the return of service of summons on Judge Pickering.

Rule framed to govern ceremonies for appearance and answer of respondent in the Pickering impeachment.

The rules for the Pickering trial provided that a record should be made if respondent appeared in person or by counsel, or if he failed to appear.

Rule for offering motions during the Pickering trial.

In the Pickering trial a rule provided that the Senate might retire for consultation on demand of one-third.

The rule of the Pickering trial required all decisions to be in open court, by yeas and nays, and without debate.

Form of oath and method of examination for witnesses in the Pickering trial.

Rule of the Senate, in the Pickering trial, for examination of a Senator.

The rules of the Pickering trial provided that a question by a Senator should be in writing and be put by the Presiding Officer.

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[1] Annals, p. 326.

On March 1[1] Mr. Tracy, from the committee appointed by the Senate to examine precedents and prepare forms, reported to the court (not to the Senate) the following resolutions, which were agreed to by the court:

Resolved, That the President of the Senate shall direct all the forms of proceeding, while the Senate are sitting as a court of impeachments, as to opening, adjourning, and all forms during the session not otherwise specially provided for by the Senate.

And that the President of the Senate be requested to direct the preparations in the Senate Chamber for the accommodation of the Senate while sitting as a court, and for the reception and accommodation of the parties to the impeachment, their counsel, witnesses, etc.

And that he be authorized to direct the employment of the marshal, or any officer or officers of the District of Columbia during the session of the court of impeachments whose services he may think requisite and which can be obtained for the purpose.

And all the expenses arising under this resolution, after being first allowed by the President of the Senate, shall be paid by the Secretary, out of the fund appropriated to defray the contingent expenses of both Houses of Congress.

Resolved, That on the 2d day of March instant, at 1 o'clock, the legislative and executive business of the Senate be postponed, and that the court of impeachments shall then be opened, after which the process, which, on the 12th day of January last, was directed to be issued and served on John Pickering, and the return thereof, shall be read, and the Secretary of the Senate shall administer an oath to the returning officer in the following form, to wit:

"I, James Mathers, do solemnly swear that the return made and subscribed by me, upon the process issued on the 12th day of January last by the Senate of the United States against John Pickering, is truly made, and that I have performed said services as there described, so help me God."

Which oath shall be entered at large on the records.

The Secretary shall then give notice to the House of Representatives that the Senate, in their capacity of a court of impeachments, are ready to proceed upon the impeachment of John Pickering in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives.

Resolved, That counsel for the parties shall be admitted to appear and be heard upon said impeachment. And upon the attendance of the House of Representatives, their managers, or any person or persons admitted to appear for the impeachment, the said John Pickering shall be called to appear and answer the articles of impeachment exhibited against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself or if by agent or attorney, naming the person appearing and the capacity in which he appears. If he does not appear either personally or by agent or attorney the same shall be recorded. All motions made by the parties or their counsel shall be addressed to the President of the Senate, and, if he shall require it, shall be committed to writing and read at the Secretary's table, and after the parties shall be heard upon such motion the Senate shall retire to the adjoining committee room for consideration, if one-third of the members present shall require it; but all decisions shall be had in open court, by ayes and noes and without debate, which shall be entered on the records.

Witnesses shall be sworn in the following form, viz: "I, A B, do swear (or affirm, as the case may be) that the evidence I shall give to this court in the case now depending shall be the truth, the whole truth, and nothing but the truth, so help me God."

Witnesses shall be examined by the party producing them, and then cross-examined in the usual form.

If a Senator is called as a witness he shall be sworn and give his testimony standing in his place.

If a Senator wishes a question to be put to a witness it shall be reduced to writing and put by the President.

These rules were not communicated to the House of Representatives.

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[1] Annals, pp. 326, 327; Senate Journal, p. 368.

2332. Pickering's impeachment continued.

Ceremonies at the calling of Judge Pickering to answer the articles of impeachment.

The House did not accept the invitation of the Senate to accompany its managers at the return of summons in Pickering's impeachment.

On the same day, in the high court, the summons to John Pickering was read, together with the return made thereon by the Sergeant-at-Arms, and the oath prescribed was administered to the returning officer by the Secretary.

Subpoenas having been issued in the form prescribed and directed to Ebenezer Chadwick and others, the following return was made to them respectively:

NEW HAMPSHIRE DISTRICT, *ss:*

January 28, 1804.

Pursuant to this precept, I have served the same by reading it to the within-named Ebenezer Chadwick, etc.

MICHAEL MCCLARY,
Marshal for the New Hampshire District.

Then it was, by the high court of impeachments—

Ordered, That the Secretary give notice to the House of Representatives that the Senate, in their capacity of a court of impeachments, axe ready to proceed upon the impeachment of John Pickering in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives, and that the Secretary communicate a copy of the regulations agreed on to that House.

On March 2[1] the substance of this order was by message communicated to the House, whereupon it was—

Resolved, That the managers appointed on the 2d of January last do now attend in the Senate Chamber for the purpose of conducting the impeachment against John Pickering on the part of this House.

It does not appear that attendance by the House itself was proposed.

Thereupon the managers attended in the high court, whereupon John Pickering was three times called to answer the articles of impeachment exhibited against him by the House of Representatives, but came not.

2333. Pickering's impeachment continued.

No appearance was made on behalf of Judge Pickering and no answer was made to the articles of impeachment.

In the Pickering impeachment counsel for respondent's son presented a petition of the latter setting forth that his father was insane, and asking for time to show this.

In the Pickering case, against the objection of the managers, the court determined to hear the counsel of respondent's son and evidence to show the insanity of the accused.

On a question of permitting counsel for respondent's son to appear in the Pickering trial, the said counsel was not permitted to argue.

The Vice-President then submitted a petition of Jacob S. Pickering, son of John Pickering, and a letter from Robert G. Harper, inclosed to the Vice-President.

[1] House Journal, p. 613; Annals, p. 1087.

PETITION OF JACOB S. PICKERING.

At a court of impeachments holden before the honorable the Senate of the United States of America, sitting in their capacity of a high court of impeachment at the city of Washington, on the 2nd day of March, 1804:

The House of Representatives of the United States *v.* John Pickering, judge of the district court for the district of New Hampshire.

Jacob S. Pickering, of Portsmouth, in the district of New Hampshire, and son of the said John Pickering, against whom articles of impeachment have been exhibited by the House of Representatives of the United States, conceives it his duty most respectfully to state to this high and honorable court the real situation of the said John Pickering, the facts and circumstances relative to said articles, wherein he stands charged of supposed high crimes and misdemeanors, and to request that this court would grant him such term of time as they shall think fit and reasonable to substantiate this statement.

Your petitioner will be able to show that at the time when the crimes wherewith the said John stands charged are supposed to have been committed, the said John was, and for more than two years before, and ever since has been, and now is, insane, his mind wholly deranged, and altogether incapable of transacting any kind of business which requires the exercise of judgment, or the faculties of reason; and, therefore, that the said John Pickering is incapable of corruption of judgment, no subject of impeachment, or amenable to any tribunal for his actions.

That this derangement has been constant and permanent, every day of his life completely demonstrating his insanity; every attempt for his relief, which has been prescribed by the faculty who have been consulted on his case, has proved unavailing, and his disorder has baffled all medical aid.

Your petitioner is well aware that the most conclusive evidence of the aforegoing fact would result from an actual view of the respondent, which unfortunately, by reason of his great infirmities can not now be, but at the hazard of his life—he is wholly unable at this inclement season to support the fatigue of so long a journey; yet if the respondent's life be spared, and his health in any degree restored, it will be the endeavor of your petitioner that the said John shall make his personal appearance before this honorable court at any future day they shall think proper to assign.

Your petitioner will be able to show, any pretense to the contrary notwithstanding, that the decisions made in the cause stated in the first article of impeachment, although not the result of reflection, or grounded on any deductions of reason, were, nevertheless, correct, perfectly consonant to the principles of justice, and conformable to the laws of the land; and the refusal of the said judge to grant the appeal claimed by the said John S. Sherburne, in behalf of the United States, was not against law, or to the injury of the public revenue, as the third article of the impeachment supposes; there being no law to warrant such appeal in such a case.

While, with deep humility, your petitioner admits and greatly laments the indecorous and improper expressions used by the said judge on the seat of justice, as mentioned in the last article of impeachment, he will clearly evince the injustice of that part thereof which respects his moral character, and show abundantly, that from his youth upward, through a long, laborious and useful life, and until he was visited by the most awful dispensation of Providence, and the most deplorable of all human calamities, the loss of reason, he was unexceptionable in his morals, remarkable for the purity of his language, and the correctness of his habits, and the deviations in these particulars now complained of, are irresistible evidence of the deranged state of his mind.

When this high and honorable court shall take into their consideration the situation of this respondent, oppressed with infirmity, incapable of making arrangements for his defense, the inclemency of the season, his great distance from the place of trial, and the shortness of notice—when your honors reflect on the high and atrocious crime with which he stands charged; in the decision of which is involved, not his life (indeed his remains of life would be but a slender sacrifice), but that which, to an honest mind, is more dear than life itself, his good name—when you advert to the consequences attached to a conviction; the indelible stigma which will befall a numerous family whose only patrimony was the unsullied reputation of their parent, which they have ever cherished, and of which they fondly, perhaps too fondly, hoped, no time, or circumstance, or adverse fortune could deprive them—when your honors shall think of these things, your petitioner has strong confidence that the wisdom and justice of this court will permit a respondent, whose integrity until now has been unquestioned;

who has sustained offices high and honorable, through a long life, and the general tenor of whose character and conduct has hitherto furnished him with a coat of armor against the assaults of his enemies, but who is now incapable of defending himself, to be defended by his friends.

Audi alteram partem is a maxim held in reverence wherever liberty yet remain. The Senate of America will be the last tribunal on earth that will cease to respect it; they will never condemn unheard; they will never refuse time for a full and impartial trial.

That time, that impartial trial, your petitioner prays for; the charity of the law presumes the innocence of the respondent; and your petitioner, also, respectfully entreats that, in the meantime, and more especially as the evidence on which the impeachment is founded, was taken ex parte, no unfavorable impressions may be made on the minds of this honorable court, by any report or extra-judicial representations which may have been made on the subject before them.

JACOB S. PICKERING.

LETTER OF ROBERT G. HARPER.

SIR: Mr. Jacob S. Pickering, the son of Judge Pickering, of New Hampshire, has forwarded to me, through one of his friends here, the inclosed petition, with a request that I will lay it before the court of impeachments, and will appear on his part, if permitted, and support the prayer of it. I am also furnished with several depositions, showing that Judge Pickering, from bodily infirmity and total derangement of mind, is wholly incapable of appearing before the court at this time, of making a defense, or of giving authority to any person to appear for him.

The process of subpoena heretofore issued by the court not being compulsory, and Judge Pickering's narrow circumstances not enabling his son to defray the expenses of the witnesses whose testimony it is important for him to produce, it was judged necessary to serve the subpoena. The object of the petition is to obtain a postponement of the trial, and either compulsory process, or an order to take depositions, which may be received in evidence. Be pleased, Sir, to lay the petition before the court, and to inform me whether I shall be received to appear on the part of the petitioner, Mr. Jacob S. Pickering, in its support. In that case I will attend in the capacity of agent or counsel for the petitioner, and submit to the court the reasons and proofs with which I am furnished in support of his application.

With the highest respect, I have the honor to be, Sir, your most obedient very humble servant,

ROBERT G. HARPER.

The VICE-PRESIDENT OF THE UNITED STATES.

The President inquired if Mr. Harper was in court, and invited him to a seat within the bar, which having taken, he made the following address:

Mr. President: Before I proceed to address this honorable court in the case now before it, I think it proper to repeat explicitly what is stated in the letter just now read, that I do not appear as the counsel, agent, or attorney of Judge Pickering, or by virtue of any authority derived from him, he being in a state of absolute and long-continued insanity, can neither appear himself nor authorize another to appear for him. I present myself to this honorable court, at the request of Jacob S. Pickering, son of Judge Pickering, stating his father's insanity, and praying that time may be allowed for collecting and producing complete proof of the melancholy fact. This application for postponement I am prepared to support by depositions now in my possession; and it is also my intention, if permitted, to make a further application on the part of Judge Pickering for compulsory process to compel the attendance of such witnesses as it may be necessary to produce in proof of the fact of insanity, or for an order to take their depositions in writing on interrogatories, and notice to the prosecutors. It rests with this honorable court whether it will receive such an application, and hear counsel so appearing in its support.

After a short pause, Mr. Harper again rose and inquired whether his appearance in support of the petition would be construed as the appearance of John Pickering by counsel.

The President [1] answered that he presumed that it would not be so construed.

Mr. Nicholas, on behalf of the House managers, objected to the hearing of Mr. Harper in any other capacity than as counsel of the accused, and remarked

[1] Aaron Burr, of New York, Vice-President and President of the Senate.

that as Mr. Harper disclaimed appearing in that capacity, he could not in his opinion be heard. Other managers spoke, especially Mr. Rodney, who said:

I understand the President as having declared that, agreeably to the rules of proceeding adopted by the Senate, no person can be heard in this case but the accused, or his agent or counsel.

The Vice-President nodded assent.

Mr. Rodney continued:

I also understand the gentleman who appeared on this occasion, as clearly and explicitly stating that he does not appear as the counsel of Mr. Pickering, nor does he wish it so to be understood. That gentleman has informed us in a very fair and candid manner of the only character in which he does appear, and has assumed very properly and correctly the only ground upon which he wishes to stand. He has in positive terms disavowed the idea of his being the agent or counsel of the accused, because he has protested against Mr. Pickering's being affected by any act done by him. On this single ground, then, I respectfully submit whether it would be proper to hear the gentleman under these circumstances, and whether it be not manifested that he does not come within the rules laid down by the Senate for the government of this high court of impeachments.

But if the gentleman is to be heard on this subject in the anomalous character in which he appears, with a view of postponing the proceedings of this court, it will first be necessary for the court to decide that the case is properly before them, agreeably to the rules which have been established. If no appearance in person or by attorney has been entered, unless proceedings have been had which they shall consider tantamount to an appearance, there is no cause regularly in court, and it would be idle for any person to talk of postponing the consideration of that which really was not before the court. A question of this kind must, from the nature of it, ever be incidental to the principal or main question. When a writ is in court according to the rules of the court, a motion for postponement may, with propriety, if the circumstances justify it, be made. This must always be a subsequent consideration, after the court are in full possession of the case. Agreeably to the correct course of proceeding in ordinary courts, until bail and appearance, there can be no case in court. The party has no day given him, because he is, until this takes place, considered to be out of court; nor would any counsel, though duly authorized, be heard in his behalf. There has, in this case, then, been no appearance in person or by agent or counsel. The accused has made default, and no agent or attorney has been recorded for him. Surely, then, his default should be first recorded, and if the court consider that after his having been duly served, and making default, they will proceed to a hearing and determination of the principal question, it will then be proper to listen to those which are necessarily incidental. It will be at this stage of the business competent for the court, if at all, to hear the gentleman. But I am decidedly of the opinion, there is no period in which it will be proper so to do unless he claims this right as the agent or counsel of the accused. In that capacity he has a right to be heard; and in that capacity alone. Our Constitution has wisely secured to every man this privilege, and I would not deprive the humblest object in the community of this inestimable benefit. I flatter myself, therefore, that this honorable court will adhere strictly to the rules which they have prescribed for themselves, and that they will for these reasons, and those which have been assigned by my colleague, refuse the present application.

Mr. Harper inquired whether it would be regular in him to reply to these remarks?

The President said it would not; and immediately after put the question to the Senate, whether Mr. Harper should be heard in support of the prayer of the petition of Jacob S. Pickering.

Whereupon the Senate retired to a private Chamber, from which they returned about 3 o'clock, when the President advised the managers that the Senate would take further time to consider the question before them, and would make them acquainted with their decision.

Finally, with open doors, the court took a vote on the question:

Will the court hear evidence and counsel respecting the insanity of John Pickering, upon the suggestion contained in the petition of Jacob S. Pickering, and the letter of R. G. Harper?

It was decided in the affirmative, yeas 18, nays 12.

It was then—

Resolved, That, on the motion made and seconded, the court shall retire to the adjoining committee room, if one-third of the Senators present shall require it.

The court adjourned to 12 o'clock the next day.

2334. Pickering's impeachment continued.

The court having determined, in the Pickering impeachment, to hear counsel of a third person on a preliminary question, the managers withdrew to consult the House.

The Senate declined to await the consultation of the managers with the House before hearing evidence as to Judge Pickering's sanity.

The House, in the Pickering impeachment, deemed it unnecessary to approve the conduct of its managers in declining to discuss in the court a matter from a third party.

In the Pickering case the Presiding Officer ruled that in presenting affidavits to show the insanity of the accused only the pertinent parts should be read.

The Presiding Officer held that counsel of the son of Judge Pickering, admitted to show the insanity of the accused, might not offer a motion to the court.

On March 6,[1] the court was opened, and the managers of the impeachment, on the part of the House of Representatives, against John Pickering, attended.

Mr. Harper also attended.

The President informed Mr. Harper that the court would hear evidence and counsel respecting the insanity of John Pickering upon the suggestion contained in the petition of Jacob S. Pickering and the letter of R. G. Harper.

Mr. Nicholson, in behalf of the managers, said he was instructed to ask for the reading of the proceedings of the court on the last day of its sitting.

The clerk having read the record, by which it appeared that John Pickering had been called three times without appearing,

Mr. Nicholson inquired at what point of time it was intended that Mr. Harper should be heard, and whether this was to be a step preliminary to the trial.

The President said he could not undertake to give an explanation of the proceedings of the Senate, adding that their meaning must be gathered from the proceedings themselves.

Mr. Nicholson then said that he begged leave to state that the managers were ready to proceed with the trial of the articles preferred by the House of Representatives.

The President said that under the decision of the Senate it had been determined in the first instance to hear Mr. Harper in support of the petition of Jacob S. Pickering.

Mr. Nicholson said he was instructed by the managers again to state that they were ready to support the articles of impeachment. They, however, not being at present under the consideration of the Senate, they did not consider themselves under

[1] Annals, p. 333.

any obligation to discuss a preliminary question raised by a third person unauthorized by the person charged. He was therefore instructed to state to the Senate that the managers would, under these circumstances, retire, and take the opinion of the House of Representatives respecting their further procedure.

The managers thereupon retired.

Then a proposition that the Senate retire to its private chamber was disagreed to, only six voting aye.

Mr. John Quincy Adams, apparently to second a suggestion of Mr. James Jackson, of Georgia, that proceedings should be delayed until the Senate had heard from the managers of the House of Representatives, moved an adjournment, but the motion was disagreed to, only 10 voting aye.

A motion by Mr. Robert Wright, of Maryland, that the counsel in support of the petition of J. S. Pickering be not heard until the return of the managers, or until their intention should be signified, was disagreed to, the ayes being seven.

Then Mr. Harper rose and presented affidavits, evidently ex parte, to show the insanity of Judge Pickering. One affidavit expressing the opinion that Judge Pickering could not "from his bodily infirmities" proceed on a journey to Washington, was ruled out by the President, as the order of the Senate confined the proof to the single allegation of insanity. On the presentation of another affidavit the President ruled that only the parts relating to insanity should be read.

After the reading of the affidavits,[1] Mr. Harper said this was the testimony on which he founded the application—which was to postpone the trial until such time as the court might think fit, in order to take depositions.

The President said:

> It does not seem to me proper to receive any motion from you. The Senate will attend to what you have said and take proper order upon it.

Mr. Harper thereupon addressed the court briefly, expressing the wish that opportunity should be allowed and the necessary facilities afforded to obtain testimony.

The court thereupon adjourned.

In the House of Representatives,[2] meanwhile, a short time after the managers returned from the court, Mr. Nicholson, in their behalf, made to the House of Representatives the following communication:

> That on Friday, the 2d of March, the managers, agreeably to the directions of the House, appeared at the bar of the Senate, to support the said articles of impeachment, when John Pickering was three times solemnly called, but did not answer or appear, either in person or by counsel. The President of the Senate then stated that he had received a letter, signed R. G. Harper, accompanying a petition, signed Jacob S. Pickering, who called himself the son of the party charged. The petition being read, it was found to contain a statement of a variety of matter, particularly the insanity of Judge Pickering, upon which the prayer of the petition was founded for a postponement of the trial to some future day. Mr. Harper was called to the bar of the Senate; he entered, and stated that he wished it to be distinctly understood that he did not appear at the bar of the Senate as counsel for John Pickering, from whom he had received no authority for that purpose; but that his object was to support the facts contained in the petition of Jacob S. Pickering, and the prayer thereof. There was a short pause, when Mr. Harper rose again and inquired whether his appearance in support of the petition would be construed as the appearance of John Pickering, by counsel. The President of the Senate answered, he presumed that Mr. Harper's appearance would not be considered as the appearance of John Pickering by counsel.

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[1] Annals, p. 342.

[2] House Journal, pp. 625, 626; Annals, p. 343.

The managers, under these circumstances, felt themselves bound to object to Mr. Harper's being heard in any other capacity than as counsel for the party who was impeached; and briefly stated their reasons for the objection.

The Senate withdrew to a private chamber, where it is presumed the question was debated. The managers again appeared at the bar of the Senate this day, and were informed by the President that it had been resolved to hear Mr. Harper in support of the allegations contained in the petition of Jacob S. Pickering, and the prayer thereof. The managers inquired at what point of time it was intended that Mr. Harper should be heard, and whether this was to be a measure preliminary to the trial. The President of the Senate declared that he could not undertake to explain the resolutions of the Senate, but that their sense must be collected from the resolutions themselves. The managers then offered themselves ready for trial, declaring that they were prepared to open the prosecution on behalf of the House of Representatives, and that the witnesses were ready to prove the facts charged in the articles of impeachment. Upon this offer being made, the President of the Senate stated that he considered it to be the sense of the Senate that Mr. Harper was to be heard before the trial commenced.

The managers considered this as an irregular step, and not believing that they ought to discuss any petition presented to the Senate from a person who was not a party to the impeachment, and this, too, before the party charged, although duly notified, had appeared, either in person or by attorney, withdrew from the Senate Chamber. They will not feel themselves either bound or authorized to appear again until the Senate shall inform them that they are prepared to proceed in the trial, unless specially directed by this House.

Mr. John Smilie, of Pennsylvania, thereupon proposed the following:

Resolved, That this House doth approve of the conduct of the managers appointed to support the articles of impeachment in the case of John Pickering, as stated in their report of this day, and that the said managers do not appear at the bar of the Senate, until they shall be specially instructed by this House.

There was objection to the resolution on the ground that it was not necessary for the House to express its opinion of the conduct of the managers at every stage. There was so much objection that Mr. Smilie on the next day withdrew the resolution.

2335. Pickering's impeachment continued.

After hearing evidence as to the sanity of the accused, the court of impeachment notified the House of its readiness to hear the managers on the articles.

There being no appearance for Judge Pickering, witnesses presented by the managers were not cross-examined, except for a few questions by the Presiding officer.

On March 7,[1] in the high court of impeachments, it was ordered that the Secretary inform the House of Representatives that the court was open and ready to receive and hear the managers in support of the articles of impeachment. This motion was agreed to by a vote of yeas 19, nays 8.

Accordingly, on March 8,[2] the court was opened, the managers attended, and one of them, Mr. Early, after opening remarks, proceeded to produce testimony in support of the first article of impeachment, and then, in order, evidence supporting the other articles. This evidence consisted of the reading of statutes of the United States, an attested copy of the record of the court, with the seal of said court annexed, and the examination of witnesses.

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[1] Annals, p. 345; House Journal, pp. 626, 627.

[2] Annals, p. 345. The Senate Journal simply records the fact of the sitting of the court of impeachments on this as on other days.

Judge Pickering not being represented by counsel, the witnesses were not cross-examined, except in certain instances [1] when the President addressed questions to a witness.

The testimony tended to substantiate the charge that the said judge was an inebriate.

Mr. Nicholson then informed the court that the managers here closed the testimony, and then the managers withdrew.

2336. Pickering's impeachment, continued.

No defense being made in the Pickering impeachment, the two Senators from the State of the accused were examined at suggestion of the court.

In the Pickering case one of the managers submitted the case finally without extended argument.

The Senate declined to postpone the Pickering trial after the evidence had been submitted.

On March 9,[2] on the suggestion of Mr. Tracy, the Senator who was chairman of the committee having in charge the preparation of forms of procedure for the trial, Simeon Olcott and William Plumer, the Senators from New Hampshire, were respectively sworn and affirmed. They testified that in their opinion the troubles of Judge Pickering were not due to intemperance. Mr. Plumer thought the intemperance the result of insanity.

Four witnesses were introduced, at whose suggestion does not appear, and testified in rebuttal.

Mr. Nicholson then observed that the managers would withdraw for a few minutes. Accordingly they withdrew, and shortly returned.

Mr. Nicholson then, in their behalf, addressed the court briefly, saying that he was directed by the managers to inform the court that they submitted the articles on the evidence offered, entertaining no doubt of full justice being done by the decision of the Senate.

Thereupon the managers retired.

Mr. Tracy then offered the following motion:

Resolved, As the opinion of this court, that the proceedings on the articles of impeachment exhibited by the House of Representatives against John Pickering be postponed to the —— day of —— next.

This resolution was disagreed to, yeas 10, nays 20.

Thereupon the court adjourned to the next day.

2337. Pickering's impeachment, continued.

In the absence of the Vice-President a President pro tempore was chosen to preside over the court trying Judge Pickering.

The Senate informed the House of the day and hour fixed for pronouncing judgment in the Pickering impeachment.

The court of impeachment declined to postpone judgment until Judge Pickering could be brought personally before it for inspection as to sanity.

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[1] Annals, p. 357.

[2] Annals, pp. 359, 362.

On March 10 [1] the record of the court of impeachment shows:

Mr. Franklin was chosen President pro tem.

The Journal of the Senate for this day shows that the Vice-President was absent and that the Senate chose Mr. Jesse Franklin, of North Carolina, President pro tempore.[2]

On this day, also, the Senate, before sitting as high court of impeachments, ordered,[3] by a vote of yeas 20, nays 9—

That the Secretary do acquaint the House of Representatives that the court of impeachments will, on Monday at 12 o'clock, proceed to pronounce judgment on the articles of impeachment exhibited by them against John Pickering.

Afterwards, the high court of impeachments having convened, Mr. Samuel White, of Delaware, submitted the following: [4]

Resolved, That this court is not at present prepared to give their final decision upon the articles of impeachment preferred by the House of Representatives against John Pickering, district judge of the district of New Hampshire, for high crimes and misdemeanors, the said John Pickering not having appeared, or been heard, by himself or by counsel; and it having been suggested to the court by Jacob S. Pickering, son of the said John Pickering, that the said John Pickering, at the time of the conduct charged against him in the said articles of impeachment as high crimes and misdemeanors, was, and yet is, insane, which suggestion has been supported by the testimony of two members of the court and by the affidavits of sundry persons, whose integrity is unimpeached; and it being further suggested in the said petition that at such future day as the court may appoint the body of the said Pickering shall be produced in court, and further testimony in his behalf, which will enable the court to judge for themselves as to the insanity of the said John Pickering and to act more understandingly in the premises: but that the said John Pickering, owing to bodily infirmity, could not be brought to court at present, at so great a distance, and at this inclement season of the year, without imminent hazard of his life.

Mr. Wilson Carey Nicholas, of Virginia (not Mr. Nicholson, the House manager) and Mr. Robert Wright, of Maryland, and others, objected to the resolution as not being in order.

Mr. Joseph Anderson, of Tennessee, asked if it would be in order to move an amendment to it.

Mr. John Quincy Adams, of Massachusetts, said he would object to any amendment to it, as, by the rule of the court, a gentleman had a right to a vote upon any specific proposition he might please to submit connected with the trial.

Mr. Samuel White, of Delaware, called for the reading of the rule.

Mr. Anderson then moved that the resolution submitted by the gentleman from Virginia yesterday be taken up as being entitled to be acted upon first.

The President pro tempore declared that the resolution of the gentleman from Delaware was fairly before the court and must be disposed of in some way before anything else could be taken up.

A motion for postponing the further consideration of it was then made and withdrawn.

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[1] Annals, p. 362; Senate Journal, p. 372.

[2] It seems hardly necessary to suppose that the court of impeachments ratified this selection of the Senate. The records of the court are not made with technical care, and the entry probably refers to action of the Senate.

[3] Senate Journal, p. 373; House Journal, p. 632. The record of the court of impeachment also shows the adoption of this order.

[4] Annals, p. 362.

Mr. Nicholas hoped it would not be permitted to go upon the journals of the court.

Mr. Jackson moved the previous question, viz: "Shall the main question be now put?"

Mr. White hoped that whatever question should be taken on the subject should be by yeas and nays; that his resolution and the manner in which it might be got rid of should be seen and understood.

Mr. Anderson then moved to amend the resolution by striking out the words, "not having been heard by himself or counsel," and all after the words "was, and yet is, insane" to the end of the resolution.

On motion of Mr. Jonathan Dayton, of New Jersey, the galleries were cleared and the doors closed.

At 3 o'clock the doors were opened and the question was taken upon the resolution as at first submitted—yeas 9, nays 19.

So the resolution was disagreed to.

2338. Pickering's impeachment, continued.

The House attended its managers to the Senate to hear the Senate pronounce judgment in the Pickering impeachment.

The House having heard judgment in the Pickering impeachment, the managers made no report, and no record appears on the House Journal.

On March 12,[1] in the House of Representatives, it was

Ordered, That this House do now attend in the Senate Chamber to hear the Senate, in their capacity of a court of impeachments, pronounce judgment on the articles of impeachment exhibited against John Pickering, judge of the district court of the United States for the district of New Hampshire, agreeably to the notification contained in a message from the Senate, by their Secretary, on Saturday last.

The Speaker, attended by the Members, accordingly withdrew to the Senate Chamber for the purpose expressed in the foregoing order; and being returned, etc., proceeded to other business. The House Journal has no record of the decision of the court.

2339. Pickering's impeachment continued.

The court determined to confine the question in the judgment on Judge Pickering to the simple question of guilt on the charges.

The court, in the Pickering judgment, declined to permit an expression at to whether the offenses constituted high crimes and misdemeanors.

In conformity with English precedents the Senate pronounced judgment, article by article, in the Pickering case.

The final question in the Pickering judgment was on the removal of the accused from office.

Meanwhile, on the same day, the Court of Impeachment had convened, and Mr. Samuel White, of Delaware, inquired whether the question was to be taken on each article separately, as practiced in the House of Lords, or on the whole

[1] House Journal, pp. 642, 643; Annals, p. 1169.

together. He hoped upon each separately, as gentlemen might wish to vote affirmatively on some and negatively on others, from which privilege they must be precluded by giving but one general vote of guilty or not guilty. He would, therefore, beg leave to submit to the consideration of the court the following as the form of the question to be put to each member upon each article of impeachment, viz:

Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the——article of impeachment or not guilty?

For this form of question, Mr. White observed, he could adduce precedent. It was nearly the same as was used in the very celebrated case of Warren Hastings, and he presumed would collect the sense of the court with as much certainty as any that could be proposed, which was his only object.

After some conversation, Mr. Joseph Anderson, of Tennessee, moved the following as the form and prayed that it might be taken up:

Is John Pickering, district judge of the district of New Hampshire, guilty as charged in the——article of impeachment exhibited against him by the House of Representatives?

The President pro tempore declared that it would not be in order to take it up till the motion of the gentleman from Delaware was acted upon, as it was first before the court and had not yet been disposed of in any way, and was about to put the question following upon it, when—

Mr. Joseph Anderson, of Tennessee, mentioned that he had objections to the form of question proposed by the gentleman from Delaware and moved to strike out the words "of high crimes and misdemeanors."

On motion, the galleries were cleared and the doors closed. After some debate, Mr. White's form of question was lost—only 10 voting in favor of it and 18 against it.

Mr. Anderson's form was then adopted—yeas 18, nays 9.

Mr. White stated that he believed Judge Pickering had practiced much of the indecent and improper conduct charged against him in the articles of impeachment; that he had been seen intoxicated and heard to use very profane language upon the bench; that he had acted illegally and very unbecoming a judge in the case of the ship *Eliza,* as charged against him in the articles, but that he was very far from believing that any part of his conduct amounted to high crimes and misdemeanors or that he was in any degree capable of such an offense, because, after the testimony the court had heard, scarcely a doubt could remain in the mind of any gentleman but that the judge was actually insane at the time; and Mr. White wished to know whether it was to be understood by the two last votes just taken that the court intended only to find the facts and to avoid pronouncing the law upon them; that they could have it in view to say merely that Judge Pickering had committed the particular acts charged against him in the articles of impeachment and upon such a conviction, to remove him, without saying directly or indirectly whether those acts amounted to high crimes and misdemeanors or not; for in the several articles they are not so charged, though judgment is demanded upon them as such. Upon such a principle and by such a mode of proceeding good behavior, he observed, would be no longer the tenure of office; every officer of the

Government must be at the mercy of a majority of Congress, and it would not hereafter be necessary that a man should be guilty of high crimes and misdemeanors in order to render him liable to removal from office by impeachment, but a conviction upon any facts stated in articles exhibited against him would be sufficient.

Mr. Jonathan Dayton, of New Jersey, observed that the honorable gentleman from Virginia seemed to be offended at the language of his honorable friend from Delaware, who, in speaking of the proceedings on the impeachment, had called them a mere mockery of trial. To such terms, however, the ears of that honorable gentleman must be accustomed and accommodated, for, whilst either he or his friend had the honor of a seat in that body, they should designate this trial by no other character. It deserved no better appellation and would be thus characterized in all parts of the United States where these proceedings could be seen and understood.

That the conclusion of this exhibition might perfectly correspond with its commencement and progress, that the catastrophe might comport with the other parts of the piece, the Senate were now to be compelled, by a determined majority, to take the question in a manner never before heard of on similar occasions. They were simply to be allowed to vote, whether Judge Pickering was guilty as charged—that is, guilty of the facts charged in each article—aye or no. If voted guilty of the facts, the sentence was to follow, without any previous question whether those facts amounted to a high crime and misdemeanor. The latent reason of this course was, Mr. Dayton said, too obvious. There were numbers who were disposed to give sentence of removal against this unhappy judge, upon the ground of the facts alleged and proved, who could not, however, conscientiously vote that they amounted to high crimes and misdemeanors, especially when committed by a man proved at the very time to be insane and to have been so ever since, even to the present moment. The Constitution gave no power to the Senate, as the High Court of Impeachments, to pass such a sentence of removal and disqualification, except upon charges and conviction of high crimes and misdemeanors. The House of Representatives had so charged the judge and had exhibited articles in maintenance and support, as they themselves declared, of those charges. The Senate had received and heard the evidence adduced by the managers and had gone through certain forms of a trial, and they now, by a majority, dictated the form of a final question the most extraordinary, unprecedented, and unwarrantable. For himself, Mr. Dayton said, he felt at a loss how to act. He was free to declare that he believed the respondent guilty of most of the facts stated in the articles, but, considering the deranged state of intellect of that unfortunate man, he could not declare him guilty in the words of the Constitution; he could not vote it a conviction under the impeachment. Let the question be stated, as had been proposed by his honorable friend from Delaware, agreeably to the form observed in the well recollected case of Warren Hastings:

> Is John Pickering guilty of a high crime and misdemeanor upon the charge contained in the first, the second, the third, or the fourth article of the impeachment, or not guilty?

Or, if the court preferred it, he should have no objection against taking the preliminary question, whether guilty of the facts charged in each article, provided

they would allow it to be followed by another most important question, viz: Whether those facts, thus proved and found, amounted to a conviction of high crimes and misdemeanors, as charged in the impeachment, and expressly required by the Constitution. Both these forms of stating the question were, it was now too evident, intended to be refused by the majority, and thus a precedent established for removing a judge in a manner unauthorized by that charter.

Mr. White asked whether, after the question now before the court—which goes merely to settle, as gentlemen themselves believe, the point whether Judge Pickering has committed the particular acts charged against him in the articles of impeachment or not—should be decided, it would then be in his power to obtain a vote of the court upon another question which, without presenting at present, he would state in his place, viz: Is it the opinion of this court that John Pickering is guilty of high crimes and misdemeanors, upon the charges exhibited against him in the articles of impeachment preferred by the House of Representatives?

The President pro tempore replied that he thought such a motion could not be received after the vote had been taken.

Mr. Wright submitted the following as the final question, viz:

Is the court of opinion that John Pickering be removed from the office of judge of the district court of the district of New Hampshire?

This form was agreed to.

2340. Pickering's impeachment continued.

In the Pickering impeachment certain Senators retired from the court because dissatisfied with form of the question on final judgment.

Messrs. John Armstrong, of New York; Stephen R. Bradley, of Vermont; David Stone, of North Carolina; Jonathan Dayton, of New Jersey; and Samuel White, of Delaware, retired from the court. The two last not because they believed Judge Pickering guilty of high crimes and misdemeanors, but because they did not choose to be compelled to give so solemn a vote upon a form of question which they considered an unfair one, and calculated to preclude them from giving any distinct and explicit opinion upon the true and most important point in the cause, viz, as to the insanity of Judge Pickering, and whether the charges contained in the articles of impeachment, if true, amounted in him to high crimes and misdemeanors or not.

2341. Pickering's impeachment continued.

In final judgment the court found Judge Pickering guilty in all the articles and decreed his removal from office.

Final judgment being pronounced, the court of impeachment in Pickering's case adjourned sine die.

The question was then taken in the presence of the managers and of the House of Representatives, and decided as follows:

On the question—

Is John Pickering, district judge of New Hampshire, guilty as charged in the first article of impeachment exhibited against him by the House of Representatives?

It was determined in the affirmative, yeas 19, nays 7.

The same question was put, in the same way, on the three remaining articles, and decided by a like result.

On the question—

Is the court of opinion that John Pickering be removed from the office of judge of the district court of the district of New Hampshire?

It was determined in the affirmative, yeas 20, nays 6.

The court then adjourned sine die.

The Senate Journal [1] records simply the fact of the sitting and adjournment of the court, as on other days, and makes no mention of the result of the trial.

[1] Senate Journal, p. 374.

Chapter LXXII.

THE IMPEACHMENT AND TRIAL OF SAMUEL CHASE.

2342. The impeachment and trial of Samuel Chase, associate justice of the Supreme Court of the United States, in 1804.

The investigation of the conduct of Richard Peters, United States district judge for Pennsylvania, in 1804.

The impeachment of Mr. Justice Chase was set in motion on the responsibility of one Member of the House, sustained by the statement of another Member.

In the case of Mr. Justice Chase the House, after long debate and a review of precedents, decided to order investigation, although Members could give only hearsay evidence as to the facts.

English precedents reviewed in the Chase case on the question of ordering an investigation on the strength of common rumor.

The House declined to state by way of preamble its reason for investigating the conduct of Mr. Justice Chase and Judge Peters.

Form of resolution authorizing the Chase and Peters investigation in 1804.

Two of the seven Members of the committee for the Chase investigation were from the number opposing the investigation.

Mr. John Randolph, who had moved the Chase investigation, was made chairman of the committee.

On January 5, 1804,[1] Mr. John Randolph, of Virginia, arising in his place in the House, spoke of the necessity of "preserving unpolluted the fountain of justice," and then said:

At the last session of Congress a gentleman from Pennsylvania did, in his place (on the bill to amend the judicial system of the United States), state certain facts in relation to the official conduct of an eminent judicial character, which I then thought, and still think, the House bound to notice. But the lateness of the session (for we had, if I mistake not, scarce a fortnight remaining) precluding all possibility of bringing the subject to any efficient result, I did not then think, proper to take any steps in the business. Finding my attention, however, thus drawn to a consideration of the character of the officer in question, I made it my business, considering it my duty as well to myself as to those whom I represent, to investigate the charges then made, and the official character of the judge, in general. The result having convinced me that there exists ground of impeachment against this officer, I demand an inquiry into his conduct, and therefore submit to the House the following resolution:

"Resolved, That a committee be appointed to inquire into the official conduct of Samuel Chase, one of the associate justices of the Supreme Court of the United States, and to report their opinion whether the said Samuel Chase hath so acted in his judicial capacity as to require the interposition of the constitutional power of this House.'

Objection being made that the House should have further information before taking a step, which would cast discredit on the character of a judge, Mr. John Smilie, of Pennsylvania, who had made the statement in the preceding Congress referred to by Mr. Randolph, arose and, in the course of his remarks, said:

A man of the name of Fries was prosecuted for treason in the State of Pennsylvania. Two of the first counsel at that bar, Mr. Lewis and Mr. Dallas, without fee or reward, undertook his defense. I mention their names to show that there could have been no party prejudices that influenced them. When the trial came on the judge behaved in such a manner that Mr. Lewis declared that he would not so far degrade his profession as to plead under the circumstances imposed upon him. Mr. Dallas declared that the rights of the bar were as well established as those of the bench; that he considered the conduct of the judge as a violation of those rights and refused to plead. The facts were these: The judge told the jury and the counsel that the court had made up their minds on what constituted treason; that they had committed their opinion to writing, and that the counsel must therefore confine themselves to the facts in the cue before the court. The counsel replied that they did not dispute the facts, but that they were able to show that they did not constitute treason. The end of the affair was that the counsel retired from court, and the man was tried without counsel, convicted, and sentenced to death.

After this the Attorney-General wrote a letter to Messrs. Dallas and Lewis, requesting them to furnish their notes and opinions for the use of the President. They drew up an answer, in which they stated that the acts charged against Fries did not amount to treason, but were only sedition, and that they were so considered in the British courts. This letter was read to me by Mr. Dallas. After receiving the letter the President pardoned the man.

A lengthy debate ensued as to whether or not, upon the facts before it, the House would be justified in agreeing to the resolution. It was objected[2] that the statements of the Member from Pennsylviana, Mr. Smilie, were not entitled to much weight, since they were not what he knew himself, but only what he had received from others. Moreover, he had charged only what amounted at most to an error of judgment on the part of the judge. Some facts, it was argued[3] ought to be adduced, and so important a step should not be taken hastily. It was stated[4]

[1] First session Eighth Congress, House Journal, p. 516, Annals, pp. 805–874.

[2] By Mr. Joseph Clay, of Pennsylvania, Annals, p. 810.

[3] By Mr. Roger Griswold, of Connecticut, Annals, p. 813.

[4] By Mr. John Dennis, of Maryland, Annals, p. 814.

that the most parliamentary way would be for a gentleman to state in the form of a resolution the grounds of impeachment and then to refer such a resolution to a select committee for investigation. But it would be novel and unprecedented for the House to institute, without facts before it, an inquiry into the character of a high officer of the Government. The voting of an inquiry, so it was declared,[1] would be considered equivalent to the expression of an opinion that the House had evidence of the probable guilt of the judge. It had been urged that the House, in this case, had all the powers of a grand jury. But a grand jury had only the right to receive testimony. They might not send for it. If there was evidence in this case they might act on it, even though it be ex parte, although that would be going far. But so far there had been no statement satisfactorily showing probable cause. It was asserted[2] that the opinion of any one Member, without presentation of facts, should not avail to set in motion this proceeding. The gentleman from Pennsylvania might have misconceived the information given to him. Objection was further made[3] that the proposed form of procedure was not warranted by the precedents. The case of Bolingbroke was not in point, since that impeachment was based on disclosures made during examination of the conduct of the ministry. In the Blount and Pickering cases the Executive had transmitted documents to the House. But in this case it was proposed to appoint a committee to search in the first instance for an accusation and then to look for proofs to justify it. The assertion was made[4] that there were no precedents to justify an assertion that common fame was sufficient ground for impeachment. The precedent of the Earl of Stratford was a gloomy and terrible precedent, unsusceptible of application under a Republican form of government. It was true that a member had risen in his place in the Commons and impeached Warren Hastings, but at the same time he exhibited specific charges of misconduct. The House was the grand inquest of the nation, and its practice ought to be in many respects analogous to that of a grand jury. It should not listen to murmurs and seek for guilt. The resolution before the House did not allege a single fact. It was urged[5] that never, so far as any precedents so far cited had shown, had an inquiry been commenced in Parliament without a statement of the facts to accompany the motion, and it was objected[6] that even if common rumor had once been ground for beginning proceedings in a period of rudeness and violence, the more improved system of modem jurisprudence should discard such a doctrine.

In favor of the resolution it was urged[7] that the purpose of the inquiry was to procure evidence. If the House already had the evidence there would be no need of the inquiry. The statement of a Member in his place, even though hearsay, was sufficient to cause inquiry. It was pointed out 11 that under the rules of the House such was the respect due to a Member of the House—the statement of a Member

[1] By Mr. George W. Campbell, of Tennessee, Annals, p. 817.
[2] By Mr. Thomas Lowndes, of South Carolina, Annals, p. 825.
[3] By Mr. R. Griswold, of Connecticut, Annals, p. 837.
[4] By Mr. James Elliott, of Vermont, Annals, p. 846.
[5] By Mr. Thomas Griffin, of Virginia, Annals, p. 860.
[6] By Mr. Samuel W. Dana, of Connecticut, Annals, p. 870.
[7] By Mr. John Randolph, of Virginia, Annals, p. 811.
[8] By Mr. Smilie, of Pennsylvania, Annals, p. 821.

that he possessed information proper to be communicated to the House was sufficient to cause the doors to be closed at once; and surely the request of a Member for a committee of inquiry ought to be of equal force. It was further urged [1] that the right to move an inquiry was one of the most important pertaining to the Representative. And it was pointed out [2] that the motion to inquire should not be confounded with the motion to impeach. There was, it was urged,[3] a great difference between the inquiry and the impeachment. The analogy between the function of the House in this matter and that of a grand jury was correct and forcible. Before a grand jury it was the right of any individual to apply for and demand an inquiry into the conduct of any person within their cognizance, and it was more especially the right of any member of the jury to make such a demand. In addition to Mr. Smilie, another Member, Mr. John W. Eppes, of Virginia, stated [4] his belief that in his State a general opinion prevailed that Judge Chase had acted indecently and tyranically in a case tried there. Mr. Eppes said he was not personally present at the trial; but he related what he believed to be the facts as to the case. It was urged I that in England common report was considered sufficient authority for similar inquiries. In this case common report from Maine to Georgia condemned the conduct of the judge, not only in the case of Fries, but in the case of a grand jury in Delaware and in the case of Callender in Virginia. The general sentiment of the country condemned [6] the judge. Moreover, the Representatives of two States lately came forward and opposed his being assigned to circuits which embraced their States. This single fact ought to make an impression on the House. But in this case a Member in his place had impeached the judge, and it was not necessary to rely on common report. As to precedents for the proposed action, the impeachments of Strafford, Bolingbroke, Oxford, and Ormond, Eyres and Hastings were referred to in English history. From American history a case of proceedings against certain judges in North Carolina in 1796 was cited.[7]

In the course of the debate it was agreed by the House that Judge Richard Peters, who was associated in the case with Judge Chase, should be included in an inquiry, should one be made. This amendment was agreed to, yeas 79, nays 37.[8]

On January 7,[9] Mr. John Dennis, of Maryland, proposed an amendment to the resolution, by prefixing the following preamble:

> Whereas information has been given to the House by one of its Members, that, in a certain prosecution for treason on the part of the United States against a certain John Fries, pending in the circuit court of the United States in the State of Pennsylvania, Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and Richard Peters, district judge for the district of Pennsylvania, by whom the said circuit court was then holden, did inform the counsel for the prisoner, that as the court

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[1] By Messrs. William Findley, of Pennsylvania, and Joseph H. Nicholson, of Maryland, Annals, pp. 826, 838.

[2] By Mr. Nicholson, Annals, p. 844.

[3] By Mr. Samuel Thatcher, of Massachusetts, Annals, pp. 861, 862.

[4] Annals, p. 863.

[5] By Mr. William Findley, Annals, p. 834.

[6] Statement by Mr. Smilie, Annals, p. 823.

[7] By Mr. James Holland, of North Carolina, Annals, p. 848.

[8] House Journal, p. 518.

[9] House Journal, p. 520; Annals, p. 874.

had formed their opinion upon the point of law, and would direct the jury thereupon, the counsel for the prisoner must confine their argument before the jury to the question of fact only; and whereas it is represented that, in consequence of such determination of the court, the counsel did refuse to address the jury on the question of fact, and the said John Fries was found guilty of treason and sentenced by the court to the punishment in such case by the laws of the United States provided, and was pardoned by the President of the United States.

It was urged in behalf of this preamble that the Journal should show the grounds for the adoption of the resolution.

Mr. Joseph H. Nicholson, of Maryland, moved to amend the proposed preamble by striking out all after the word "whereas," where it first occurred, and inserting:

Members of this House have stated in their places that they have beard certain acts of official misconduct alleged against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and Richard Peters, judge of the district court of the district of Pennsylvania.

A division of the motion to strike out and insert was made,[1] and on striking out there appeared yeas 79, nays 41. Then the motion to insert was agreed to without division.

Mr. Randolph and others opposed the preamble, urging that it would tend to limit the general inquiry desired.

The question being taken on the preamble as amended, it was disagreed to without a division.

The original resolution, as it had previously been amended, was then agreed to 2 as follows, the yeas being 81, the nays 40:

Resolved, That a committee be appointed to inquire into the official conduct of Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and of Richard Peters, district judge of the district of Pennsylvania, and to report their opinion whether the said Samuel Chase and Richard Peters, or either of them, have so acted, in their judicial capacity, as to require the interposition of the constitutional power of this House.

Thereupon the committee was appointed as follows: Messrs. John Randolph, jr., of Virginia; Joseph H. Nicholson, of Maryland; Joseph Clay, of Pennsylvania; Peter Early, of Georgia; Roger Griswold, of Connecticut; Benjamin Huger, of South Carolina, and John Boyle, of Kentucky.[3]

On January 10,[4] the House passed a resolution that the committee "be authorized to send for persons and papers."

On January 30[5] Mr. J. Randolph, in the name of the committee appointed to inquire into the conduct of Samuel Chase and Richard Peters, stated that documents had been received by them which occupied a considerable bulk, the printing of which would considerably assist their investigation, by rendering them more convenient for perusal. He added that it would probably be necessary to print these papers for the information of the House when the report of the committee was made. He therefore moved the vesting in them authority to cause to be printed

[1] The rule at present does not permit such a division.

[2] House Journal, pp. 522, 523; Annals, p. 875.

[3] It is to be observed that two of the seven members of this committee represented the minority, who had opposed the investigation.

[4] House Journal, p. 525.

[5] House Journal, p. 558; Annals, p. 959.

such papers as they might conceive proper. It was objected that the printing of a part of the documents might prejudice the case in advance; but on the part of the committee it was replied that it was not necessary that the printed documents be made public until the report should be made. The motion of Mr. Randolph was then agreed to.

2343. Chase's impeachment, continued.

The report recommending the impeachment of Mr. Justice Chase was considered in Committee of the Whole House.

The investigation which resulted in the impeachment of Mr. Justice Chase was entirely ex parte.

The House found that Judge Richard Peters had not so acted as to require impeachment.

The impeachment of Mr. Justice Chase was carried to the Senate by a committee of two.

Form of declaration used by the committee in presenting the impeachment of Mr. Justice Chase in the Senate.

Verbal report made by the committee that had carried the impeachment of Mr. Justice Chase to the Senate.

Form of the resolution directing the carrying of the Chase impeachment to the Senate.

The committee appointed to prepare articles in the Chase case were all of those who had favored the impeachment.

The articles of impeachment in the Chase case were reported just before the close of the first session of the Congress.

On March 6[1] Mr. Randolph submitted the report of the committee; which was referred to a Committee of the Whole House. On March 8[2] Mr. Randolph submitted to the House an additional affidavit, which was referred also to the Committee of the Whole House.

On March 12[3] the report of the committee was taken up in Committee of the Whole House for consideration. This report was as follows:

That in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion—

1. That Samuel Chase, esq., one of the associate justices of the Supreme Court of the United States, be impeached of high crimes and misdemeanors.

2. That Richard Peters, district judge of the district of Pennsylvania, has not so acted in his judiciary capacity as to require the interposition of the constitutional powers of this House.

Accompanying this report was a volume of printed testimony. Two members of the committee, Messrs. Huger and Griswold, did not concur in the report; but as it was not the practice in the House at that time to permit minority views, their dissent appears only from the debate. Mr. Huger declared[4] that the testimony on which it was proposed to proceed was "entirely ex parte." This was not denied. Mr. Huger based his opposition to the report on this ground.

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[1] House Journal, p. 620; Annals, p. 1093.

[2] House Journal, p. 630; Annals, p. 1124.

[3] House Journal, p. 643; Annals, pp. 1171–1181.

[4] Annals, p. 1180.

The Committee of the Whole House, after considering the report, recommended the following:

Resolved, That Samuel Chase, esq., one of the associate justices of the Supreme Court of the United States, be impeached of high crimes and misdemeanors.

Resolved, That Richard Peters, district judge of the district of Pennsylvania, hath not so acted, in his judicial capacity, as to require the interposition of the constitutional power of this House.

The House agreed to the first resolution, yeas 73, nays 32. The second resolution was then agreed to without division.

Thereupon it was

Ordered, That Mr. John Randolph and Mr. Early be appointed a committee to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Samuel Chase, one of the associate justices of the Supreme Court of the United States, of high crimes and misdemeanors; and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same.

Ordered, That the committee do demand that the Senate take order for the appearance of the said Samuel Chase to answer to the said impeachment.

On March 13,[1] in the Senate, a message from the House of Representatives, by Messrs. J. Randolph and Early, two of their Members, was received, as follows:

Mr. President: We are ordered, in the name of the House of Representatives and of all the people of the United States, to impeach Samuel Chase, one of the associate justices of the Supreme Court of the United States, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same.

We are also ordered to demand that the Senate take order for the appearance of the said Samuel Chase to answer to the said impeachment.

On the same day,[2] in the Senate, it was ordered that the message be referred to Messrs. Abraham Baldwin, of Georgia; Joseph Anderson, of Tennessee, and William C. Nicholas, of Virginia, "to consider and report thereon."

On March 13,[3] in the House, Mr. John Randolph, from the committee appointed on the 12th instant, reported—

That, in obedience to the order of the House, the committee had been to the Senate, and in the name of the House of Representatives, and of the people of the United States, had impeached Samuel Chase, one of the associate justices of the Supreme Court of the United States, of high crimes and misdemeanors; and had acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

And further: That the committee had demanded that the Senate take order for the appearance of the said Samuel Chase to answer to the said impeachment.

On motion it was—

Resolved, That a committee be appointed to prepare and report articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, who has been impeached by this House, during the present session, of high crimes and misdemeanors; and that the said committee have power to send for persons, papers, and records.

Ordered, That Mr. John Randolph, Mr. Nicholson, Mr. Joseph Clay, Mr. Early, and Mr. Boyle be appointed a committee, pursuant to the said resolution.

All of this committee had favored the report in favor of impeachment.

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[1] Senate Journal, p. 374; Annals, p. 271.

[2] Senate Journal, p. 375; Annals, p. 374.

[3] House Journal, p. 645; Annals, p. 1182.

On March 26[1] Mr. Randolph reported articles of impeachment, which were ordered printed. These articles do not appear in the Journal of the House.

Then, on March 27,[2] the Congress adjourned to the first Monday in November next.

2344. Chase's impeachment, continued.

The proceedings in the Chase impeachment were continued after a recess of Congress; but in deference to the practice at that time the articles were recommitted for a new report.

The articles impeaching Mr. Justice Chase were considered article by article in Committee of the Whole.

Practice in considering and amending articles of impeachment in Committee of the Whole.

The House decided to retain in the articles of the Chase impeachment the old reservation of liberty to exhibit further articles.

The articles of impeachment in the Chase case appear in the House Journal in full at the time of their adoption.

Method by which the House amended and voted on the articles of impeachment in the Chase case.

On the second day of the next session, November 6,[3] Mr. Randolph raised a question as to the status of the articles of impeachment, it being then the practice of the House that pending business should begin anew at the first of a session.[4] As a result of this inquiry the report made at the last session was referred to a select committee, composed of the same members as the select committee of the preceding session, except that Mr. John Rhea, of Tennessee, succeeded Mr. Nicholson.

On November 30,[5] Mr. Randolph, from the select committee, reported articles of impeachment, which were nearly the same as those reported at the last session, with the addition of two new articles. The articles were referred to a Committee of the Whole House. An objection was made that the committee reporting in this case had been given no power of investigation, and yet that they had reported new articles not reported by the former committee, which had expired. This objection was not considered by the House.

On December 3,[6] the report was considered in Committee of the Whole House. The articles having been read, a question arose as to procedure, especially as to amendment; and the Chairman[7] gave it as his opinion that the proper method would be to take up the report by articles. This was done accordingly.

The first article being read, a motion was made to strike it out, whereupon, the Chairman, with the approval of the committee so far as expressed, decided that, while the motion to strike out the first section of a bill would be in order, yet it seemed to him that in considering independent articles it would be preferable to

[1] House Journal, pp. 689, 690; Annals, pp. 1237–1240.

[2] House Journal, p. 696.

[3] Second session Eighth Congress, House Journal, p. 6; Annals, p. 680.

[4] The rule in this respect was modified in 1818.

[5] House Journal, p. 29; Annals, pp. 726–731.

[6] Annals, p. 728.

[7] Joseph B. Varnum, of Massachusetts, Chairman.

take the sense of the Committee of the Whole on each article on a motion to concur with the action of the select committee which had reported the articles. This method was thereupon adopted.

Thereupon the Committee of the Whole House went through the report article by article, amending, and where an article had several paragraphs, reading by paragraphs for amendment. And on each article, after an opportunity for amendment and after reading of testimony relating to it on demand of a Member, the question was put on concurring.[1] The committee decided, ayes 40, noes 50, that the testimony should not be read as a whole on each article, but only as called for by Members.

When the last article was read, Mr. James Mott, of New Jersey, moved[2] to strike out the words, declaring that the House "saved to itself the liberty of exhibiting at any time hereafter any further articles, or other accusation or impeachment against the said Samuel Chase," and further, that part which saved to the House "the right of replying to any such articles of impeachment or accusation which shall be exhibited to them." It seemed to him unfair that the House should reserve such a right to themselves. If there was anything more with which he ought to be charged, it ought to be now brought forward, and the accused should be informed at once how far they meant to go, in order to enable him the better to make his defense.

Mr. Randolph argued that these reservations had been made in the articles of the Blount and Pickering impeachments, and he did not wish to see the liberties of the people or the rights of the House abridged. Mr. Mott admitted the practice, which had been followed in his own State.

Mr. Mott's motion was disagreed to.

The last article having been concurred in, the Committee of the Whole House rose and reported the articles with amendments.

On December 4,[3] the articles were considered in the House, the Journal containing them in full as reported originally by the select committee. Each article was considered by itself, and after opportunity to amend the question was taken "that the House do agree" to the article. On the last article a division was demanded, as it contained both a charge against Judge Chase and the protestation whereby the House reserved to themselves the "liberty of exhibiting at any time hereafter any further articles." The first portion of the article was agreed to, and then the question being taken on the second portion, it was agreed to, yeas 78, nays 32. The other votes on agreeing to the several articles had ranged as follows: yeas 70 to 84, nays 34 to 45. All amendments made in Committee of the Whole had been disagreed to, and no new ones were agreed to by the House.

The question having been taken on each article, the House then voted affirmatively on the question—

That the House do concur with the select committee in their agreement to the said articles of impeachment, as originally proposed, and hereinbefore recited.

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[1] Annals, pp. 731–746.

[2] Annals, p. 743.

[3] House Journal, pp. 31–44; Annals, pp. 747–762.

2345. Chase's impeachment continued.

The House appointed seven managers, by ballot, for the trial of Mr. Justice Chase.

The managers chosen for the trial of Mr. Justice Chase had each voted for a portion, at least, of the articles.

The House overruled the Speaker and decided that a manager of an impeachment should be elected by a majority and not by a plurality.

Forms of resolutions directing the managers to exhibit in the Senate the articles of impeachment against Mr. Justice Chase.

In the Chase impeachment the message notifying the Senate that articles would be exhibited does not appear to have included the names of the managers.

The Senate notified the House of the day and hour when it would receive the managers to exhibit the articles impeaching Mr. Justice Chase.

The Senate as a court adopted a rule prescribing the ceremonies at the presentation of articles impeaching Mr. Justice Chase.

On December 5,[1] it was—

Resolved, That seven managers be appointed by ballot, to conduct the impeachment exhibited against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

Thereupon the following were elected: Messrs. John Randolph, jr., of Virginia; Caesar A. Rodney, of Delaware; Joseph H. Nicholson, of Maryland; Peter Early, of Georgia; John Boyle, of Kentucky; Roger Nelson, of Maryland, and George W. Campbell, of Tennessee.

Each of these managers had voted for a portion or all of the articles of impeachment.

On the first ballot the six first Members on the list had each a majority of the ballots; but Mr. Campbell had only a plurality.

A question arising, the Speaker,[2] after referring to the rule of the House, "In all other cases of ballot than for committees, a majority of the votes given shall be necessary to an election," held that Mr. Campbell was duly chosen.

A question arose, and after reference to precedents, which did not seem conclusive, Mr. Randolph appealed from the decision. And the question being taken, the decision of the Speaker was overruled, ayes 25, noes 50. Thereupon a second ballot was taken, at which Mr. Campbell received a majority.

Thereupon, on motion of Mr. Nicholson, it was—

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of the people of the United States, against Samuel Chase, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

Ordered, That a message be sent to the Senate to inform them that this House have appointed managers to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by this House to be exhibited in maintenance of their impeachment against the said Samuel Chase; and that the Clerk of this House do go with the said message.

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[1] House Journal, p. 44; Annals, pp. 762, 763.

[2] Nathaniel Macon, of North Carolina, Speaker.

On December 6[1] in the Senate the Clerk of the House delivered the message as follows:

Mr. President, I am directed to inform the Senate that the House of Representatives have appointed managers to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by the House to be exhibited in maintenance of their impeachment against the said Samuel Chase.

On December 7[2] Mr. William B. Giles, of Virginia, from a committee appointed on November 30 "to prepare and report proper rules of proceeding to be observed by the Senate in cases of impeachment," made a report, which was read. With Mr. Giles on this committee were Messrs. Abraham Baldwin, of Georgia, John Breckenridge, of Kentucky, David Stone, of North Carolina, and Israel Smith, of Vermont.

Also on December 7[3] it was—

Resolved, That the Senate will, at 1 o'clock this day, be ready to receive articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, to be presented by the managers appointed by the House of Representatives.

Ordered, That the Secretary notify the House of Representatives accordingly.

Immediately thereafter, in the high court of impeachment,[4] it was—

Resolved, That when the managers of the impeachment shall be introduced to the bar of the Senate and shall have signified that they are ready to exhibit articles of impeachment against Samuel Chase, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States." After which the articles shall be exhibited; and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.[5]

2346. Chase's impeachment continued.

The articles of impeachment of Mr. Justice Chase.

Ceremonies at the presentation of the articles before the high court of impeachment in the Chase case.

In presenting to the court the articles impeaching Mr. Justice Chase, the chairman of the managers read them and then delivered them at the table.

The managers having carried to the Senate the articles impeaching Mr. Justice Chase, reported verbally to the House.

On the same day the message from the Senate announcing its readiness to receive the articles of impeachment was received in the House,[6] and the managers

[1] Senate Journal, p. 421.

[2] Senate Journal, p. 422.

[3] Senate Journal, p. 422; Annals, p. 21.

[4] Journal of High Court of Impeachment, Senate Journal, pp. 509, 510.

[5] This is the exact form of resolution adopted on January 4, 1804, for the presentation of the articles of impeachment against Judge John Pickering. Senate Journal, Eighth Congress, pp. 494, 495.

[6] House Journal, p. 47; Annals, p. 89.

repaired at 1 o'clock to the Senate Chamber. They were admitted,[1] and Mr. Randolph, the chairman, announced that they were—

the managers instructed by the House of Representatives to exhibit certain articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States.

The managers were requested by the President to take seats assigned them within the bar, and the Sergeant-at-Arms was directed to make proclamation in the words following:

Oyes! Oyes! Oyes!
All persons are commanded to keep silence, etc. [In words as prescribed by the resolution.]

After the proclamation the managers rose, and Mr. Randolph, their chairman, read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against Samuel Chase, one of the associate justices of the Supreme Court of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ART. 1. That unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with treason, before the circuit court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz:

1. In delivering an opinion in writing, on the question of law, on the construction of which the defense of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defense;

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defense of their client;

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.

In consequence of which irregular conduct of the said Samuel Chase, as dangerous to our liberties as it is novel to our laws and usages, the said John Fries was deprived of the right, secured to him by the eighth article amendatory of the Constitution, and was condemned to death without having been heard by counsel, in his defense, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the right of juries, on which ultimately rest the liberty and safety of the American people.

ART. 2. That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the mouth of May, 1800, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callender was arraigned for a libel on John Adams, then President of the United States, the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the trial, because he had made up his mind as to the publication from which the words, charged to be libelous in the indictment, were extracted; and the said Basset was accordingly sworn, and did serve on the said jury, by whose verdict the prisoner was subsequently convicted.

ART. 3. That with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretense that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact.

[1] Senate Impeachment Journal, pp. 509, 510.

ART. 4. That the conduct of the said Samuel Chase was marked, during the whole course of the said trial, by manifest injustice, partiality, and intemperance, viz:

1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above-named John Taylor, the witness.

2. In refusing to postpone the trial, although an affidavit was regularly filed stating the absence of material witnesses on behalf of the accused; and although it was manifest that, with the utmost diligence, the attendance of such witnesses could not have been procured at that term.

3. In the use of unusual, rude, and contemptuous expressions toward the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law to which the conduct of the judge did at the same time manifestly tend.

4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which at length induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment.

5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice.

ART. 5. And whereas it is provided by the act of Congress passed on the 24th day of September, 1786, entitled "An act to establish the judicial courts of the United States," that for any crime or offense against the United States the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the State where such offender may be found; and whereas it is provided by the laws of Virginia that upon presentment by any grand jury of an offense not capital the court shall order the clerk to issue a summons against the person or persons offending to appear and answer such presentment at the next court; yet the said Samuel Chase did, at the court aforesaid, award a capias against the body of the said James Thompson Callender, indicted for an offense not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in that case made and provided.

ART. 6. And whereas it is provided by the thirty-fourth section of the aforesaid act, entitled "An act to establish the judicial courts of the United States," that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply; and whereas by the laws of Virginia it is provided that in cases not capital the offender shall not be held to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall have been made, yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial during the term at which he, the said Callender, was presented and indicted, contrary to law in that case made and provided.

ART. 7. That at a circuit court of the United States for the district of Delaware, held at Newcastle, in the month of June, 1800, whereat the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer by refusing to discharge the grand jury, although entreated by several of the said jury so to do; and after the said grand jury had regularly declared through their foreman that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury that he, the said Samuel Chase, understood "that a highly seditious temper had manifested itself in the State of Delaware among a certain class of people, particularly in Newcastle County, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order, that the name of this printer was "—but checking himself, as if sensible of the indecorum which he was committing, added "that it might be assuming too much to mention the name of this person, but it becomes your duty, gentlemen, to inquire diligently into this matter," or words to that effect; and that with intention to procure the prosecution of the printer in question the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States the necessity of procuring a file of the papers to which he alluded (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser"), and, by a strict examination of them, to find some passage which might furnish the groundwork of a prosecution against the printer of the said paper,

thereby degrading his high judicial functions and tending to impair the public confidence in and respect for the tribunals of justice so essential to the general welfare.

ART. 8. And whereas mutual respect and confidence between the Government of the United States and those of the individual States, and between the people and those governments, respectively, are highly conducive to that public harmony without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at a circuit court for the district of Maryland, held at Baltimore in the month of May, 1803, pervert his official right and duty to address the grand jury then and there assembled on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury and of the good people of Maryland against their State government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the Supreme Court of the United States; and, moreover, that the said Samuel Chase then and there, under pretense of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury and of the good people of Maryland against the Government of the United States by delivering opinions which, even if the judicial authority were competent to their expression on a suitable occasion and in a proper manner, were at that time, and as delivered by him, highly indecent, extrajudicial, and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusation or impeachment against the said Samuel Chase, and also of replying to his answers which he shall make unto the said articles, or any of them, and of offering proof to all and every the aforesaid articles, and to all and every other articles, impeachment, or accusation, which shall be exhibited by them as the case shall require, do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as are agreeable to law and justice.

After the reading of the articles[1] the President notified the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives.

The managers delivered the articles of impeachment at the table and withdrew.

Thereupon the high court of impeachments adjourned.

The managers having returned to the House, Mr. Randolph, their chairman, reported[2] that they did this day carry to the Senate the articles of impeachment agreed to by this House on the 4th instant, and that the said managers were informed by the Senate that their House would take proper measures relative to the said impeachment, of which this House should be duly notified.

2347. Chase's impeachment continued.

Form prescribed for the writ of summons in the Chase impeachment.

Form of precept to be indorsed on the writ of summons in the Chase impeachment.

The Senate having fixed a day for the return of the writ of summons in the Chase impeachment, informed the House thereof.

On December 10[3] the high court of impeachments considered the report of the committee appointed November 30 to prepare and report proper rules of proceedings, and after consideration agreed to the following:

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[1] The articles are not given in the Senate Journal (p. 510) on the day of their presentation, so the signatures of the Speaker and Clerk do not appear.

[2] House Journal, p. 47.

[3] Senate Impeachment Journal, pp. 510, 511; Annals, pp. 89, 90.

A summons shall issue, directed to the person impeached, in the form following:

"THE UNITED STATES OF AMERICA, *ss:*

"The Senate of the United States to——, greeting:

"Whereas, the House of Representatives of the United States of America did, on the ——— ——— day of ———, exhibit to the Senate articles of impeachment against you, the said, in the words following, viz: [here recite the articles] and did demand that you, the said ——— ——— should be put to answer the accusations as set forth in said articles; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeble to law and justice: You, the said ——— ———, are therefore hereby summoned, to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the ——— day of ———, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States shall make in the premises, according to the Constitution and laws of the United States. Hereof you are not to fail.

"Witness, ——— ———, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this ——— day of ———, in the year of our Lord ——— and of the Independence of the United States the ———."

Which summons shall be signed by the Secretary of the Senate, and sealed with their seal, and served by the Sergeant-at-Arms to the Senate, or by such other person as the Senate shall specially appoint for that purpose, who shall serve the same, pursuant to the directions given in the form next following:

A precept shall be indorsed on said writ of summons, in the form following, viz:

"UNITED STATES OF AMERICA, *ss:*

"The Senate of the United States to ———, greeting:

"You are hereby commanded to deliver to, and leave with ———, if to be found, a true and attested copy of the within writ of summons, together with a like copy of this precept, showing him both; or in case he can not with convenience be found, you are to leave true and attested copies of the said summons and precept at his usual place of residence, and in whichsoever way you perform the service let it be done at least ——— days before the appearance day mentioned in said writ of summons. Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in said writ of summons.

"Witness, ——— ———, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this —— day of ——, in the year of our Lord ——— and of the Independence of the United States the ———."

Which precept shall be signed by the Secretary of the Senate and sealed with their seal.

It was then

Resolved, That the secretary be directed to issue a summons to Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, to answer certain articles of impeachment, exhibited against him by the House of Representatives on Friday last; that the said summons be returnable the second of January next, and be served at least fifteen days before the return day thereof.

Ordered, That the secretary notify the House of Representatives of this resolution.

On the same day the message was delivered in the House,[1] and on the succeeding day was read, in form as follows:

In Senate of the United States—High Court of Impeachments, Monday, December 10, 1804.

The United States *v.* Samuel Chase.

Resolved, That the Secretary be directed to issue a summons to Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, to answer certain articles of impeachment exhibited against him by the House of Representatives, on Friday last. That the said summons be returnable the second day of January next and be served at least fifteen days before the return day thereof.

Ordered, That the Secretary carry this resolution to the House of Representatives.

Attest:

SAM. A. OTIS, *Secretary.*

Ordered, That the said proceedings of the Senate do lie on the table.

[1] House Journal, pp. 49, 50, Annals, p. 791.

On December 14,[1] in the High Court of Impeachments, "Return was made by the Sergeant-at-Arms on the summons issued."

2348. Chase's impeachment continued.

The rules agreed to by the high court of impeachment to govern the trial of Mr. Justice Chase.

On December 24[2] the High Court of Impeachments concluded its consideration of the report of the committee and the rules stood as follows:

1. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person, and are directed to carry such articles to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to the said notice.

2. When the managers of an impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against any person, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against ——— ———;" after which the articles shall be exhibited, and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

3 and 4. [As adopted on December 10—Forms of summons and precept.]

5. Subpoenas shall be issued by the Secretary of the Senate, upon the application of the managers of the impeachment, or of the party impeached, or his counsel, in the following form, to wit:

To ——— ———, greeting:

"You, and each of you, are hereby commanded to appear before the Senate of the United States, on the ——— day of ———, at the Senate Chamber, in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———. Fail not.

"Witness, ——— ———, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this ——— day of ———, in the year of our Lord ——— and of the Independence of the United States the ———."

Which shall be signed by the Secretary of the Senate and sealed with their seal.

Which subpoenas shall be directed, in every case, to the marshal of the district where such witnesses respectively reside, to serve and return.

6. The form of direction to the marshal, for the service of the subpoena, shall be as follows:

"The Senate of the United States of America to the Marshal of the District of ———:

"You are hereby commanded to serve and return the within subpoena, according to law.

"Dated at Washington, this ——— day of ———, in the year of our Lord—and of the Independence of the United States the ———.

——— ———,

"Secretary of the Senate."

7. That the President of the Senate shall direct all necessary preparations in the Senate Chamber, and all the forms of proceeding, while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for by the Senate.

8. He shall also be authorized to direct the employment of the marshal of the District of Columbia, or any other person or persons, during the trial, to discharge such duties as may be prescribed by him.

9. At 12 o'clock of the day appointed for the return of the summons against the person impeached the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer, in the form following, viz: "I, ——— ———, do solemnly swear that the return made and subscribed by me, upon the process issued on the ——— day of ———, by

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[1] Senate Impeachment Journal, p. 511.

[2] Senate Impeachment Journal, pp. 511–513, Annals pp. 89–92.

the Senate of the United States, against ——— ———, is truly made, and that I have performed said services as therein described. So help me God." Which oath shall be entered at large on the records.

10. The person impeached shall then be called to appear and answer the articles of impeachment exhibited against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself or if by agent or attorney, naming the person appearing and the capacity in which he appears.

11. At 12 o'clock of the day appointed for the trial of an impeachment the legislative and executive business of the Senate shall be postponed. The Secretary shall then administer the following oath or affirmation to the President:

"You solemnly swear, or affirm, that in all things appertaining to the trial of the impeachment of ——— ———, you will do impartial justice according to the Constitution and laws of the United States."

12. And the President shall administer the said oath or affirmation to each Senator present.

The Secretary shall then give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ——— ———, in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives.

13. Counsel for the parties shall be admitted to appear, and be heard upon an impeachment.

14. All motions made by the parties or their counsel shall be addressed to the President of the Senate, and if he shall require it, shall be committed to writing, and read at the Secretary's table; and all decisions shall be had by yeas and nays, and without debate, which shall be entered on the records.

15. Witnesses shall be sworn in the following form, to wit: "You, ——— ———, do swear (or affirm, as the case may be) that the evidence you shall give in the case now depending between the United States and ——— ———, shall be the truth, the whole truth, and nothing but the truth. So help you God." Which oath shall be administered by the Secretary.

16. Witnesses shall be examined by the party producing them, and then cross-examined in the usual form.

17. If a Senator is called as a witness, he shall be sworn, and give his testimony, standing in his place.

18. If a Senator wishes a question to be put to a witness, it shall be reduced to writing and put by the President.

19. At all times, whilst the Senate is sitting upon the trial of an impeachment, the doors of the Senate Chamber shall be kept open.

The nineteenth rule was agreed to on December 31.[1]

2349. Chase's impeachment continued.

Form of return made and oath taken by the Sergeant-at-Arms in the Chase impeachment.

Mr. Justice Chase appeared to answer the articles of impeachment "in his own proper person."

On his appearance to answer articles of impeachment Mr. Justice Chase was furnished with a chair.

Mr. Justice Chase, in appearing, was permitted by the Vice-President, without objection of the Senate, to read a paper giving reasons for delaying his answer.

Mr. Justice Chase, in asking time to prepare his answer to the articles, was called to order by the Vice-President for expressions used.

It was decided that members of the court should be sworn before considering respondent's motion for time to answer in the Chase case.

Mr. Justice Chase's application for a time to answer was accompanied by a sworn statement of reasons.

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[1] Senate impeachment, Journal, pp. 513, 514.

The Senate having fixed the day for Mr. Justice Chase to file his answer, informed the House that the trial would proceed on that day.

Neither the managers nor the House attended on the appearance of Mr. Justice Chase in answer to the summons.

On January 2, 1805,[1] the high court of impeachment having been opened by proclamation, the return made by the Sergeant-at-Arms was read, as follows:

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, in obedience to the within summons to me directed, did proceed to the residence of the within-named Samuel Chase, on the 12th day of December, 1804, and did then and there leave a true copy of the said writ of summons, together with a true copy of the articles of impeachment annexed, with him, the said Samuel Chase.

JAMES MATHERS.

After which the Secretary administered to him the oath, as follows:

You, James Mathers, Sergeant-at-Arms to the Senate of the United States, do solemnly swear that the return made and subscribed by you upon the process issued on the 10th day of December last, by the Senate of the United States, against Samuel Chase, one of the Associate Justices of the Supreme Court, is truly made, and that you have performed said services as therein described. So help you God.

Samuel Chase was then solemnly called,[2] who appeared "in his own proper person."

The President of the Senate[3] informed him that the Senate was ready to receive any answer that he had to make.[4]

Mr. Chase requested the indulgence of a chair, which was immediately furnished. The report of the trial intimates that in accordance with the parliamentary practice of England no chair was assigned to him previously to his appearance, but that an informal intimation was made to him that, on his request, it would be furnished.

After being seated for a short time Judge Chase rose and commenced reading from a paper which he held in his hand.

After reading far enough to show that the paper was proceeding in general denial of the charges, the President reminded him that this was the day appointed to receive any answer he might make to the articles of impeachment. Thereupon Judge Chase said it was his purpose to request the allowance of further time to put in his answer.

The reading was then proceeding, when the President interrupted and asked if the paper was intended as his answer. If so, it would be put on file. If it was a prelude to a motion he meant to make praying to be allowed further time for putting, in his answer, he would confine himself strictly to what had relation to that object.

Judge Chase said it was not his answer that he was reading, but that he was

[1] Senate impeachment, Journal, p. 514.

[2] The form of this call is not given, but in the Blount trial it was as follows: "Hear ye! Hear ye! Hear ye! William Blount, late a Senator from the State of Tennessee, come forward and answer the articles of impeachment against you by the House of Representatives." Senate Journals, Sixth, Seventh, and Eighth Congresses, p. 486.

[3] Aaron Burr, of New York, Vice-President, and President of the Senate.

[4] Annals, pp. 92–98.

assigning reasons why he could not now answer, in order to show that he was entitled to further time to prepare and put in his answer.

The President replied:

You, who are so conversant in the practice of courts of law, know very well that a motion for time must not be founded on mere suggestions, but must be founded on some facts to prove the propriety of the motion.

Judge Chase said he meant to show the impracticability of his answering at this time, from the articles themselves, and it was for that purpose that he made an allusion to them.

The President said that with the caution he had given he might proceed, provided no objection were made by any gentleman of the Senate.

Judge Chase proceeded in his address.

Later in the reading the following paragraph occurred:

And acrimonious as are the terms in which many of the accusations are conceived; harsh and opprobrious as are the epithets wherewith it has been thought proper to assail my name and character, by those who were *"puling in their nurses' arms" whilst I was contributing my utmost aid to lay the groundwork of American liberty*, I yet thank my accusers, whose functions as members of the Government of my country I highly respect, for having at length put their charges into a definitive form, susceptible of refutation; and for having thereby afforded me an opportunity of vindicating my innocence, in the face of this honorable court, of my country, and of the world.

On using the expressions marked in *italics*,

The President interrupted Judge Chase and said that observations of censure or recrimination were not admissible; it would be very improper for him to listen to observations on the statements of the House of Representatives before an answer was filed.

Judge Chase said he had very few words more to add, which would conclude what he had to say at the present time.

With the permission of the President he proceeded.

The address being concluded, the President requested him to reduce to writing any motion which he wished to make.

Thereupon Judge Chase submitted the following:

I solicit this honorable court to allow me until the first day of the next session to put in my answer and prepare for my trial.

The President informed Mr. Chase that the court would take time to consider the motion.

During these proceedings incident to the return on the summons and the appearance of Judge Chase, neither the House of Representatives nor its managers were present.

After Judge Chase had submitted his motion the Senate withdrew to a private apartment, where debate arose as to whether or not the Senators should take the oath required by the Constitution before they took into consideration the motion of Judge Chase; and at the conclusion of the debate it was

Resolved, That on the meeting of the Senate to-morrow, before they proceed to any business on the articles of impeachment before them, and before the decision of any question, the oath prescribed by the rules shall be administered to the President and Members of the Senate.

On January 3[1] the high court of impeachments was duly opened with proclamation, and the oath was administered to the President and Senators in the manner prescribed by the rule.

Thereupon the President stated that he had received a letter from the defendant, inclosing an affidavit that further time was necessary for him to prepare for trial; which affidavit[2] was read, as follows:

City of Washington, ss:

Samuel Chase made oath on the Holy Evangels of Almighty God, that it is not in his power to obtain information respecting the facts alleged in the articles of impeachment to have taken place in the city of Philadelphia in the trial of John Fries; or of the facts alleged to have taken place in the city of Richmond in the trial of James T. Callender, in time to prepare and put in his answer, and to proceed to trial, with any probability that the same could be finished on or before the 5th day of March next. And, further, that it is not in his power to procure information of the names of the witnesses, whom he think it may be proper and necessary for him to summon, in time to obtain their attendance, if his answer could be prepared in time sufficient for the finishing of the said trial, before the said 5th day of March next; and the said Samuel Chase further made oath that he believes it will not be in his power to obtain the advice of counsel, to prepare his answer, and to give him their assistance on the trial, which he thinks necessary, if the said trial should take place during the present session of Congress; and that he verily believes, if he had at this time full information of facts, and of the witnesses proper for him to summon, and if he had also the assistance of counsel, that he could not prepare the answer he thinks he ought to put in, and be ready for his trial, within the space of four or five weeks from this time. And, further, that his application to the honorable the Senate, for time to obtain the information of facts, in order to prepare his answer, and for time to procure the attendance of necessary witnesses, and to prepare for his defense in the trial, and to obtain the advice and assistance of counsel, is not made for the purpose of delay, but only for the purpose of obtaining a full hearing of the articles of impeachment against him in their real merits.

SAMUEL CHASE.

Sworn to this 3d day of January, 1805, before

SAMUEL HAMILTON.

Whereupon the following motion was made by Mr. Stephen R. Bradley, of Vermont:

Ordered, That Samuel Chase file his answer, with the Secretary of the Senate, to the several articles of impeachment exhibited against him, by the House of Representatives, on or before the ——— day ———.

A motion was made by Mr. William B. Giles, of Virginia, to amend the motion and to strike out all that follows the word *"Ordered,"* and insert "That ——— next shall be the day for receiving the answer, and proceeding on the trial of the impeachment against Samuel Chase.

The motion to strike out was agreed to, yeas 20, nays 10. And then the motion to insert was also agreed to, yeas 22, nays 8.

The motion to fill the blank with the words "first Monday of December next" was disagreed to, yeas 12, nays 18. Then a motion to insert "the fourth day of February next" was agreed to, yeas 22, nays 8. Then the resolution as amended was agreed to, yeas 21, nays 9.

It was then

Ordered, That the Secretary notify the House of Representatives and the said Samuel Chase thereof.

Thereupon the high court of impeachments adjourned.

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[1] Senate impeachment, Journal, pp. 514, 515; Annals, pp. 98–100.

[2] This affidavit does not appear in full in the Journal of the high court of impeachments.

On January 4[1] the House was informed by message, which was read in form, as follows:

In Senate of the United States—High court of impeachments, January 3, 1805.

United States *v.* Samuel Chase.

Ordered, That the 4th day of February next shall be the day for receiving the answer, and proceeding on the trial of the impeachment against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

Attest:

SAM A. OTIS, *Secretary.*

Ordered, That the said proceedings of the Senate do lie on the table.

2350. Chase's impeachment continued.

A Manager of the Chase impeachment being excused, the House chose another by ballot and informed the Senate thereof.

The House determined to attend as a Committee of the Whole the proceedings of the trial of Mr. Justice Chase.

On January 25,[2] in the House—

Resolved, That Mr. Nelson be excused from serving as one of the Managers appointed on the 5th ultimo, on the part of this House, to conduct the impeachment against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

On January 28[3] the House elected by ballot Mr. Christopher Clark, of Virginia, to succeed Mr. Nelson, and informed the Senate thereof by message, delivered as follows by the Clerk:

Mr. President, I am directed to acquaint the Senate that the House of Representatives have elected Mr. Clark a manager to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, in the place of Mr. Nelson, who hath been excused that service.

Mr. Clark had voted in favor of all of the articles of impeachment save one, which he had voted against.

On February 4,[4] in the House, it was

Resolved, That, during the trial of the impeachment now depending before the Senate, this House will attend, at 10 o'clock in the forenoon, and proceed on the legislative business before the House until the hour at which the Senate shall appoint each day to proceed on the trial of the impeachment now pending before that body, and that the House then resolve itself into a Committee of the Whole and attend the said trial.

2351. Chase's impeachment continued.

Attendance of the House in Committee of the Whole at the ceremonies of the beginning of Chase's trial.

Description of the arrangement of the Senate chamber for the Chase trial.

Mr. Justice Chase introduced his counsel at the time he gave in his answer.

The Senate granted the request of Mr. Justice Chase for permission to read his answer by himself and counsel.

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[1] House Journal, p. 78; Annals, p. 872.

[2] House Journal, p. 105; Annals, p. 1011.

[3] House Journal, p. 108: Senate Journal, pp. 442, 516.

[4] House Journal, p. 118; Annals, p. 1174.

The answer of Mr. Justice Chase to the articles of impeachment.

The answer of the respondent in the Chase trial does not appear in the journal of the court.

On request of the managers the Senate directed its Secretary to carry to the House an attested copy of Mr. Justice Chase's answer.

The answer of Mr. Justice Chase being received in the House was referred to the managers.

Form of proceedings when the House attends an impeachment trial as Committee of the Whole.

On the same day,[1] the high court of impeachments was duly opened with proclamation, and it was then—

Ordered, That the Secretary give notice to the House of Representatives that the Senate are in their public Chamber and are ready to proceed on the trial of Samuel Chase; and that seats are provided for the accommodation of the Members.

This message being received in the House,[2] that body resolved itself into a Committee of the Whole House, with Mr. Joseph B. Varnum, of Massachusetts, as Chairman, and proceeded to the Senate Chamber with the managers. Soon after they entered the Chamber and took their seats.

The Senate Chamber was fitted up in a style of appropriate elegance. Benches covered with crimson, on each side, and in a line with the chair of the President, were assigned to the Members of the Senate. On the right and in front of the chair, a box was assigned to the managers, and on the left a similar box to Mr. Chase and his counsel, and chairs allotted to such friends as he might introduce. The residue of the floor was occupied with chairs for the accommodation of the Members of the House of Representatives, and with boxes for the reception of the foreign ministers, and civil and military officers of the United States. On the right and left of the Chair, at the termination of the benches of the members of the court, boxes were assigned to stenographers. The permanent gallery was allotted to the indiscriminate admission of spectators. Below this gallery and above the floor of the House a new gallery was raised and fitted up with peculiar elegance, intended primarily for the exclusive accommodation of ladies. But this feature of the arrangement, made by the Vice-President, was at an early period of the trial abandoned, it having been found impracticable. At the termination of this gallery, on each side, boxes were specially assigned to ladies attached to the families of public personages. The preservation of order was devolved on the marshal of the District of Columbia, who was assisted by a number of deputies.[3]

Samuel Chase being called to make answer to the articles of impeachment exhibited against him by the House of Representatives, appeared and requested that Robert G. Harper, Luther Martin, Philip B. Key, and Joseph Hopkinson, esqs., might be admitted and considered as counsel for him, the said Samuel Chase, and thereupon submitted a motion, which was read at the table as follows:

Samuel Chase moves for permission to read his answer, by himself and his counsel, at the bar of this honorable court.

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[1] Senate Impeachment Journal, p. 516; Annals, p. 101.

[2] House Journal, p. 119.

[3] Annals, p. 100.

The President asked him if it was the answer on which he meant to rely? To which he replied in the affirmative.

The question being taken on the motion, it passed in the affirmative.

Then Judge Chase began the reading of his answer, and before its conclusion was assisted by Messrs. Harper and Hopkinson. The answer began as follows: [1]

This respondent, in his proper person, comes into the said court, and protesting that there is no high crime or misdemeanor particularly alleged in the said articles of impeachment to which he is or can be bound by law to make answer, and saving to himself now, and at all times hereafter, all benefit of exception to the insufficiency of the said articles, and each of them, and to the defects therein appearing in point of law or otherwise, and protesting also that he ought not to be injured in any manner, by any words, or by any want of form in this his answer, he submits the following facts and observations by way of answer to the said articles.

The answer then proceeds to answer the charges, article by article.

At the conclusion of the reading, Mr. Randolph, chairman of the managers, moved that they have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer.

To this the President replied that the motion would be taken into consideration and the House of Representatives should be notified of the result.

Thereupon the high court of impeachments adjourned and the Members of the House of Representatives returned to their Hall, and the Committee of the Whole House rose and their Chairman reported.[2]

On February 5,[3] in the high court of impeachments—

Ordered, That the Secretary carry to the House of Representatives an attested copy of the answer of Samuel Chase, one of the associate justices of the Supreme Court, to articles of impeachment against him by the House of Representatives.

The message being delivered in the House the same day,[4] the copy of the answer was read and ordered to be referred to the managers.

2352. Chase's impeachment continued.

The replication of the House to the answer of Mr. Justice Chase to the articles of impeachment.

In the Chase case the House refused to strike from its replication certain words reflecting on the motives of the respondent.

Forms of resolutions relating to the adoption of the replication in the Chase case and the carrying thereof to the Senate.

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[1] Annals, pp. 101–150. The Journal of the Court of Impeachments does not have the answer; and prints the articles only as they are voted on.

[2] The Journal of the House has the following entry, showing the form used while the trial progressed:

"The House then, in pursuance of a resolution agreed to this day, resolved itself into a Committee of the Whole House, and proceeded in that capacity to the Senate Chamber to attend the trial by the Senate of the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States; and, after some time spent therein, the committee returned into the Chamber of the House, and Mr. Speaker having resumed the chair, Mr. Varnum, from the said Committee of the Whole, reported that the committee had, according to order, attended the trial by the Senate of the said impeachment, and that some progress had been made therein." (House Journal, p. 119.)

[3] Senate Impeachment Journal, p. 516.

[4] House Journal, pp. 123, 124; Annals, pp. 1181–1184.

The replication in the Chase impeachment was signed by the Speaker and attested by the Clerk.

The replication in the Chase case was read to the Senate by the chairman of the managers.

Counsel for respondent were furnished a copy of the House's replication by direction of the Presiding Officer.

Later, on the same day, Mr. Randolph, chairman of the managers, submitted to the House the following report:

That they have considered the said answer, and do find that the said Samuel Chase has endeavored to cover the crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts; and that the said answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said articles; and do submit to the judgment of the House their opinion that, for avoiding any imputation of delay to the House of Representatives, in a case of so great moment, a replication be forthwith sent to the Senate, maintaining the charge of this House; and that the committee had prepared a replication accordingly, which they herewith report to the House, as follows:

"The House of Representatives of the United States have considered the answer of Samuel Chase, one of the associate justices of the Supreme Court of the United States, to the articles of impeachment against him by them exhibited, in the name of themselves and of all the people of the United States; and observe—

"That the said Samuel Chase has endeavored to cover the high crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts; that the answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said articles; that the said Samuel Chase did, in fact, commit the numerous acts of oppression, persecution, and injustice of which he stands accused; and the House of Representatives, in full confidence of the truth and justice of their accusation and of the necessity of bringing the said Samuel Chase to a speedy and exemplary punishment, and not doubting that the Senate will use all becoming diligence to do justice to the proceedings of the House of Representatives, and to vindicate the honor of the nation, do aver their charge against the said Samuel Chase to be true; and that the said Samuel Chase is guilty in such manner as he stands impeached; and that the House of Representatives will be ready to prove their charges against him, at such convenient time and place as shall be appointed for that purpose."

Mr. Roger Griswold, of Connecticut, moved that the report be committed to a Committee of the Whole House, which motion was disagreed to.

Mr. John Dennis, of Maryland, moved to amend the replication by striking out therefrom after the words "and observe," the following words:

That the said Samuel Chase has endeavored to cover the high crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts; that the said answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said articles.

This amendment was disagreed to, yeas 41, nays 70.

Then the question being taken that the House do agree to the said replication, it passed in the affirmative, yeas 77, nays 34.

Thereupon, it was

Resolved, That the replication annexed to the report of the managers be put into the answer and pleas of the aforesaid Samuel Chase, on behalf of this House; and that the managers be instructed to proceed to maintain the said replication at the bar of the Senate, at such time as shall be appointed by the Senate.

Ordered, That a message be sent to the Senate to inform them that this House have agreed to a replication, on their part, to the answer of Samuel Chase, one of the associate justices of the Supreme Court of the United States, to the articles of impeachment exhibited to the Senate against him by this

House, and have directed the managers appointed to conduct the said impeachment to carry the said replication to the Senate; and to proceed to maintain the same at the bar of the Senate, at such time as shall be appointed by the Senate.

On February 7, 1805,[1] in the high court of impeachments, the Clerk of the House delivered the message, as above directed.

Then it was

Ordered, That the Secretary inform the House of Representatives that the Senate will be ready to proceed on the trial of the impeachment of Samuel Chase, one of the associate justices of the Supreme Court, at half past 2 o'clock this day.

The high court of impeachments being duly opened at 2 o'clock the managers attended, and the replication was read by Mr. Randolph, in the form given above, with the following attestation:

Signed by order and in behalf of the said House.

NATH. MACON, *Speaker.*

Attest:

JOHN BECKLEY, *Clerk.*

Mr. Hopkinson requested a copy of the replication, which, the President replied, would be furnished by the Secretary.

Mr. Breckenridge moved a resolution to the following effect:

That the Secretary be directed to inform the House of Representatives that the Senate will, tomorrow, at 12 o'clock, proceed with the trial of Samuel Chase;

which was agreed to without one dissenting voice, 34 members voting for it.

Whereupon the Senate withdrew to their legislative apartment.

2353. Chase's impeachment continued.

The answer and replication being filed in the Chase impeachment, the court proceeded to hear testimony.

Proclamation made by the Sergeant-at-Arms at the opening of the Chase trial for presentation of evidence.

Witnesses on both sides were called at the opening of the Chase trial.

The managers not being ready to present testimony at the opening of the Chase trial, the court granted their motion to postpone.

On February 8[2] the high court of impeachments having met, it was

Ordered, That the Secretary notify the House of Representatives that the Senate are ready to proceed further on the trial of the impeachment of Samuel Chase, one of the associate justices of the Supreme Court.

The managers, accompanied by the House of Representatives in Committee of the Whole House, accordingly attended.

Samuel Chase, the respondent, attended with his counsel.

Proclamation was made to keep silence, and also as follows:

Oyes! Oyes! Oyes!

Whereas a charge of high crimes and misdemeanors hath been exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against Samuel Chase, one of the associate justices of the Supreme Court, all persons concerned are to take notice that he now stands upon his trial, and they may come forth in order to make good the said charge.

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[1] Senate Impeachment Journal, p. 516.

[2] Senate Impeachment Journal, p. 517; Annals, p. 152.

The President informed the managers that they were at liberty to proceed in support of the articles of impeachment exhibited.

On request of Mr. Randolph the witnesses on behalf of the managers were called.

On request of Mr. Hopkinson, counsel for the respondent, his witnesses were called.

Mr. Randolph observed that various considerations, which it was unnecessary to detail, induced him, on behalf of the managers, to move a postponement of the trial till to-morrow, when they hoped to be prepared to proceed with it.

Mr. Harper said that, on behalf of Judge Chase, he would not object to the motion.

The President informed the managers that the Senate acceded to their request, and added, that the Senate would attend to-morrow at 12 o'clock, for the purpose of proceeding with the trial.

The court thereupon adjourned.

2354. Chase's impeachment continued.

During the Chase trial the House attended daily without notice from the court, except on a special occasion, when the hour was changed.

Order of proceeding in the Chase trial during the introduction of evidence.

The journal of an impeachment trial records the names of witnesses, but not their testimony, except when it is subject of objection.

By consent, during the Chase trial, a witness for respondent was examined while the managers were presenting testimony.

In an impeachment trial the discharge of witnesses is determined by the Senate, sometimes in conformity with the consent of the parties.

Mr. Justice Chase, after attending during much of his trial, asked leave to retire, and was informed that the rules did not require his attendance.

Mr. Justice Chase did not, after reading his reply, participate personally in the conduct of his case, beyond waiving objection to one question.

The Presiding Officer of the Senate frequently put questions to witnesses during the Chase trial.

In the Chase impeachment the respondent introduced additional counsel during the trial.

On February 9,[1] and thereafter during the continuation of the trial, the high court met daily at 12 o'clock, and until February 23, near the end of the session, the House of Representatives in Committee of the Whole House attended with the managers without notice from the court. A single exception is noticed, however. On February 13[2] the two Houses met at noon to count the electoral vote. After that duty was concluded, the Secretary of the Senate presented the following message:

Mr. Speaker: I am directed to inform this House that the Senate will, at half past 2 o'clock on this day, be ready to proceed on the trial of the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States.

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[1] Journal of Impeachments, p. 517; Annals, p. 153.

[2] House Journal, p. 137; Senate Impeachment Journal, p. 518.

Accordingly the managers and the House attended.

The trial proceeded in this order:

On February 9,[1] Mr. Randolph, chairman of the managers, opened the cause. Then witnesses for the managers were sworn, gave testimony, and were crossexamined. The Journal states the name of each witness, but not his testimony, unless any portion was objected to and became the subject of decision by the court. On February 13,[2] while the managers were still presenting their testimony, at the request of Mr. Harper, counsel for the respondent, and with the consent of the managers, John Basset, a witness on the part of Judge Chase, was sworn and examined, in consequence of the peculiar situation of his family requiring his immediate return home.

On February 14,[3] while the managers were putting in their testimony, the respondent requested that Charles Lee, esq., might also be allowed to appear as one of his counsel.

On February 15,[4] the managers having completed their testimony, the respondent was notified that he might proceed to make his defense. Thereupon Mr. Harper, in his defense, addressed the court, and then proceeded to adduce witnesses.

On February 19,[4] on request, and with consent of parties, David Robinson, a witness, was discharged.

Also on February 19,[5] the following occurred:

Mr. HARPER. I am desired by Judge Chase to make of this honorable court the request contained in the following letter, which I will read:

"Mr. President: The state of my health will not permit me to remain any longer at this bar. It is with great regret I depart before I hear the judgment of this honorable court. If permitted to retire, I shall leave this honorable court with an unlimited confidence in its justice; and I beg leave to present my thanks to them for their patience and indulgence in the long and tedious examination of the witnesses. Whatever may be the ultimate decision of this honorable court, I console myself with the reflection that it will be the result of mature deliberation on the legal testimony in the case, and will emanate from those principles which ought to govern the highest tribunal of justice in the United States."

The President observed that the rules of the Senate did not require the personal attendance of the respondent; whereupon Judge Chase bowed in a very respectful manner and withdrew. Until this time the respondent had attended each day. Thereafter he did not attend. While in attendance he had not, after the reading of his reply, participated personally in the conduct of the defense, except in one instance to say that he had no objection to a question which his counsel had challenged.[6]

The President of the Senate frequently put questions to the witnesses as the trial proceeded.

On February 20[7] at the conclusion of the testimony, a request was made that a certain witness, a Mr. Tilghman, be discharged, and the following took place:

Mr. Harper said the counsel for the respondent would have no objection to discharge all the witnesses, but must object to discharging part of them.

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[1] Senate Impeachment Journal, p. 517.

[2] Senate Impeachment Journal, p. 519; Annals, p. 222.

[3] Senate Impeachment Journal, p. 519.

[4] Senate Impeachment Journal, p. 522.

[5] Journal, p. 522; Annals, p. 310.

[6] Annals, p. 171.

[7] Annals, p. 312.

The PRESIDENT. If the gentlemen do not agree upon the discharge of the witnesses, I will take the sense of the Senate upon the point.

Mr. HARPER. The particular situation of Mr. Tilghman's family requires his return to Philadelphia. I must therefore request that his further attendance be dispensed with.

The managers consented, and Mr. Tilghman was discharged.

The question was then taken by the President on the discharge of the witnesses, and lost; there being 16 votes in the affirmative and 17 in the negative.

Mr. Rodney requested the discharge of the witnesses from Delaware; which being consented to by the respondent's counsel, they were discharged.

It may be proper here to notice that, from time to time, during the trial, witnesses were discharged with consent of the parties.

2355. Chase's impeachment, continued.

In the Chase impeachment, by agreement, the managers had the opening and close of the final arguments.

Those making the final arguments of the Chase trial were limited neither as to time nor numbers.

On February 19,[1] the following occurred as to the concluding arguments:

The PRESIDENT. Is the course of the arguments on each side understood?

Mr. NICHOLSON. We understand that the managers will open; that reply will be made by the counsel for the respondent, and that the managers will then close.

Mr. KEY. This is the usual course, and we have no objection to it.

The testimony being closed, on February 20,[2] Mr. Early commenced for the managers the argument in support of the articles, and was followed by Mr. Campbell, also in behalf of the managers, and then by Mr. Clark, also a manager.

Then Messrs. Hopkinson, Key, Lee, Martin, and Harper were severally heard for the respondent.

Finally Messrs. Nicholson, Rodney, and Randolph concluded for the managers.

2356. Chase's impeachment continued.

The managers of the Chase impeachment resisted strenuously the argument that impeachment might be invoked only for indictable offenses.

The argument of Mr. Manager Campbell in the Chase trial on the nature of the power of impeachment.

In their arguments the managers and counsel for the respondent considered not only the evidence as tending to substantiate the charges set forth in the articles, but discussed at length the meaning and application of the Constitution in those clauses establishing the remedy of impeachment.

Mr. Campbell, of the managers, said:[3]

The first provision in the Constitution on this subject (art. 1, see. 3,), declares that the Senate shall have the sole power to try all impeachments. Here we discover the great wisdom of the framers of the Constitution. The highest and most enlightened tribunal in the nation is charged with the protection of the rights and liberties of the citizens against oppression from the officers of Government under the sanction of law; unawed by the power which the officer may possess, or the dignified station he may fill, complete justice may be expected at their hands. The accused is called upon before the same tribunal, and in many instances, before the same men, who sanctioned his official elevation, to answer for abusing the powers with which he had been intrusted. Men who are presumed to have had

[1] Annals, p. 311.

[2] Senate Impeachment Journal, pp. 522, 523.

[3] Annals, p. 331.

a favorable opinion of him once are to be his judges; no inferior or coordinate tribunal is to decide on his case, which might from motives of jealousy interest be prejudiced against him and wish his removal. No, sir; his judges, without the shadow of temptation to influence their conduct, are placed beyond the reach of suspicion.

The next provision in the Constitution declares that judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Here the Constitution seems to make an evident distinction between such misdemeanors as would authorize a removal from office, and disqualification to hold any office, and such as are criminal, in the ordinary sense of the word, in courts of common law, and punishable by indictment. So far as the offense committed is injurious to society, only in consequence of the power reposed in the officer being abused in the exercise of his official functions, it is inquirable into only by impeachment, and punishable only by removal from office and disqualification to hold any office; but so far as the offense is criminal, independent of the office, it is to be tried by indictment, and is made punishable according to the known rules of law in courts of ordinary jurisdiction. As, if an officer take a bribe to do an act not connected with his office, for this he is indictable in a court of justice only. Impeachment therefore, according to the meaning of the Constitution, may fairly be considered a kind of inquest into the conduct of an officer, merely as it regards his office; the manner in which he performs the duties thereof; and the effects that his conduct therein may have on society. It is more in the nature of a civil investigation than of a criminal prosecution. And though impeachable offenses are termed in the Constitution high crimes and misdemeanors, they must be such only so far as regards the official conduct of the officer; and even treason and bribery can only be inquired into by impeachment, so far as the same may be considered as a violation of the duties of the officer, and of the oath the officer takes to support the Constitution and laws of the United States, and of his oath of office; and not as to the criminality of those offenses independent of the office. This must be inquired into and punished by indictment.

This position is strongly supported by the mode of proceeding adopted by this honorable court in cases of impeachment. You issue a summons to give notice to the accused of the proceeding against him; you do not consider his personal appearance necessary; you issue no compulsory process to enforce his personal attendance; and you pass sentence, or render judgment on him in his absence. But, in all criminal prosecutions, compulsory process must issue at some stage of it to enforce the defendant's appearance; unless outlawry in England be considered an exception, which, it is believed, is not resorted to in this country, and his personal appearance is considered absolutely necessary; and in almost every case he must be present when sentence is pronounced against him. This construction of the Constitutional provision appears to be absolutely necessary, to avoid the absurd consequence that would arise from a different construction; that of punishing a man twice for the same offense, which could not have been intended by the framers of the Constitution. The nature of the judgment which you are bound to render, and not to exceed, appears also conclusive on this head. You can only remove and disqualify an individual from holding any office of honor, trust, or profit. This can not be considered a criminal punishment; it is merely a deprivation of rights; a declaration that the person is not properly qualified to serve his country. Hence I conceive that, in order to support these articles of impeachment, we are not bound to make out such a case as would be punishable by indictment in a court of law. It is sufficient to show that the accused has transgressed the line of his official duty, in violation of the laws of his country; and that this conduct can only be accounted for on the ground of impure and corrupt motives. We need not hunt down the accused as a criminal, who had committed crimes of the deepest die; and this honorable court are not authorized to inflict a punishment adequate to such crimes, if they had been committed and could be established. With this view of the meaning of the Constitutional provision relative to impeachments, I shall proceed to examine the articles now under consideration, and the evidence given to support them. In the course of this examination, we apprehend it will clearly appear that the whole conduct of the judge in the several transactions, for which charges are alleged against him, had its origin in a corrupt partiality and predetermination unjustly to oppress, under the sanction of legal authority, those who became the objects of his resentment in consequence of differing from him in political sentiments; turning the judicial power, with which he was vested, into an engine of political oppression.

2357. Chase's impeachment continued.

The argument of Mr. Manager Nicholson on the nature of the power of impeachment.

Mr. Manager Nicholson said: [1]

But, sir, there is one principle upon which all the counsel for the accused have relied, upon which they have all dwelt with great force, and to the maintenance of which they have directed all their powers, that we can not assent to; we mean to contend against it, because we believe it to be totally untenable, and because it is of the first importance in the decision of the question now under discussion. We do not contend that, to sustain an impeachment, it is not necessary to show that the offenses charged are of such a nature as to subject the party to an indictment, for the learned counsel have said that the person now accused is not guilty, because the misdemeanors charged against him are not of a nature for which he might be indicted in a court of law.

To show how entirely groundless this position is, I need only pursue that course which has been pointed out to us by the respondent himself and his counsel. I might refer to English authorities of the highest respectability, to show that officers of the British Government have been impeached for offenses not indictable under any law whatever. But I feel no disposition to resort to foreign precedents. In my judgment, the Constitution of the United States ought to be expounded upon its own principles, and that foreign aid ought never to be called in. Our Constitution was fashioned after none other in the known world, and if we understand the language in which it is written, we require no assistance in giving it a true exposition. As we speak the English language, we may, indeed, refer to English authorities for definitions, as we should refer to English dictionaries for the meaning of English words; but upon this, as upon all occasions, where the principles of our Government are to be developed, I trust that the Constitution of the United States will stand upon its own foundation, unsupported by foreign aid, and that the construction given to it will be, not an English construction, but one purely and entirely American.

The Constitution declares that "the judges both of the supreme and inferior courts shall hold their commissions during good behavior." The plain and correct inference to be drawn from this language is, that a judge is to hold his office so long as he demeans himself well in it; and whenever he shall not demean himself well, he shall be removed. I therefore contend that a judge would be liable to impeachment under the Constitution, even without the insertion of that clause which declares, that "all civil officers of the United States shall be removed for the commission of treason, bribery, and other high crimes and misdemeanors." The nature of the tenure by which a judge holds his office is such that, for any act of misbehavior in office, he is liable to removal. These acts of misbehavior may be of various kinds, some of which may, indeed, be punishable under our laws by indictment; but there may be others which the lawmakers may not have pointed out, involving such a flagrant breach of duty in a judge, either in doing that which he ought not to have done, or in omitting to do that which he ought to have done, that no man of common understanding would hesitate to say he ought to be impeached for it.

The words "good behavior" are borrowed from the English laws, and if I were inclined to rest this case on English authorities, I could easily show that, in England, these words have been construed to mean much more than we contend for. The expression durante se bene gesserit, I believe, first occurs in a statute of Henry VIII, providing for the appointment of a custos rotulorum, and clerk of the peace for the several countries in England. The statute recites, that ignorant and unlearned persons had, by unfair means, procured themselves to be appointed to these offices, to the great injury of the community, and provides that the custos shall hold his office until removed, and the clerk of the peace shall hold his office durante se bene gesserit. The reason for making the tenure to be during good behavior was that the office had been held by incapable persons, who were too ignorant to discharge the duties; and it was certainly the intention of the legislature that such persons should be removed whenever their incapacity was discovered. Under this statute, therefore, I think it clear that the officer holding his office during good behavior might be removed for any improper exercise of his powers, whether arising from ignorance, corruption, passion, or any other cause. To this extent, however, we do not wish to go. We do not charge the judge with incapacity. His learning and his ability are

[1] Annals, pp. 562–567.

acknowledged on all hands; but we charge him with gross impropriety of conduct in the discharge of his official duties, and as he can not pretend ignorance we insist that his malconduct arose from a worse cause.

If, however, a judge were not made liable to removal, from the very nature of the tenure by which he holds his office, we still insist that every judge conducting himself improperly in office comes under that clause of the Constitution which declares that "the President, Vice-President, and civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

We do not mean to contend against a position which one of the learned counsel took so much pains to prove, that the word "high" applies as well to misdemeanors as to crimes; nor do we deem it important at this time to inquire whether a civil officer of the United States can be removed for offenses not committed in the discharge of his official duties. It will be time enough to make this inquiry when the case presents itself. At present we aver that the party charged has been guilty of a high misdemeanor in office, and that he ought to be removed for it.

Here, however, we are met by being told, that although his conduct may have been improper, yet that he is not liable to impeachment, unless the offense is of such a nature as that he might be indicted for it in a court of law.

If this be true, as it relates to a judge, the Constitution, to be consistent with itself, must make it universally true; and yet, if the doctrine be admitted, the Constitution will be found to be at variance with itself. Treason is an offense which may or may not be committed in the discharge of official duty, and no doubt the party committing it may be indicted. Bribery is an offense for which a judge may be indicted in the courts of the United States, because an act of Congress makes provision for it, and declares the punishment; but there is no law by which any other officer of the United States can be indicted for bribery. If, therefore, the President of the United States should accept a bribe, he certainly can not be indicted for it, and yet no man can doubt that he might be impeached. If one of the heads of Departments should undertake to recommend to office for pay, he certainly might be impeached for it, and yet, I would ask, under what law, and in what court could he be indicted?

To this, perhaps, it might be answered, that bribery is one of those offenses for which the Constitution expressly provides that the officer may be impeached. This is true; but let us proceed further, and inquire whether there are not other offenses for which an officer may be impeached, and for which he can not be indicted?

If a judge should order a cause to be tried with eleven jurors only, surely he might be impeached for it, and yet I believe there is no court in which he could be indicted. You, Mr. President, as Vice-President of the United States, together with the Secretary of the Treasury, the Chief Justice, and the Attorney-General, as commissioners of the sinking fund, have annually at your disposal $8,000,000, for the purpose of paying the national debt. If, instead of applying it to this public use, you should divert it to another channel, or convert it to your own private uses, I ask if there is a man in the world who would hesitate to say that you ought to be impeached for this misconduct? And yet there is no court in this country in which you could be indicted for it. Nay, sir, it would amount to nothing more than a breach of trust, and would not be indictable under the favorite common law.

But, sir, this ground, which was so strenuously fought for, will probably be abandoned, and instead of our adversaries maintaining that the offense must be of an indictable nature, they will, like one of the honorable counsel (Mr. Harper), go a step back and say that it must be a breach of some known positive law. Thus they will endeavor to shelter their client by saying that there is no act of Congress declaring it illegal for a judge to deliver his opinion on the law before counsel have been heard, or to make political harangues from the bench.

There are offenses for which an officer may be impeached, and against which there are no known positive laws. It is possible that the day may arrive when a President of the United States, having some great political object in view, may endeavor to influence the legislature by holding out threats or inducements to them. A treaty may be made which the President, with some personal view, may be extremely anxious to have ratified. The hope of office may be held out to a Senator; and I think it can not be doubted, that for this the President would be liable to impeachment, although there is no positive law forbidding it. Again, sir, a Member of the Senate or of the House of Representatives may have a very dear friend in office, and the President may tell him unless you vote for my measures your friend shall be dismissed. Where is the positive law forbidding this, yet where is the man who

would be shameless enough to rise in the face of the country and defend such conduct, or be bold enough to contend that the President could not be impeached for it?

It was said by one of the counsel that the offense must be a breach either of the common law, a State law, or a law of the United States, and that no lawyer would speak of a misdemeanor, but as an act violating some one of these laws. This doctrine is surely not warranted, for the Government of the United States have no concern with any but their own laws. In a State court, I would speak of a misdemeanor as an offense against a State law; in the courts of the United States, I would speak of it as an offense against an act of Congress; but, sir, as a member of the House of Representatives, and acting as a manager of an impeachment before the highest court in the nation, appointed to try the highest officers of the Government, when I speak of a misdemeanor, I mean an act of official misconduct, a violation of official duty, whether it be a proceeding against a positive law, or a proceeding unwarranted by law.

If the objection that the offense must be of an indictable nature, or against some positive law, means anything, it must be that the misconduct for which a judge or any other officer may be impeached, is either made punishable by, or is a violation of an act of Congress, for we are not to be regulated either by the common law or a State law. What, then, would be the result? I have pointed out several instances of gross misconduct in violation of no act of Congress, and yet under this doctrine he is to be permitted to pursue his wicked courses until every possible offense is defined by statute. This, too, would teach us that we have done wrong heretofore, for at the last session a judge was impeached and removed from office for drunkenness and profane swearing on the bench, although there is no law of the United States forbidding them. Indeed, I do not know that there is any law punishing either in New Hampshire, where the offense was committed. If it was said by one of the counsel that these were indictable offenses. I, however, do not know where; certainly not in England. Drunkenness is punishable there by the ecclesiastical authority, but the temporal magistrate never had any power over it until it was given by a statute of James I, and even then the power was not to be exercised by the courts, but only by a justice of the peace, as is now the case in Maryland, where a small fine may be imposed.

But the attorney-general of Maryland (Mr. Martin) admits that offenses may be of so heinous a nature that their punishment carries infamy with them, and that, though not committed in the discharge of official duty, yet if against a State law, the party may be impeached and removed from office. This, though not very material to the present question, may serve us in showing how inapplicable the doctrine is, that the offense must be against a State law or the common law. I will suppose that in New Hampshire there is no law punishing profane swearing. In Maryland a magistrate is authorized to impose a fine of 33 cents, and if this is not paid instantly the offender may be put in the pillory and receive thirty-nine lashes. The punishment is infamous, and if inflicted on a judge, according to the idea of this gentleman, he is to be impeached and removed from office. If the same offense is committed in New Hampshire, the judge is not to be removed, not because he has been guilty of a lighter offense, but because there is no State law punishing it. If, then, the State law is to be made the criterion, a judge in Maryland is to be removed from office for that which he might do with impunity in another State.

To carry this idea a little further: There was once in the State of Connecticut, and may be yet for aught I know, a celebrated code called the Blue Laws. Under the provisions of this code, I believe it is a fact that a captain of a ship was tied up and publicly whipped, because, on returning from a long voyage, he met his wife on a Sunday at the front door and kissed her. This was deemed a high offense, and was ignominiously punished. Now, if we are to be governed by the State laws, I trust the Blue Laws of Connecticut will be rejected, and that our grave judges may be allowed to kiss when and where they please, as to their wisdom shall seem meet, without incurring the pains and penalties of an impeachment. This, sir, may be somewhat ludicrous, but I hope it is not, therefore, the less illustrative of the absurdity of the doctrine contended for. It has been said that the offenses for which a judge or other officer is to be impeached ought to be defined by act of Congress. This is impossible. Such is the multiplicity of passions that sway the human heart, such is the variety of human action, that a code of laws never did and never can exist in which all human offenses are defined. The Constitution is sufficiently definite when it declares that a judge shall hold his office during good behavior, and that all civil officers shall be removed for high crimes and misdemeanors. The law of good behavior is the law of truth and justice. It is confined to no soil and to no climate. It is written on the heart

of man in indelible characters, by the hand of his Creator, and is known and felt by every human being. He who violates it violates the first principles of law. He abandons the path of rectitude, and by not listening to the warning voice of his conscience, he forsakes man's best and surest guide on this earth. The best and ablest judge will often err in mere matters of law, but as to principles of duty, in discharging acts of common justice to his fellow-men, he can never err so long as he follows conscience as his guide, and suffers justice to be the only object which he has in view.

2358. Chase's impeachment continued.
The argument of Mr. Manager Rodney on the nature of the power of impeachment.

Mr. Manager Rodney, at greater length, discussed this question: [1]

We have been told by that able lawyer, the attorney-general of Maryland, that a judge can not be impeached for any offense which is not indictable; nor, indeed, for an indictable offense, unless it be a high crime or misdemeanor; and not even for a high crime or misdemeanor, except such as stamp infamy on the character and brand the soul with corruption. A variety of cases have been put to explain his ideas. The law books and the Constitution have been relied on to support those positions, which it becomes my duty to examine. Without troubling you to remove the lumber of the books, let me call your attention, in the first place, to the Constitution. The Constitution shall be my text. I think I shall be able to demonstrate that, in order to render an offense impeachable, it is not necessary that it should be indictable. But, I will go further and prove that, agreeably to the learned counsel's own principles, Judge Chase has committed indictable offenses. Taking his own explanation of crimes and misdemeanors, and recurring to his authority, I will prove that, within the strictest terms of the definition on which he relies, Judge Chase is guilty, not merely of misdemeanors in the various acts of judicial misbehavior, but of aggravated crimes against the express language of the laws and the positive provisions of the Constitution.

In adverting to the Constitution, when looking at one part, we should take a view of the whole instrument to fix the proper construction. In examining any provision, we should consider the bearing and tendencies of all the rest. By adopting this rule we shall preserve order and harmony throughout the system.

The first place in which the subject of impeachment is mentioned in the Constitution is in the first section of the first article. The language used by those who framed it is, in my humble opinion, too plain to be misconceived, and too clear to be misunderstood: "The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment."

This section vests the exclusive authority to impeach in the immediate representatives of the people. The power thus delegated is general and comprehensive. It is not limited to any particular acts or transgressions, but is coextensive with every proper object or subject of impeachment. The House of Representatives is thus constituted, most emphatically, the grand jury of the nation: A high and responsible authority, which, I trust, will always be exercised with prudence and discretion, directed with impartiality and justice. But I do confidently hope that there will ever be found sufficient spirit and firmness to arraign the guilty delinquent, however elevated his station, when the Constitution or laws have been infringed, the tenure of office broken, or its duties violated.

The next passage in order which touches this topic and to which I shall refer is the third section of the same article: "The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside. And no person shall be convicted without the concurrence of two-thirds of the Members present."

This clause establishes a tribunal for the trial of impeachments. To the Senate this important trust is wisely confided. It prescribes the manner in which the jurisdiction shall be exercised, directs that the Members shall be under oath or affirmation, and fixes the number necessary to convict. Let us proceed a step further in the path: "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law."

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[1] Annals, pp. 591–610.

The part I have just read contains two very salutary provisions. The first limits the extent of the punishment to be inflicted by the Senate. The second, as a necessary consequence of the former, reserves to the ordinary tribunal of law the right to proceed by indictment. This last provision has been a fruitful source of argument to the learned counsel. They have very ingeniously played upon these terms, and, in the zeal of their imaginations, have fancied that they proved to a demonstration the position, that an offense must be indictable or it is not impeachable. There may be magic in their argument, but I do not perceive there is any logic. The superstructure which they have erected on this basis is easily demolished. From the language of this clause they draw the inference that the framers of the Constitution intended that no person should be impeached for any offense for which he was not liable to be indicted. Is this the fair import of the expressions? The text of this instrument is remarkably free from ambiguity. Clearness, correctness, and precision are its leading characteristics. With a very few exceptions it speaks a language intelligible by all. Had it been the design and wish of the authors of the Constitution that no offenses should be impeachable which were not indictable, they would have declared so in express and positive terms, and left nothing for inference or conjecture. This they have not done, and we may reasonably presume they did not intend to do. They prudently looked into the volume of history, where they saw the shocking purposes to which, in evil times, the power of impeachments had been basely and inhumanly prostituted. They read in those instructive pages the dear-bought lessons of experience. and wisely ordained limits which the authority to punish should not exceed. They fixed a ne plus ultra for the tribunal that they established which their severest judgments should not pass. They knew, at the same time, that crimes might be perpetrated and offenses committed which would demand additional chastisement. The loss of office, and disqualification to hold any in future, the maximum of punishment which they had prescribed, would be very inadequate and bear little proportion to the atrocious guilt which might be incurred. Under the influence of these impressions they reserved to the tribunals established by law the right to inflict the just penalties annexed to this class of cases. Without any intention whatever, when any acts had been committed which manifested an unfitness for office, or when there had been a breach of the tenure by which it was held, by malconduct or misbehavior, to prevent the proceedings by impeachment, although the case might not be such as to warrant any additional punishment at law. This, I apprehend, is the object they had in view, and this is the fair, easy, natural, and obvious sense of the words they have used.

Those conversant with the juridical history of England, or who have studied her political annals, must be sensible of the deplorable situation to which that country has been reduced, at different periods, by the abuse of the power of impeachment. The revengeful exercise of this authority has too often deluged the scaffold with blood. In that country the proceeding by impeachment for any offense supersedes all other modes. The person accused, whether he be acquitted or condemned, can not afterwards be indicted for the same offense, or called to an account before the ordinary tribunals. The former course is a complete bar to the latter. To prevent those consequences flowing from a proceeding by impeachment under the Constitution, those who formed that instrument, at the same time that they limited the punishment, have expressly declared it shall have no effect to bar a trial before the ordinary courts, but that the party shall be liable to indictment and punishment according to law. Without this positive provision, as we are almost as much in the habit of drawing on the Bank of England for law as our merchants are for cash or credit, we might have incorporated a principle into our code totally repugnant to the system. The Constitution has drawn the true line on this subject. From a mere reprimand or temporary suspension, the court may ascend in the scale of punishment to removal and disqualification. But thus far can they go and no farther. They can not pass the Rubicon. If the crime deserves a more exemplary sentence recourse must be had to the ordinary mode of proceeding, and then their judgment is not pleadable in bar to an indictment. By this means adequate punishment may in all cases be inflicted.

In England every person, in a public or private capacity, either as an officer or an individual, is liable to be proceeded against by impeachment. In this country the sphere of impeachment is properly limited. The attorney-general of Maryland has taken a long, tedious, and circuitous march to arrive at this point, which I would readily have yielded without an argument. I do not recollect that any of my colleagues contended for the position that every man in this country, in his individual capacity, might be an object of impeachment. For myself I utterly disclaim the idea. Admitting, as I do, in its fullest extent, this wide distinction between the power delegated by the Constitution and that exercised in England, which embraces every subject of that kingdom, how does it bear on the case or affect the

argument? After laboring for a considerable time, and employing all his talents, and that fund of legal knowledge which is inexhaustible, to prove that the House of Representatives can not impeach every citizen indiscriminately, the learned attorney-general has not favored us with any application of his principle to the present cause. It proves certainly one among many other broad lines of difference which exist between the British doctrines on the subject of impeachment and the constitutional provisions of this country. In this respect it adds to the weight of our scale. It shows how cautious we should be in bowing down to British precedents which can not be perfectly applicable. I hope I have satisfied the court that the gentlemen are mistaken in their argument on this part of the Constitution. In the general wreck of their defense I conceive this sinking plank, to which they have clung, can not afford them the most distant prospect of safety. We will now proceed a little further in the broad and plain road of the Constitution, carefully examining the ground on which we move.

By the fourth section of the second article of the Constitution it is provided that "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

The learned counsel have placed great reliance on this passage to prove that an officer must be guilty, not merely of an indictable offense (as they concede every crime or misdemeanor to be), but must have committed a high crime or high misdemeanor to justify an impeachment. One of the learned gentlemen, to fix the true construction of the term "or other high crimes and misdemeanors," commented at great length on the expressions. To illustrate the subject his fancy readily formed an objection which with logical accuracy he removed. He demonstrated that, agreeably to the strictest grammatical construction and the nicest propriety of speech, the epithet high was to be considered as prefixed to misdemeanors as well as to crimes. In this manner the phantom which his own imagination raised was laid not by a spell, but by the exertion of his argumentative powers. We would willingly have conceded the point and spared him his labor and his breath. We mean not to cavil about trifles or dispute for straws.

Taking it for granted that he has given the proper construction to a part, let us examine what is the just sense of the whole of this passage. In plain English it commands upon the conviction by impeachment of certain atrocious offenses that the guilty officer shall be removed at all events. Depriving the court thus far of the discretion which they would otherwise have possessed as to the judgment they might pass. Having previously limited, in general cases, the punishment which they might inflict, according to their discretion, by establishing a maximum which they should not exceed in this particular grade of flagrant offenses, they have fixed the sentence which they shall pass. The language of the Constitution is peremptory and imperative. Those convicted of such daring enormities of those high crimes or high misdemeanors must be removed from office, which they have justly forfeited. This is the minimum of punishment to be inflicted. Perhaps those who penned the great charter of the Union apprehended that in evil times some high officer of the United States clothed with power and armed with influence might be proved to have committed the base and detestable crime of bribery, or some other equally great, by evidence too strong and too powerful to be resisted, and in an unfortunate hour, awed by fear or seduced by favor, the constitutional judges would not hurl him at once from the seat which he was unworthy to occupy, but permit him to remain in his station, to the disgrace of the country and to the injury of the people. Hence they were induced to make this wholesome provision which left nothing to the discretion of the judges. But is there a word in the whole sentence which expresses an idea or from which any fair inference can be drawn that no person shall be impeached but for "treason, bribery, or other high crimes and misdemeanors?" It does not pretend to specify the various acts of an officer which may subject him to an impeachment: its whole object is to define and fix the punishment which he shall incur on the commission of particular offenses, which is removal from office. This is the least penalty they can inflict in such cases, and God knows it would be much too little had they not in the former part provided that after stripping the traitorous impostor of the insignia of office and power the ordinary tribunals may add to the constitutional sentence of the Senate the fines or forfeitures imposed by law.

From the most cursory and transient view of this passage I submit with due deference that it must appear very manifest that there are other cases than those here specified for which an impeachment will lay and is the proper remedy. In these particular cases the punishment is ascertained, to wit, removal from office; but in a clause to which I have sometime since adverted it is discretionary. Where was the necessity or use of that, if this defined all the impeachable offenses and specified the punishment?

We must, if possible, give effect to every sentence of this instrument. We must not suppose that its authors made nugatory provisions. The sense and meaning which I have given to their language and the constructions which I have maintained will give force and effect to every word.

The system of impeachment thus understood, and I humbly submit rationally explained, is perhaps as little liable to exception as any branch of the Constitution. It is stripped of those terrible instruments of death and destruction which have made such dreadful havoc and carnage in the ages that have preceded us. We have been benefited by the sanguinary precedents of barbarous times. We have been taught wisdom ourselves by the folly of others. We have improved the advantages we possessed, and thus, according to his own inscrutable ways, has the benevolent Author of our existence brought good out of evil.

In guarding effectually against the cruel and vindictive punishments which the extraordinary tribunal of impeachment might inflict, in the exacerbations of party violence and personal animosity, the fathers of the Constitution took care to provide that a certain grade of offenses should deprive the guilty incumbent of his office, thereby rendering him a harmless object to the community when dispossessed of his abused authority. Nay, they went further. Their wisdom and prudence led them to make a specific declaration that, after being deprived of his power, he should be subject to the legal consequences of his guilt upon trial and conviction before the ordinary tribunals at law. Thus rendering the system perfect and complete.

There is an important provision contained in the Constitution, intimately connected with this subject, to which I now beg leave to refer. It will be found in the first section of the third article:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior."

With this particular part of the Constitution the learned judge must have been more especially acquainted when he accepted of his present office, and must then have expressly accepted it on the terms specified. No man can seriously say that for a judge to continue in the exercise of his authority and the receipt of his salary after any acts of misbehavior is not a violation of this essential provision of the Constitution. He holds his office explicitly and expressly during good behavior. The instant he behaves bad he commits a breach of the tenure by which he holds the possession, and the office becomes forfeited. The people have leased out the authority upon certain specified terms. So long as he complies with them, and not a moment longer, is he entitled to exercise the power which was not intended for his individual advantage, but for their benefit. But, sir, who is to take notice of these acts of misbehavior? How are they to be ascertained, and what shall be considered as such? Are the people in their individual capacity, ipso facto, on the commission of the act to declare the office forfeited, and is a judge then to cease from his labors? Or must it not be officially, or rather judicially, ascertained? This, I conceive, would be the proper mode of procedure. Has the Constitution provided no tribunal for this purpose? I answer it has, most indubitably. By the Constitution the Senate, as the court, and jury, too, in cases of impeachment, has the sole power of removing from offices those who hold them by the tenure of good behavior. If a judge misbehave, he ought to be removed, because agreeably to the plainest provision he has forfeited his right to hold the office. The Constitution having established this single mode of removal, and having declared that a judge shall hold his office only during good behavior, it becomes the duty of the representatives of the people, as the grand inquest of the nation, vested with the general power of impeachment, when they know, of their own knowledge or from the information of their constituents, that acts of misbehavior have been committed, to present the delinquent to this high tribunal, whose powers are competent to inquire into the case and apply the remedy; whose authority is coextensive with the complaint, commensurate with the object, and adequate to the redress of the evil. Shall it be said that it is true the Constitution has declared that a judge shall hold his office no longer than he behaves himself well, and that though he behaves never so ill it has provided no means to turn him out of office if he has the hardihood to remain in his seat? If such a doctrine be contended for, it is too preposterous to receive the sanction of this court. It would render this provision nugatory indeed. It would do more. It would be establishing the principle that whether they behave well or ill they must continue in office, because there was no mode fixed for removing them. This would be the strongest construction that plain language, obvious to the common sense of the most unlettered man, ever received in a court of justice. The method I have

pointed out solves all difficulties at once and releases us from every embarrassment on this subject. It makes the Constitution consistent with itself and preserves uniformity throughout all the parts.

The learned counsel were compelled to make a show in maintenance of unsound doctrines to give the appearance of support to positions equally untenable.

I flatter myself that every member of this court is by this time convinced that if a judge misbehave, he should be deprived of his office, because guilty of a breach of the tenure by which it is held; that any acts of misbehavior must be judicially inquired into and ascertained; that the Constitution, having delegated to the House of Representatives exclusively the general power to impeach, acts of misbehavior are proper subjects of impeachment, upon conviction of which the Senate has the authority to remove an officer, and is bound to exercise it. Shall we be told, then, that no matter how gross the acts of judicial misbehavior, or how flagrant the misconduct of a judge, he can not be removed from office, nay, he can not be impeached, unless guilty of treason or bribery or some crime equally great? Sir, it is impossible that the intelligent understandings and the mature judgments of this court could countenance for a moment such an idea.

The terms "during good behavior" appear to have been considered as very vague and indefinite by the learned counsel for the defendant, from the manner in which they have argued the case. When, in the strong, nervous language of my honorable friend, the conduct of the accused has been described in the most appropriate terms in the articles of impeachment, they have treated them with levity, as if they did not understand their import, because they admitted of no serious refutation. The clear explanation of the expression "during good behavior," and the lucid exposition of this passage contained in the charges themselves, they seem unwilling to comprehend. The commentary is as unintelligible as the text. When to such conduct as was never before witnessed in a court of justice is applied the epithet of novel, we have been told by one counsel that the term is too uncertain to be comprehended—no precise idea can be affixed to it, nor is the language sufficiently technical to constitute a criminal charge. When behavior the most rude and contumelious, disgraceful on any occasion, but truly degrading on the bench and unquestionably criminal, because calculated to bring the judiciary into the lowest contempt and to excite universal indignation against the tribunals of the country, is portrayed in the impressive style of truth, the age of captious sophistry or technical bigotry is resorted to for proving there is no sense or meaning in the charge. Upon what an ocean of uncertainty have we embarked when the plainest language is not understood! If sound, solid common sense were to be confounded by technical jargon, the tower of Babel would not present a greater confusion of tongues. Sir, when the gentlemen can not but feel the force of these charges, with what admirable ingenuity do they attempt to evade them! Is this tribunal, say they, to erect itself into a court of honor, or assume the chair of chivalry, and form a scale by which decorum and good manners may be nicely graduated? Is every slight deviation from the line of politeness at an assembly or drawing-room to be marked with accuracy and chastised with severity? The testimony furnishes apt and ready answers to those questions. The learned judge is not arraigned because he does not possess the polished manners of an accomplished gentleman, but for outraging all the rules of decency and decorum by conduct at which the plain sense of every honest man would revolt.

I beg this court seriously to consider whether a judge may not be guilty of acts of misbehavior inferior in criminality to treason or bribery for which he ought to be impeached, though no indictment would lay for the same. When gentlemen talk of an indictment being a necessary substratum of an impeachment I should be glad to be informed in what court it must be supported. In the courts of the United States or in the State courts? If in the State courts, then in which of them? Or, provided it can be supported in any of them, will the act warrant an impeachment? If an indictment must lay in the courts of the United States, in the long catalogue of crimes there are very few which an officer might not commit with impunity. He might be guilty of treason against an individual State, of murder, arson, forgery, and perjury, in various forms, without being amenable to the Federal jurisdiction, and unless he could be indicted before them he could not be impeached. Are we then to resort to the erring data of the different States? In New Hampshire drunkenness may be an indictable offense, but not in another State. Shall a United States judge be impeached and removed for getting intoxicated in New Hampshire, when he may drink as he pleases in another State with impunity? In some States witchcraft is a heinous offense, which subjects the unfortunate person to indictment and punishment; in several other States it is unknown as a crime. A greater variety of cases might be put to expose the fallacy of the principle and to prove how improper it would be for this court to be governed

by the practice of the different States. The variation of such a compass is too great for it to be relied on. This honorable body must have a standard of their own, which will admit of no change or deviation. The test by which they will try an impeachment can not be that of indictment. Even in England, to whose practice and whose precedents such constant recourse has been had, the learned counsel have not adduced a single case where a judge of one of their superior courts has been indicted for any malconduct in office. Nay, I believe I may defy them to show an example of the kind. The best authorities tell us they are not subject to indictment, but may be proceeded against by impeachment. They have been impeached, convicted, and punished for giving opinions which they knew to be contrary to law, and for a variety of misdeeds, but never in a solitary instance that I know of have they been indicted. I think I can put so many striking cases of misconduct in a judge for which it must be admitted that an impeachment will lay, though no indictment could be maintained, that the learned counsel themselves must be compelled at length to surrender this post at discretion, without any term of capitulation. I will not state the case of a judge willfully and designedly neglecting to hold a court on the day prescribed by law, for I am aware of the answer gentlemen would give, that it is an offense against a particular provision. But let use suppose Judge Chase, to comply with the forms of the law at the time appointed, should appear and open the court, and notwithstanding there was pressing business to be done he should proceed knowingly and willfully to adjourn it until the next stated period. He would be guilty of no violation of any positive law for which he might be punished by indictment; but ought he not to be impeached? Suppose he proceeded in the dispatch of business, and from prejudice against one party or favor to his antagonist he ordered on the trial of a cause, though legal grounds are exhibited for postponement. Is this not a proper subject of impeachment? And yet there is no express law infringed. If when the jury return to the bar to give the verdict, he should knowingly receive the verdict of a majority, is there any positive provision by which a jury shall be composed of twelve men and that their decision shall be unanimous? I believe even the learning of that profound lawyer (Mr. Martin), from the reading of laborious years and the indefatigable researches of a life devoted to the pursuit of his profession, could not show any positive provision in the Constitution of the United States or any statute of Congress on the subject. So far from it being originally necessary in civil cases that a jury should be unanimous, the late Judge Wilson (a great and venerable authority), magnum et memorabile nomen, asserts that a majority always decided agreeably to the primary principles of that valuable institution.

Again, there is no man so ignorant as to be insensible to manifest violations of the sanctuary of a court. It was never intended as a stage for the exhibition of pantomimes or plays. Were a judge to entertain the suitors with a farce or a comedy, instead of hearing their causes, and turn a jester or buffoon on the bench, I presume he would subject himself to an impeachment; and yet there is no positive law preventing a court from being converted into a theater or of preferring the buskin to the sock. If he should exhibit a tragic scene, in which an unfortunate fellow-citizen might find himself really no actor in the part which he bore, I presume his conduct would claim the attention of the House of Representatives, as the grand inquest of the nation. It must be unnecessary to multiply examples of misconduct in a judge against the known law of his duty, so manifest at first blush that the most callous conscience can not be insensible to them, not minutely specified and described (for that would be impossible) by particular provision in any legislative act, but all embraced and comprehended in the solemn oath which he takes to perform his duty faithfully and impartially as a judge. As a judge he is bound to execute the laws. Every opinion which he gives and every sentence which he passes must be in conformity to law and be authorized by it. It ought to be the judgment of the law and not his own individual opinion. If he willfully make a decree not sanctioned by law, he is guilty of misbehavior as a judge, for it is a glaring violation of the fundamental principles of his office. I shall have occasion in the course of my argument to advert to judicial opinions delivered by the accused which there was no legislative act to warrant, no precedent to authorize, no principle to sanction, and which the utmost latitude of legal discretion would not justify. In such a case, if this court be satisfied that he acted innocently wrong, that it was an honest error of judgment which led him astray, he will no doubt stand acquitted. But if, from a concurrence of circumstances, they are convinced that he erred through design, from prejudiced and partial motives, though he may not have been corrupted by a bribe, they will consider him as a proper subject of their jurisdiction, and a proper object for the exercise of their authority.

The doctrines of the learned counsel for the defendant would lead to a conclusion which they may not have contemplated, but which the country would feel. Time would fail me to enumerate the different offenses of various grades which a judge might commit, and for which he ought most assuredly to be impeached, though no indictment could be maintained in any of the Federal courts. If their positions were correct, a judge might violate all the Ten Commandments without subjecting himself to impeachment and removal; for I know of no method of removal but through the medium of impeachment. There is no law of the United States prohibiting drunkenness on the bench, or indeed punishing this vice at all, unless we look into the laws of a naval or military court-martial, and yet a judge ought certainly to be removed from office if guilty of habitual intoxication. The use of profane or obscene language by a judge is not expressly proscribed by any act of Congress with which I am acquainted, though if it were forbidden in general terms gentlemen might say with as much propriety as they have done in other cases, in the course of their argument, that every term, considered as such, ought to be enumerated, and yet, I believe, should a judge, in his place, be guilty of taking the name of his God in vain, of cursing and swearing on the bench, or using the obscene language of Billingsgate or St. Giles, he ought to be impeached and removed. The sancity of a court should he preserved unsullied, and the officer displaced who was capable of exhibiting so shocking an example, calculated to destroy all respect for, and confidence in, the judicial establishment of the country, and to corrupt the morals of the nation. But, sir, why need I enlarge on this subject? The counsel for the defendant have appeared at one stage of their argument to possess great respect and deference for precedent. To consider cases solemnly argued or deliberately adjudged as fixing the law so perfectly as to justify a court in absolutely preventing any counsel, even though concerned for a criminal, and that, too, in a capital case, from questioning principles thus established. If precedent will furnish us with a clue to the intricate labyrinth in which they have attempted to involve us, we are in possession of one equal to that of Ariadne.

Suffer me again to refer them to the precedent which I cited a few days since. I allude to the case of Judge Addison, in Pennsylvania. One of the counsel (Mr. Martin), for whose legal erudition I feel the greatest respect, has endeavored to impeach the authority of the highest tribunal in that State, and has asked if that decision is to be a precedent for this court? I was the more surprised at this, because his colleague (Mr. Lee) had cited, in the course of his argument, a case from Kirby's Connecticut Reports, decided by Chief Justice Ellsworth and his associates. I ask, sir, in reply, whether, when a case determined in one of the ordinary courts of Connecticut has been produced by the opposite counsel as entitled to consideration, the decision of the senate of Pennsylvania, the highest court of criminal judicature in that Commonwealth, ought not to be respected. Permit me to add that, in my humble opinion, there is as much propriety in referring to such examples as in recurring to British precedents. I have said, and with increasing confidence I repeat it, that this case, under the constitution of Pennsylvania, is emphatically stronger than the present, under the Constitution of the United States, on the much-litigated question whether a judge can be impeached for any act for which he can not be indicted. In the constitution of Pennsylvania, article 5 and section 2, there is a provision not to be found in the Constitution of the United States, by which a judge, for any reasonable cause, which shall not be sufficient ground for impeachment, may be removed by the governor, on the address of two-thirds of each branch of the legislature. This provision would seem to be intended to meet the distinction which the learned counsel have labored to establish. In this light Judge Addison himself on his trial considered it, and pressed the point most forcibly on the senate of Pennsylvania. He had the strongest interest in so doing. If this course had been pursued, he would have merely lost his office, but upon conviction by impeachment he dreaded the disqualification to hold any office which the senate might annex to the judgment of removal. But, sir, this is not the only reason, cogent as it is, for considering the case of Judge Addison particularly applicable to the present. It so happens that we have a decision of the supreme court of Pennsylvania on the very objection which the gentlemen now take, when the conduct of Judge Addison was brought before them previous to his being impeached. If the learned counsel will not give full faith and credit to the determination of the senate of Pennsylvania, perhaps they will admit the authority of her supreme court. I hope this tribunal, at least, will give it equal weight with that of the supreme court of Connecticut. A very correct account of the case will be found in the statement of the attorney-general on the trial of Judge Addison, taken in connection with a printed report of the case, which was produced by Mr. Dallas on that occasion. I will not detain this honorable court with reading all which is there recorded on this subject, but will

refer to pages 51, 52, 64, and 69 of Addison's trial, and endeavor to present them an accurate view of the case.

On the ground of an application filed by J. B. C. Lucas, then an associate judge of the same court in which Judge Addison presided, stating that Judge Addison, on a particular occasion, after having delivered a charge to the grand jury himself, had prevented Judge Lucas from addressing them, by ordering a constable to be sworn and the jury to be taken from the box, the attorney-general moved for leave to file an information against Mr. Addison.

The attorney-general made two points: First, that Judge Lucas had an equal right with the presiding judge to deliver a charge to the grand jury, on principle and authority. The chief justice, Shippen, immediately observed that it was unnecessary to speak to that point or to read authorities; speak to the second point—Is this conduct the subject of an information?"

After the argument was closed, the opinion of the court (Judge Breckenridge taking no part) was delivered by the chief justice, who stated that the proceeding was arbitrary, unbecoming, unhandsome, ungentlemanly, unmannerly, and improper, but "but that it was not indictable, nor the subject of an information," and that there was another remedy, referring no doubt to an impeachment; for the attorney-general states, in page 52, "That from what fell from the judges of the supreme court, when the case was before them, it might be easily inferred that impeachment was the proper mode to correct the evil complained of."

Thus we have the solemn adjudication of the supreme court that conduct in a judge may be impeachable, though no indictment can be maintained for it. 'We could not have formed for ourselves a precedent more apposite.

An impeachment was accordingly presented against Judge Addison by the constitutional authority to the senate of Pennsylvania. Pardon me for trespassing so much on your time as to read distinctly the articles, in order to put this court in possession of the whole case:

"ARTICLE 1. That the said Alexander Addison, being duly appointed and commissioned president of the several courts of common pleas, in the circuit consisting of the said counties of Westmoreland, Fayette, Washington, and Allegheny, within the territory of the said Commonwealth, while acting as president of the said court of common pleas of the said county of Allegheny, on Saturday, the 28th day of March, in the year of our Lord 1801, in open court of common pleas, then and there holden, in and for the county last aforesaid, did, after John Lucas, otherwise John B. C. Lucas, also duly appointed and commissioned one of the judges of the court of common pleas of the county last aforesaid, had, in his official character and capacity of judge as aforesaid, and as of right he might do, addressed a petit jury, then and there duly impaneled, and sworn or affirmed, respectively, as jurors, in a cause then pending, then and there, openly declare and say to the said jury, 'that the address delivered to them by the said John Lucas, otherwise John B. C. Lucas, had nothing to do with the question before them, and that they ought not to pay any attention to it;' thereby degrading or endeavoring to degrade and vilify the said John Lucas, otherwise John B. C. Lucas, and his character and office as aforesaid, to the obstruction of the free, impartial, and due administration of justice, and contrary to the public rights and interests of this Commonwealth.

"ART. 2. That the said Alexander Addison, being duly appointed and commissioned president as aforesaid, did, at a court of quarter sessions of the peace and court of common pleas, holden in and for the county of Allegheny aforesaid, on Monday, the 22d day of June, in the year of our Lord, 1801, under the pretense of discharging and performing his official duties as president aforesaid, unjustly, illegally, and unconstitutionally claim, usurp, and exercise authority not given or delegated to him by the constitution and laws of this Commonwealth, inasmuch as he, the said Alexander Addison, president as aforesaid, did, under pretense as aforesaid of discharging and performing his official duties, then and there, in time of open court, unjustly, illegally, and unconstitutionally stop, threaten, and prevent the said John Lucas, otherwise John B. C. Lucas, also duly appointed and commissioned one of the judges of the said courts, from addressing, as of right he might do, a grand jury of the said county of Allegheny, then and there assembled and impaneled, and sworn or affirmed, respectively, concerning their rights and duties as grand jurymen, thereby abusing and attempting to degrade the high offices of president and judge as aforesaid, to the denial and prevention of public right, and of the due administration of justice, and to the evil example of all others in the like case offending."

You have now a clear and comprehensive view of the grounds on which the impeachment was supported. The first charge accuses Judge Addison of speaking, in terms very unjustifiable for a presi-

dent of a court, of an address delivered to a petit jury by his associate, Judge Lucas. The language which he used, and the manner in which it was proved to have been delivered, are equally exceptionable. His conduct was rude, ungentlemanly, and utterly inconsistent with that decorum and respect which should be inculcated and practiced on the bench, to preserve the credit and the character of a court of justice. Its object and tendency was to deter Mr. Lucas from exercising his judgment and expressing his opinion from the bench, and to reduce him to a perfect cipher.

The other charge was for preventing Judge Lucas from addressing a grand jury. This was effected in the same rude and insolent manner, as will appear from the testimony of Judge Lucas himself, in pages 33 and 37 of the printed trial.

To support the first article, I believe it would not be possible to find any positive act or special provision prescribing what particular language a president of a court may use, and what he shall not, in reference to the opinion which an associate justice may have delivered. There is no legal barometer for weighing words, nor any particular law embracing all the variety of cases of lighter and darker shades which may occur. The learned counsel who supported the prosecution did not cite a single precedent, even, of the kind. There may have been a law to be found in the breast of every man of common sense and common manners, with which Judge Addison was not unacquainted, and upon which the Senate considered themselves perfectly justified in convicting him. This was the general, but clear and comprehensive law which marked his rights and duties as a judge—the law of his office, prescribed by his oath.

The second article, for preventing an associate judge from delivering a charge to the grand jury after they had received one from the president of the court, could not have been maintained on the ground of any express statute or legal usage. It is the first time I ever heard of such a case. The uniform practice in the courts to which I have been accustomed is for the chief justice or president to deliver the charge. This was more especially the case in the court in which Judge Addison presided, for it appears they had adopted a positive rule on the subject. The practice of a court of justice is generally considered as the law of that court. But the senate, believing on principle (and believing correctly) that the power of all the judges of the court was equal, pronounced a sentence of condemnation.

With these plausible circumstances to countenance him, Judge Addison, a gentleman of considerable celebrity both in the legal and political world, and of unquestionable talents, conducted his own defense. His principal reliance was on the very objection which the learned counsel for the present defendant now make. He contended that he had committed no act for which he was liable to indictment, and that he was, therefore, not subject to impeachment. In the position that his conduct was not indictable, he was supported by the opinion of the supreme court, who had, nevertheless, considered it a fit subject for impeachment. His argument was able and ingenious; but, sir, his objection was anticipated or answered in such a masterly manner, by a chain of reasoning so irresistible, that it produced complete conviction on the minds of the senate of Pennsylvania. This honorable court know the result. He has been not only removed, but disqualified to hold the office of judge in any court of law in that State. We have, then, the deliberate opinion of the senate of Pennsylvania, upon solemn argument, confirming the decision made by her supreme court. If these cases do not furnish us with lessons of instruction, I know not where such lessons are to be read.

I will remark, sir, further, in relation to this case, that had it not been for the extreme anxiety of Judge Addison to propagate his political dogmas from the bench, he would never have been reduced to this serious dilemma. Like the defendant, he converted the sacred edifice of justice into a theater for the dissemination of doctrines to which I hope I shall never subscribe. If I have a desire relative to the administration of justice, paramount to all others, it is that party and party spirit should banished from every court. My sincere and fervent prayer is that the laws, like the providence of God, may shed their protecting influence equally over all, without respect to persons or opinions.

I have been requested by the attorney-general of Maryland to state another and a recent case which has happened in Pennsylvania. For his satisfaction I will briefly inform this honorable court of all that took place on that occasion, in the least degree applicable to the present trial. Three of the judges of their supreme court were accused of fining and imprisoning, without the intervention of a jury, a fellow-citizen, for publishing a paper which they considered as a contempt of court. The judges were defended by two most able and eloquent counsel, who contended that the constitution, the laws, and the practice of Pennsylvania, by adopting the common law doctrines on the subject, justified the proceeding; and that if there was no law to justify it, their conduct flowed from an honest error in judgment, for which they were not liable to impeachment. But, sir, they did not attempt to maintain the

position contended for on this occasion, that to support an impeachment the conduct of a judge must be such as to subject him to an indictment. Nor could they, with any consistency, have supported such a doctrine, for their clients had before in the case of Mr. Addison decided that his conduct was not a proper subject of impeachment though it might be of indictment.

This precedent, then, fortifies the former decisions on this point, and adds another authority to those which previously existed, and to which I have adverted.

The judges were acquitted, I acknowledge, and were I to hazard an opinion, I would say because some of the members of the senate of Pennsylvania thought their conduct proceeded from an honest error of judgment. If this court shall be of the same opinion with respect to the conduct of Judge Chase, I trust they will follow the precedent and acquit him, and I shall cheerfully acquiesce in the decision.

I fear I shall fatigue this honorable court by noticing the various cases on this subject, but I can not omit pressing on their attention a decision of the most authoritative and binding nature, because it is one of their own. The case to which I allude and its attending circumstances must be fresh in the recollection of every Member of the Senate. The district judge of New Hampshire was impeached for habitual drunkenness on the bench, and for using profane and indecent language. It was not in evidence to the court that drunkenness or profane and indecent language were indictable by any law of that State. There is no law of the United States, unless we recur to the naval or military code, punishing these vices as offenses. Of course, sir, it was not pretended by the managers on that occasion, of whom I had the honor to be one, that any indictment could be maintained against Judge Pickering in any civil court of the United States, or of the individual State of which he was a citizen. I appeal to your recollection, sir, for the accuracy of this statement; and, let me ask, what was the result? A constitutional majority of the senate pronounced a verdict of guilty and passed a judgment of removal.

One of the counsel (Mr. Harper), of whose argument I may be permitted to observe, without disparagement to the talents and learning of his colleagues, that it contained an able and masterly defense of the conduct of the accused, sunk beneath the weight of this stubborn and conclusive precedent. It was a stumbling block which he could not remove out of his way, and he seemed compelled, reluctantly, to yield the principle to the decisive authority and pointed application of the case.

We have, then, the whole weight of American authority in our scale, whilst the learned counsel have not been able to adduce a single precedent, foreign or domestic, against us. When I speak of precedents, I do not allude to the obscure dicta which may be found by turning over the dark lantern of tradition in remote ages of antiquity, or to the interpolations which may be scattered through the marginal references to the abridgments, by unknown editors; but to some authoritative case which has occurred since the regular date of parliamentary impeachments. The fines which Edward I imposed on some of his judges, in what manner is not certainly known, to replenish, as many have supposed, an exhausted treasury, are familiar to every student. But from the period of impeachment to the present time, I believe no instance of an indictment can be shown against a judge of the Common Pleas, Exchequer, or King's Bench in England, nor against a Lord Keeper or Lord Chancellor, who hold their offices to this day, let it be remembered, during pleasure. The civil business of the Court of Chancery is more important than that of all the other courts, and the decisions of that tribunal have been as impartial I believe as any, notwithstanding the high sounding doctrines of judicial independence. There have been many impeachments, the judges have sometimes been complained of by information in the execrable Star Chamber, but there have been no indictments at law. The Star Chamber has been long since abolished, and the sole method of proceeding against judges of the superior court now is by impeachment. The best writers agree, "that judges of record are freed from all presentations whatever, except in Parliament, where they maybe punished for anything done by them in such courts as judges." Numerous authorities might be cited on this subject, but I shall content myself with barely referring to them.—1 Hawk., 192, chap. 73, sec. 6; 1 Salk., 396; Woodeson, 596; Jacob's Law Dictionary, title Judges, 12 Co., 25, 26.

Were I to rest the point here, I confidently believe we should be perfectly safe; but I will proceed further, agreeably to my engagement in the commencement of my argument, and demonstrate that, according to their own principles and authorities, Judge Chase has been guilty of crimes and misdemeanors, in the strictest technical sense of the terms, for which he ought to be punished in an exemplary manner.

In contesting the principles that no act is impeachable unless it also be indictable, I have not contended for the position attributed to me by the learned attorney-general of Maryland, that a judge may

be impeached for conduct which is not criminal. On the contrary, we rely on supporting this as a criminal proceeding, and the gentlemen are entitled to every advantage which they can reap from this declaration.

I have had occasion to state that I considered every act of misbehavior in a judge as a misdemeanor, and the attorney-general of Maryland has expressed in strong terms his perfect agreement in the opinion that misbehavior is synonymous with misdemeanor. He appeared to imagine that he gained a great advantage by making this concession, and I am content to give him the fall benefit to be derived from it. I shall not shrink from the position, but meet the gentleman with pleasure and confidence on this ground. I love to break, a lance in the open field of discussion, and disdain every kind of ambush in argument.

As we agree in one point, that misbehavior and misdemeanor are convertible terms, Jacob's Law Dictionary, which quotes the language of Judge Blackstone in his Commentaries, has been recurred to for a definition of a misdemeanor. Let us try the conduct Judge Chase by his text. "A crime or misdemeanor (says Judge Blackstone) is an act committed or omitted, in violation of a public law either forbidding or commanding it." "This general definition comprehends both crimes and misdemeanors, which properly speaking are mere synonymous terms."

There is a public law that prescribes the following oath which Judge Chase took on his entrance into office (1 vol., p. 53): "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially perform all the duties incumbent on me as a judge of the Supreme Court according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Who that reads this solemn and impressive provision, and looks at the plenary evidence we have before us, can hesitate to pronounce the respondent guilty of violating a public law, which he was bound by the most sacred of all human obligation to execute with fidelity? His oath informed him that the law, like the gospel, was no respecter of persons, and yet what have we beheld in his conduct, when a poor unfortunate Fries or a wretched Callender was before him, upon a criminal charge? I appeal to the testimony which I shall by and by comment upon, whether his acts do not prove that he marked them out as victims to be sacrificed on the altar of party? Sir, I can not believe that gentlemen will seriously contend that the expressions "faithfully and impartially to perform his duties," have no definite meaning; that conduct grossly prejudiced, and the most shameless partiality shall be considered as no violations of his solemn oath. If they did, I have too exalted an opinion of the good sense and discernment of the court to believe they would countenance such an idea. Their import is certainly plain and obvious without recurring to the black-lettered lore for explanation. What then was the conduct of the respondent to Fries, if testimony not only unimpeached but unimpeachable is to be believed? Was he not prejudiced both against the unhappy prisoner and his case, which he had from a superabundance of zeal completely prejudged? Or, sir, when he declared Callender ought to be hung and set off with his miserable pamphlet in his pocket, ready scored for his purpose, and proceeded in the most arbitrary manner with his trial, was he impartial, or was he not guilty of the most manifest and daring partiality? Shall he be guilty of all these outrages against the plain language of a public statute, which combines the obligation of an oath with the sanction of a law, and yet be innocent of any crime or misdemeanor? If gentlemen will hold up the acts of Congress in one hand, and the acts of Judge Chase, proved by the testimony, in the other, they will see and be satisfied, that within the strictest legal definition he has been guilty of repeated and aggravated violations of public law, and therefore unquestionably of crimes and misdemeanors.

The Constitution, however, is declared to be emphatically the supreme law of the land. This sacred instrument he was bound by a twofold oath to preserve inviolate. All executive and judicial officers of the United States, independent of their oaths of office, are bound by oath to support the Constitution. (Art. 6, see. 3.)

By the seventh article of the amendments of the Constitution, which have been duly ratified and therefore now form part of that instrument, it is declared, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

This article secures to every accused individual the right of a trial by an impartial jury. Without their unanimous consent, no matter how eager the Government are for conviction, no person can be punished. Where any man is charged in due form with the commission of a crime, and pleads he is not guilty, the jury are to decide on the whole case whether he be innocent or not. Their verdict must be commensurate with the issue joined, which involves both fact and law, which they have indubitably the right to decide, agreeably to the express and positive provision of the Constitution. This right, therefore, is an original right, flowing from the highest authority. It is beyond doubt a principle and not an incidental right. It is not a right incidental to the trial, but it constitutes the trial itself; for there can be no other trial in the case but by jury.

This same amendment guarantees to the accused the assistance of counsel. How important is this privilege, when it is recollected that veterans of the bar are generally selected to prosecute. The situation, too, of an innocent man, charged with the commission of a crime, is delicate and embarrassing. It excites frequently apprehensions which unfit him for making a defense. I feel myself compelled to declare, upon the authority of the testimony in this case, that the respondent has been proved guilty of violating the supreme law of the land in those great essential provisions. He has deprived accused individuals of a trial by jury, for he wound not suffer the jury to decide, or even to hear argument on the subject of the law, and he has deprived them of the benefit of counsel by conduct which drove counsel from the bar. This has happened in more than one instance, and above all, an injured fellow-citizen has been stripped of his invaluable privileges in a capital case. Is this imagination or is it reality? Let the recorded testimony determine. If, however, I am correct, must I not have satisfied this honorable court, agreeably to my promise that taking the learned counsel's own definition, and relying upon his authorities, I have demonstrated that the accused has been guilty of crimes and misdemeanors? But have I not gone further, and shown that he has been guilty of high crimes and misdemeanors, and such as disqualify him for a seat on the bench, so as to come fully within the rule which he has laid down?

God forbid that it should be said, when a judge is guilty of grossly violating not merely a public law, but the supreme law of the land, nay, a law which he was bound by two solemn oaths to support, he is not guilty of any crime or misdemeanor; or that when he violated this supreme law which he is thus obligated to respect, for the purpose of depriving a fellow-citizen, accused of a capital crime, of the benefit of counsel, and the inestimable right of trial by jury, he shall not be declared guilty of high crimes and misdemeanors, which evince a want of integrity, and mark a depravity of heart that completely disqualify him for a judicial office.

I have now finished my observations in reply to the preliminary objections which have been made to this mode of proceeding, and have been reluctantly compelled to discuss them at much greater length than I at first contemplated, from the zeal and pertinacity with which they have been urged and insisted on by the learned counsel opposed to us. Under the impression that I have been successful in this undertaking, I shall hasten to the investigation of the articles themselves.

2359. Chase's impeachment continued.

The argument of Mr. Manager Randolph on the nature of the power of impeachment.

And Mr. Manager Randolph said:

It has been contended that an offense, to be impeachable must be indictable. For what then, I pray you, was it that this provision of impeachment found its way into the Constitution? Could it not have said, at once, that any civil officer of the United States, convicted on an indictment, should (ipso facto) be removed from office? This would be coming at the thing by a short and obvious way. If the Constitution did not contemplate a distinction between an impeachable and an indictable offense, whence this cumbrous and expensive process, which has cost us so much labor, and so much anxiety to the nation? Whence this idle parade, this wanton waste of time and treasure, when the ready intervention of a court and jury alone was wanting to rectify the evil? In addition to the instances adduced by my right worthy friend (Mr. Nicholson) who first addressed the court yesterday, permit me to cite a few others by way of illustration. The President of the United States has a qualified negative on all bills passed by the two Houses of Congress, that he may arrest the passage of a law framed in a moment of legistive delirium. Let us suppose it exercised, indiscriminately, on every act presented for his acceptance.

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[1] Annals, pp. 642, 643.

This surely would be an abuse of his constitutional power, richly deserving impeachment; and yet no man will pretend to say it is an indictable offense. The President is authorized by the Constitution to retain any bill presented for his approbation, not exceeding ten days, Sundays excepted, within which period he may return it to the House wherein it originated, stating his reasons for disapproving it. Now let us suppose that, at a session like the present, which must necessarily terminate on the third of March (and that day falls this year on a Sunday) the President should keep back until the last hour of an expiring Congress every bill offered to him for signature during the ten preceding days (and these are always the greater part of the laws passed at any session of the Legislature), and should then return them, stating his objections, whether good or bad is altogether immaterial. It is true that a vote of two-thirds of each branch may enact a law in despite of Executive opposition; but, in the case I have stated, it would be physically impossible for Congress to exercise its constitutional power. Indeed, over the bills presented to the President within nine days preceding its dissolution, the Legislature might be deprived of even the shadow of control, since the Executive is not bound to make any return of them whatever. Now, I ask whether such misconduct in the President be an indictable offense? And yet is there a man who hears me who will deny that it would be a flagrant abuse, under pretense of exercise of his constitutional authority, for which he ought to be impeached, removed, and disqualified? Sir, this doctrine, that impeachable and indictable are convertible terms, is almost too absurd for argument. Nothing but the high authority by which it is urged, and the dignified theater where it is advanced, could induce me to treat it seriously. Strip it of technical jargon, and what is it but a monstrous pretension that the officers of Government, so long as they steer clear of your penal statutes—so long as they keep without the letter of the law—may, to the whole length of the tether of the Constitution, abuse that power, which they are bound to exercise with a sound discretion and under a high responsibility for the general good? The counsel who closed the defense (Mr. Harper) felt that this ground trembled beneath his feet; and, fearing to be swallowed up in the yawning ruin, he precipitately abandoned it. He shifts from the position taken by his associates, and lays down this principle "that an offense, to be impeachable, need not be indictable, yet it must have been committed against some known law." Well, take the question in this point of view, and there is no longer matter of dispute between us; it is reduced to a miserable quibble. For what do we contend?—that the respondent has contravened the known law of the land and of his duty, which required him "to dispense justice faithfully and impartially, and without respect to persons." He stands charged with having sinned against this law and against his sacred oath, by acting in his judicial capacity unfaithfully, partially, and with respect to persons. These are our points. We do charge him with misdemeanor in office. Weaver that he hath demeaned himself amiss—partially, unfaithfully, unjustly, corruptly. This is the sum and substance of our accusation, and this we have established by undeniable proof. I will waste no more time in attempting to dislodge our opponents from a position which they have abandoned in the face of day.

2360. Chase's impeachment continued.

The counsel for Mr. Justice Chase argued elaborately that the power of impeachment applied only to indictable offenses.

Argument of Mr. Joseph Hopkinson, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

On the other hand the counsel for the respondent argued at length that the power should be considered narrower.

Mr. Hopkinson said: [1]

In England the impeachment of a judge is a rare occurrence. I recollect but two in half a century. But, in our country, boasting of its superior purity and virtue, and declaiming ever against the vice, venality, and corruption of the Old World, seven judges have been prosecuted criminally in about two years. A melancholy proof either of extreme and unequaled corruption in our judiciary, or of strange and persecuting times among us.

The first proper object of our inquiries in this case is, to ascertain with proper precision what acts or offenses of a public officer are the objects of impeachment? This question meets us at the very threshold of the case. If it shall appear that the charges exhibited in these articles of impeachment are not, even if

[1] Annals, pp. 356–364.

true, the constitutional subjects of impeachment; if it shall turn out on the investigation that the judge has really fallen into error, mistake, or indiscretion, yet if he stands acquitted in proof of any such acts as by the law of the land are impeachable offenses, he stands entitled to discharge on his trial. This proceeding by impeachment is a mode of trial created and defined by the Constitution of our country; and by this the court is exclusively bound. To the Constitution, then, we must exclusively look to discover what is or is not impeachable. We shall there find the whole proceeding distinctly marked out; and everything designated and properly distributed necessary in the construction of a court of criminal jurisdiction. We shall find (1) who shall originate or present an impeachment; (2) who shall try it; (3) for what offenses it may be used; (4) what is the punishment on conviction. The first of these points is provided for in the second section of the first article of the Constitution, where it is declared that "the House of Representatives shall have the sole power of impeachment." This power corresponds with that of a grand jury to find a presentment or indictment. In the third section of the same article the court is provided before whom the impeachment thus originated shall be tried: "The Senate shall have the sole power to try all impeachments." And the fourth section of the second article points out and describes the offenses intended to be impeachable, and the punishment which is to follow conviction, subject to a limitation in the third section of the first article.

Have any facts, then, been given in evidence against the respondent which makes him liable to be proceeded against by this high process of impeachment? What are the offenses? What is the constitutional description of those official acts for which a public officer may be arraigned before this high court? In the fourth section of the second article of the Constitution it is declared that "the President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Treason or bribery is not alleged against us on this occasion. Our offenses, then, must come under the general description of "high crimes and misdemeanors," or we are not impeachable by the Constitution of the United States. I offer it as a position I shall rely upon in my argument, that no judge can be impeached and removed from office for any act or offense for which he could not be indicted. It must be by law in indictable offense. One of the gentlemen, indeed, who conduct this prosecution (Mr. Campbell), contends for the reverse of this proposition, and holds that for such official acts as are the subject of impeachment no indictment will lie or can be maintained. For, says he, it would involve us in this monstrous oppression and absurdity, that a man might be twice punished for the same offense, once by impeachment and then by indictment. And so most surely he may; and the limitation of the punishment on impeachment takes away the injustice and oppression the gentleman dreads. A slight attention to the subject will show the fallacy of this gentleman's doctrine. If the absurdity and oppression he fears will really ensue on indicting a man for the same offense for which he has already been impeached, they must be charged to the Constitution itself, which, in the third section of the first article, after limiting the extent of the judgment in cases of impeachment, goes on to declare that "the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." The idea of the honorable manager is that for acts done in the course of official duty a judge must be proceeded against exclusively by impeachment; and that no indictment will lie in such case. The incorrectness of this notion appears not only from a reference to the Constitution, but to the known law of England also. I will remind you of a case, stated, I believe, in the elementary books of the law, in which it is said that if a judge undertakes, of his own authority, to change the mode of punishment prescribed by law for any crime, he is indictable; for instance, should he sentence a man to be beheaded when the law directed him to be hanged, the judge is guilty of murder, and may be accordingly indicted. When, sir, I contend, that, in order to sustain an impeachment, an offense must be proved upon the respondent which would support an indictment, I do not mean to be understood as admitting that the converse of the proposition is true—that is, that every act or offense which is impeachable is indictable. Far from it. A man may be indictable for many violations of positive law which evince no mala mens, no corrupt heart or intention, but which would not be the ground of an impeachment. I will instance the case of an assault, which is an indictable offense, but will not surely be pretended to be an impeachable offense, for which a judge may be removed from office. It is true that the second section of the first article, which gives the House of Representatives the sole power of impeachment, does not in terms limit the exercise of that power. But its obvious meaning is not, in that place, to describe the kind of acts which are to be subjects of impeachment, but merely to declare in what branch of the Government it shall commence. The House of Representatives has the power of impeachment; but for what they

are to impeach, in what cases they may exercise this delegated power, depends, on other parts of the Constitution, and not on their opinion, whim, or caprice. The whole system of impeachment must be taken together, and not in detached parts; and if we find one part of the Constitution declaring who shall commence an impeachment, we find other parts declaring who shall try it, and what acts and what persons are Constitutional subjects of this mode of trial. The power of impeachment is with the House of Representatives—but only for impeachable offenses. They are to proceed against the offense in this way when it is committed, but not to create the offense, and make any act criminal and impeachable at their will and pleasure. What is an offense, is a question to be decided by the Constitution and the law, not by the opinion of a single branch of the legislature; and when the offense thus described by the Constitution or the law has been committed, then, and not until then, has the House of Representatives power to impeach the offender. So a grand jury possesses the sole power to indict; but in the exercise of this power they are bound by positive law, and do not assume under this general power to make anything indictable which they might disapprove. If it were so, we should indeed have a strange, unsettled, and dangerous penal code. No Man could walk in safety, but would beat the mercy of the caprice of every grand jury that might be summoned, and that would be crime to-morrow which is innocent to-day.

What part of the Constitution then declares any of the acts charged and proved upon Judge Chase, even in the worst aspect, to be impeachable? He has not been guilty of bribery or corruption; he is not charged with them. Has he then been guilty of "other high crimes and misdemeanors?" In an instrument so sacred as the Constitution, I presume every word must have its full and fair meaning. It is not then only for crimes and misdemeanors that a judge is impeachable, but it must be for high crimes and misdemeanors. Although this qualifying adjective "high" immediately precedes and is directly attached to the word "crimes," yet, from the evident intention of the Constitution and upon a just grammatical construction, it must be also applied to "misdemeanors." The repetition of this adjective would have injured the harmony of the sentence without adding anything to its perspicuity. How would this be in common parlance? Suppose it should be said that at this trial there are attending many ladies and gentlemen. Would it be doubted that the adjective many applies to gentlemen as well as ladies, although not repeated? Or, if there is anything peculiar in this respect in this word "high," I will suppose it were said that among the auditors there are men of high rank and station. Would it not be as well understood as if it were said that men of high rank and station are here? There is surely no difference. So in the Constitution, it is said, that "a regular statement of the receipts and expenditures of all public money shall be published from time to time." Is not the account to be regular as well as the statement? I should have deemed it unnecessary to have spent a word on so plain a point, had I not understood that a difficulty would probably be made upon it. If my construction of this part of the Constitution be not admitted, and the adjective "high" be given exclusively to "crimes" and denied to "misdemeanors," this strange absurdity must ensue—that when an officer of the Government is impeached for a crime, he can not be convicted unless it proves to be a high crime; but he may nevertheless be convicted of a misdemeanor of the most petty grade. Observe, sir, the crimes with which these "other high crimes" are classed in the Constitution, and we may learn something of their character. They stand in connection with "bribery and corruption;" tried in the same manner and subject to the same penalties. But if we are to lose the force and meaning of the word "high" in relation to misdemeanors, and this description of offenses must be governed by the mere meaning of the term "misdemeanors," without deriving any grade from the adjective, still my position remains unimpaired, that the offense, whatever it is, which is the ground of impeachment, must be such a one as would support an indictment. "Misdemeanor" is a legal and technical term, well understood and defined in law; and in the construction of a legal instrument we must give to words their legal signification. A misdemeanor or a crime—for in their just and proper acceptation they are synonymous terms—is an act committed or omitted, in violation of a public law either forbidding or commanding it. By this test, let the conduct of the respondent be tried, and, by it, let him stand justified or condemned.

Does not, sir, the court, provided by the Constitution for the trial of an impeachment give us some idea of the grade of offenses intended for its jurisdiction? Look around you, sir, upon this awful tribunal of justice—is it not high and dignified, collecting within itself the justice and majesty of the American people? Was such a court created—does such a court sit—to scan and punish paltry errors and indiscretions, too insignificant to have a name in the penal code, too paltry for the notice of a court

of quarter sessions? This is indeed employing an elephant to remove an atom too minute for the grasp of an insect. Is the Senate of the United States solemnly convened and held together in the presence of the nation to fix a standard of politeness in a judge and mark the precincts of judicial decorum? The honorable gentleman who opened the prosecution (Mr. Randolph) has contended for a contrary doctrine, and held that many things are impeachable that are not indictable. To illustrate his position, he stated the cases of habitual drunkenness and profane swearing on the bench, which he held to be objects of impeachment and not of indictment. I do not desire to impose my opinions on this court as of any value. But surely I could not hesitate to say that both of the cases put by the gentleman would be indictable. Is there not known to us a class of offenses, not provided for indeed by the letter of any statute, but which come under the general protection which the law gives to virtue, decency, and morals in society? Any act which is contra bonos mores is indictable as such. And it is so, not by act of Congress, but by the pure and wholesome mandates of that common law which some men would madly drive from our jurisprudence, but which I most sincerely pray may live forever.

If I am correct in my position that nothing is impeachable that is not also indictable, for what acts then may a man be indicted? May it be on the mere caprice or opinion of any ten, twenty, or one hundred men in the community; or must it not be on some known law of the society in which he resides? It must unquestionably be for some offense, either of omission or commission, against some statute of the United States—or some statute of a particular State, or against the provision of the common law. Against which of these has the respondent offended? What law of any of the descriptions I have mentioned has he violated? By what is be to be judged, by what is he to be justified or condemned, if not by some known law of the country; and if no such law is brought upon his case—if no such violation rises on this day of trial in judgment against him—why stands he here at this bar as a criminal? Whom has he offended? The House of Representatives—and is he impeached for this?

I maintain as a most important and indispensable principle, that no man should be criminally accused, no man can be criminally condemned, but for the violation of some known law by which he was bound to govern himself. Nothing is so necessary to justice and to safety as that the criminal code should be certain and known. Let the judge, as well as the citizen, precisely know the path he is to walk in, and what he may or may not do. Let not the sword tremble over his unconscious head, or the ground be spread with quicksands and destruction which appear fair and harmless to the eye of the traveler. Can it be pretended there is one rule of justice for a judge and another for a private citizen; and that while the latter is protected from surprise, from the malice or caprice of any man or body of men, and can be brought into legal jeopardy only by the violation of laws before made known to him, the latter is to be exposed to punishment without knowing his offense, and the criminality or innocence of his conduct is to depend not upon the laws existing at the time, but upon the opinions of a body of men to be collected four or five years after the transaction? A judge may thus be impeached and removed from office for an act strictly legal, when done, if any House of Representatives for any indefinite time after, shall for any reason they may act upon, choose to consider such act improper and impeachable. The Constitution, sir, never intended to lay the Judiciary thus prostrate at the feet of the House of Representatives, the slaves of their will, the victims of their caprice. The Judiciary must be protected from prejudice and varying opinion, or it is not worth a farthing. Suppose a grand jury should make a presentment against a man, stating that most truly he had violated no law or committed any known offense; but he had violated their notions of common sense—for this was the standard of impeachment the gentleman who opened gave us—he had shocked their nerves or wounded their sensibility. Would such a presentment be received or listened to for a moment? No, sir; and on the same principle, no judge should be put in jeopardy because the common sense of one hundred and fifty men might approve what is thus condemned, and the rule of right, the objects of punishment or praise, would thus shift about from day to day. Are we to depend upon the House of Representatives for the innocence or criminality of our conduct? Can they create offenses at their will and pleasure, and declare that to be a crime in 1804 which was an indiscretion or pardonable error, or perhaps an approved proceeding, in 1800? If this gigantic House of Representatives, by the usual vote and the usual forms of legislation, were to direct that any act heretofore not forbidden by law should hereafter become penal, this declaration of their will would be a mere nullity; would have no force and effect, unless duly sanctioned by the Senate and the approbation of the President. Will they then be allowed, in the exercise of their power of impeachment, to create crimes and inflict the most serious penalties on actions never before suspected to be criminal when they could not have swelled the same act into an offense in the

form of a law? If this be truly the case, if this power of impeachment may be thus extended without limit or control, then indeed is every valuable liberty prostrated at the foot of this omnipotent House of Representatives; and may God preserve us! The President may approve and sign a law, or may make an appointment which to him may seem prudent and beneficial, and it may be the general, nay the universal, sentiment that it is so; and it is undeniable that no law is violated by the act. But some four or five years hence there comes a House of Representatives whose common sense is constructed on a new model, and who either are or affect to be greatly shocked at the atrocity of this act. The President is impeached. In vain he pleads the purity of his intention, the legality of his conduct, in vain he avers that he has violated no law and been guilty of no crime. He will be told, as Judge Chase now is, that the common sense of the House is the standard of guilt, and their opinion of the error of the act conclusive evidence of corruption. We have read, sir, in our younger days, and read with horror, of the Roman Emperor who placed his edicts so high in the air that the keenest eye could not decipher them, and yet severely punished any breach of them. But the power claimed by the House of Representatives to make anything criminal at their pleasure, at any period after its occurrence, is ten thousand times more dangerous, more tyrannical, more subversive of all liberty and safety. Shall I be called to heavy judgment now for an act which, when done, was forbidden by no law, and received no reproach, because in a course of years there is found a set of men whose common sense condemns the deed? The gentlemen have referred us to this standard, and, being under the necessity to acknowledge that the respondent has violated no law of the community, they would on this vague and dangerous ground accuse, try, and condemn him. The code of the Roman tyrant was fixed on the height of a column, where it might be understood with some extraordinary pains; but here, to be safe, we must be able to look into years to come, and to foresee what will be the changing opinions of men or points of decorum for years to come. The rule of our conduct, by which we are to be judged and condemned, lies buried in the bosom of futurity, and in the minds and opinions of men unknown, perhaps unborn.

The pure and upright administration of justice, sir, is of the utmost importance to any people; the other movements of Government are not of such universal concern. Who shall be President, or what treaties or general statutes shall be made, occupies the attention of a few busy politicians; but these things touch not, or but seldom, the private interests and happiness of the great mass of the community. But the settlement of private controversies, the administration of law between man and man, the distribution of justice and right to the citizen in his private business and concern, comes to every man's door, and is essential to every man's prosperity and happiness. Hence I consider the judiciary of our country most important among the branches of Government, and its purity and independence of the most interesting consequence to every man. Whilst it is honorably and fully protected from the influence of favor or fear, from any quarter, the situation of a people can never be very uncomfortable or unsafe. But if a judge is forever to be exposed to prosecutions and impeachments for his official conduct, on the mere suggestions of caprice, and to be condemned by the mere voice of prejudice, under the specious name of common sense, can he hold that firm and steady hand his high functions required? No! if his nerves are of iron they must tremble in so perilous a situation.

In England the complete independence of the judiciary has been considered, and has been found the best and surest safeguard of true liberty, securing a government of known and uniform laws, acting alike upon every man. It has, however, been suggested by some of our newspaper politicians, perhaps from a higher source, that although this independent judiciary is very necessary in a monarchy to protect the people from the oppression of a court, yet that, in our republican institution, the same reasons for it do not exist; that it is indeed inconsistent with the nature of our Government that any part or branch of it should be independent of the people from whom the power is derived. And as the House of Representatives come most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controlling influence over the other branches. My doctrine is precisely the reverse of this. If I were called upon to declare whether the independence of judges were more essentially important in a monarchy or a republic, I should certainly say, in the latter. All governments require, in order to give them firmness, stability, and character, some permanent principle, some settled establishment. The want of this is the great deficiency in republican institutions. Nothing can be relied upon; no faith can be given either at home or abroad to a people whose systems and operations and policy are constantly changing with popular opinion. If, however, the judiciary is stable and independent; if the rule of justice between men rests upon known and permanent principles, it gives

a security and character to a country which is absolutely necessary in its intercourse with the world and in its own internal concerns. This independence is further requisite as a security from oppression. All history demonstrates, from page to page, that tyranny and oppression have not been confined to despotisms, but have been freely exercised in republics, both ancient and modern—with this difference, that in the latter, the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while in the former it is systematically planned and pursued as an ingredient and principle of the government. The people destroy not deliberately, and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue, but, while the fit is on, their devastation and cruelty are more terrible and unbounded than the most monstrous tyrant. It is for their own benefit and to protect them from the violence of their own passions that it is essential to have some firm, unshaken, independent branch of government, able and willing to resist their frenzy. If we have read of the death of a Seneca under the ferocity of a Nero, we have read too of the murder of a Socrates under the delusion of a republic. An independent and firm judiciary, protected and protecting by the laws, would have snatched the one from the fury of a despot and preserved the other from the madness of a people.

I have considered these observations on the necessary independence of the judiciary applicable and important to the case before this honorable court, to repel the wild idea that a judge may be impeached and removed from office although he has violated no law of the country, but merely on the vague and changing opinions of right and wrong—propriety and impropriety of demeanor. For if this is to be the tenure on which a judge holds his office and character; if by such a standard his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our judiciary. In opposition to this reasoning I have heard (not from the honorable managers) a sort of jargon about the sovereignty of the people, and that nothing in a republic should be independent of them. No phrase in our language is more abused or more misunderstood. The just and legitimate sovereignty of a people is truly an awful object, full of power and commanding respect. It consists in a full acknowledgment that all power originally emanates in some way from them, and that all responsibility is finally in some way due to them; and whether this is acknowledged or not, they have, if driven to the last resort, a physical force, to make it so. But, sir, this sovereignty does not consist in a right to control or interfere with the regular and legal operations and functions of the different branches of the Government at the will and pleasure of the people. Having delegated their power; having distributed it for various purposes into various channels, and directed its course by certain limits, they have no right to impede it while it flows in its intended directions. Otherwise we have no Government. In like manner the officers of Government are responsible in certain modes, and at certain periods, for the exercise of their duties and powers; but the people have no right to make them accountable in any other manner, or at any other period than that prescribed by the great compact of Government or Constitution. Having parted with their power under certain regulations and restrictions, they are done with it. They are bound by their own act, and having retained and declared the manner in which they will correct abuses in office, they have no right to claim any other sort of responsibility. If this be not the case, what government have we? What rule of conduct? What system of association? None; but we are truly in a state of savage anarchy and ruthless confusion, with all the vices incident to civilization without the restraints to control them.

2361. Chase's impeachment continued.

Argument of Mr. Luther Martin, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

Mr. Martin, counsel for the respondent, said:

We have been told by an honorable manager (Mr. Campbell) that the power of trying impeachments was lodged in the Senate with the most perfect propriety; for two reasons—the one, that the person impeached would be tried before those who had given their approbation to his appointment to office. This certainly was not the reason by which the framers of the Constitution were influenced when they gave this power to the Senate. Who are the officers liable to impeachment? The President, the Vice-President, and all civil officers of Government. In the election of the two first the Senate have no control, either as to nomination or approbation. As to other civil officers who hold their appointments during good behavior, it is extremely probable that, though they were approved by one

[1] Annals, pp. 429–437.

Senate, yet from lapse of time and the fluctuations of that body an officer may be impeached before a Senate not one of whom had sanctioned his appointment, not one of whom, perhaps, had he been nominated after their election would have given him their sanction.

This, then, could not have been one of the reasons for thus placing the power over these officers. But as a second reason he assigned that, if any other inferior tribunal had been intrusted with the trial of impeachments, the members might have an interest in the conviction of an officer, thereby to have him removed in order to obtain his place; but that no Senator could have such inducement. I, sir, disclaim—I hold in contempt the idea—that the members of any tribunal would be influenced in their decision by so unworthy, so base a motive; but what is there to prevent this Senate more than any other court from being influenced? Is there anything to prevent any Member of this Senate or any of their friends from being appointed to the office of any person removed by their conviction?

I speak not from any apprehension I have of this honorable Court. In their integrity I have the greatest confidence. I have the greatest confidence they will discharge their duty to my honorable client with uprightness and impartiality. I have only made these observations to show that the reasons assigned by the honorable manager for vesting the trials of impeachment in the Senate are fallacious.

I see two honorable Members of this court [Messrs. Dayton and Baldwin] who were with me in convention, in 1787, who as well as myself perfectly know why this power was invested in the Senate. It was because, among all our speculative systems, it was thought this power could nowhere be more properly placed or where it would be less likely to be abused. A sentiment, sir, in which I perfectly concurred, and I have no doubt but the event of this trial will show that we could not have better disposed of that power.

Let us now, sir, examine the Constitution on the subject of impeachments, and from thence learn in what cases, and in what only, impeachments will lie. To have correct sentiments on this subject is of infinite importance. An error here would be like what is called an error in the first concoction, and would pervade the whole system.

By the Constitution it is declared that "the House of Representatives shall have the sole power of impeachment." That section, however, does not declare in what cases the power shall be exercised. This is designated in a subsequent part of the Constitution, and I shall contend that the power of impeachment is confined to the persons mentioned in the Constitution, namely, "the President, Vice President, and all other civil officers."

Will it be pretended, for I have heard such a suggestion, that the House of Representatives have a right to impeach every citizen indiscriminately? For what shall they impeach them? For any criminal act? Is the House of Representatives, then, to constitute a grand jury to receive information of a criminal nature against all our citizens and thereby to deprive them of a trial by jury? This was never intended by the Constitution?

The President, Vice-President, and other civil officers can only be impeached. They only in that case are deprived of a trial by jury; they, when they accept their offices, accept them on those terms, and, as far as relates to the tenure of their offices, relinquish that privilege; they, therefore, can not complain. Here, it appears to me, the framers of the Constitution have so expressed themselves as to leave not a single doubt on this subject.

In the first article, section the third, of the Constitution it is declared that judgment in all cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit under the United States. This clearly evinces that no persons but those who hold offices are liable to impeachment. They are to lose their offices; and, having misbehaved themselves in such manner as to lose their offices, are with propriety to be rendered ineligible thereafter.

The next question of importance is in what cases the House of Representatives have a right to impeach the President, the Vice-President, and the other civil officers.

It has been said that a judge can not be indicted for the same crime for which he may be impeached, "for," says the honorable manager (Mr. Campbell), "it would introduce the absurdity that a person might be punished twice for the same crime."

This honorable Court will observe that the two punishments which may here be inflicted on impeachment and subsequent indictment amount to no more than in England takes place on a single prosecution; for there on a single conviction a judge may be removed from office and also fined, imprisoned, or otherwise punished according to the nature of his offense. But the whole of this power the United States have not vested in the same body. To the Senate they have confined the punish-

ment of removal from office, and disqualification of the person from holding offices in future; but can there be a single doubt that a person by impeachment removed from office can not afterward, according to the nature of his crime, be punished by indictment? Can gentlemen suppose a removal from office was intended to wash away all crimes the officer should have committed? What are the crimes for which an officer can be impeached? "Treason, bribery, and other high crimes and misdemeanors."

Suppose a judge removed from office by impeachment for treason. Would that wash away his guilt? Would he not afterwards be liable to be indicted, tried, and punished as a traitor. Undoubtedly he would; so in the case of bribery. Yet, if the gentleman's idea is correct, a removal from office on impeachment for either of those crimes would free the officer from any other punishment. Consider the monstrous consequences which would result from the principle suggested by the managers, that a judge is only removable from office on account of crimes committed by him as a judge, and not for those for which he would be punishable as a private individual! A judge, then, might break open his neighbor's house and steal his goods; he might be a common receiver of stolen goods; for these crimes he might be indicted, convicted, and punished in a court of law; but yet he could not be removed from office because the offense was not committed by him in his judicial capacity, and because he could not be punished twice for the same offense.

The truth is, the framers of the Constitution, for many reasons which influenced them, did not think proper to place the officers of Government in the power of the two branches of the Legislature further than the tenure of their office. Nor did they choose to permit the tenure of their offices to depend upon the passions or prejudices of jurors. The very clause in the Constitution of itself shows that it was intended the persons impeached and removed from office might still be indicted and punished for the same offense, else the provision would have been not only nugatory, but a reflection on the enlightened body who framed the Constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for one offense, could prevent the same person from being indicted and punished for another and different offense.

I shall now proceed in the inquiry, For what can the President, Vice-President, or other civil officers, and, consequently, for what can a judge, be impeached? And I shall contend that it must be for an indictable offense. The words of the Constitution are, "that they shall be liable to impeachment for treason, bribery, or other high crimes and misdemeanors."

There can be no doubt but that treason and bribery are indictable offenses. We have only to inquire, then, what is meant by high crimes and misdemeanors? What is the true meaning of the word "crime?" It is the breach of some law which renders the person who violates it liable to punishment. There can be no crime committed where no such law is violated. The honorable gentleman to whom I before alluded has cited the new edition of Jacob's Law Dictionary; let us, then, look into that authority for the true meaning of the word "misdemeanor." He tells us—

"Misdemesnor, or misdemeanor, a crime less than felony. The term 'misdemeanor' is generally used in contradistinction to felony, and comprehends all indictable offenses which do not amount to felony, as perjury, libels, conspiracies, assaults," etc. (See 4 Comm. c. 1, p. 5.)

"A crime or misdemeanor, says Blackstone, is an act committed or omitted in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors which, properly speaking, are mere synonymous terms, though in common usage the word 'crimes' is made use of to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentle name of misdemeanors only.

"In making the distinction between public wrongs and private, between crimes and misdemeanors, and civil injuries, the same author observes that public wrongs or crimes and misdemeanors are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity." (4 Comm., 5.)

Thus it appears crimes and misdemeanors are the violation of a law exposing the person to punishment, and are used in contradistinction to those breaches of law which are mere private injuries, and only entitle the injured to a civil remedy.

Blackstone's Commentaries, volume 4 page 5, is cited by Jacob, and is as there stated. I shall not turn to it. Hale, in his Pleas of the Crown, volume 1, in his Proemium, which is not paged, speaking of the division of crimes, says:

"Temporal crimes, which are offenses against the laws of this realm, whether the common law or acts of Parliament, are divided into two general ranks or distributions in respect to the punishments

that are by law appointed for them, or in respect to their nature or degree; and thus they may be divided into capital offenses, or offenses only criminal, or rather, and more properly, into felonies and misdemeanors. And the same distribution is to be made touching misdemeanors, namely, they are, such as are so by the common law, or such as are specially made punishable, as misdemeanors, by acts of Parliament."

Thus, then, it appears that crimes and misdemeanors are generally used as synonymous expressions, except that "crimes" is a word frequently used for higher offenses. But while I contend that a judge can not be impeached except for a crime or misdemeanor, I also contend that there are many crimes and misdemeanors for which a judge ought not to be impeached unless immediately relating to his judicial conduct. Let us suppose a judge provoked by insolence should strike a person; this certainly would be an indictable but not an impeachable offense. The offense for which a judge is liable to impeachment must not only be a crime or misdemeanor, but a high crime or misdemeanor. The word "crime," as distinguished from "misdemeanor," is applied to offenses of a more aggravated nature; the word "high," therefore, must certainly equally apply to misdemeanors as to crimes. Nay, sir, I am ready to go further and say there may be instances of very high crimes and misdemeanors for which an officer ought not to be impeached and removed from office; the crimes ought to be such as relate to his office, or which tend to cover the person who committed them with turpitude and infamy; such as show there can be no dependence on that integrity and honor which will secure the performance of his official duties.

But we have been told, and the authority of the State of Pennsylvania has been cited by one honorable manager (Mr. Rodney) in support of the position, that a judge may be impeached, convicted, and removed from office, for that which is not indictable, for that which is not a violation of any law.

What, sir! Can a judge be impeached and deprived of office when he has done nothing which the laws of his country prohibited? Is not deprivation of office a punishment? Can there be punishment inflicted where there is no crime? Suppose the House of Representatives to impeach for conduct not criminal; the Senate to convict, does that change the law? No, the law can only be changed by a bill brought forward by one House in a certain manner, assented to by the other, and approved by the President. Impeachment and conviction can not change the law and make that punishable which was not before criminal.

It is true it often happens that the good of the community requires that the laws should be passed making criminal and exposing to punishment conduct, which, antecedently, was not punishable; but even in those cases Government has no power to punish acts antecedently done; it can only punish those acts done after the enaction of the law. The Constitution has declared "no ex post facto law shall be passed."

Should such a principle be once admitted or adopted, could the officers of Government ever know how to proceed? Admit that the House of Representatives have a right to impeach for acts which are not contrary to law, and that thereon the Senate may convict and the officer be removed, you leave your judges and all your other officers at the mercy of the prevailing party. You will place them much in the unhappy situation as were the people of England during the contest between the white and red roses, while the doctrine of constructive treasons prevailed. They must be the tools or the victims of the victorious party.

I speak not, sir, with a view to censure the principles or the conduct of any party which has prevailed in the United States since our Revolution, but I wish to bring home to your feelings what may happen at a future time. In republican governments there ever have been, there ever will be a conflict of parties. Must an officer, for instance a judge, ever be in favor of the ruling party whether wrong or right? Or, looking forward to the triumph of the minority, must he however improper their views act with them? Neither the one conduct nor the other is to be supposed but from a total dereliction of principle. Shall, then, a judge by honestly performing his duty and very possibly thereby offending both parties be made the victim of the one or the other, or perhaps of each, as they have power? No, sir: I conceive that a judge should always consider himself safe while he violates no law, while he conscientiously discharges his duty, whomever he may displease thereby.

But an honorable manager (Mr. Campbell) has read to us an authority to prove that a judge can not in England be proceeded against by indictment for violation of his official duties, but only in Parliament or by impeachment; his authority was the new edition of Jacob's Law Dictionary. Let me be indulged with reading to this honorable Court the case from 12 Coke, the case of Floyd and Barker

to which Jacob refers, and it will be found that the reasons there assigned, however correct they might be as to judges in England, can have no possible application to the judges of the United States.

[Here Mr. Martin read the following part of the third resolution, to wit:]

"It was resolved that the said Barker who was judge of assize, and gave judgment on the verdict upon the said W. P., and the sheriff who did execute him according to the said judgment, nor the justices of peace who did examine the offender, and the witnesses for proof of the murder before the judgment were not to be drawn in question, in the Star Chamber, for any conspiracy; nor any witness, nor any other person ought to be charged with conspiracy in the Star Chamber, or elsewhere, when the party indicted is convicted or attaint of murder or felony, and although the offender upon the indictment was acquitted, yet the judge, be he judge of assize, or a justice of peace, or any other judge, by commission and of record and sworn to do justice, can not be charged for conspiracy for that which he did openly in court as judge or justice of peace; and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice will do injustice, but if he hath conspired before out of court, this is extrajudicial, but due examination of causes out of the court, and inquiring by testimony and similar is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutors, out of court, to such whom he knows will be indictors, to find any guilty, etc., amounts to an unlawful conspiracy.

"And as a judge shall not be drawn in question in the cases aforesaid at the suit of the parties, no more shall he be charged in the said cases before any other judge at the suit of the King.

"And the reason and cause why a judge, for anything done by him as a judge, by the authority which the King (concerning his justice) shall not be drawn in question before any other judge, for any surmise of corruption, except before the King himself, is for this; the King himself is de jure to deliver justice to all his subjects; and for this, that he himself can not do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath.

"And forasmuch as this concerns the honor and conscience of the King, there is great reason that the King himself shall take account of it, and no other."

But even in England it has been solemnly determined that judges may be proceeded against by indictment for the violation of the laws in their official conduct, for which I refer this honorable Court to Viner's abridgment, 14th volume, page 579, (F), pl. 3, and in notes, where he says:

"A justice can not rase a record, nor imbecile it, nor file an indictment which is not found, nor give judgment of death where the law does not give it, but if he doth this it is misprision, and he shall lose his office and shall make fine for misprision." (In the note "Brooke, Corone pl. 173 cities 2 R, 3, 9, 10, S. C. and P. and that he shall be indicted and arraigned.")

And that to Hawkin's Pleas of the Crown, volume 1, chapter 69, section 6, where that author tells us:

"It is said that at common law bribery in a judge, in relation to a cause depending before him, was looked upon as an offense of so heinous a nature that it was sometimes punished as high treason, before the 25th Edward III, and at this day it certainly is a very high offense and punishable not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment," etc.

Mr. President, the principle I have endeavored to establish is that no judge or other officer can, under the Constitution of the United States, be removed from office but by impeachment, and for the violation of some law, which violation must be not simply a crime or misdemeanor, but a high crime or misdemeanor.

But an honorable manager (Mr. Rodney), who has this morning referred to some authorities as to other parts of the case has also contested the correctness of the foregoing principle, and has introduced the constitution of the State of Pennsylvania, by which he has told us a judge may, by the governor, be removed from office without the commission of any offense upon the vote of two-thirds of the two houses for his removal; notwithstanding that constitution has a similar provision for removal by impeachment as has the Constitution of the United States. To this I answer as we have no such provision in the Constitution of the United States the reverse is to be inferred, to wit, that the people of the United States from whom the Constitution emanated did not intend their judges should be removed, however obnoxious they might be to any part or to the whole of the Legislature, unless they were guilty of some high crime or misdemeanor, and then only by impeachment. It is also well known that the governor of Pennsylvania has not considered those words in the constitution of that State, "that he may remove the judges on such address," as being imperative. For, in a recent instance,

where he did receive such address, instead of admitting the construction to be as was contended, "you must," he determined it to be "I will not," and I have had the pleasure of seeing that judge some time since that transaction on the bench with his brethren dispensing justice. I again repeat that as the framers of the Constitution of the United States did not insert in their Constitution such a clause as is inserted in the constitution of Pennsylvania, it is the strongest proof that they did not mean a judge or other officer should be displaced by an address of any portion of the legislature, but only according to the constitutional provisions.

The same gentleman (Mr. Rodney) has told us that the tenure by which a judge holds his office is good behavior, therefore that he is removable for misbehavior; and, further, that misbehavior and misdemeanor are synonymous and coextensive. Here I perfectly agree with the honorable gentleman and join issue with him. Misbehavior and misdemeanor are words equally extensive and correlative; to misbehave or to misdemean is precisely the same; and as I have shown that to misdemean, or, in other words, to be guilty of a misdemeanor, is a violation of some law punishable, so, of course, misbehavior must be the violation of a similar law.

The same honorable gentleman has mentioned the impeachment and conviction of Judge Addison, and has told us that he was not impeached for the breach of any law, but only for rude or unpolite conduct to his brother judge; that this objection was made with much energy on his defense, but that the Senate were convinced by the great talents and eloquence of Mr. Dallas and some other gentlemen that the objection was groundless; they, therefore, convicted and removed him. I have not here the proceedings against Judge Addison and, therefore, it is possible that the senate of Pennsylvania erected themselves into a court of honor to punish what they might consider breaches of politeness; but does this honorable Court sit here to take its precedents from the State of Pennsylvania or any other State, however respectable? I should rather hope that this honorable Court should furnish precedents which might be respected and adopted by the different States. I would also ask, "When was that precedent established? Was it not at a time when there is too much reason to believe that the warmth and violence of party had more influence in it than justice; and that the senate of Pennsylvania overleaped their constitutional limits? But if we are to go to Pennsylvania for a precedent, why should we not be guided by that which the same State has so recently given us in a trial in which that gentleman bore so conspicuous a part? a precedent of acquittal; a precedent which we are perfectly willing should be adopted, and which we trust will be adopted on the present occasion.

My observations thus far have been principally with a view to establish the true construction of our Constitution, as relates to the doctrine of impeachment.

2362. Chase's impeachment, continued.

Argument of Mr. Robert G. Harper, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

And finally, on behalf of the respondent, Mr. Harper said:[1]

The honorable managers, indeed, are as much at war with themselves on this point as with the Constitution and the laws. For when they have told us in one breath that this is merely a question of policy and expediency, they resort in the next to legal authorities, both English and American, for the purpose of explaining the doctrine of impeachment, and of proving that the acts alleged against the respondent amount to impeachable offenses; thus paying an involuntary homage to truth and furnishing an instance of the irresistible power with which she forces herself on the mind, even when most obstinately determined to resist her. Let us also, Mr. President, be permitted to adduce the authority of an elementary writer, of very high authority, on the laws of England in support of the principle for which we contend. Woodeson, in his Lectures, volume 2, page 611, treating on the law of impeachment, speaks thus: "As to the trial itself, it must of course vary in external ceremony, but differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevail. For impeachments are not formed to alter the law, but to carry it into more effectual execution, where it might be obstructed by the influence of too powerful delinquents, or not easily discerned in the ordinary course of jurisdiction, by reason of the peculiar quality of alleged crimes. The judgment therefore is to be such as is warranted by legal principles or

[1] Annals, pp. 505–514.

precedents. In capital cases the mere stated sentence is to be specifically pronounced." Thus far this learned professor and commentator of the laws of England; and he cites as authorities for this doctrine Selden and the State Trials; the latter of which, this honorable court need not be informed, is a collection of adjudged cases in the highest courts of England; and the former, a writer of great learning and very high authority, peculiarly tenacious of every principle tending to the security of public liberty, and not likely to mistake on a point so essential as the law of impeachment.

Thus we find that even in England, where the power of impeachment is subject to no express constitutional restrictions and where abuses of that power, for the purpose of party persecution and State policy, have sometimes been committed, and more frequently attempted, an impeachment has never been considered as a mere inquest of office, but always as a criminal prosecution, differing not in essentials from those which are carried on before the ordinary tribunals of justice and subject to the same rules of evidence, and the same legal maxims concerning crimes and punishments, as a proceeding contrived not to alter the law, but to carry it into more effectual execution. These authorities, sanctioned by the practice of one hundred and fifty years, prove the principle for which we contend. Instances may, no doubt, be found in the history of that country where these salutary principles have been disregarded and impeachments have been converted into engines of oppression. But this abuse does not destroy or impair the principle. That remains as eternal as the laws of reason and justice on which it is founded, while the abuse passes into oblivion with the temporary interests and fleeting projects which it was made to subserve, or remains in our recollection as a sad monument of the excesses into which frail man is hurried by his passions.

And has not this great principle of English jurisprudence, which in that country has weathered so many storms of faction, revolution, and civil war, received the sanction also of this honorable court? Has not testimony been rejected because it was judged illegal according to the ordinary rules of evidence? And how could those rules apply to this case unless it were considered as a criminal prosecution?

The Constitution of the United States will as little bear out the managers in their position as the laws of England. That Constitution gives the power of impeachment to the House of Representatives and to the Senate the power of trying impeachments. Had the authors of that instrument and those who adopted it intended to leave this power at large or to erect it into a general inquest for inquiring into the qualifications of judges and the expediency of removing them, nothing more would have been done than merely to give the power. But it will be found that various restrictions are imposed in the subsequent parts of the instrument, which prove that no person can be impeached except for an offense.

Thus, for instance, in speaking of the power of pardoning, the Constitution provides (art. 2, sec. 2) that "the President may grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Is not this the same thing as saying that cases of impeachment are cases of offenses? What, Mr. President, are offenses in the language of the Constitution and the laws? For a definition of the term "offense," in a constitutional sense, we must consult our law books and not the caprice or the varying opinions of popular leaders or popular assemblies. Those books tell us that word "offense" means some violation of law. Whence it evidently follows that no officer of Government can be impeached unless he has committed some violation of the law, either statute or common. It is not necessary for me to contend that this offense must be an indictable offense. I might safely admit the contrary, though I do not admit it, and there are reasons which appear to be unanswerable in favor of the opinion that no offense is impeachable unless it be also the proper subject of an indictment. But it is not necessary to go so far, and I can suppose cases where a judge ought to be impeached for acts which I am not prepared to declare indictable. Suppose, for instance, that a judge should constantly omit to hold court, or should habitually attend so short a time each day as to render it impossible to dispatch the business. It might be doubted whether an indictment would lie for those acts of omission, although I am inclined to think that it would. But I have no hesitation in saying that a judge in such a case ought to be impeached. And this comes within the principle for which I contend, for these acts of culpable omission are a plain and direct violation of the law which commands him to hold courts a reasonable time for the dispatch of business, and of his oath which binds him to discharge faithfully and diligently the duties of his office.

The honorable gentlemen who opened the case on the part of the prosecution cited the case of habitual drunkenness and profane swearing on the part of a judge as an instance of an offense not indictable and yet punishable by impeachment. But I deny his position. Habitual drunkenness in a judge and profane swearing in any person are indictable offenses. And if they were not, still they are viola-

tions of the law. I do not mean to say that there is a statute against drunkenness and profane swearing. But they are offenses against good morals, and as such are forbidden by the common law. They are offenses in the sight of God and man, definitive in their nature, capable of precise proof and of a clear defense.

The honorable managers have cited a case decided in this court as an authority to prove that a man may be convicted on impeachment without having committed an offense. I mean the case of Judge Pickering. But that case does not support the position. The defendant there was charged with habitual drunkenness and gross misbehavior in court arising from this drunkenness. The defense set up was that the defendant was insane, and that the instances adduced of intoxication and improper behavior proceeded from his insanity. On this point there was a contrariety of evidence. It is not for me to inquire on which side the truth lay. But the court, by finding the defendant guilty, gave their sanction to the charge that his insanity proceeded from habitual drunkenness. This case therefore proves nothing further than that habitual drunkenness is an impeachable offense.

As little aid can the honorable gentlemen derive from the case of Judge Addison, on which also they have relied. The articles of impeachment will show that Judge Addison was not impeached, as the honorable gentlemen suppose, for rude and ungentleman-like behavior in court to one of his colleagues; but for a supposed usurpation of power in preventing his colleague, by an exertion of authority, from exercising the right which he was supposed to possess to charge a grand jury, and in exerting his official influence and power to prevent the jury from paying attention to the legal opinions expressed by his colleague in a civil case. The report of that trial, now in my hand, will attest the correctness of this statement and will show also that Judge Addison was so far from being charged with rude and ungentleman-like behavior to his colleague that the honorable gentleman himself towards whom that behavior is supposed to have been used and who gave evidence on the trial, bore testimony to the mildness and politeness of Judge Addison's manner on the occasions which furnished the grounds of impeachment. Whether the acts done by that learned and distinguished judge did amount to an usurpation of unconstitutional power, or whether his colleague did possess those rights in the exercise of which he was supposed to have been improperly restricted, are questions foreign from the present inquiry. But I am free to declare that if Judge Addison's colleague did possess those rights and if he did arbitrarily prevent and impede the exercise of them by an unconstitutional exertion of the powers of his office he was guilty of an offense for which he might properly be impeached, because he must in that case have acted in express violation of the Constitution and laws.

The great principle for which we contend, and which is so strongly supported by the clause of the Constitution already cited, that an impeachment is a criminal prosecution and can not be maintained without the proof of some offense against the laws, pervades all the other provisions of the Constitution on the subject of impeachment. The fourth section of the second article declares "that the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." This provision, I know has been considered by some as a mere direction of what shall be done in those specified cases, and not as a prohibition confining impeachment to those cases. But it must be recollected, Mr. President, that the Constitution is a limited grant of power, and that it is of the essence of such a grant to be construed strictly and to leave in the grantors all the powers not expressly or by necessary implication granted away. In this manner has the Constitution always been construed and understood; and although an amendment was made for the purpose of expressly declaring and asserting this principle, yet that amendment was always understood by those who adopted it and was represented by the eminent character who brought it forward as a mere declaration of a principle inherent in the Constitution which it was proper to make for the purpose of removing doubts and quieting apprehensions. When, therefore, the Constitution declares for what acts an officer shall be impeached, it gives power to impeach him for those acts and all power to impeach him for any other cause is withheld. The enumeration in the affirmative grant implies clearly a negative restriction as to all cases not enumerated. This provision of the Constitution, therefore, must be considered upon every sound principle of construction as a declaration that no impeachment shall lie except for a crime or misdemeanor; in other words, for a criminal violation of some law.

The same idea is found in the second section of the third article, third clause, where it is declared that "the trial of all crimes, except in cases of impeachment, shall be by jury;" plainly implying that cases of impeachment are cases of "trials for crimes."

It is material, also, Mr. President, to advert to the peculiar force of the term "conviction," which is employed in several parts of the Constitution, in application to cases of impeachment. The third section of the first article, sixth clause, speaking of the trial of impeachments, says: "And no person shall be convicted without the concurrence of two-thirds of the members present." The seventh clause of the same section, treating on the extent and operation of a judgment in impeachment, says: "But the party convicted shall nevertheless be liable and subject," etc. And the fourth section of the second article declares that certain officers "shall be removed from office on impeachment for, and conviction of, treason, bribery," etc. This term "conviction" has in our law a fixed and appropriate meaning. There is indeed no word in our legal vocabulary of more technical force. It always imports the decision of a competent tribunal pronouncing a person guilty of some specific offense for which he has been legally brought to trial. In an instrument so remarkable as the Constitution of the United States for technical accuracy in the use of terms the frequent and indeed constant use of this word is decisive to prove that in the intention of the framers of that instrument no man could be impeached except for some offense against law of which he might in legal language be said to be "convicted."

In fixing the construction of this instrument no safer guide can be followed than contemporaneous expositions furnished by those who made or ratified it; and among those expositions the most authoritative are to be found in the constitutions of the several States, formed about the same time, and drawn up in many instances by the same persons. Whenever it appears clearly from the context of these constitutions that they affix a certain meaning to particular terms we may safely infer that those or similar terms in the Constitution of the United States were intended to have the same meaning. And we shall find by inspecting the constitutions of the several States that impeachment has been considered by all of them as a criminal prosecution for the punishment of defined offenses against the laws.

Let us begin with that of Pennsylvania. In treating of impeachments, article the fourth, it speaks of conviction on impeachment, and declares that all civil officers shall be liable to impeachment for any misdemeanor in office. The term "misdemeanor" is of as accurate meaning and of as much technical force as any term in the law. It describes a class of offenses against law, as well defined as any in the criminal code. A still stronger argument is furnished by the second section of the fifth article, which provides that for any reasonable cause which shall not be sufficient ground of impeachment the governor may remove any of the judges on the address of two-thirds of each branch of the legislature. It is most manifest that this provision would have been wholly unnecessary had the people of Pennsylvania, in framing their constitution, considered impeachments, like the honorable managers, merely as inquests of office by which a judge might be removed for any cause which two-thirds of each branch might think reasonable. And the arguments derived from the constitution of Pennsylvania have more force, inasmuch as the terms "misdemeamor in office," used by it for describing impeachable acts, are much less strong than "treason, bribery, and other high crimes and misdemeanors," employed by the Constitution of the United States for the same purpose.

The constitution of Delaware, section 22, directs that impeachments shall lie against all persons "offending against the State, either by maladministration, corruption, or other means by which the safety of the State may be endangered." This is a very broad description of impeachable offenses against the laws, liable to punishment in the regular course of justice. It is declared that all impeachments shall be commenced "within eighteen months after the offense committed" and shall be prosecuted by the attorney-general or such other persons as the house of assembly shall appoint, according to the laws of the land. Persons found guilty on impeachment are to be disqualified, or removed, "or subjected to such pains and penalties as the laws shall direct." And the term "conviction," whose peculiar technical force has been already remarked, is applied by this constitution to cases of impeachment.

The people of Maryland did not think fit to invest the legislature with the power of impeachment, but have directed by their bill of rights, section 30, and by their constitution, section 40, that misbehavior in office shall be proceeded against by indictment in a court of law only, and that removal, and, fn some cases, disqualification, shall be the consequence of conviction. It will not be denied that "misdemeanor" and "misbehavior in office" are convertible terms. If there be any difference, the latter is the less strong; and yet the people of Maryland have declared that the term "misbehavior in office" means an indictable offense, of which a person may be convicted in a court of law.

The constitution of Virginia provides that persons offending against the State by maladministration, corruption, or other means by which the safety of the State may be endangered, "shall be impeach-

able by the house of delegates" in the general court, according to the laws of the land; "and that if all or any of the judges of the general court should, on grounds (to be judged by the house of delegates), be accused of any of the crimes or offenses above mentioned, such house of delegates may, in like manner, impeach the judge or judges so accused, to be tried in the court of appeals." Hence it appears most clearly that these general words "offending against the State by maladministration, corruption, or other means by which the safety of the State may be endangered," words far more general and indefinite in themselves than those employed by the Federal Constitution, were considered by the people of Virginia as meaning specific crimes or offenses, which might be proceeded against in a court of law according to the usual course of criminal justice. The words "any other means by which the safety of the State may be endangered" are certainly broad enough to embrace those reasons of political expediency and State policy for which the honorable managers contend that a judge may be removed by impeachment; but we find that the people of Virginia had no idea of giving them a construction so contrary to the notions entertained in this country respecting legal rights, personal safety, and constitutional liberty.

The provisions made on this subject by the constitution of North Carolina breathe the same spirit. That instrument declares, section 23, "that the governor and other officers offending against the State by violating any part of this constitution, maladministration, or corruption, may be prosecuted on the impeachment of the general assembly or presentment of the grand jury of any court of supreme jurisdiction in this State." This plainly implies that impeachable acts, though described in terms the most indefinite were neither more nor less than offenses indictable in the ordinary course of law.

In the constitution of South Carolina, article 5, we find the same idea necessarily implied. The words "misdemeanor in office" are used as the description of impeachable offenses; the term "conviction" is applied to impeachments, and it is provided that persons so convicted "shall, nevertheless, be liable to indictment, trial, judgment, and punishment, according to law." It is plain, therefore, that the words "misdemeanor in office," were understood and intended by the people of South Carolina to mean offenses against the laws for which the offender might be indicted and "convicted."

The constitution of Georgia contains no words which can operate in any manner to define or describe impeachable offenses. It merely directs who shall have the power of impeaching, who shall try impeachments, and what description of persons may be impeached. But in that of Vermont there is a provision on this subject, which, though very concise, is very strong to our present purpose. Among the powers given by it, section 9, to the house of representatives is that to "impeach State criminals." This term "criminals," which in our laws is never applied except to persons charged with offenses of the highest nature, sufficiently declares that the people of Vermont considered impeachments as applicable to cases of crimes only, and not to removals for reasons of State expediency; not even to cases of smaller offenses, much less of indiscretion or impropriety of behavior, such as is alleged against the respondent in this case. For surely it would be an abuse of language to apply the term "criminal" to improper interruptions of the counsel, to rude, hasty or intemperate expressions; to ridicule employed by a judge against counsel who, in his opinion, conducted themselves incorrectly, or to the precipitate and ill-timed expression of a correct legal opinion. No, sir. This word imports the intentional violation of some known law, the perpetration of some specific defined crime, which may admit of precise proof, which every citizen may be able to avoid, against which, when accused of it, he may know how to make his defense.

Such, Mr. President, is the solemn exposition of impeachable offenses given by the people of the United States through the medium of their constitutions. Though not accustomed to talk about the will of the people, there is no man that bows with more reverence to that will when constitutionally declared. And shall we, Mr. President, let go this sheet-anchor of personal rights and political privileges to commit ourselves to the storms of party rage, personal animosity, and popular caprice? Shall we throw down this great landmark, fixed by the wisdom and patriotism of our fellow-citizens and fathers? Instead of having our best and dearest rights secured by fixed and known principles of law, shall we leave them to be governed and disposed by the ever varying whims and passions of the moment? No, sir, I trust not. When I look at these benches and recollect how deep a stake the members of this honorable court have in those rights which form the palladium of our safety and are now intrusted to their care and keeping, I can not but confidently expect that they will feel the whole importance of the great trust reposed in them by their country; that they will regard themselves as acting for future generations, as well as for the present age; and will elevate themselves above the sphere of little views and momentary feelings. They will recollect, sir, that unjust principles, adopted to answer particular purposes,

are two-edged swords, which often rebound on the head of him who strikes with them, and that justice, though it may be an inconvenient restraint on our power while we are strong, is the only rampart behind which we can find protection when we become weak. They will remember that power which depends on popular favor is of all sublunary things the most fleeting and transient; that it must, from time to time, change hands; and that when the change which sooner or later must arrive shall have taken place, when those who now direct the thunder of impeachment shall be placed, as ere long they must be, in a situation to be smitten by its bolts, they will be glad to invoke, and unless they now set a great example of correct decision, will invoke in vain those constitutional privileges to which we now cry for safety.

Need I, Mr. President, urge the necessity of adhering to those principles, as it respects the independence of the judiciary department? Need I enlarge on the essential importance of that independence to the security of personal rights, and to the well-being, nay, to the existence of a free government? These considerations of themselves strike the mind with a force not to be increased by any efforts of mine. It is sufficient merely to bring them into the view of this honorable court.

But it is not to the party accused, to the nation, to posterity, and to the interests of free governments that the observance of settled constitutional principles in cases of impeachment is alone important. It is equally so to the character and feelings of those appointed to judge. Is there any member of this honorable court who would wish, nay, who would consent, in deciding this cause, to be set free from the restraints of the law, or, more properly speaking, to be deprived of its guidance and left to the influence of his own passions, feelings, or prepossessions? Were causes like this to be determined on expediency, and not on fixed principles of law, to what suspicions might not the judges be liable, of having sought the indulgence of some animosity, or the attainment of some selfish end, instead of consulting for the public good? But when they are known to be governed by the settled rules of law, and are considered as merely its organs, their motives will be more respected, and their conduct less liable to suspicion or reproach. Is any member of this honorable body prepared to relinquish the high and venerable station of the organ and expounder of the law, in order to assume the doubtful and dangerous character of a judge, subject to no rule but his own arbitrary will?

To a judge, too, it is the sweetest consolation in the discharge of his painful duties that when he has doomed a fellow-citizen to dishonor and misery, he has merely pronounced the decision of the law, and not the dictates of his own will; that he is not the author of the sentence by which so much calamity is brought on others, but merely its official organ. This reflection soothes his mind under the anguish which it must feel from another's woe. And is there any member of this honorable court who would consent to relinquish this consolation? I boldly say, no. I feel that every heart will respond to the assertion. And if any who hear me be capable of entertaining a contrary opinion, or would wish, in the same situation, to hold a different conduct, I envy not their feelings, however highly I may estimate their intellectual powers.

In every light, therefore, in which this great principle can be viewed, whether as a well-established doctrine of the Constitution; as the bulwark of personal safety and judicial independence; as a shield for the characters of those whose lot it may be to sit under the trial of impeachments; or as a solace to them under the necessity of pronouncing a fellow-citizen guilty; it will equally claim, and I can not doubt that it will receive the sanction of this honorable court, by whose decision it will, I trust, be established so as never hereafter to be brought into question, that an impeachment is not a mere inquiry, in the nature of an inquest of office, whether an officer be qualified for his place, or whether some reason of policy or expediency may not demand his removal, but a criminal prosecution, for the support of which the proof of some willful violation of a known law of the land is known to be indispensably required.

2363. Chase's impeachment, continued.

At the conclusion of the final arguments in the Chase trial, the court set a day and hour for giving final judgment.

It does not appear surely that the House attended on the final judgment in the Chase impeachment.

In the Chase trial the court modified its former rule as to form of final question.

Two-thirds not having voted guilty on any article, the Presiding Officer declared Mr. Justice Chase acquitted.

As soon as the arguments were concluded, on February 27,[1] it was, on motion of Mr. James Jackson, of Georgia, a Senator—

Resolved, That the court will on Friday next, at 12 o'clock, pronounce judgment in the case of Samuel Chase, one of the associate justices of the Supreme Court of the United States.

On Friday, March 1,[2] the court being opened by proclamation, the managers, accompanied by the House of Representatives, attended.[3]

The counsel for the respondent also attended.

The consideration of the motion, made yesterday for an alteration of one of the rules in cases of impeachments, was resumed; whereupon,

Resolved, That in taking the judgment of the Senate upon the articles of impeachment now depending against Samuel Chase, esq., the President of the Senate shall call on each Member by his name, and upon each article, propose the following question, in the manner following: "Mr. ———, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the ——— article of impeachment?"

Whereupon, each Member shall rise in his place, and answer guilty or not guilty.

The President rose, and addressing himself to the members of the court, said:

Gentlemen: You have heard the evidence and arguments adduced on the trial of Samuel Chase, impeached for high crimes and misdemeanors. You will now proceed to pronounce distinctly your judgment on each article.

The Secretary then read the first article of impeachment.

The article having been read, the President took the opinion of the members of the court respectively, in the form following:

Mr. ———, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the first article of impeachment?

And thus, after the reading of each article, the opinion of the court was taken.

At the conclusion, the President rose and said: On the first article, sixteen gentlemen have pronounced guilty and eighteen not guilty; on the second article, ten have said guilty and twenty-four not guilty; on the third article, eighteen have said guilty and sixteen not guilty; on the fourth article, eighteen have said guilty and sixteen not guilty; on the fifth article, there is an unanimous vote of not guilty; on the sixth article, four have said guilty and thirty not guilty; on the seventh article, ten have said guilty and twenty-four not guilty; and on the eighth article, nineteen have said guilty and fifteen not guilty.

Hence, it appears that there is not a constitutional majority of votes finding Samuel Chase, esq., guilty on any one article. It, therefore, becomes my duty to declare that Samuel Chase, esq., stands acquitted of all the articles exhibited by the House of Representatives against him.

Whereupon, the court adjourned without day.

It does not appear, from the House Journal,[4] that the decision was communicated to the House; and there is no record in the House Journal that the House attended either as Committee of the Whole House or otherwise.

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[1] Senate Impeachment Journal p. 523; Annals, p. 664.

[2] Journal, pp. 523–527; Annals, pp. 664–669.

[3] The House Journal raises a doubt as to whether or not the House as a Committee of the Whole attended. No mention of such attendance is made, after February 23 (Journal, pp. 149–162). It is probable that in the pressure of business, attendance as an organized body was omitted.

[4] House Journal pp. 157–162.

Chapter LXXIII.

IMPEACHMENT AND TRIAL OF JAMES H. PECK.

2364. The impeachment and trial of James H. Peck, United States judge for the district of Missouri.

The impeachment proceedings in the case of Judge Peck were set in motion by a memorial.

The investigation into the conduct of Judge Peck was revived by referring to a committee a memorial presented in a former Congress.

Form of memorial praying for an investigation into the conduct of Judge Peck.

The House decided formally to investigate the conduct of Judge Peck only after the Judiciary Committee had examined the memorial.

On December 8, 1826,[1] Mr. John Scott, of Missouri, presented a memorial of Luke Edward Lawless, for an inquiry into the official conduct of James H. Peck, district judge of the United States for the district of Missouri, in relation to certain proceedings on an attachment for contempt had by said judge against said Lawless. This memorial was referred to the Committee on the Judiciary. On February 15, 1827,[2] the House ordered the committee discharged from the consideration of the memorial, and gave leave to the memorialist to withdraw the same.

On December 29, 1828,[3] on motion of Mr. George McDuffie, of South Carolina, it was

[1] Second session Nineteenth Congress, House Journal, p. 32.
[2] Journal, p. 300.
[3] Second session Twentieth Congress, House Journal, p. 101.

Ordered, That the memorial of Luke Edward Lawless, presented on the 8th December, 1826, be referred to the Committee on the Judiciary.

No report was made at this session.

On December 15, 1829,[1] on motion of Mr. McDuffie, it was

Ordered, That the memorial of Luke Edward Lawless, presented on the 8th December, 1826, praying for impeachment of John H. Peck, judge of the United States court in the State of Missouri, be referred to the Committee on the Judiciary.

This memorial[2] was addressed as follows:

To the honorable the House of Representatives of the United States:

The petition of Luke Edward Lawless, a citizen of the State of Missouri, and of the United States, respectfully showeth:

That, on the 30th day of March, in the present year, 1826, there appeared in the Republican, a newspaper printed in the city of St. Louis, State of Missouri, an article purporting to be the final decree or opinion of the judge of the district court of the United States for the district of Missouri, in the cause in which the widow and heirs of Antoine Soulard were plaintiffs, and the United States defendant, etc.

The memorial goes on to set forth that an appeal had already been taken to the Supreme Court of the United States when this final decree was published; that the petitioner wrote a letter, which was published in a St. Louis newspaper, setting forth in courteous and decorous language the errors of fact and law which he conceived to exist in the decree. This publication, as petitioner conceived, was meritorious rather than censurable, since the land titles of a large district were affected adversely by the decree, and speculators were taking advantage of this fact. The petition goes on to set forth that he was, for this publication, punished by Judge Peck for contempt. In conclusion the memoralist says:

Having thus submitted to your honorable body the facts of his case, and the evidence in support thereof, your petitioner begs leave to observe that it appears from those facts:

First. That the said James H. Peck has, in his capacity of judge of a district court of the United States, been guilty of usurping a power which the laws of the land did not give him.

Second. That said James H. Peck has exercised his power, be the same usurped or legitimate, in the case of your petitioner, in a manner cruel, vindictive, and unjust.

Wherefore, and inasmuch as the said James H. Peck has not only outraged and oppressed your petitioner as an individual citizen, but, in your petitioner's person, has violated the most sacred and undoubted rights of the inhabitants of these United States, namely, the liberty of speech and of the press, and the right of trial by jury, your petitioner prays that the conduct and proceedings in this behalf, of said Judge Peck, may be inquired into by your honorable body, and such decision made therein as to your wisdom and justice shall seem proper.

And your petitioner, as in duty bound, will pray.

LUKE EDWARD LAWLESS.

ST. LOUIS, MO., *September 22, 1826.*

Various documents accompanied this memorial, in substantiation of those charges which he offered to prove.

On January 7, 1830,[3] Mr. James Buchanan, of Pennsylvania, from the Com-

[1] First session Twenty-first Congress, House Journal, p. 39.

[2] For copy of this memorial in full see "Report of the trial of James H. Peck," published in Boston, in 1833, by Hilliard Gray & Co. This publication has the proceedings of the trial in full. The Debates of Congress give them in a very fragmentary form.

[3] House Journal, p. 138.

mittee on the Judiciary, reported the following resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers in the case of the charge of official misconduct against James H. Peck, judge of the district court of Missouri.

2365. Peck's impeachment, continued.

In reporting in favor of impeaching Judge Peck the committee submitted transcripts of testimony.

Following the Chase precedent, the committee refrained from giving their reasons for concluding that Judge Peck should be impeached.

In the investigation of Judge Peck, the respondent cross-examined witnesses, and addressed the committee.

The House declined to print with the evidence in the Peck investigation the memorial or the address of respondent.

The report favoring the impeachment of Judge Peck was committed to the Committee of the Whole House on the state of the Union.

On March 23[1] Mr. Buchanan submitted from that committee the following report:

That, in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion that James H. Peck, judge of the district court of the United States for the district of Missouri, be impeached of high misdemeanors in office.

In presenting the report Mr. Buchanan stated that the committee[2] deemed it fairest toward the party accused not to report to the House their reasons at length for arriving at the conclusion that he ought to be impeached. In this respect they thought it advisable to follow the precedent which had been established in the case of the impeachment of Judge Chase.

The report contains, however, an abstract of the case of heirs of Antoine Soulard *v.* United States, the opinion of Judge Peck therein, the letter of Mr. Lawless criticising the opinion, and the court records showing the arrest and punishment of the latter. The journal of the committee also accompanies the report. It gives the testimony of Mr. Lawless and others before the committee, and shows that Judge Peck was present in the committee room in person, and cross-examined the witnesses.

Mr. Buchanan moved that the report, with the documents as described and the transcripts of the testimony, be printed. Thereupon Mr. Clement C. Clay, of Alabama, moved to add to the matter to be printed "the memorial of Luke E. Lawless and the address of the judge to the committee." This amendment was disagreed to, and then the original motion of Mr. Buchanan was agreed to.

The report was committed to the Committee of the Whole House on the state of the Union.

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[1] House Journal, p. 454; Debates, p. 637; House Report No. 325.

[2] This committee consisted of Messrs. Buchanan, Charles A. Wickliffe, of Kentucky; Henry R. Storrs, of New York; Warren R. Davis, of South Carolina; Thomas T. Bouldin, of Virginia; William W. Ellsworth, of Connecticut, and Edward D. White, of Louisiana.

2366. Peck's impeachment, continued.

Judge Peck, threatened with impeachment, was permitted to make to the House a written or oral argument.

Judge Peck, threatened with impeachment, transmitted to the House a written argument, which was ordered to be read.

In Judge Peck's case the committee proceeded on the theory of an ex parte inquiry.

Judge Peck was not permitted to bring witnesses before the House committee, but cross-examined and filed a statement.

In the Peck case the House, with a view to English precedents, discussed the nature of the inquiry preliminary to impeachment.

Form of memorial in which Judge Peck asked leave to state his case to the House.

On April 5 [1] the Speaker laid before the House a memorial:

To the honorable the Speaker and Members of the House of Representatives of the United States:

The memorial of James H. Peck, judge of the district court of the United States for the district of Missouri, respectfully represents:

That, by a report of the Committee on the Judiciary, made to your honorable body on the 23d March, 1830, on the petition of Luke E. Lawless, it is proposed that your memorialist be impeached of high misdemeanors in office.

The memorialist goes on to describe the status of the case, and says that in view of the gravity of the proceeding he—

presumes that it will not be displeasing to your honorable body to have a full view of the whole ground of this accusation before you proceed to decide finally on the report of the committee. In England, from which we borrow the process of impeachment, the House of Commons has been willing to receive such information from the party accused before they will vote the impeachment.

The memorialist then cites in support of this assertion the case of Warren Hastings.

The memorialist further asks that he may be permitted to adduce against the prima facie impression to his disadvantage arising from the report of the committee the fact that Mr. Lawless's petition had been presented in former Congresses, and that the able men to whom it was referred found no grounds for proceeding.

The petitioner suggests that any method which may be taken to enable him to present "a full exposition of all the facts" will be satisfactory to him, whether by direct address to the House or before a committee.

When the memorial of Mr. Lawless had been referred to the Judiciary Committee, they had notified the present memorialist, Judge Peck, that they would receive "any explanation" which he might think proper to make in reference to the charge. In the brief time allowed he had made such a statement as was possible, although it was inadequate. But when it was handed in, the chairman of the committee did not read it, but proceeded immediately to examine the witnesses.

It is true, also,

continues the memorial—

that your memorialist was permitted to cross-examine, to a certain extent, the witnesses who had been summoned and examined in support of the charge, but this cross-examination was much restricted by

[1] House Journal, p. 499; Debates, p. 736; House Report No. 345.

frequent objections, and by the strong desire evinced by the committee to get through the examination at least within the two remaining days of the week; and your memorialist having been more than once admonished that he was there ex gratia, felt himself checked and restrained from extending the cross examination to points which seemed to him to belong to the inquiry, so that his having been permitted to be present under such circumstances is rather a disadvantage to him than a benefit, because it gives to the transaction all the semblance of a free and full investigation of the whole case, without the reality. Your memorialist does not make this remark in censure of the honorable committee; on the contrary, considering the proceeding, as they manifestly seemed to do, as being analogous to an inquiry by a grand jury and to be governed by the same rules, your memorialist is sincerely satisfied that it was their purpose to treat him, as, in this view of the subject, they did in fact treat him, with great liberality and indulgence.

But your memorialist submits, with great respect, that the proceeding of the House of Representatives, in inquiring whether they will, or will not, institute an impeachment, is not to be governed by those strict rules which confine a grand jury to ex parte evidence. It was not the course pursued by the House of Commons of Great Britain, in the case of Warren Hastings, to which he has referred, and in which the House, before they voted the impeachment, heard not only the defense, but the testimony of his witnesses.

And the memorialist concludes:

Your memorialist, therefore, respectfully prays that your honorable body will receive from him a written exposition of the whole case, embracing both the facts and the law, and give him, also, process to call his witnesses from Missouri in support of his statements, before any discussion or vote shall be taken on the evidence as it is now presented with the report of the committee. * * *

If this prayer can not be granted, his hope and prayer is that your honorable body will, if it meet your own approbation, vote the impeachment at once, without any discussion on that partial evidence which presents a garbled view of the subject, greatly to the prejudice of your memorialist, and that he may have as speedy an opportunity as the nature of the case will allow to exhibit before the tribunal of the Senate and before his country the entire transaction, in all its parts, as it really occurred, being conscious and confident that to insure his acquittal from all censure in the minds of all honorable men accustomed to discussions of this kind, the case requires only to be fully understood.

And in the strong hope that the one or the other of these prayers will be granted, your memorialist, as in duty bound, will ever pray.

JAMES H. PECK.

WASHINGTON CITY, APRIL *5, 1830.*

Mr. Henry R. Storrs, of New York, at once moved that the memorial be referred to the Committee of the Whole House on the state of the Union, to which the report of the Judiciary Committee had already been referred.

A debate [1] at once arose as to the propriety of granting the prayer of the petitioner. Mr. Clement C. Clay, of Alabama, said:

As to precedents, there was no uniformity in them on this subject. One high case had been referred to, that of Warren Hastings, and also that of Judge Chase. But the practice in the several States differed from that which had been pursued by the General Government. In his own State (and he hoped he should not be considered as presumptuous in referring to the practice of a State which had so recently been admitted to the Union) the course pursued in cases of impeachment was different and he thought there were many inducements for the House to pursue the practice there adopted. He could not unite in the opinion that the House should proceed precisely as did a grand jury in ordinary cases of indictment. The present case was totally different. A great officer had been accused of a great offense. Did gentlemen suppose, could they think, that when a high officer of the Government was accused by a private individual he must, on the mere ex parte testimony of that accuser, be at once impeached? Mr. Clay said he should hesitate much before he could subscribe to such an opinion. He thought the House ought to proceed with very great caution. Merely to accuse was not all that was necessary in

[1] Annals, pp. 737, 738.

order to have a judge impeached. Some gentlemen seemed to conceive that the memorial of this petitioner asked that witnesses might be examined at the bar of that House; but it made no such request directly. It only asked this as one alternative—that his witnesses might be heard here, if not elsewhere.

Mr. Buchanan said:

Judge Peck, in that memorial, suggests that the Committee on the Judiciary sent for such witnesses only as had been selected by Mr. Lawless. That is far from being the fact. The committee acted upon higher principles. They were sensible of the high responsibility which they owed, both to this House and to the country, for the correctness of their proceedings; and had, therefore, inquired and ascertained, from the best sources in their power, the names of such witnesses as would be most likely to give an impartial and intelligent statement of the transaction. They had sent for and examined seven witnesses; and he owed it to them to say that, although he had long been in the habit of examining witnesses in courts of justice, he had never observed, on any occasion, more candor or more impartiality than these seven gentlemen had exhibited upon their examination before the committee.

It is true, as the memorial suggests, that, in the case of Warren Hastings, the House of Commons did hear the accused, and did permit him to produce testimony, before they voted an impeachment against him. But this was only a single instance. That course might have been adopted, because Mr. Burke, merely as in individual Member of the House, had risen in his place, and moved the impeachment. Whether he was correct in this conjecture or not, it was certain there had been no case of an impeachment by this House, in which so much indulgence was granted, as had been allowed to the accused upon the present occasion. He was permitted to furnish the committee with a written explanation of his conduct, and his request that he might cross-examine the witnesses was promptly granted.

Mr. Ralph I. Ingersoll, of Connecticut, confessed that this was, in a great measure, a new case to him. The only one that he had ever before witnessed was that in which charges, through a newspaper of this district, had been brought against the Vice-President about three years ago. That officer had presented these charges to the House, as the grand inquest of the nation, and requested an inquiry. A committee had been appointed to investigate them; and, before that committee, a friend of the Vice-President had been permitted to appear and represent him throughout the whole investigation. Witnesses, also, had been examined on the part of the accused. How it had been in the case of Judge Chase, or of Judge Pickering, from New Hampshire, he did not recollect; but he well recollected that witnesses in favor of the Vice-President had been examined, as well as against him, and that his representative had been allowed to be present before the committee through every stage of that examination. The committee at that time took some pains to ascertain what was the proper mode of proceeding, and they became satisfied that the party accused had, in these preliminary proceedings, a right to be thus heard.

Mr. Spencer Pettis, of Missouri, said that the practice in cases of impeachment, so far as regarded the proceedings of this House, was now to be settled; for it was obvious that it had not yet been settled by precedent. Gentlemen had, indeed, spoken of the case of Judge Chase; but that case had no application to the present one as it now stands. Judge Chase did not ask to make his defense before this House, nor did he ask either to cross-examine witnesses on the part of the Government, or to have an examination of his own witnesses. As the present question was not then raised, that case can form no precedent to govern in this instance.

Mr. Pettis also went on to cite the investigations of the conduct of Mr. John C. Calhoun, as Secretary of War, and of Secretary of the Treasury William H. Crawford. In both investioations the accused had been permitted to have witnesses examined

before the committees. Both these gentlemen were charged with high misdemeanors, and the charges had been preferred in times of great political excitement.

Mr. James Strong, of New York, said that, from the little examination he had been able to give to this subject, he had come to the conclusion that the present proceedings should be strictly ex parte, rigidly so. It had been said by the gentleman from Massachusetts [Mr. Everett] that the committee had departed somewhat from this line. It was true that they had deviated from it in a slight degree, but the departure was not such as to warrant the House in taking the other step which was now requested. There was a very material difference between hearing the party accused and hearing his witnesses. The Members of the House were not judges to try or to condemn the accused. It was true that the matters in this testimony might not be such as to mix themselves up with party politics; but suppose that it were proposed to impeach a political man of high standing, and that the witnesses were brought to the bar of the House, he put it to every man to say whether the safety of the country did not require that in such cases politics should be thoroughly excluded from that tribunal. And how could this be done but by keeping the proceedings strictly ex parte? Complaints had been made that the committee had not reported articles of impeachment; the case had been referred to them for no such purpose; their duty had been simply to ascertain facts. The House did not want even their opinions; it wanted the facts only, and on one side. What the House had to decide was, whether the testimony did or did not contain matter to warrant an impeachment. If it did, then the House would say the party should be impeached, and the next step would be to appoint a committee to frame the articles. These would be reported to the House, and, if they were agreed upon, then managers would be appointed to conduct the trial before the Senate. It struck him that the safest course would be to keep the proceedings as near ex parte as possible.

Finally the memorial was ordered to be laid on the table for printing, and was not referred to the Committee of the Whole.

On April 7,[1] Mr. Pettis proposed a resolution which, after modifications, read as follows:

Resolved, That James H. Peck, judge of the district court of the United States for the district of Missouri, be permitted, at any time, until Wednesday next at 12 o'clock, to make to this House any written or oral argument on the law or matters of fact, now in evidence before the House, he may think proper, in answer to the charges preferred against him by Luke E. Lawless, esq., which charges have been reported on by the Committee on the Judiciary.

Mr. William Drayton, of South Carolina, moved to strike out the words "or oral." He said that in making the motion he had no intention of preventing the individual concerned from availing himself of the full benefit of what the resolution proposed to grant to him, but had been influenced by the consideration that, if his exposition should be made in writing all the Members of the House would have an opportunity of examining it; but if made orally it would be impossible that all the Members should distinctly hear it, and, if they did, they would probably not retain the substance of it distinctly in their memories. This was one reason which actuated him. Another was that, in his opinion, ill consequences would be likely to arise

[1] House Journal, p. 513; Debates, p. 746–753.

from the personal appearance of the memorialist before the House. He might aver that a material fact could be established by testimony incorrectly or imperfectly referred to in the report of the committee, and ask leave to introduce it fully. Should his application be rejected, he might regard the permission to be heard as illusory. Should his application be acceded to, they would be drawn into a trial of the cause.

The amendment was disagreed to by the House.

On behalf of the resolution, Mr. Pettis said that he had examined the precedents since 1640 and had found none against the proposed action.

Mr. Buchanan said that he had examined the British precedents, and found that in several cases the party had been admitted to the floor of the House of Commons simply to make an argument on the testimony which had been previously given to the House. This was the utmost extent of the privilege so far as he had examined, except in a single instance—that of Warren Hastings. He should make no objection to a mere permission to make an exposition of the law and an argument upon the facts as they appeared in the testimony already taken.

Mr. William Drayton, of South Carolina, drew a distinction between this House and the House of Commons. This House had no other inquisitorial authority than was expressly delegated to it by the Constitution. The House of Commons, on the other hand, was the "grand inquest" of the nation. It may even supersede the courts in cases of individual misdemeanors, as in the case of Alice Pierce, Sir John Fenwick, etc. British precedents were more likely to mislead than assist. The Constitution simply gives this House power to decide whether the case shall be tried before another body. The House could not itself try the case. Unless it should confine itself to what was termed ex parte evidence there would be no bounds to the inquiry.

Mr. Buchanan said his desire was that the House might establish such a precedent as should protect the interests of the accused in all future time. The Judiciary Committee had Judge Chase's trial before them. The mode of proceeding in that trial they considered as strictly proper and delicate. The committee in that case were directed to report their opinion on the charges against Judge Chase, which had been made on the floor of the House. For the purpose of enabling them to do so they procured all the testimony in their power. This they reported to the House, together with a simple statement of their own opinion upon it—nothing else. And why? He presumed that, as it was a judicial proceeding, they wished to leave every gentleman to decide for himself on the naked testimony. They considered one Member as competent to decide as another. Their report was referred to the Committee of the Whole House on the state of the Union, and there it was discussed. If in this case the Committee of the Whole should concur with the Judiciary Committee in their view of the case, then the House would appoint a committee to draft articles of impeachment. These articles would be considered and adopted by the House. Until after this second decision the accused would not be called upon to answer. As to the course pursued by the Pennsylvania house in a similar case, it had never met his approval.

The House agreed to the resolution proposed by Mr. Pettis without division.

Judge Peck did not avail himself of the permission to come before the House and make an oral statement; but on April 14[1] the Speaker laid before the House a letter from Judge Peck transmitting his "explanation in answer to the charges," with documents referred to in the answer.

The House decided that the explanation should be read, but after a time the reading was suspended and the statement alone having been ordered printed, it was, with the documents, referred to the Committee of the Whole House on the state of the Union.

2367. Peck's impeachment, continued.

After consideration in Committee of the Whole, the House concurred in the proposition to impeach Judge Peck.

The impeachment of Judge Peck was only for "high misdemeanors in office."

Forms and ceremonies of carrying the impeachment of Judge Peck to the Senate.

The impeachment of Judge Peck was carried to the Senate by a committee of two.

After discussing precedents the Senate appointed a committee to consider the message impeaching Judge Peck.

The Blount precedent for requiring bonds of the respondent was discussed adversely in the Peck case.

Mr. Senator Benton was excused from voting on a preliminary question in the Peck impeachment.

On April 21, 22, 23, and 24[2] the Committee of the Whole House on the state of the Union considered the question of impeachment, the debate being on a resolution proposed, as follows, by Mr. Buchanan:

Resolved, That James H. Peck, judge of the district court of the United States for the district of Missouri, be impeached of high misdemeanors in office.

Mr. Edward Everett, of Massachusetts, moved to amend the resolution by striking all out after the word "*Resolved*" and inserting as follows:

That though, on the evidence now before it, this House does not approve of the conduct of James H. Peck, judge of the district court of the United States for the district of Missouri, in his proceeding by attachment against Luke E. Lawless for alleged contempt of the said court, yet there is not sufficient evidence of evil intent to authorize the House to impeach the said judge of high misdemeanors in office.

This amendment was disagreed to.

The resolution was then agreed to, ayes 113, negative not taken.

The Committee of the Whole then rose and reported the resolution to the House, whereupon the question was put:

Will the House concur with the Committee of the Whole House [on the state of the Union] in the adoption of the said resolution?

and there were ayes 123, nays 49.[3]

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[1] House Journal, p. 532; Debates, p. 789; House Report, No. 359.

[2] House Journal, pp. 558, 560, 564, 565; Debates, pp. 810, 814, 818.

[3] It was stated later by Mr. Manager Spencer, in his argument to the high court, that this decision was not at all on party lines. (See Report of the trial of James H. Peck, p. 289.)

So the resolution was agreed to.

It was then [1]—

Ordered, That Mr. Buchanan and Mr. Henry R. Storrs, of New York, be appointed a committee to go to the Senate and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach James H. Peck, judge of the district court of the United States for the district of Missouri, of high misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same.

Ordered, That the committee do demand that the Senate take order for the appearance of the said James H. Peck to answer to said impeachment.

On motion of Mr. Henry R. Storrs, of New York—

Resolved, That a committee be appointed to prepare and report to this House articles of impeachment against James H. Peck, district judge of the United States for the district of Missouri, for high misdemeanors in his said office.

And Mr. Buchanan, Mr. Storrs, of New York; Mr. George McDuffie, of South Carolina; Mr. Ambrose Spencer, of New York, and Mr. Charles A. Wickliffe, of Kentucky, were appointed the said committee.

All of this committee were from among those who had voted in favor of the impeachment.

On April 26 [2]—

Ordered, That James H. Peck have leave to withdraw his memorials and the documents which accompanied the same.

On April 26,[3] in the Senate Messrs. Buchanan and Storrs, Members of the House of Representatives, with a message from that House, were announced, and, having taken the seats assigned them,

The President [4] informed them that the Senate was ready to receive any communication they might have to make.

Mr. Buchanan then rose and said:

We are commanded, in the name of the House of Representatives and of all the people of the United States, to impeach James H. Peck, judge of the district court of Missouri, of high misdemeanors in office, and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same, and we do demand that the Senate take order for the appearance of the said James H. Peck to answer to said impeachment.

Messrs. Buchanan and Storrs, having retired,

Mr. Littleton W. Tazewell, of Virginia, rose and said that in looking over similar cases for the purpose of ascertaining what would be the proper course of proceeding, he discovered that messages, similar in most particulars to the one just received, had been presented to the Senate in three cases. The first was the case of Blount, one of the Members of this body; the next was that of John Pickering, judge of the district court of New Hampshire, and the third was that of Judge Chase. Upon each of these cases there seemed to have been some anxious consideration in order to adopt the course most proper to be pursued. Mr. Tazewell

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[1] House Journal, pp. 566, 567; Debates, p. 819.

[2] House Journal, p. 670.

[3] Senate Journal, p. 269; Debates, pp. 383, 384.

[4] John C. Calhoun, of South Carolina, Vice-President, and President of the Senate.

would state in what the proceedings in these cases differed. The case of Mr. Blount, being the first of the kind that had ever occurred, presented so anomalous a practice that it never could be referred to as a precedent. The other two were consistent with the general principles of law and justice. From these it seems that it had been settled that when the House of Representatives informed the Senate that they were about to present articles of impeachment a select committee was appointed to take the subject into consideration and report what measures were proper to be taken. He would read for the information of the Senate the cases as they occurred.

Mr. Tazewell, having read the precedents in the cases of Blount, Pickering, and Chase, said that as to the precedent in the case of Blount the idea of calling upon an individual to enter into a recognizance to appear at no named time at no given place to answer charges not yet set forth in articles of impeachment was so manifestly contrary to justice that the Senate itself seemed to have abandoned it. Therefore he concluded that the Blount case would not be considered a fit precedent, so he moved the following resolution to the message:

Resolved, That it be referred to a select committee, to consist of three members, to consider and report thereon.

This resolution was agreed to.

The Senate then proceeded to ballot for the committee.

Mr. Thomas H. Benton, of Missouri, asked to be excused from voting on the question, and the question being taken he was excused.

Then the committee were chosen, as follows: Messrs. Tazewell, Samuel Bell, of New Hampshire, and Daniel Webster, of Massachusetts.

On the same day, in the House,[1] Mr. Buchanan reported that, in obedience to the order of the House, they had been to the Senate, and in the name of the House of Representatives and of all the people of the United States had impeached James H. Peck, judge, etc., of high misdemeanors in office; that the committee had acquainted the Senate that the House of Representatives would, in due time, exhibit particular articles of impeachment against the said James H. Peck and make good the same, and that the committee had demanded that the Senate take order for the appearance of the said James H. Peck to answer to the said impeachment.

On April 27 [2] in the Senate, Mr. Tazewell, from the Select Committee appointed on the subject, made the following report; which was concurred in by the Senate:

Whereas the House of Representatives on the 26th of the present month, by two of their members, Messrs. Buchanan and Storrs, of New York, at the bar of the Senate, impeached James H. Peck, judge of the district court of the United States for the district of Missouri, of high misdemeanors in office, and acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same; and likewise demanded that the Senate take order for the appearance of the said James H. Peck, to answer the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

And the committee further recommended to the Senate that the Secretary of the Senate be directed to notify the House of Representatives of the foregoing resolution.

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[1] House Journal, p. 671.

[2] Senate Journal, p. 271; Debates, p. 385.

Accordingly, after the report had been concurred in, it was

Ordered, That the Secretary notify the House of Representatives accordingly.

On the same day the message was communicated to the House.[1]

2368. Peck's impeachment, continued.

The respondent in the Peck impeachment communicated with the Senate as to the trial before articles had been presented.

The article of impeachment against Judge Peck was considered in Committee of the Whole before being agreed to by the House.

All of the committee who framed the article in the Peck case had voted for the impeachment. (Footnote.)

The article in the Peck impeachment appears in the House Journal on the day of its adoption.

The managers of the Peck impeachment were chosen by ballot, a majority vote being required for election.

Instance wherein the Journal recorded the names of the tellers on a vote by ballot.

Form of resolutions providing for carrying to the Senate the article impeaching Judge Peck.

All the managers in the Peck trial were of those who had voted for impeachment.

On April 28[2] the Vice-President communicated to the Senate two letters from Judge Peck, notifying the Senate of his intention to go to Baltimore, where he should remain some days; and requesting that, in the arrangement of the Senate chamber preparatory to his impeachment, a seat might be assigned him by which he might avoid facing the windows. The letters, having been read, were laid on the table.

On April 29,[3] Mr. Buchanan, from the committee appointed for the purpose, reported an article, to be exhibited to the Senate of the United States in behalf of themselves and of all the people of the United States, against Judge Peck, a judge of the district court of the United States for the district of Missouri, in maintenance and support of their impeachment against him. It was laid on the table and directed to be printed.

On April 30,[4] on motion of Mr. Buchanan,

Ordered, That the article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, be committed to the Committee of the Whole House on the state of the Union.

On May 1,[5] the article was considered in Committee of the Whole, and, after a verbal amendment, was reported favorably to the House.

And the question was then put:

Will the House adopt the said article, as its article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri?

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[1] House Journal, pp. 573, 574.

[2] Senate Journal, p. 272.

[3] House Journal, p. 584; Debates, p. 863.

[4] House Journal, p. 588; Debates, p. 866.

[5] House Journal, pp. 591–596; Debates, p. 869.

And it passed in the affirmative, without division.

The article [1] appears in full in the Journal of the House of this date.

On motion of Mr. Buchanan,

Resolved, That five managers be appointed, by ballot, to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, on the part of this House.

The House proceeded to the appointment of five managers, by ballot, when the following gentlemen received a majority of votes, and were appointed, viz: James Buchanan, of Pennsylvania; Henry R. Storrs, of New York; George McDuffie of South Carolina; Ambrose Spencer, of New York, and Charles Wickliffe, of Kentucky.

The first four were elected on the first ballot. But four ballots were taken before a majority was given for Mr. Wickliffe.

The Journal records that Messrs. William McCoy, of Virginia, Daniel H. Miller, of Pennsylvania, and Robert Desha, of Tennessee, were appointed tellers to examine the ballots on the vote.

The managers were the same as the committee appointed to prepare the article of impeachment; and all had been favorable to the impeachment.

On motion of Mr. Buchanan, it was

Resolved, That the article agreed to by this House, to be exhibited, in the name of themselves and of all the people of the United States, against James H. Peck, in maintenance of their impeachment against him for high misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

On motion of Mr. Buchanan, it was

Resolved, That a message be sent to the Senate, to inform them that this House have appointed managers to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, and have directed the said managers to carry to the Senate the article agreed upon by this House, to be exhibited in maintenance of their impeachment against the said James H. Peck, and that the Clerk of this House do go with said message.

2369. Peck's impeachment continued.

The message announcing to the Senate that an article impeaching Judge Peck would be presented gave the names of the managers.

The Senate adopted a rule prescribing ceremonies for receiving as a court the articles impeaching Judge Peck.

Form of oath prescribed for Senators in the Peck trial.

Form of proclamation of the Sergeant-at-Arms when articles of impeachment against Judge Peck were to be presented.

On May 3,[2] in the Senate, the Clerk of the House delivered this message:

Mr. President, I am directed to inform the Senate that the House of Representatives have appointed Mr. Buchanan, of Pennsylvania, etc. (naming the others), managers to conduct the impeachment against James H. Peck, judge of, etc.; and have directed the said managers to carry to the Senate the articles agreed upon by the House to be exhibited in maintenance of their impeachment against the said James H. Peck.

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[1] As shown above, the committee which framed this article was composed entirely of Members who voted for the impeachment.

[2] Senate Journal, p. 282; Debates, p. 405.

The message having been delivered and read, on motion by Mr. Tazewell, it was

Resolved, That at 12 o'clock to-morrow the Senate will resolve itself into a court of impeachment, at which time the following oath or affirmation shall be administered by the Secretary to the President of the Senate, and by him to each Member of the Senate, viz:

"I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri, I will do impartial justice according to law."

Which court of impeachment being thus formed will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment, in the name of themselves and of all the people of the United States, against James H. Peck, judge of the district court of the United States for the district of Missouri, pursuant to notice given to the Senate this day by the House of Representatives that they had appointed managers for the purposes aforesaid; and that the Secretary of the Senate lay this resolution before the House of Representatives.

Resolved, That after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against James H. Peck, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri." After which the articles shall be exhibited and the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

On the same day the first of the above resolutions was communicated to the House of Representatives by message.[1]

On May 4[2] the Senate resolved itself into a high court of impeachment,[3] and the Secretary administered the prescribed oath to the Vice-President, who then administered it in turn to the Senators.

The managers on the part of the House of Representatives appeared and were admitted; and Mr. Buchanan, their chairman, having announced that they were the managers instructed by the House of Representatives to exhibit a certain article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, they were requested by the Vice-President to take seats assigned them within the bar; and the Sergeant-at-Arms was directed to make proclamation in the words following:

Oyez! Oyez! Oyez! All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri.

2370. Peck's impeachment, continued.

The article of impeachment against Judge Peck.

The article of impeachment in the Peck case was signed by the Speaker and attested by the Clerk.

The article of impeachment in the Peck case was read by the chairman of the managers, and appears in full on the journal of the trial.

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[1] House Journal, p. 603.

[2] Senate Impeachment Journal, second session Twenty-first Congress, pp. 240–243; Debates, pp. 411–413.

[3] During this trial the court is described by the singular number "impeachment." In former trials the word has been "impeachments."

Having laid the article impeaching Judge Peck on the Senate table, the managers returned and reported verbally to the House.

The article of impeachment against Judge Peck having been presented, the Senate ordered a writ of summons to issue, and informed the House thereof.

After which the managers rose, and Mr. Buchanan, their chairman, read the following article, which appears in full in the journal of the impeachment:

Article exhibited by the House of Representatives of the United States, in the name of themselves, and of all the people of the United States, against James H. Peck, judge of the district court of the United States for the district of Missouri, in maintenance and support of their impeachment against him for high misdemeanors in office.

ARTICLE.

That the said James H. Peck, judge of the district court of the United States for the district of Missouri, at a term of the said court, holden at St. Louis, in the State of Missouri, on the 4th Monday in December, 1825, did, under and by virtue of the power and authority vested in the said court, by the act of the Congress of the United States, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," approved on the 26th day of May, 1824, render a final decree of the said court in favor of the United States, and against the validity of the claim of the petitioners, in a certain matter or cause depending in the said court, under the said act, and before that time prosecuted in the said court, before the said judge, by Julie Soulard, widow of Antoine Soulard, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs at law of the said Antoine Soulard, petitioners against the United States, praying for the confirmation of their claim, under the said act, to certain lands situated in the said State of Missouri; and the said court did, thereafter, on the 30th day of December, in the said year, adjourn to sit again on the third Monday in April, 1826.

And the said petitioners did, and at the December term of the said court, holden by and before the said James H. Peck, judge as aforesaid, in due form of law, under the said act, appeal against the United States from the judgment and decree so made and entered in the said matter, to the Supreme Court of the United States; of which appeal, so made and taken in the said district court, the said James H. Peck, judge of the said court, had then and there full notice. And the said James H. Peck, after the said matter or cause had so been duly appealed to the Supreme Court of the United States, and on or about the 30th day of March, 1826, did cause to be published, in a certain public newspaper, printed at the city of St. Louis, called "The Missouri Republican," a certain communication, prepared by the said James H. Peck, purporting to be the opinion of the said James H. Peck, as judge of the said court, in the matter or cause aforesaid, and purporting to set forth the reasons of the said James H. Peck, as such judge, for the said decree, and that Luke Edward Lawless, a citizen of the United States, and an attorney and counsellor at law in the said district court, and who had been of counsel for the petitioners in the said court, in the matter aforesaid, did, thereafter, and on or about the 8th day of April, 1826, cause to be published in a certain other newspaper, printed at the city of St. Louis, called "The Missouri Advocate and St. Louis Enquirer," a certain article signed "A Citizen," and purporting to contain exposition of certain errors of doctrine and fact alleged to be contained in the opinion of the said James H. Peck, as before that time so published, which publication by the said Luke Edward Lawless was to the effect following, viz:

"To the Editor:

"SIR: I have read, with the attention which the subject deserves, the opinion of Judge Peck on the claim of the widow and heirs of Antoine Soulard, published in the Republican of the 30th ultimo. I observe that, although the judge has thought proper to decide against the claim, he leaves the grounds of his decree open for further discussion.

"Availing myself, therefore, of this permission, and considering the opinion so published to be a fair subject of examination to every citizen who feels himself interested in, or aggrieved by, its operation, I beg leave to point the attention of the public to some of the principal errors which I

think I have discovered in it. In doing so, I shall confine myself to little more than an enumeration of those errors, without entering into any demonstration or developed reasoning on the subject. This would require more space than a newspaper allows, and, besides, is not, as regards most of the points, absolutely necessary.

"Judge Peck, in this opinion, seems to me to have erred in the following assumptions, as well of fact as of doctrine:

"1. That, by the ordinance of 1754, a subdelegate was prohibited from making a grant in consideration of services rendered or to be rendered.

"2. That a subdelegate in Louisiana was not a subdelegate, as contemplated by the said ordinance.

"3. That O'Reily's regulations, made in February, 1770, can be considered as demonstrative of the extent of the granting power of either the governor-general or the subdelegates, under the royal order of August, 1790.

"4. That the royal order of August, 1770 (as recited or referred to in the preamble to the regulations of Morales, of July, 1799), related exclusively to the governor-general.

"5. That the word 'mercedes,' in the ordinance of 1754, which, in the Spanish language, means 'gifts,' can be narrowed, by anything in that ordinance, or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money.

"6. That O'Reily's regulations were in their terms applicable, or ever were in fact applied to, or published in, upper Louisiana.

"7. That the regulations of O'Reily have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them.

"8. That the limitations to a square league of grants to new settlers in Opelousas, Attakapas, and Natchitoches (in eighth article of O'Reily's regulations) prohibits a larger grant in upper Louisiana.

"9. That the regulations of the governor-general, Gayoso, dated 9th September, 1797, entitled 'Instructions to be observed for the admission of new settlers,' prohibit, in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until February, 1804.

"10. That the complete titles made by Gayoso are not to be referred to as affording the construction made by Gayoso himself, of his own regulations.

"11. That, although the regulations of Morales were not promulgated as law in upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, or must be presumed, 'from the official station which he held,' to have had notice, of their terms.

"12. That the regulations of Morales 'exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.'

"13. That the complete titles (produced to the court) made by the governor-general, or the intendant-general, though based on incomplete titles, not conformable to the regulations of O'Reily, Gayoso, or Morales, afford no inference in favor of the power of the lieutenant-governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees.

"14. That the language of Morales himself, in the complete titles issued by him, on concessions made by the lieutenant-governor of upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations.

"15. That the uniform practice of the subdelegates, or lieutenant-governor of upper Louisiana, from the first establishment of that province to the 10th March, 1804, is to be disregarded as proof of law, usage, or custom therein.

"16. That the historical fact that nineteen-twentieths of the titles to lands in upper Louisiana, were not only incomplete but not conformable to the regulations of O'Reily, Gayoso, or Morales at the date of the cession to the United States, affords no inference in favor of the general legality of those titles.

"17. That the fact that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the Government and population of Louisiana as property, salable, transferable, and the subject of inheritance and distribution ab intestato, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession, or of the law of nations.

"18. That the laws of Congress heretofore passed in favor of incomplete titles furnish no argument or protecting principle in favor of those titles of a precisely similar character, which remain unconfirmed.

"In addition to the above, a number of other errors, consequential on those indicated, might be stated. The judge's doctrine as to the forfeiture which he contends is inflicted by Morales's regulations, seems to me to be peculiarly pregnant with grievous consequences. I shall, however, not tire the reader with any further enumeration, and shall detain him only to observe, by way of conclusion, that the judge's recollection of the argument of the counsel for the petitioner, as delivered at the bar, differs materially from what I can remember, who also heard it. In justice to the counsel I beg to observe that all that I have now submitted to the public has been suggested by that argument as spoken, and by the printed report of it, which is even now before me.

"A CITIZEN."

And the said James H. Peck, judge as aforesaid, unmindful of the solemn duties of his station, and that he held the same, by the Constitution of the United States, during good behavior only, with intention wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke Edward Lawless, under color of law, did, thereafter, at a term of the said district court of the United States for the district of Missouri, begun and held at the city of St. Louis, in the State of Missouri, on the 3d Monday in April, 1826, arbitrarily, oppressively, and unjustly, and under the further color and pretense that the said Luke Edward Lawless was answerable to the said court for the said publication signed "A Citizen," as for a contempt thereof, institute, in the said court, before him, the said James H. Peck, judge as aforesaid, certain proceedings against the said Luke Edward Lawless, in a summary way, by attachment issued for that purpose by the order of the said James H. Peck, as such judge, against the person of the said Luke Edward Lawless, touching the said pretended contempt, under and by virtue of which said attachment the said Luke Edward Lawless was, on the 21st day of April, 1826, arrested, imprisoned, and brought into the said court, before the said judge, in the custody of the marshal of the said State; and the said James H. Peck, judge as aforesaid, did, afterwards, on the same day, under the color and pretenses aforesaid, and with the intent aforesaid, in the said court, then and there, unjustly, oppressively, and arbitrarily, order and adjudge that the said Luke Edward Lawless, for the cause aforesaid, should be committed to prison for the period of twenty-four hours, and that he should be suspended from practicing as an attorney or counsellor at law in the said district court for the period of eighteen calendar months from that day, and did then and there further cause the said unjust and oppressive sentence to be carried into execution; and the said Luke Edward Lawless was, under color of the said sentence, and by the order of the said James H. Peck, judge as aforesaid, thereupon suspended from practicing as such attorney or counsellor in the said court for the period aforesaid, and immediately committed to the- common- prison in the said city of St. Louis, to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the people of the United States.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusations or impeachment, against the said James H. Peck, and also of replying to his answers which he shall make unto the article herein preferred against him, and of offering proof to the same, and every part thereof, and to all and every other articles, accusation, or impeachment, which shall be exhibited by them as the case shall require, do demand that the said James H. Peck may be put to answer the misdemeanors herein charged against him, and that such proceedings, examinations, trials, and judgments, may be thereupon had and given, as may be agreeable to law and justice.

A. STEVENSON,
Speaker of the House of Representatives, United States.

Attest:

M. ST. CLAIR CLARKE,
Clerk House of Representatives, United States.

The Vice-President then informed the managers that the Senate would take proper order thereon, of which the House of Representatives should have due notice.

The managers, by their chairman, delivered the article of impeachment at the table of the Secretary, and then withdrew.

On motion by Mr. Tazewell, it was

Resolved, That the Secretary be directed to issue a summons, in the usual form, to James H. Peck, judge of the district court of the United States for the district of Missouri, to answer a certain article

of impeachment exhibited against him by the House of Representatives on this day: that the said summons be returnable here on Tuesday next, the l1th instant, and be served by the Sergeant-at-Arms, or some person to be deputed by him, at least three days before the return day thereof; and that the Secretary communicate this resolution to the House of Representatives.

On motion by Mr. Tazewell,

The court then adjourned to Tuesday next at 12 o'clock.

On the same day, in the House, the managers reported: [1]

That they did, this day, carry to the Senate, then in session as a high court of impeachment, the article of impeachment agreed to by this House on the 1st instant, and that they were informed that they would take proper measures relative to the said impeachment, of which the House would be duly notified.

A little later, on the same day, the Secretary of the Senate communicated [2] a message:

IN SENATE OF THE UNITED STATES,
HIGH COURT OF IMPEACHMENT,
Tuesday, May 4, 1830.

The United States *v.* James H. Peck.

Resolved, That the Secretary be directed to issue a summons, etc. [here follows the text of the resolution already given above].

Attest:

WALTER LOWRIE, *Secretary.*

2371. Peck's impeachment, continued.

Form of proclamation of Sergeant-at-Arms enjoining silence at the opening of the high court of impeachment for the Peck trial.

Form used by the Sergeant-at-Arms in calling Judge Peck to appear and answer the article.

Form of return made by the Sergeant-at-Arms in the Peck trial, and oath taken by him at the time.

Ceremonies at the appearance of Judge Peck in response to the writ of summons.

Judge Peck appeared in person, attended by counsel, in answer to the writ of summons.

Having appeared, Judge Peck asked time to prepare his answer, accompanying the request with an affidavit.

The Senate declined to allow Judge Peck until the next session of Congress to file his answer, and set an earlier date.

The answer of Judge Peck to the article of impeachment was ordered to be filed with the Secretary.

The Senate notified the House of the date fixed for Judge Peck to file his answer.

On May 11,[3] the high court of impeachment was opened by proclamation of silence by the Sergeant-at-Arms, as follows:

Oyez! Oyez! Oyez! Silence is commanded on pain of imprisonment while the Senate of the United States is sitting as a high court of impeachment for the trial of James H. Peck, judge of the district court of the United States for the district of Missouri.

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[1] House Journal, p. 605; Debates, p. 872.

[2] House Journal, p. 606.

[3] Senate Impeachment Journal, second session Twenty-first Congress, pp. 244–248; Debates, p. 432.

The return of the Sergeant-at-Arms of the summons issued to James H. Peck was read, as follows:

I, Mountjoy Bayly, Sergeant-at-Arms of the Senate of the United States, in obedience to the within summons, to me directed, did proceed to Barnum's Hotel, in the city of Baltimore, on Thursday, the 6th instant, and did then and there deliver to, and leave with, the within-named James H. Peck a true copy of the within writ of summons and a true copy of the precept thereon indorsed, and did show him both.

MOUNTJOY BAYLY.

WASHINGTON, *May 8, 1830.*

The Secretary then administered the following oath to the Sergeant-at-Arms:

You, Mountjoy Bayly, Sergeant-at-Arms to the Senate of the United States, do swear that the return made and subscribed by you upon the process issued on the 4th day of May, instant, by the Senate of the United States against James H. Peck, judge of the district court of the United States for the district of Missouri, is truly made, and that you have performed said services as therein described. So help you God.

Proclamation was then made as follows:

Oyez! oyez! oyez! James H. Peck, judge of the district court of the United States for the district of Missouri, come forward and answer the article of impeachment exhibited against you by the House of Representatives.

Whereupon James H. Peck appeared at the bar, attended by William Wirt, as his counsel, and they were seated within the bar.

The Vice-President informed Judge Peck that the court was ready to receive his answer.

Judge Peck rose and addressed the Senate as follows:

Mr. President: I appear, in obedience to a summons from this honorable court, to answer an article of impeachment exhibited against me by the honorable the House of Representatives; and I have a motion to make, which I request may be done by my counsel.

The Vice-President having signified the willingness of the court to receive the motion,

Mr. Wirt rose and read a letter addressed to the President of the Senate and signed by the respondent, in which were set forth the necessity of time to prepare a defense, and in which was also included a motion, respectfully submitted:

1. That a reasonable time may be allowed me to prepare my answer and plea; and, for this purpose, I ask until the 25th day of the present month.

2. That, after my answer and plea shall be filed, process for witnesses may be awarded to me, and a reasonable time may be allowed to collect my witnesses and proofs from the State of Missouri.

The communication also referred to an accompanying affidavit. In this affidavit James H. Peck made oath that certain named persons were material witnesses for him, that there were other witnesses not named who would be material, and that there were certain public records needful to his defense; and that in order to produce these the delay asked for was not too much. He further made oath that his application was not for purposes of delay.

The reading having concluded, Mr. Daniel Webster, of Massachusetts, then submitted the following order:

Ordered, That James H. Peck file his answer and plea with the Secretary of the Senate to the article of impeachment exhibited against him by the House of Representatives, on or before the second Monday of the next session of Congress.

On motion of Mr. George M. Bibb, of Kentucky, this order was amended by striking out all after the words "on or before" and inserting "the 25th day of the present month;" and as amended the order was agreed to.

It was further—

Ordered, That the Secretary notify the foregoing order to the House of Representatives and to James H. Peck.

On the same day this message was duly communicated to the House.[1]

2372. Peck's impeachment, continued.

In the Peck trial new rules were not adopted, the rules framed in the Chase trial being considered as operative.

On May 11,[2] also, the Senate (not the high court of impeachment) agreed to the following:

Ordered, That the Secretary of the Senate direct copies of the rules of proceedings, prescribed in cases of impeachment, to be printed for the use of the Members, and laid on their tables on the first day of the next session of the court; and also that copies be furnished to the managers of the impeachment in the case of James H. Peck and to the accused and his counsel.

The rules referred to are those agreed upon at the trial of Samuel Chase. They are printed as a footnote in the Journal of the impeachment; but they were not acted on in any way by the court at this time, being treated as existing rules.[3]

2373. Peck's impeachment continued.

In the Peck trial the House decided to attend its managers at the presentation of the answer but not during the trial.

On May 25,[4] in the House, Mr. Storrs, of New York, observed that, as the Senate would meet to-day as a court of impeachment for the purpose of receiving the answer of the respondent, Judge Peck, it was indispensable that the House come to some order immediately on the subject. He therefore moved a resolution that the House would, in Committee of the Whole, attend the Senate during the trial of James H. Peck. Mr. Storrs argued that the resolution was in accordance with former usage and that the House should be present during every day of the trial. The appointment of managers was not intended to dispense with the presence of the House. The managers could take no step without consulting the House, which must, therefore, be present.

On the other hand, Mr. Pettis and Mr. Joel B. Sutherland, of Pennsylvania, insisted that the presence of the managers alone would be sufficient, and that if the House were to attend daily the other business would suffer. Mr. Sutherland said it would be very proper to go to the Senate to-day, and be present at the opening of the court for the impeachment, and receiving the answer of the accused; but afterwards, unless some very pressing occasion should require it, the presence of the House would be unnecessary. The object in appointing managers was to leave it to them to conduct the impeachment. He cited Jefferson's Manual to

[1] House Journal, p. 625.

[2] Senate Journal, first session Twenty-first Congress, p. 296.

[3] Senate Impeachment Journal, second session Twenty-first Congress, pp. 248–250.

[4] House Journal, p. 714; Debates, p. 1134.

sustain his opinion, and moved to modify the resolution so as to provide that the House would attend this day.

In accordance with this suggestion, the resolution was modified and agreed to as follows:

Resolved, That this House will, this day, at such hour as the Senate shall appoint, resolve itself into Committee of the Whole, and attend in the Senate on the trial of the impeachment there pending of James H. Peck, judge of the district court of the United States for the district of Missouri.

2374. Peck's impeachment continued.

Arrangement of the Hall and ceremonies at the presentation of Judge Peck's answer.

Form of answer of Judge Peck in answer of the article of impeachment.

Judge reek, in his plea, declared that the acts charged were justified by the law of the land.

The answer in the Peck case was read by counsel for respondent and then delivered to the Secretary.

Form of journal entry describing the attendance of the House in Committee of the Whole at the Peck trial.

The House was furnished by the court with a copy of Judge Peck's answer.

On the same day, May 25,[1] in the high court of impeachment, at the hour of 12 o'clock, the court was opened by proclamation in the usual form.

On motion by Mr. Webster, it was

Ordered, That the Secretary give notice to the House of Representatives that the Senate are now in their Chamber and are ready to proceed on the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri; and that seats are provided for the accommodation of the Members of the House of Representatives.

And this notice was duly received by the House.[2]

In the high court seats had been arranged on the right and left of the Chair, for the accommodation of the Senators, and their seats assigned to the managers and Members of the House of Representatives, and the accused and his counsel.

Judge Peck appeared, accompanied by William Wirt and Jonathan Meredith as his counsel, and they occupied seats assigned them to the right of the Chair.

The managers and Members of the House of Representatives appeared and took the seats usually occupied by the Senate.

The Vice-President then asked Judge Peck whether he was prepared to answer the article of impeachment exhibited against him.

Judge Peck replied that his answer and plea were prepared and desired that they might be read by his counsel.

The Vice-President asked Judge Peck whether the answer now to be made was to be considered as his final answer on which he intended to rely; and the judge having answered in the affirmative, the counsel was directed to proceed to read it.

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[1] Senate Impeachment Journal, second session Twenty-first Congress, pp. 249–326; Debates, pp. 455, 456.

[2] House Journal, p. 717.

Mr. Meredith read the answer (which occupied upward of two hours). In form the answer began as follows:

The answer of James H. Peck to the article of impeachment exhibited against him by the honorable House of Representatives of the United States.

The said James H. Peck, saving to himself all exceptions whatsoever to the said article and the charges therein contained, answers and says:

Here follows the answer in detail, and the conclusion:

In all which actions and doings of this respondent in the premises, he avers that he was supported and justified by the Constitution and laws of the land, and that he will be prepared to make good this averment at such time as this honorable court shall appoint.

And, solemnly denying the intention charged to him by the article of impeachment, "wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke E. Lawless, under color of law," and asserting, in the presence of the Supreme Searcher of Hearts, that in all that he did in the premises he was actuated by the purest sense of what he deemed a high official duty and was, as he believed and still confidently believes, well warranted and supported in every step by the Constitution and laws of the land, this respondent, for plea to the said article of impeachment, saith that he is not guilty of any high misdemeanor, as in and by the said article is alleged, and this he prays may be inquired of by this honorable court in such manner as law and justice shall seem to them to require.

JAMES H. PECK.

This answer, with sundry exhibits referred to therein, is spread on the Journal of the high court of impeachment. It was delivered to the Secretary of the Senate after the reading.

Mr. Storrs, in behalf of the managers, moved

That they have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer of the respondent, which was agreed to.

On motion by Mr. Webster it was

Ordered, That when this court adjourn, it adjourn to meet again on the second Monday of the next session of Congress, at 12 o'clock, then to proceed with the said impeachment.

Mr. Wirt desired to know whether blank summons as for the attendance of witnesses would be allowed to the respondent.

The Vice-President replied that they would.

The court then adjourned to the second Monday of the next session of Congress.

The House Journal of this day has this entry: [1]

The House then, in pursuance of a resolution agreed to this day, resolved itself into a Committee of the Whole House, and proceeded in that capacity to the Senate Chamber, to attend the trial by the Senate of the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri; and, after sometime spent therein, the committee returned into the Chamber of the House; and the Speaker having resumed the Chair, Mr. P. P. Barbour, of Virginia, from the said Committee of the Whole, reported that the committee had, according to order, attended the trial by the Senate of the said impeachment; that the answer and plea of the mid James H. Peck were delivered in their presence; that some progress was made in said trial, and that the Senate, sitting as a high court of impeachment, had adjourned to meet again on the second Monday of the next session of Congress, at 12 o'clock.

And on May 31 [2] the Congress adjourned.

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[1] Page 717.

[2] House Journal, p. 812.

2375. Peck's impeachment, continued.

A recess of Congress intervened between the filing of the answer and the presentation of the replication in the Peck trial.

Form of replication to Judge Peck's answer and forms of resolutions providing for its presentation.

Senators elected after the beginning of an impeachment trial are sworn as in the case of other Senators.

At the next session of Congress the proceedings were resumed where they had ended at the preceding session.

On December 13,[1] 1830, in the House,

Mr. Buchanan, on behalf of the managers appointed to conduct the impeachment against Judge James H. Peck, submitted the following report:

The committee of managers appointed by the House of Representatives to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, report that they have had under consideration the answer of Judge Peck to the article of impeachment exhibited against him by the House, and recommend the adoption of the following replication thereto:

REPLICATION.

By the House of Representatives of the United States to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment exhibited against him by the said House of Representatives.

The House of Representatives of the United States having considered the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment against him by them exhibited, in the name of themselves and of all the people of the United States, reply that the said James H. Peck is guilty in such manner as he stands impeached; and that the House of Representatives will be ready to prove their charges against him at such convenient time and place as shall be appointed for that purpose.

The replication being read was agreed to by the House.

Thereupon, on motion of Mr. Buchanan,

Resolved, That the foregoing replication be put into the answer and plea of the aforesaid James H. Peck on behalf of this House; and that the managers be instructed to maintain the said replication at the bar of the Senate, at such time as shall be appointed by the Senate.

Resolved, That a message be sent to the Senate to inform them that this House have agreed to a replication on their part to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment exhibited to the Senate against him by this House, and have directed the managers appointed to conduct the said impeachment to carry the said replication to the Senate, and to maintain the same at the bar of the Senate, at such time as shall be appointed by the Senate.

On the same day[2] the high court of impeachment was opened by proclamation,[3] and the President[4] administered the oath to Messrs. David J. Baker, of Illinois, and George Poindexter, of Mississippi, newly-elected Senators who had taken their seats at the first of the session.

On motion of Mr. Levi Woodbury, of New Hampshire,

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[1] Second session Twenty-first Congress, House Journal, pp. 47, 48; Debates, pp. 354, 355.

[2] Senate Impeachment Journal, pp. 326, 327; Debates, p. 3.

[3] The Debates say that this proclamation was made by the marshal of the District of Columbia.

[4] John C. Calhoun, of South Carolina, Vice-President and President of the Senate.

Ordered, That the Secretary inform the House of Representatives that the Senate are in their public Chamber, and are ready to proceed on the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri, and that seats are provided for the accommodation of the Members.

The message from the House of Representatives announcing that the managers had been directed to carry the replication was received.

The respondent, accompanied by Mr. Wirt and Mr. Meredith, his counsel, appeared at the bar of the Senate. They were conducted to seats, with a table before them, prepared for their convenience.

In a few minutes the managers to conduct the impeachment on the part of the House of Representatives also came in and took their seats.

Mr. Buchanan, one of the managers, rose and said that the managers, on the part of the House of Representatives, were ready to present the replication of that House, to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the articles of impeachment exhibited against him by that body. He then read the replication, after which it was handed to the Secretary to be filed.

2376. Peck's impeachment, continued.

In the Peck trial, after the witnesses had been called, the court granted the request of the managers for delay to await a material witness.

The President then informed the managers that they were at liberty to proceed in support of the article of impeachment exhibited.

On request of Mr. Buchanan the witnesses on behalf of the managers were called; and on request of Mr. Meredith the witnesses for the respondent were also called.

Then it was

Ordered, That the Secretary inform the House of Representatives that the Senate will, on Monday next, at 12 o'clock, be ready further to proceed on the trial of the impeachment of James H. Peck, judge. * * *

The court then adjourned to Monday next at 11 o'clock.

2377. Peck's impeachment continued.

The House attended its managers a portion of the time during the Peck trial, including the days of final argument.

The subject of attendance with the managers was discussed during the Peck trial, with citation of American and English precedents.

The court of impeachment provided that the House should be notified daily of its sittings.

The court of impeachment may adjourn over without interfering with session of the Senate in the interim.

When the managers had returned to the House,[1] a question was raised over the fact that the House itself had not attended the managers. Mr. Buchanan said that no motion had been made on the subject, and the managers had felt it their duty to go and present the replication without awaiting action. As to the question of attendance generally, with the permission of the House he would state the course that had been pursued by the managers. They had examined all the precedents

[1] Debates, p. 358.

which had occurred in this country to guide them to a correct performance of their duty. It was ascertained that since the adoption of the present Constitution there had been three impeachments, viz, those of Messrs. Blount and Pickering and Judge Chase. On the trial of the first two the House did not attend in a body, but left it to the managers to conduct the impeachment; on the trial of Judge Chase, they did attend every day. It not being considered by the managers of the pending trial that any principle so important as to interrupt the legislative business of the House was involved in the present case, they had gone to the Senate this day, as managers, and presented to that body the replication agreed upon by the House. Mr. Buchanan further remarked that he had consulted the English precedents. On the trial of Warren Hastings the House of Commons attended at the commencement of the trial, but they did not continue to do so. On the trial of the Earl of Macclesfield they did not attend until his conviction by the House of Lords; and then they attended in consequence of a message having been sent them by that body that they were ready to pronounce judgment on the impeached, if the House of Commons would attend and demand it.

This question arose from time to time during the trial. On December 20,[1] when the trial was to begin, Mr. Michael Hoffman, of New York, proposed an order that the House, from time to time, resolve itself into Committee of the Whole to attend, but after discussion as to the state of the general business before the House, it was decided to modify the proposition so as to provide merely for attendance on that day. On December 22,[2] a proposed order that the House attend each day until otherwise ordered was disagreed to, yeas 83, nays 88. On December 23,[3] by a vote of yeas 96, nays 30, it was—

Resolved, That during the trial of the impeachment now pending before the Senate this House will meet daily at the hour of 11 o'clock in the forenoon; and that, from day to day, it will resolve itself into a Committee of the Whole and attend said trial during the continuance thereof, and until the conclusion of the same.

The House acted in accordance with this resolution until January 4,[4] when the vote agreeing to it was reconsidered, and then the resolution was disagreed to, yeas 69, nays 118. Thereupon Mr. Kensey Johns, jr., of Delaware, proposed this resolution:

Resolved, That a message be sent by the Clerk of the House, informing the Senate that the House of Representatives decline further attendance during the trial of the impeachment of Judge Peck.

This was criticised as likely to give an impression that the House had abandoned the impeachment. Finally, after being amended, on motion of Mr. Storrs, the resolution was agreed to in this form:

Resolved, That the managers appointed to conduct the impeachment of James H. Peck be instructed to attend the trial of the said impeachment, at such times as the Senate shall appoint for that purpose; and that the attendance of the House be dispensed with until otherwise ordered by the House, and that the Clerk communicate this resolution to the Senate.

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[1] Debates, p. 378; House Journal, p. 80.

[2] Debates, p. 379; House Journal, pp. 91, 92.

[3] Debates, p. 382; House Journal, p. 97.

[4] Debates, p. 399; House Journal, p. 140.

On January 17[1] it was resolved by the House that "during the argument of counsel in the impeachment" this House "will, from day to day, resolve itself into a Committee of the Whole on the state of the Union and attend the same."

And in accordance with this order the House attended until the end of the session.

On December 24,[2] after the House had decided to attend each day, the high court of impeachments—

Ordered, That the Secretary notify the House of Representatives, from day to day, that the Senate is sitting as a high court of impeachment for the trial of James H. Peck, judge of the district court of the United States for the district of Missouri.

And on January 3, 1831,[3] when it was ordered that the adjournment of the high court on that day (a Monday) be to Wednesday, it was also ordered that the House be informed. It may be noted that while the high court of impeachment adjourned over January 4, the Senate itself was in session on that day.

2378. Peck's impeachment continued.

The presentation of evidence and the arguments in the Peck trial.

On the final arguments in the Peck trial the managers had the opening and closing.

In the Peck trial a Senator was examined as a witness on behalf of respondent.

On receipt of a letter from a physician, showing the illness of one of Judge Peck's counsel, the court adjourned.

On Monday, December 20,[4] the court having been opened by proclamation, and the managers accompanied by the House of Representatives, and the respondent accompanied by his counsel having attended, at the request of Mr. Meredith the witnesses in behalf of the respondent were called. Although one or two material witnesses failed to answer, Mr. Meredith announced that they were ready to go to trial.

The President informed the managers that they might now proceed to substantiate their charge.

Mr. McDuffie thereupon proceeded to open the cause, and concluded on the succeeding day. Then, on December 21[5] and thereafter until January 5, 1831, witnesses were called for the managers, the same being cross-examined on behalf of the respondent.

On January 5,[6] Mr. Meredith opened the defense and began the introduction of testimony, which continued to January 17.

On January 11,[7] Thomas H. Benton, a Senator from Missouri, was sworn on behalf of the respondent.

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[1] Debates, p. 518; House Journal, p. 186.

[2] Senate Impeachment Journal, p. 329.

[3] Senate Journal, pp. 67, 330.

[4] Senate Impeachment Journal, pp. 327, et seq.; Debates, p. 10.

[5] Senate Impeachment Journal, pp. 328–330.

[6] Journal, pp. 331–335; Annals, p. 26.

[7] Journal, p. 334; Debates, p. 28.

On January 13,[1] the Vice-President communicated a letter from the physician attending Mr. Wirt, one of the counsel for the respondent, stating that Mr. Wirt would be unable to attend until the 17th. Thereupon the high court adjourned until that date. Once previously it had adjourned for the same reason at request of counsel and with consent of managers.

On January 17,[2] Mr. Spencer, on behalf of the managers, commenced the argument in support of the article of impeachment, and on January 18, Mr. Wickliffe, also on behalf of the managers, continued.

On January 19,[3] Mr. Meredith commenced the argument on behalf of the respondent, and continued until January 22, when Mr. Wirt continued the argument for the respondent until January 25, when he concluded.

From January 26 to 29,[4] Messrs. Storrs and Buchanan occupied the time with the arguments for the managers.

2379. Peck's impeachment, continued.

In the arguments in the Peck trial the managers resisted the theory that impeachment might be only for indictable offenses.

Argument of Mr. Manager Spencer on the nature of impeachable offenses.

In the course of the argument the managers and counsel for respondent considered not only the evidence and law applicable to the article itself, but discussed the nature of the power of impeachment. Mr. Manager Spencer said:[5]

It is necessary to a right understanding of the impeachment to ascertain and define what offenses constitute judicial misdemeanors. A judicial misdemeanor consists, in my opinion, in doing an illegal act, colore officii, with bad motives, or in doing an act within the competency of the court or judge in some cases, but unwarranted in a particular case from the facts existing in that case, with bad motives. To illustrate the last proposition: The eighth article of the amendments of the Constitution forbids the requirement of excessive bail, the imposition of excessive fines, or the infliction of cruel or unusual punishments. If a judge should disregard these provisions, and from bad motives violate them, his offense would consist, not in the want of power, but in the manner of his executing an authority intrusted to him, and for exceeding a just and lawful discretion.

2380. Peck's impeachment continued.

Argument of Mr. Manager Wickliffe on the constitutional provisions relating to impeachment.

Mr. Manager Wickliffe said:[6]

I do not know that it will be contended by the counsel for the respondent, as it has been on a former impeachment before the Senate of the United States, with great ability and apparent confidence, "that a judge can not be impeached for any offense which is not indictable; that the Constitution declares the judges shall be removed from office by impeachment for treason, bribery, and other high crimes and misdemeanors;" consequently as nothing less than the commission of some offense which may be punishable by indictment, presentment, or information comes within the known interpretation of the terms "high crimes and misdemeanors," no act, judicial or otherwise, unless indictable, is impeachable.

I do not agree with this interpretation of the Constitution. * * *

I maintain the proposition that any official act committed or omitted by the judge, which is in violation of the condition upon which he holds his office, is an impeachable offense under the Constitution. * * *

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[1] Journal, p. 335; Debates, pp. 23, 27, 28.

[2] Journal, p. 335; Debates, p. 34.

[3] Journal, pp. 335, 336; Debates, p. 34.

[4] Journal, p. 337; Debates, p. 44.

[5] Report of the trial of James H. Peck, p. 290.

[6] Report of the trial of James H. Peck, pp. 308–310.

The framers of the Constitution wisely limited the punishment which this court may award, fixing a point beyond which you can not go, but leaving you in the exercise of a sound discretion to make it less than removal from office. They were governed by equal wisdom when they left the official delinquent to answer personally to the offended laws of the State in which he had committed any crime or misdemeanor against their injunctions.

The offense for which an officer may be impeached might not, in the judgment of his triers (though deserving punishment), require the infliction of the severer punishment, that of removal from and disqualification for office. It might not deserve both of these penalties, perhaps neither; a reprimand, a temporary suspension of his functions and salary, might, in particular cases, be a punishment equal to the official misdemeanor.

If nothing else had been said in this Constitution upon the subject of impeachment, who would doubt the plenitude of power, the nature of the punishment, or the objects upon which Congress could exercise it? But, sir, the members of the convention, as if solemnly impressed with the danger to the judiciary and other departments of the Government, resulting from the humanity and mercy of the members of the tribunal for the trial of impeachment; or, perhaps, looking at the dark side of the picture of human nature, believing it possible that the time might come when a judge or other officer, though stained with the foul crime of treason and bribery, or other high crimes and misdemeanors, would find favor in the sympathies, or cover in the bad passions of his triers, who would blush, however, to pronounce him not guilty in the face of conclusive evidence; but who would, nevertheless, diminish the punishment under the discretionary power in the first article, and leave the traitor or convicted felon to disgrace the judicial ermine or official robe. To guard against this possible state of the case, * * * the members of the convention intended, by the sixth section of the second article, to declare what shall be the punishment to be awarded by the court of impeachment for the enumerated offenses of treason, bribery, and other high crimes and misdemeanors; hence they declared that "the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." This language is imperative; it leaves you no discretion; you can not stop short of removal from office; you can not exceed it,

If the construction of the Constitution which was contended for in the impeachment to which I have referred be the true reading of the instrument, and it shall be decided that no offense, no conduct of an officer, unless it be a high crime and misdemeanor, within the technical meaning of these terms, and punishable by some known and existing criminal law, is impeachable, what would be the condition of our Government, and especially the judicial department? No matter what was the conduct of a judge in or out of court, if he kept himself without the pains and penalties enacted for the punishment of treason, felony, and vice, in the most degraded of civil society, no power exists to strip him of the judicial character which he degraded. He would, covered with disgrace and immorality, smile with contempt at your power, and shield himself under the imputed ignorance of the members of the convention.

A few cases will, I think, suffice to prove the fallacy of such a construction of the Constitution. Suppose a judge, who is bound to open his court at stated periods for the trial of causes, fulfills the letter of the law, opens his court at the regular stated terms, but as regularly adjourns, and refuses to hear and decide the causes pending in court. This, sir, would be no indictable offense under any law; yet I am inclined to believe this court would remove him from office for official misconduct, for misbehavior in office, a forfeiture of the condition upon which he held his commission.

Suppose a judge, under the influence of political feeling, * * * shall award to his favorite a new trial, in an important cause, against known law, would this be an indictable offense under any code of laws in force in this Government?

Suppose a judge shall forget the dignity which belongs to the station he fills, and to disregard that decorum which should ever regulate the conduct of a judge, in and out of court, shall, while in court, take advantage of his situation, and labor for two hours in pouring forth his abuse and vituperation upon a respectable and unoffending citizen, whom he has dragged before him by the strong arm of usurped power—in what court would you file your indictment against him, for a high misdemeanor? * * *

Take the case of the President of the United States. Suppose him base enough, or foolish enough, if you please, to refuse his sanction to any and every act which Congress may pass. This is a power which, according to the Constitution, he can exercise. Will it be contended that he could be indicted for it, as a misdemeanor, in any court, State or Federal? Yet where is the man who would hesitate to remove him from office by impeachment? If one of the heads of a department shall so far forget the

obligations of his official duty as to direct his power and patronage, not to the promotion of the welfare of the country, but with the known and avowed purpose of his own personal or political aggrandizement, who would think of finding an indictment in a criminal court of justice against him? Yet who would not remove him from office by impeachment?

If precedent is to have any authority in this court, I consider the question settled by the Senate of the United States in the trial of Judge Pickering, of New Hampshire. The principal charge exhibited against him was a disregard of a plain statute of the United States, which makes it the duty of a district court, before restoration of goods libeled for a violation of the revenue laws of the United States, to the claimant in court, to take from him bond and security to return the goods or to perform the judgment of the court. Upon this charge the Senate found him guilty and removed him from office. He was also charged with intemperance, which, though a misdemeanor, has never been denominated or regarded by the laws of any country a "high misdemeanor."

2381. Peck's impeachment, continued.

Argument of Mr. Manager Buchanan on the nature of impeachable offenses.

Argument that the proof of intention is not necessary in an impeachment trial to secure punishment for the fact.

Mr. Manager Buchanan said:[1]

The Constitution of the United States declares the tenure of the judicial office to be "during good behavior." Official misbehavior, therefore, in a judge is a forfeiture of his office. But when we say this we have advanced only a small distance. Another question meets us. What is misbehavior in office? In answer to this question, and without pretending to furnish a definition, I freely admit that we are bound to prove that the respondent has violated the Constitution or some known law of the land. This, I think, was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offense impeachable it must be indictable. But this violation of law may consist in the abuse, as well as in the usurpation of authority. The abuse of a power which has been given may be as criminal as the usurpation of a power which has not been granted. Can there be any doubt of this? Suppose a man to be indicted for an assault and battery. He is tried and found guilty, and the judge, without any circumstances of peculiar aggravation having been shown, fines him a thousand dollars and commits him to prison for one year. Now, although the judge may possess the power to fine and imprison for this offense, at his discretion, would not this punishment be such an abuse of judicial discretion and afford such evidence of the tyrannical and arbitrary exercise of power as would justify the House of Representatives in voting an impeachment? But why need I fancy cases? Can fancy imagine a stronger case than is now, in point of fact, before us? A member of the bar is brought before a court of the United States guilty, if you please, of having published a libel on the judge—a libel, however, perfectly decorous in its terms and imputing no criminal intention, and so difficult of construction that though the counsel for the respondent have labored for hours to prove it to be a libel, still that question remains doubtful. If, in this case, the judge has degraded the author by imprisonment and deprived him of the mean of earning bread for himself and his family by suspending him from the practice of his profession for eighteen months, would not this be a cruel and oppressive use of authority, even admitting the power to punish in such a case to be possessed by the judge?

A gross abuse of granted power and an usurpation of power not granted are offenses equally worthy of and liable to impeachment. If therefore the gentleman could establish, on the firmest foundation, that the power to punish libels as contempts may be legally exercised by all the courts of the United States, still he would not have proceeded far toward the acquittal of his client. * * *

It has been contended that even supposing the judge to have transcended his power and violated the law, yet he can not be convicted unless ' the Senate should believe he did the act with criminal intention. It has been said that crime consists in two things—a fact and an intention; and in support of this proposition the legal maxim has been quoted that "actus non fit reum, nisi mens rea." This

[1] Report of the trial of James H. Peck, pp. 427–429.

may be true as a, general proposition, and yet it may have but a slight bearing upon the present case. Did the gentlemen mean to contend that before the judge could be convicted we must prove by positive testimony malice in his breast, a lurking emnity against Mr. Lawless and the purpose of gratifying a base revenge? I should suppose that to have been the reason for which they asked so many questions to show that the judge and Mr. Lawless had previously been upon good terms. This argument may be answered with great force in the strong language of the respondent himself in his answer to the article of impeachment." Both in law and morals (says the judge) every man is presumed to intend the natural consequences of his own actions." This was the rule by which he tried Mr. Lawless. He took up the article signed "A Citizen" and from that article alone he inferred the intention of its author. In doing this he acted correctly; but his jaundiced mind and wounded vanity had so diseased his perceptions that he saw burnt letters upon the scroll, although in themselves they were perfectly innocent and harmless. * * *

I admit that if the charge against a judge be merely an illegal decision on a question of property, in a civil cause, his error ought to be gross and palpable, indeed, to justify the inference of a criminal intention and to convict him upon an impeachment. And yet one case of this character has occurred in our history. Judge Pickering was tried and condemned upon all the four articles exhibited against him, although the three first contained no other charge than that of making decisions contrary to law in a cause involving a mere question of property, and then refusing to grant the party injured an appeal from his decision, to which he was entitled.

And yet am I to be told that if a judge shall do an act which is in itself criminal, if he shall, in an arbitrary and oppressive manner, and without the authority of law, imprison a citizen of this country, and thus consign him to infamy, you are not to infer his intention from the act? Is not the act itself the best source from which to draw the inference? * * *

The fourth article of impeachment exhibited against Judge Pickering charged him with having appeared upon the bench in a state of total intoxication. This was gross official misbehavior. Would the Senate in that case have gravely listened to an argument to prove that the judge might have got drunk without an evil intention? Certainly not. The act was done. The tribunal had been disgraced, and the Senate inferred his intention from his conduct and turned him out of office.

2382. Peck's impeachment continued.

Mr. William Wirt argued in defense of Judge Peck that a judge might not be impeached for a mere mistake of the law without guilty intent.

Mr. William Wirt's argument that intent was not established by proof of the mere commission of an unlawful act.

Arguing for the respondent, Mr. Wirt said:[1]

Even if the judge were proved to have mistaken the law, that would not warrant a conviction, unless the guilt of intention be also established. For a mere mistake of the law is no crime or misdemeanor in a judge. It is the intention that is the essence of every crime. The maxim is (for the principal is so universally admitted that it has grown into a maxim) actus non facit reum nisi mens sit rea.

Sir, if the impeachment had not contained the charge of the guilty intention the respondent, under the advice of his counsel, would have demurred to it; not by any special demurrer to the form, but a general demurrer to the substance, for the intention is the substance of the crime. The honorable managers who prepared this article of impeachment were perfectly aware of this and have, therefore, very properly charged the intention in express terms. Sir, it is a material part of the charge, and what it was material to charge it is material to prove. * * * One of the honorable managers, seeming to perceive the impossibility of satisfying any candid mind that the respondent was guilty of the intention charged, endeavored to escape this rule of the criminal law by contending that if they fixed on the respondent the commission of an unlawful act, the guilty intention charged in the impeachment followed as a necessary implication of law. This I deny; for then every mistake of law on the part of a judge would become a crime or a civil injury, for which he would be personally responsible. The honorable manager sought to illustrate his proposition by the cases of murder and forgery. "If," said he, "a party be proved to have committed a deliberate murder, will he not be presumed to have intended

[1] Report of the trial of Judge Peck, pp. 485, 486, 492, 494–497.

to commit murder? Is separate proof of intention ever required in such a case? Or if a man be proved to have committed forgery, will not the law infer the intention from the act?" This is plausible; let us examine its solidity: It is the proposition which they must maintain, and from which alone they can have any hope of success in this case. Is it sound?

Mr. Wirt then proceeded to discuss the crimes of murder and forgery to show that the guilty intention was part of the proof in such cases, since neither crime existed without guilty intention. Continuing, he said:

Another of the honorable managers (Mr. Wickliffe) has advanced a proposition so novel and so directly confronted by all the authorities, that had it not been for some other things that I have heard in this case, I should have heard it with unmixed surprise. The honorable manager tells us that "he cares not for proof of intention; that he cares not whether the judge acted wrong from ignorance or intention. That ignorance of the law is no excuse in an unlearned layman, much less in a learned judge. That every man is presumed to know the law, and a fortiori, a judge whose office it is to understand and administer the law. If, therefore, a judge through ignorance of the law has done that which he has no power to do, he is just as guilty in the eye of the law as if he had sinned intentionally against the light of knowledge."

Then, according to this process of reasoning, a mistake of the law by a judge is an impeachable offense. But is it possible that the honorable manager can mean to contend that a judge is answerable, either civilly or criminally, for an error of judgment; that he can be either sued, indicted, or impeached for such an error? If such be his meaning, he is in direct conflict with all the authorities on the subject. The question is not a new one. It has been long since settled both in England and the United States; and I am not aware that, for many centuries, any judge or advocate has, even by inadvertence, sanctioned or even countenanced the position which has been thrown out by the gentleman. From the reign of Edward III to the present day the current of authorities is clear and uniform the other way, and establish beyond controversy the principle that the judge of a court of record is not answerable either civilly or criminally for a mistake of judgment in his judicial character.

Mr. Wirt then discusses the case of Yates and Lansing, wherein the English authorities were reviewed by Chief Justice Kent, and says:

What does the judge declare would be an impeachable offense? The acting with knowledge (scienter) that the judge was violating the law—"the intentional violation of the law." The chancellor, he says, was bound to imprison the party if he considered his conduct as a contempt of court. He might have been mistaken in considering that as a contempt, which in truth was not one. But this would have been a mere error of judgment, for which he was not answerable either civilly much less criminally. If he knew it was not a contempt, and still punished it as one, it would have been an intentional violation of the law, which would have been an impeachable offense. Here is the very doctrine for which we are contending—that it is the guilty intention which forms the gist of the charge in every impeachment, and that a mere mistake of judgment is not an impeachable offense. * * *

I have examined, with all the attention and care in my power, the various cases of impeachment of judges, both in England and the United States, and I have not observed that any counsel, even under the severest stress of the evidence, has taken refuge in so bold a proposition as this which we are considering—that error of judgment is an impeachable offense. On the contrary, I think it will be found, on the strictest perusal of all the cases that have been cited, that the counsel on both sides have uniformly proceeded on the concession that the guilty intention is the gist of the impeachment.

The discussion of the power of impeachment was preliminary merely, the main force of the arguments going to the question of law as to the right of the judge to punish for contempt, and the question of fact as to his intention.

2383. Peck's impeachment continued.

The Senate proceeded to judgment in the Peck case without prior deliberation in secret session.

The House accompanied its managers when the court pronounced judgment in the Peck impeachment.

Form of question put in ascertaining the judgment of the court in the Peck trial.

A Senator who had been a witness for respondent was excused from voting on the judgment in the Peck trial.

A Senator who had taken his seat after part of the testimony in the Peck trial had been taken was excused from voting.

Two-thirds not voting guilty, the Vice-President declared Judge Peck acquitted.

Judgment being rendered in the Peck impeachment, the Vice-President directed an adjournment sine die.

On Saturday, January 29,[1] at the conclusion of the arguments, on motion of Mr. Daniel Webster, of Massachusetts:

Resolved, That the Senate will, on Monday next, at 12 o'clock, proceed further on the trial of the article of impeachment exhibited by the House of Representatives of the United States against James H. Peck, judge of the district court of the United States for the district of Missouri.

On Monday, January 31,[2] the court was opened as usual, with proclamation. The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel also attended.

Mr. Littleton W. Tazewell, of Virginia, moved the following resolution:

Resolved, That this court will now pronounce judgment upon James H. Peck, judge of the district court of the United States for the district of Missouri.

Mr. Tazewell observed that if there were one member of the court unprepared for a decision on this impeachment at this time, or preferred any other mode of proceeding to pronounce judgment, he would cheerfully withdraw the resolution.

No objection having been made, the resolution was unanimously adopted.

The names of the Senators were then called over by the Secretary.

The Secretary of the Senate, under the direction of the Vice-President, read the article of impeachment exhibited by the House of Representatives against James H. Peck, judge of the district court of the United States for the district of Missouri.

The Vice-President rose and said:

Senators: You have heard the article of impeachment read; you have heard the evidence and the arguments for and against the respondent; when your names are called you will rise from your seats and distinctly pronounce whether he is guilty or not guilty, as charged by the House of Representatives.

The Vice-President then, in an audible voice, put the following question to each of the Senators in alphabetical order:

Mr. Senator ———: What say you: Is James H. Peck, judge of the district court of the United States for the district of Missouri, guilty or not guilty of the high misdemeanor charged in the article of impeachment exhibited against him by the House of Representatives?

Each Senator rose from his seat as this question was propounded to him, and answered.

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[1] Senate Impeachment Journal, p. 337.

[2] Journal, pp. 337, 338; Debates, p. 45.

Messrs. Thomas H. Benton, of Missouri, who had been a witness, and John M. Robinson, of Illinois, who had taken his seat on January 4, after the testimony for the managers had been concluded, were, on their request, excused from voting.

The vote having been ascertained, the Vice-President said:

Senators: Twenty-one Senators having voted that the respondent is guilty and 22 that he is not guilty, and two-thirds of the Senate not having voted for his conviction, it becomes the duty of the Chair to pronounce that James H. Peck, the judge of the district court of the United States for the district of Missouri, stands acquitted of the charge exhibited against him by the House of Representatives.

The Vice-President then directed the marshal to adjourn the court of impeachment; and it was accordingly adjourned sine die.

2384. Peck's impeachment continued.

A report of the acquittal of Judge Peck was made in the House in the report of the chairman of the Committee of the Whole.

Forms of reports made by a chairman of a Committee of the Whole after attending an impeachment trial. (Footnote.)

The House attended the Peck trial as a Committee of the Whole House. (Footnote.)

The journal of the House for this day has this entry: [1]

The House again resolved itself into a Committee of the Whole House, and proceeded to the Senate Chamber to attend the trial by the Senate of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri; and, after some time spent therein, the committee returned into the Chamber of the House; and, the Speaker having resumed the chair, Mr. Cambreleng [Churchill, C., of New York], from the Committee of the Whole, reported that the committee had, according to order, attended the trial of the said impeachment, and that the said James H. Peck had been acquitted by the Senate of the matter whereof he stood charged by the House of Representatives, as contained in their article of impeachment exhibited against him.[2]

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[1] House Journal, p. 236.

[2] The reports from day to day had been similar, but varied to meet the conditions. Usually they ended somewhat like this: "That further progress had been made therein, and that the court of impeachment had adjourned to meet again to-morrow, at 12 o'clock meridian." If no progress had been made, the report simply gave the hour to which the court had adjourned. (Journal, pp. 226, 229.) Mr. William D. Martin, of South Carolina, acted as chairman of the Committee of the Whole a portion of the time.

It is to be noticed that, while the impeachment had been considered in Committee of the Whole House on the state of the Union, the House resolved itself into the Committee of the Whole House to attend the proceedings.

Chapter LXXIV.

THE IMPEACHMENT AND TRIAL OF WEST H. HUMPHREYS.

2385. The impeachment and trial of West H. Humphreys, United States judge for the several districts of Tennessee.

It being declared by common fame that Judge Humphreys had joined the foes of the Government the House voted to investigate his conduct.

After an ex parte investigation the House voted to impeach Judge Humphreys.

Form of resolution providing for carrying the impeachment of Judge Humphreys to the Senate.

The impeachment of Judge Humphreys was carried to the Senate by a committee of two representing the two political parties.

On January 8, 1862,[1] Mr. Horace Maynard, of Tennessee, presented the following preamble and resolution, which were agreed to by the House without debate or division:

Whereas it is alleged that West H. Humphreys, now holding a commission as one of the judges of the district court of the United States, has, for nearly twelve months, failed to hold the courts for the districts of East, Middle, and West Tennessee, as by law he was required to do, and that he has accepted a judicial commission in hostility to the Government of the United States, and is assuming to act under it,

Resolved, That the Committee on the Judiciary inquire into the truth of the said allegations, with power to send for persons and papers, and report from time to time such action as they may deem proper.

On March 4, 1862,[2] Mr. John A. Bingham, of Ohio, submitted the report of the committee. This report showed that the committee examined four witnesses,

[1] Second session Thirty-seventh Congress, Journal, p. 150; Globe, p. 229.

[2] Journal, p. 400; Globe, p. 1062; House Report No. 44.

Mr. Maynard, Member of the House, and Messrs. Trigg, McFall, and Lellyet, citizens of Tennessee. It does not appear that anyone was present to represent Judge Humphreys at the investigation, or that any suggestion was made in his behalf. From the testimony it appeared that Judge Humphreys, who still held and had not resigned his commission, had publicly declared in favor of secession; that he had neglected his duties as judge; that he had officiated as judge for the confederacy, and in that capacity had entertained proceedings against loyal citizens. Therefore the committee proposed this resolution:

Resolved, That West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, be impeached of high crimes and misdemeanors.

On May 6,[1] after the reading of the report and very brief debate, the House agreed to the resolution without division.

Thereupon, Mr. Bingham, stating that he followed the usual precedents, offered the following resolution, which was agreed to without division:

Resolved, That a committee of two be appointed to go to the Senate, and at the bar thereof, in the name of the House of Representatives and of all of the people of the United States, to impeach West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate take order for the appearance of said West H. Humphreys to answer slid impeachment.

The Speaker[2] thereupon appointed Mr. Bingham and Mr. George H. Pendleton, of Ohio, as the committee; both were members of the Judiciary Committee, and Mr. Bingham represented the majority party in the House and Mr. Pendleton the minority party.

2386. Humphreys's impeachment continued.

Forms and ceremonies of presenting the impeachment of Judge Humphreys in the Senate.

Form of resolution adopted by the Senate in taking order for the impeachment of Judge Humphreys.

On May 7,[3] in the Senate, a message was received from the House by its Clerk, announcing the passage of the resolution and the committee appointed in accordance therewith.

Immediately thereafter the committee, Messrs. Bingham and Pendleton, appeared at the bar of the Senate, and Mr. Bingham spoke as follows:

Mr. President, by order of the House of Representatives, we appear at the bar of the Senate, and in the name of the House of Representatives and of all the people of the United States, we do impeach West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and we do further inform the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same, and in their name we do demand that the Senate take order for the appearance of said West H. Humphreys to answer to said impeachment.

The Presiding Officer[4] said:

The Senate will take order in the premises.

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[1] Journal, p. 646; Globe, pp. 1966, 1967.

[2] Galusha A. Grow, of Pennsylvania, Speaker.

[3] Senate Journal, p. 454; Globe, p. 1991.

[4] Lafayette S. Foster, of Connecticut, in the chair.

It does not appear that the committee from the House reported to that body on their return from the Senate.

In the Senate, on May 8,[1] the message from the House was read, and on motion of Mr. Lafayette S. Foster, of Connecticut, the subject was referred to a select committee of three, to be appointed by the Chair. Thereupon the President pro tempore[2] appointed Messrs. Foster, James R. Doolittle, of Wisconsin, and Garrett Davis, of Kentucky.

On May 9,[3] in the Senate, Mr. Foster reported from the select committee the following resolution, which was agreed to without division or debate:

Whereas the House of Representatives, on the 7th day of the present month, by two of their Members, Messrs. Bingham and Pendleton, at the bar of the Senate impeached West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same, and likewise demanded that the Senate take order for the appearance of the said West H. Humphreys to answer the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

On the same day a message announcing the action of the Senate was received in the House.[4]

2387. Humphreys's impeachment continued.

The committee to draw the articles in the Humphreys impeachment were appointed by the Speaker, and all but one was of the majority party.

The articles of impeachment against Judge Humphreys were agreed to by the House without debate.

On May 14,[5] in the House, Mr. Bingham submitted the following resolution, which was agreed to without debate or division:

Resolved, That a committee of five be appointed to prepare and report articles of impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, with power to send for persons, papers, and records.

The Speaker thereupon appointed Messrs. Bingham, John Hickman, of Pennsylvania, George H. Pendleton, of Ohio, Charles R. Train, of Massachusetts, and Charles W. Walton, of Maine. All of this committee but Mr. Pendleton, of Ohio, appear to have been of the majority party in the House. All but Messrs. Train and Walton were members of the Judiciary Committee.

On May 19[6] Mr. Bingham, from the select committee, reported articles of impeachment, which were read and at once, without debate or division, were adopted by the House and ordered printed. They appear in fall in the Journal of the House of this date.

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[1] Senate Journal, pp. 456, 457; Globe, p. 2010.

[2] Solomon Foot, of Vermont, President pro tempore.

[3] Senate Journal, pp. 464, 465; Globe, p. 2039.

[4] House Journal, p. 665.

[5] House Journal, p. 684; Globe, p. 2134.

[6] House Journal, pp. 709–712, Globe, pp. 2205, 2206.

2388. Humphreys's impeachment continued.

Form of resolutions providing for selection of managers and the presentation of the articles to the Senate in the Humphreys impeachment.

The managers of the Humphreys impeachment were appointed by the Speaker, and all but one belonged to the majority party.

The message informing the Senate that articles impeaching Judge Humphreys would be brought contained the names of the managers.

Mr. Bingham then offered the following resolutions, which were agreed to without debate or division:

Resolved, That five managers be appointed by the Speaker of this House to conduct the impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

Resolved, That the articles agreed to by this House, to be exhibited, in the name of themselves and of all the people of the United States, against West H. Humphreys in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the impeachment.

Resolved, That a message be sent to the Senate to inform them that this House have appointed managers on their part to conduct the impeachment against West H. Humphreys, and have directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House to be exhibited in maintenance of their impeachment against the said West H. Humphreys.

On May 20[1] the Speaker announced the appointment of the following managers: Messrs. Bingham, Hickman, Pendleton, Train, and George W. Dunlap, of Kentucky. All but Mr. Pendleton belonged to the majority party in the House.

On May 21[2] the Clerk of the House delivered the message in the Senate as follows:

Mr. President: I am directed to inform the Senate that the House of Representatives has appointed Mr. Bingham, of Ohio, Mr. Hickman, of Pennsylvania, Mr. Pendleton, of Ohio, Mr. Train, of Massachusetts, and Mr. Dunlap, of Kentucky, managers to conduct the impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, and has directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House, to be exhibited in maintenance of their impeachment against the said West H. Humphreys.

2389. Humphreys's impeachment, continued.

The Senate followed the precedents in adopting rules prescribing forms and ceremonies for receiving the articles in the Humphreys impeachment.

Forms of oath taken and proclamations made in the court opened to receive the articles impeaching Judge Humphreys.

The message having been delivered, the resolution of the House was read, and thereupon Mr. Foster proposed the following:

Resolved, That at 1 o'clock to-morrow afternoon the Senate will resolve itself into a court of impeachment, at which time the following oath and affirmation shall be administered by the Secretary to the President of the Senate, and by him to each Member of the Senate, to wit: "I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, I will do impartial justice, according to law;" which court of impeachment, being thus formed, will, at the time

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[1] House Journal, pp. 717, 718; Globe, p. 2262.

[2] Senate Journal, pp. 515–517; Globe, pp. 2247, 2248.

aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment in the name of themselves and of all the people of the United States against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, pursuant to notice given to the Senate this day by the House of Representatives that they had appointed managers for the purpose aforesaid.

Ordered, That the Secretary lay this resolution before the House of Representatives.

The resolution having been agreed to, Mr. Foster offered the following, which was also agreed to:

Resolved, That after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against West H. Humphreys, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee; "after which the articles shall be exhibited, and then the President of the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

On the same day the first of the above resolutions was communicated to the House by message.[1]

On May 22,[2] in the Senate, the Vice-President [3] announced:

The hour of 1 o'clock having arrived, the Senate win now resolve itself into a court of impeachment, in pursuance of its order of yesterday, for the trial of West H. Humphreys, judge of the district court of the United States for the State of Tennessee.

The following oath was administered to the Vice-President by the Secretary of the Senate:

I, Hannibal Hamlin, do solemnly swear that in all things appertaining to the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, I will do impartial justice according to law. So help me God.

The Vice-President said:

The Secretary will now call the roll of Senators alphabetically, calling them in numbers of four, and Senators will please to advance as they are called.

The Secretary called the names of Senators, and they advanced by fours to the desk, when the Vice-President administered the oath to them.

2390. Humphreys's impeachment, continued.

The House being notified that the Senate was ready to receive the articles impeaching Judge Humphreys, the managers attended unaccompanied.

The articles impeaching Judge Humphreys and their presentation.

The articles impeaching Judge Humphreys were signed by the Speaker and attested by the Clerk.

The oath having been administered to the Senators, it was then—

Ordered, That the Secretary inform the House of Representatives that the Senate has resolved itself into a high court of impeachment, and is now ready to receive the managers appointed by the House to

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[1] House Journal, p. 723; Globe, p. 2271.

[2] Senate Impeachment Journal, pp. 889–892; Globe, pp. 2277, 2278.

[3] Hannibal Hamlin, of Maine, Vice-President and President of the Senate.

exhibit articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee.

This message was duly delivered in the House, and presently four of the managers appointed by the House of Representatives, namely, Mr. Bingham, Mr. Pendleton, Mr. Train, and Mr. Dunlap (Mr. Hickman not being present), appeared below the bar.

Mr. Bingham advanced and said:

Mr. President, myself and associates are managers appointed by the House of Representatives, and instructed in their name to appear at the bar of the Senate, and present articles of impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, for high crimes and misdemeanors.

The VICE-PRESIDENT. The managers on the part of the House of Representatives will please be seated, at seats prepared for them within the bar of the Senate.

The managers were conducted to the seats prepared for them in the area between the Secretary's desk and the seats of the Senators.

The VICE-PRESIDENT. The Sergeant-at-Arms of the Senate will now make the usual proclamation,

The Sergeant-at-Arms, GEORGE T. BROWN, Esq. Oyez! oyez! oyez! All persons are commanded to keep silence on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee.

Mr. Bingham (all the managers standing) read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States in the name of themselves and of all the people of the United States against West H. Humphreys, judge of the district court of the United States for the several districts of the State of Tennessee, in maintenance and support of their impeachment against him for high crimes and misdemeanors..

ARTICLE 1. That, regardless of his duties as a citizen of the United States, and unmindful of the duties of his said office, and in violation of the sacred obligation of his official oath "to administer justice without respect to persons," "and faithfully and impartially discharge all the duties incumbent upon him as judge of the district court of the United States for the several districts of the State of Tennessee agreeable to the Constitution and laws of the United States," the said West H. Humphreys, on the 29th day of December, A. D. 1860, in the city of Nashville, in said State, the said West H. Humphreys then being a citizen of the United States, and owing allegiance thereto, and then and there being judge of the district court of the United States for the several districts of said State, at a public meeting, on the day and year last aforesaid, held in said city of Nashville, and in the hearing of divers persons then there present, did endeavor by public speech to incite revolt and rebellion within said State against the Constitution and Government of the United States, and did then and there publicly declare that it was the right of the people of said State, by an ordinance of secession, to absolve themselves from all allegiance to the Government of the United States, the Constitution and laws thereof.

ART. 2. That, in further disregard of his duties as a citizen of the United States, and unmindful of the solemn obligations of his office as judge of the district court of the United States for the several districts of the State of Tennessee, and that he held his said office, by the Constitution of the United States, during good behavior only, with intent to abuse the high trust reposed in him as such judge, and to subvert the lawful authority and Government of the United States within said State, the said West H. Humphreys, then being judge of the district court of the United States, as aforesaid, to wit, in the year of our Lord 1861, in said State of Tennessee, did, together with other evil-minded persons within said State, openly and unlawfully support, advocate, and agree to an act commonly called an ordinance of secession, declaring the State of Tennessee independent of the Government of the United States, and no longer within the jurisdiction thereof.

ART. 3. That in the years of our Lord 1861 and 1862, within the United States, and in said State of Tennessee, the said West H. Humphreys, then owing allegiance to the United States of America, and

then being district judge of the United States, as aforesaid, did then and there, to wit: within said State, unlawfully, and in conjunction with other persons, organize armed rebellion against the United States and levy war against them.

ART. 4. That on the 1st day of August, A. D. 1861, and on divers other days since that time, within said State of Tennessee, the said West H. Humphreys, then being judge of the district court of the United States, as aforesaid, and J. C. Ramsay, and Jefferson Davis, and others, did unlawfully conspire together "to oppose by force the authority of the Government of the United States," contrary to his duty as such judge and to the laws of the United States.

ART. 5. That said West H. Humphreys, with intent to prevent the due administration of the laws of the United States within said State of Tennessee, and to aid and abet the overthrow of "the authority of the Government of the United States "within said State, has, in gross disregard of his duty as judge of the district court of the United States, as aforesaid, and in violation of the laws of the United States, neglected and refused to hold the district court of the United States, as by law he was required to do, within the several districts of the State of Tennessee, ever since the 18th day of July, A. D. 1861.

ART. 6. That the said West H. Humphreys, in the year of our Lord 1861, within the State of Tennessee, and with intent to subvert the authority of the Government of the United States, to hinder and delay the due execution of the laws of the United States, and to oppress and injure citizens of the United States, did unlawfully act as judge of an illegally constituted tribunal within said State, called the district court of the Confederate States of America, and as judge of said tribunal last named said West H. Humphreys, with the intent aforesaid, then and there assumed and exercised powers unlawful and unjust, to wit, in causing one Perez Dickinson, a citizen of said State, to be unlawfully arrested and brought before him, as judge of said alleged court of said Confederate States of America, and required him to swear allegiance to the pretended government of said Confederate States of America; and upon the refusal of said Dickinson so to do, the said Humphreys, as judge of said illegal tribunal, did unlawfully, and with the intent to oppress said Dickinson, require and receive of him a bond, conditioned that while he should remain within said State he would keep the peace, and as such judge of said illegal tribunal, and without authority of law, said Humphreys there and then decreed that said Dickinson should leave said State.

2. In decreeing within said State, and as judge of said illegal tribunal, the confiscation to the use of said Confederate States of America of property of citizens of the United States, and especially of property of one Andrew Johnson and one John Catron.

3. In causing, as judge of said illegal tribunal, to be unlawfully arrested and imprisoned within said State citizens of the United States because of their fidelity to their obligations as citizens of the United States, and because of their rejection of, and their resistance to, the unjust and assumed authority of said Confederate States of America.

ART. 7. That said West H. Humphreys, judge of the district court of the United States as aforesaid, assuming to act as judge of said tribunal known as the district court of the Confederate States of America, did, in the year of our Lord 1861, without lawful authority, and with intent to injure one William G. Brownlow, a citizen of the United States, cause said Brownlow to be unlawfully arrested and imprisoned within said State in violation of the rights of said Brownlow as a citizen of the United States, and of the duties of said Humphreys as a district judge of the United States.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles, or other accusation or impeachment against the said West H. Humphreys, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them as the case shall require, do demand that the said West H. Humphreys may be put to answer the high crimes and misdemeanors herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

GALUSHA A. GROW,
Speaker House of Representatives.

Attest:

EMERSON ETHERIDGE,
CLERK HOUSE OF REPRESENTATIVES.

Mr. Bingham delivered the articles to the Secretary, who handed them to the Vice-President.

The VICE-PRESIDENT. The Chair informs the managers on the part of the House of Representatives that the Senate will take proper order upon the impeachment preferred, of which notice will be furnished to the House of Representatives.

The managers thereupon retired.

2391. Humphreys's impeachment, continued.

Form of resolution directing the issue of a writ of summons to Judge Humphreys, and fixing the return day.

The House was informed by message of the issuance of a writ of summons to Judge Humphreys.

Mr. Foster then offered in the high court of impeachment the following, which was agreed to:

Resolved, That the Secretary be directed to issue a summons, in the usual form, to West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, to answer a certain article of impeachment exhibited against him by the House of Representatives on this day, and that the said summons be returnable here on Monday, the 9th day of June next, and be served by the Sergeant-at-Arms, or some person deputed by him, at least ten days before the return day thereof.

Ordered, That the Secretary lay this resolution before the House of Representatives.

Then the court, on motion of Mr. Foster, adjourned until Monday, June 9, at 1 o'clock p. m.

In the House it does not appear that the managers reported after they had presented the articles of impeachment in the Senate.

On May 23 [1] in the House a message from the Senate informed the House that the issuance of a summon had been directed.

2392. Humphreys's impeachment, continued.

On the day set for the appearance of Judge Humphreys the House in Committee of the Whole House attended its managers.

Forms observed by the House attending the Humphreys trial as a Committee of the Whole (footnote).

Forms of oath, proclamation, and ceremonies at the calling of Judge Humphreys to appear and answer articles of impeachment.

On June 9,[2] in the high court of impeachment, the Vice-President having administered the prescribed oath to certain Senators, and the court having been opened by proclamation, it was—

Ordered, That the Secretary inform the House of Representatives that the Senate is now sitting as a high court of impeachment for the trial of West H. Humphreys, and that seats are provided for the accommodation of the Members of the House in the Senate Chamber.

The message having been delivered, it was then resolved by the House as follows: [3]

Resolved, That the House will this day, and at such hour as the Senate shall appoint, resolve itself into a Committee of the Whole House, and attend in the Senate on the trial of the impeachment

[1] House Journal, p. 731.

[2] Senate Impeachment Journal, pp. 893, 894; Globe, pp. 2617, 2618.

[3] House Journal, p. 821; Globe, p. 2621.

of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

Accordingly the House resolved itself into a Committee of the Whole House, Mr. E. B. Washburne, of Illinois, being chairman, and proceeded to the Senate Chamber.[1]

Previous to the arrival of the House the Senators took seats on a platform prepared on the right and left of the Vice-President, leaving the body of the Hall for the House of Representatives.

The managers and Representatives having arrived, the following occurred:

The VICE-PRESIDENT. The Sergeant-at-Arms will make proclamation opening the court.

The SERGEANT-AT-ARMS. Oyez! Oyez! Oyez! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting as a court of impeachment on the case of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

The Sergeant-at-Arms handed his return to the Vice-President.

The VICE-PRESIDENT. The return of the officer will be read by the Secretary.

The Secretary read, as follows:

UNITED STATES OF AMERICA, *City of Washington, ss:*

I, George T. Brown, Sergeant-at-Arms of the Senate of the United States, in obedience to the within and foregoing writ of summons and precept to me directed, did proceed to the usual place of residence of the within-named West H. Humphreys, in the vicinity of Nashville, in the State of Tennessee, on the 29th day of May, A. D. 1862, and then and there made diligent inquiry for the said West H. Humphreys, but he could not be found. I further certify, that on the same day and year, and at the usual place of residence of the said West H. Humphreys, in the vicinity of Nashville, in the State of Tennessee, I did then and there leave true and attested copies of the within and foregoing writ of summons and precept.

GEORGE T. BROWN,
Sergeant-at-Arms of the Senate.

JUNE 9, 1862.

The VICE-PRESIDENT. The Secretary will administer the oath to the Sergeant-at-Arms touching the truth of his return.

The Secretary administered the oath to the Sergeant-at-Arms, as follows:

"George T. Brown, Sergeant-at-Arms of the Senate of the United States, do solemnly swear that the return made and subscribed by me upon the process issued on the 22d day of May last, by the Senate of the United States against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, is truly made, and that I have performed said services as therein described. So help me God.

The VICE-PRESIDENT. The Sergeant-at-Arms will make proclamation for the appearance of West H. Humphreys.

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[1] The Globe (p. 2617) has the following as to the order: "The form in which it appears on such occasions displaces its high functionary, the Speaker, its Sergeant-at-Arms, and the emblem of its authority—the mace.

"The chairman, supported by Emerson Etheridge, esq., the Clerk, and Ira Goodnow, esq., the Doorkeeper, were conducted to seats in the center aisle, in front of the Vice-President; the managers on the part of the House of Representatives, Messrs. Bingham, Pendleton, Dunlap, and Train, took the seats which they previously occupied in the right section of the central area; that on the left, with similar accommodations, was provided for the judge impeached and his counsel, if they should appear. The Members of the House occupied the body of the Senate Chamber."

The SERGEANT-AT-ARMS. Oyez! Oyez! Oyez! West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

2393. Humphreys's impeachment continued.

Judge Humphreys did not appear, in person or by attorney, to answer the articles of impeachment.

Judge Humphreys not appearing, the case was continued on motion of the managers, to enable the production of testimony.

Judge Humphreys having failed to appear to answer the articles of impeachment, the court directed publication of a proclamation for him to appear.

In the Humphreys impeachment it was first provided that the subpoenas should be served by the Sergeant-at-Arms or his deputy.

Form of report of Chairman of the Committee of the Whole on returning from the Humphreys trial.

Whereupon, West H. Humphreys not appearing in person, or by counsel, to answer the said articles of impeachment, the following occurred:

Mr. Manager BINGHAM (after a pause). On behalf of the managers of the House of Representatives, I move the continuance of this cause until the 26th day of June, 1862, in order to obtain the attendance of witnesses necessary to the prosecution of the impeachment.

The VICE-PRESIDENT. Senators, the following motion is submitted for the decision of the court: On behalf of the managers of the House of Representatives, Mr. Bingham moves that further proceedings in the impeachment of West H. Humphreys, be postponed until Thursday, the 26th day of June, 1862.

The roll being called, there appeared, yeas 35, nays 4. So the motion was agreed to.

The Vice-President then informed the managers that of such other proceedings as should be taken by the Senate in the case of the impeachment of West H. Humphreys, the House of Representatives should be duly notified.

Thereupon the managers, attended by the House of Representatives, withdrew and having returned into their own Hall, the Committee of the Whole House rose,[1] and the Speaker having resumed the Chair, Mr. Washburne reported—

that the committee had, according to order, attended the trial by the Senate of the said impeachment, when the Senate postponed the further consideration of the case until Thursday, the 26th instant.

Meanwhile, in the high court of impeachment, on motion of Mr. Foster, and by a vote of yeas 36, nays 0, the following was agreed to:[2]

Ordered, That this high court of impeachment stand adjourned till the 26th day of June next, at 12 o'clock, meridian; and as the said West H. Humphreys has failed to make his appearance to answer the said articles of impeachment, though duly summoned, it is further ordered that proclamation for his appearance on that day be made by publishing this order in the National Intelligencer, National Republican, and Evening Star, newspapers printed in the city of Washington, for at least ten days successively, before said 26th day of June, instant, and also in the Nashville Union, a newspaper published in the city of Nashville, State of Tennessee, on at least five several days before said 26th day of June, instant.

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[1] House Journal, p. 821; Globe, p. 2621.

[2] Senate impeachment Journal, p. 894; Globe, pp. 2617, 2618.

And further, on motion of Mr. Foster, and in order to obviate the difficulty which might arise from there being no marshal of the United States in certain districts where it might be necessary to send subpoenas, it was further

Ordered, That subpoenas may be issued by the Secretary of the Senate, according to the rules[1] of proceedings of the Senate, when acting as a court of impeachment, and directed to the Sergeant-at-Arms of the Senate, or his deputy, as well as to the marshal of the district of——.

The court then adjourned to Thursday, June 26, at 12 o'clock, meridian.

On June 10[2] a message was received in the House giving information of the resolutions adopted by the court after the House had retired, and of the date to which the court had adjourned.

2394. Humphreys's impeachment, continued.

Judge Humphreys's having failed to appear in answer both to the summons and proclamation, the Presiding Officer announced that the managers might proceed in support of the articles.

Form of proclamation for appearance of Judge Humphreys, and the proof thereof on the day set for appearance.

In the absence of the Vice-President the President pro tempore took the oath and presided at the Humphreys trial.

At the beginning of the Humphreys trial the returns on the subpoenas were read and the names of the witnesses called.

A witness unable to attend the Humphreys trial was excused by the court.

On June 26,[3] when the high court of impeachment again opened, the Vice-President was absent and the President pro tempore[4] of the Senate was in the chair. At once the Secretary administered to him the prescribed oath. The court was then opened by proclamation as follows by the Sergeant-at-Arms:

Oyez! Oyez! Oyez! Silence is commanded on pain of imprisonment while the Senate of the United States is sitting as a high court of impeachment for the trial of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

On motion of Mr. Foster—

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber and ready to proceed on the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, and that seats are provided for the accommodation of the Members.

This message being received in the House[5] that body resolved itself into a Committee of the Whole House and proceeded to the Senate. When they arrived the Sergeant-at-Arms of the Senate appeared before the bar and announced:[6]

The honorable the House of Representatives of the United States.

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[1] The rules governing impeachments, adopted at the trial of Judge Chase and followed without readoption in the trial of Judge Peck and in this trial, provided that subpoenas should in every case be directed to the marshal of the districts wherein the witnesses might reside.

[2] House Journal, p. 832.

[3] Senate Impeachment Journal, p. 895; Globe, p. 2942.

[4] Solomon Foot, of Vermont, President pro tempore.

[5] House Journal, p. 940.

[6] Senate Impeachment Journal, p. 895; Globe, p. 2942.

The Members then entered and took the seats assigned them, the chairman of the Committee of the Whole House occupying a seat in the aisle in front of the President pro tempore, and the Clerk of the House having a seat near him. The managers on the part of the House were conducted to seats assigned to them in the area in front of the Secretary's desk.

By direction of the President pro tempore, the Secretary read the return made by the Sergeant-at-Arms on the 9th instant and already read in the high court on that day. The Secretary also read the proclamation made by order of the court on the 9th and published in certain newspapers. This proclamation [1] was as follows:

The Senate of the United States of America, as the court of impeachment, sitting on the case of West H. Humphreys, judge of the district court of the United States for the several districts of the State of Tennessee.

MONDAY, JUNE 9, 1862.

Ordered, That this high court of impeachment stands adjourned till the 26th day of June, instant, at 12 o'clock meridian; and, as the said West H. Humphreys has failed to make his appearance to answer the said articles of impeachment, though duly summoned, it is further ordered that proclamation for his appearance on that day be made by publishing this order in the National Intelligencer, National Republican, and Evening Star newspapers, printed in the city of Washington, for at least ten days, successively, before said 26th day of June, instant, and also in the Nashville Union newspaper, printed in the city of Nashville, in the State of Tennessee, at least five several days before said 26th day of June, instant.

Attest:

J. W. FORNEY,
Secretary of the Senate.

A question being raised as to the proof of the proclamation, the production of copies of the several papers in which it was published was considered sufficient.

Then the following proceedings occurred:

The PRESIDENT pro tempore. The Sergeant-at-Arms will now make proclamation for the appearance of the accused.

THE SERGEANT-AT-ARMS! Oyez! Oyez! Oyez! West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

No response being made,

The PRESIDENT pro tempore. The accused West H. Humphreys being in default, not appearing in pursuance of the summons or proclamation, the managers on the part of the United States House of Representatives are now at liberty to proceed in support of the articles of impeachment exhibited against him.

Mr. BINGHAM. Mr. President, on behalf of the managers for the House of Representatives, I ask that the returns of the Sergeant-at-Arms to the subpoenas issued for witnesses in support of this impeachment may be reported, and the names of the witnesses called over and those present recorded.

The Secretary then read the returns on the subpoenas, and the names of the witnesses were called on motion of Mr. Manager Bingham. The witnesses were assigned seats on the left of the chair, in the rear of the seats usually occupied by Senators.

Among the witnesses called was Andrew Johnson, who failed to respond. Mr. Bingham, of the managers, stated that Mr. Johnson was detained by his duties as governor of Tennessee, and moved that he be excused from obeying the process of the court. This motion was unanimously agreed to.

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[1] Journal, pp. 895, 896; Globe, p. 2943.

2395. Humphreys's impeachment continued.

In the Humphreys trial, with no representative for the respondent, witnesses were not cross-examined.

The respondent not being represented in the Humphreys trial, the managers, without argument, demanded judgment.

In the absence of representation of respondent in the Humphreys trial, the Senator insisted on the rules of evidence.

Mr. Train then opened the case for the managers, outlining at not great length what it was proposed to prove.

Mr. Bingham, for the managers, then proceeded to offer evidence, documentary and oral, witnesses being sworn, in accordance with the rule, by the Secretary.

The witnesses were then examined by the managers.[1] There was no cross-examination, as there was no appearance for Judge Humphreys. At the close of each witness's testimony the President pro tempore announced that any Senator might propose a question by reducing it to writing and having it read by the Secretary. But no questions were proposed.

Twice objection was made by Senators to questions put by the managers, as eliciting testimony inadmissible as evidence, but either the question or the objection was withdrawn without a decision by the court.[2]

At the conclusion of the testimony Mr. Bingham stated that the managers did not deem it necessary to introduce further testimony or to submit argument; and he respectfully demanded of the court, in the name of all the people of the United States, a judgment of guilty, in manner and form as prescribed by the Constitution of the United States.

2396. Humphreys's impeachment continued.

The decision of the court on the articles in the Humphreys case was guilty as to a portion of the articles.

Form of question on verdict of the court in the Humphreys trial.

Various Senators were excused from voting on the judgment in the Humphreys case.

The presiding officer ruled that testimony might not be read during the voting on the articles impeaching Judge Humphreys.

By unanimous consent, in the Humphreys trial a Senator was permitted to vote after the decision on the articles had been declared.

Then, by direction of the President pro tempore, the articles of impeachment were read one by one, and at the conclusion of the reading of each article the President pro tempore took the opinion of the members of the court,[3] respectively, in the form following:

> Mr. Senator ——, how say you? Is the accused, West H. Humphreys, guilty or not guilty of the high crimes and misdemeanors as charged in this article of impeachment?

And the Senators having answered, the President declared West H. Humphreys guilty or not guilty of the charge, according as two-thirds voted him guilty or failed to do so.

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[1] Globe, pp. 2944–2949.

[2] Globe, p. 2946.

[3] Senate Impeachment Journal, pp. 897–903; Globe, pp. 2949, 2950.

Very frequently a Senator would give a brief explanation of his reason for his vote, and several Senators were by vote excused from voting on a particular article, reasons in each case being assigned as absence when the testimony was given or inability to hear the testimony.

In voting on the second specification of the sixth article Mr. Preston King, of New York, asked that the testimony in support of the specification be referred to.

The President pro tempore [1] said:

That proceeding is entirely out of order at this stage.

The sixth article containing several specifications, a vote was taken separately on each one at the suggestion of a Senator and by direction of the President pro tempore.

The vote was as follows:

	Guilty.	Not guilty.
Article 1	39	0
Article 2	36	1
Article 3	33	4
Article 4	28	10
Article 5	39	0
Article 6, specification 1	36	1
Article 6, specification 2	12	24
Article 6, specification 3	35	1
Article 7	35	1

Mr. James H. Lane, of Kansas, was by unanimous consent permitted to record his vote after the results had been announced and declared.[2]

On motion of Mr. Foster it was—

Ordered, That the court take a recess until 4 o'clock p.m., at which hour the court will proceed to pronounce judgment in the case of West H. Humphreys, judge of the district court of the United States for the eastern, middle, and western districts of Tennessee.

2397. Humphreys's impeachment, continued.

The court declined to consider in secret session the question of final judgment in the Humphreys case.

Having found Judge Humphreys guilty, the court proceeded to pronounce judgment of removal and disqualification.

The presiding officer held that the question on removal and disqualification was divisible.

Debate as to whether or not the Constitution requires both removal and disqualification on conviction by impeachment.

Form of judgment pronounced by the presiding officer in the Humphreys trial.

Judgment being pronounced in the Humphreys case, the court adjourned without day.

The judgment of the court in the Humphreys trial was communicated to the House by the report of the chairman of the Committee of the Whole.

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[1] Solomon Foot, of Vermont, President pro tempore.

[2] Globe, p. 2951.

The Senate ordered an attested copy of the court's decision in the Humphreys case to be sent to the President of the United States.

The high court met again at 4 p.m., and the House was informed by message that the court was ready to pronounce judgment and requested the attendance of the House of Representatives.[1]

Before the arrival of the Members of the House Mr. Edgar Cowan, of Pennsylvania, suggested[2] a short secret session; but Mr. John P. Hale, of New Hampshire, suggested that the rule required the doors to be kept open. Mr. Cowan suggested that the rule referred only to the trial and not to proceedings relating to the verdict.

The President pro tempore said he would entertain a motion for a secret session, but Mr. Cowan did not insist on it.

The House of Representatives having entered the Chamber, Mr. Foster offered[3] the following as an interrogation to be put to each member of the court in order that judgment might be perfected.

Is the court of the opinion that West H. Humphreys be removed from the office of judge of the district court of the United States for the districts of Tennessee?

To this Mr. Lyman Trumbull, of Illinois, offered an amendment as follows:

Add thereto: "and be disqualified to hold and enjoy any office of honor, trust, or profit under the United States."

Mr. Trumbull quoted the Constitution to show that both removal from office and disqualification should be the punishment.

Mr. Foster explained that the question proposed was in exactly the form used in the case of Judge Pickering, and that it was the only question propounded in rendering that judgment.

After debate, Mr. Trumbull's amendment was agreed to, yeas 27, nays 10.

Thereupon, Mr. Garrett Davis, of Kentucky, asked for a division of the question.

Upon this demand there was debate. Mr. Trumbull said:

I have very serious doubts whether it is a double question; whether the whole is not one judgment. "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." I am not sure but that when the Constitution says it shall not extend further than that, it necessarily follows that it shall extend that far. It is not in the alternative, and I am by no means satisfied that that consequence does not necessarily follow the conviction. It is a limitation. As is well suggested by my friend from Pennsylvania [Mr. Wilmot], could you impose that latter part without the former? Could you decide that he should be disqualified to hold and enjoy any office of honor, trust, or profit? If each proposition is independent, it must be able to stand by itself without affecting any other. I am by no means satisfied that these are independent propositions. It seems to me that altogether the safer way is to take the question on them together.

Mr. Jacob Collamer, of Vermont, said:

Mr. President, I take it the test of the divisibility of a question depends upon whether there can be a vote left after it is divided, let the first be decided as it may. That is the criterion; that, if after you have voted "yea" or "nay" upon the first article of division, there is still a question to be decided

[1] House Journal, p. 943.

[2] Globe, p. 2951.

[3] Senate Impeachment Journal, pp. 903, 904; Globe, pp. 2951–2953.

if the decision be either way. Now, in this case, suppose the proposition to be that this man be deprived of office, and that he be rendered ineligible, and it is divided, and the vote shall be that he be not deprived of his office; is there anything left? There would be nothing left to vote on, because the rendering him ineligible hereafter is only a consequence of the first, and rests in judicial discretion whether we put it on or not. It is not, in my apprehension, divisible, because a vote in one way on the first branch would render it impossible to get along with the second.

Mr. O. H. Browning, of Illinois, said:

We have the authority of an adjudicated case of the action of the Senate, in which they found a judge guilty upon impeachment and entered against him a judgment of ouster from his office; going no further. I apprehend it was competent for them to do that. They were not bound to attach to it the other consequence that may be attached to it under the Constitution, of disqualification forever thereafter to hold office. It may frequently occur—it occurred in that case, it may occur again—that a majority of the Senators would feel it their duty to vote for his ouster from office, and would not feel it their duty to vote for his disqualification forever thereafter to hold any other office under the Government, however unimportant. If you are compelled to put the question, and the whole question, as one question—to put it all together—men who are unwilling to vote to disqualify him forever, disfranchise him forever, will be constrained to vote that he be ousted from office, and also to vote for another proposition, which in their judgments would be unjust. That would follow inevitably; and after you had taken the question on them jointly, I apprehend you could not return and divide them, and take the propositions separately, so as to say whether he should be ousted from office.

The President pro tempore [1] said:

In the judgment of the Chair these are separate and divisible propositions. * * * From the authority of the Pickering case the Chair is obliged to say that it is a divisible proposition.

The question was then taken on the first proposition, and it was determined in the affirmative, yeas 38, nays 0.

On the second branch of the question there appeared, yeas 36, nays 0.

The President pro tempore thereupon pronounced the judgment of the court, as follows:

This court, therefore, do order and decree, and it is hereby adjudged: That West H. Humphreys, judge of the district court of the United States for the eastern, middle, and western districts of Tennessee, be and he is removed from his said office; and that he be and is disqualified to hold and enjoy any office of honor, trust, or profit under the United States.

Then, on motion of Mr. Foster, the court adjourned without day.

On the same day, the Committee of the Whole House having returned to Representatives Hall, the Committee of the Whole rose, and the Speaker having resumed the chair, Mr. E. B. Washburne, of Illinois, the Chairman, reported—

that the committee had, according to order, attended the trial by the Senate of the said impeachment; and that the said West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, had been found guilty by the Senate of the matter whereof he stood charged by the House of Representatives, as contained in its articles of impeachment exhibited against him.[2]

In the Senate, on June 27,[3] on motion of Mr. Foster, it was,

Ordered, That the Secretary lay before the President of the United States an attested copy of the judgment of the Senate as the high court of impeachment in the case of West H. Humphreys.

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[1] Solomon Foot, of Vermont, President pro tempore.

[2] House Journal, pp. 943, 944.

[3] Senate Journal, p. 718; Globe, p. 2957.

Chapter LXXV.

THE FIRST ATTEMPTS TO IMPEACH THE PRESIDENT.

2398. The House refused in 1843 to impeach John Tyler, President of the United States, on charges preferred by a Member.

A proposition to impeach a civil officer of the United States is received in the House as a question of privilege.

Form of impeachment of a civil officer by a Member on the floor of the House.

On January 10, 1843,[1] Mr. John M. Botts, of Virginia, proposed the following:

I do impeach John Tyler, Vice-President, acting as President of the United States, of the following high crimes and misdemeanors:

First. I charge him with gross usurpation of power and violation of law, in attempting to exercise a controlling influence over the accounting officers of the Treasury Department, by ordering the payment of accounts of long standing that had been by them rejected for want of legal authority to pay, and threatening them with expulsion from office unless his orders were obeyed; by virtue of which threat thousands were drawn from the Public Treasury without the authority of law.

Second. I charge him with a wicked and corrupt abuse of the power of appointment to and removal from office: First, in displacing those who were competent and faithful in the discharge of their public duties, only because they were supposed to entertain a political preference for another; and, secondly, in bestowing them on creatures of his own will, alike regardless of the public welfare and his duty to the country.

Third. I charge him with the high crime and misdemeanor of aiding to excite a disorganizing and revolutionary spirit in the country, by placing on the records of the State Department his objections to a law as carrying no constitutional obligation with it; whereby the several States of this Union were invited to disregard and disobey a law of Congress which he himself had sanctioned and sworn to see faithfully executed, from which nothing but disorder, confusion, and anarchy can follow.

Fourth. I charge him with being guilty of a high misdemeanor, in retaining men in office for months after they have been rejected by the Senate as unworthy, incompetent, and unfaithful, with an utter defiance of the public will and total indifference to the public interests.

[1] Third session Twenty-seventh Congress, Journal, pp. 157–163; Globe, pp. 144–146.

Fifth. I charge him with the high crime and misdemeanor of withholding his assent to laws indispensable to the just operations of government, which involved no constitutional difficulty on his part; of depriving the Government of all legal means of revenue, and of assuming to himself the whole power of taxation, and of collecting duties of the people without the authority or sanction of law.

Sixth. I charge him with an arbitrary, despotic, and corrupt abuse of the veto power, to gratify his personal and political resentments against the Senate of the United States for a constitutional exercise of their prerogative in the rejection of his nominees to office, with such evident mark of inconsistency and duplicity as leave no room to doubt his disregard of the interests of the people and his duty to the country.

Seventh. I charge him with gross official misconduct, in having been guilty of a shameless duplicity, equivocation, and falsehood with his late Cabinet and Congress, which led to idle legislation and useless public expense, and by which he has brought such dishonor on himself as to disqualify him from administering the Government with advantage, honor, or virtue, and for which alone he would deserve to be removed from office.

Eighth. I charge him with an illegal and unconstitutional exercise of power, in instituting a commission to investigate past transactions under a former Administration of the custom-house in New York, under the pretense of seeing the laws faithfully executed; with having arrested the investigation at a moment when the inquiry was to be made as to the manner in which those laws were executed under his own Administration; with having directed or sanctioned the appropriation of large slim of the public revenue to the compensation of officers of his own creation, without the authority of law, which, if sanctioned, would place the entire revenues of the country at his disposal.

Ninth. I charge him with the high misdemeanor of having withheld from the Representatives of the people information called for and declared to be necessary to the investigation of stupendous frauds and abuses alleged to have been committed by agents of the Government, both upon individuals and the Government itself, whereby he himself became accessory to these frauds.

Mr. Botts also submitted this resolution, for the action of the House:

Resolved, That a committee of nine members be appointed, with instructions diligently to inquire into the truth of the preceding charges preferred against John Tyler, and to report to this House the testimony taken to establish said charges, together with their opinion whether the said John Tyler hath so acted in his official capacity as to require the interposition of the constitutional power of this House; and that the committee have power to send for persons and papers.

Mr. Botts stated in his place as a Member that he was himself able to prove every charge made, and he not only asked but demanded the opportunity to do so.

The Speaker [1] having decided that the charges involved a question of privilege, the House proceeded to consideration of the resolution.

Mr. Cave Johnson, of Tennessee, moved that the proposition lie on the table. This motion was disagreed to, yeas 104, nays 119.

On the question of agreeing to the resolution, there appeared yeas 84, nays 127. So the resolution was disagreed to.

2399. The first attempt to impeach Andrew Johnson, President of the United States.

The impeachment of President Johnson was first proposed indirectly through general investigations.

On December 17, 1866,[2] Mr. James M. Ashley, of Ohio, moved that the rules be suspended so as to enable him to report from the Committee on Territories [3] the following resolution:

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[1] John White, of Kentucky, Speaker.

[2] Second session Thirty-ninth Congress, Journal, p. 89; Globe, p. 154.

[3] At that time reports could not be made at any time.

Resolved, That a select committee to consist of seven Members of this House be appointed by the Speaker, whose duty it shall be to inquire whether any acts have been done by any officer of the Government of the United States which in contemplation of the Constitution are high crimes or misdemeanors, and whether said acts were designed or calculated to overthrow, subvert, or corrupt the Government of the United States, or any department thereof, and that said committee have power to send for persons and papers and to administer the customary oath to witnesses, and that they have leave to report by bill or otherwise.

In the brief debate permitted objection was made to such a general inquest on all the officers of the United States. On the vote there appeared yeas 90, nays 49. So the rules were not suspended.

On January 7, 1867,[1] in the morning hour for the presentation of resolutions,[2] Mr. Benjamin F. Loan, of Missouri, submitted this resolution:

Resolved, That for the purpose of securing the fruits of the victories gained on the part of the Republic during the late war, waged by rebels and traitors against the life of the nation, and of giving effect to the will of the people as expressed at the polls during the recent elections by a majority numbering in the aggregate more than 400,000 votes, it is the imperative duty of the Thirty-ninth Congress to take without delay such action as will accomplish the following objects:

1. The impeachment of the officer now exercising the functions pertaining to the office of President of the United States of America, and his removal from said office upon his conviction, in due form of law, of the high crimes and misdemeanors of which he is manifestly and notoriously guilty, and which render it unsafe longer to permit him to exercise the powers he has unlawfully assumed.

2. To provide for the faithful and efficient administration of the executive department of the Government within the limits prescribed by law.

3. To provide effective means for immediately reorganizing civil government in those States lately in rebellion, excepting Tennessee, and for restoring them to their practical relations with the Government upon a basis of loyalty and justice; and to this end

4. To secure by the direct intervention of Federal authority the right of franchise alike, without regard to color, to all classes of loyal citizens residing within those sections of the Republic which were lately in rebellion.

After some discussion this resolution was, under the requirements of a rule of the House, referred to the Committee on Reconstruction.

Immediately thereafter Mr. John R. Kelso, of Missouri, offered as a new proposition the first portion of the resolution, having stricken out all of subdivisions 3 and 4.

Mr. Thomas T. Davis, of New York, moved to lay the resolution on the table, and the motion was disagreed to, yeas 40, nays 104. The question was then put on ordering the previous question, when the morning hour expired, and the House proceeded to other business.

2400. The first attempt to impeach President Johnson, continued.

On January 7, 1867, President Johnson was formally impeached in the House on the responsibility of a Member.

The House voted to investigate the conduct of President Johnson on the strength of charges made by a Member on his own responsibility only.

A Member having impeached the President and presented a resolution of investigation, the Speaker admitted it as a question of privilege.

In the first attempt to impeach President Johnson the investigation was made by the Judiciary Committee.

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[1] Journal, pp. 118, 119; Globe, pp. 319–321.

[2] This order of business does not now exist.

On the same day, January 7,[1] Mr. James M. Ashley, of Ohio, rising in his place, declared:

On my responsibility as a Representative, and in the presence of this House, and before the American people, I charge Andrew Johnson, Vice-President and acting President of the United States, with the commission of acts which, in contemplation of the Constitution, are high crimes and misdemeanors. I therefore submit the following—

which was presented as a question of privilege:

I do impeach Andrew Johnson, Vice-President and acting President of the United States, of high crimes and misdemeanors.

I charge him with a usurpation of power and violation of law:

In that he has corruptly used the appointing power.

In that he has corruptly used the pardoning power.

In that he has corruptly used the veto power.

In that he has corruptly disposed of public property of the United States.

In that he has corruptly interfered in elections, and committed acts which, in contemplation of the Constitution, are high crimes and misdemeanors: Therefore,

Be it resolved, That the Committee on the Judiciary be, and they are hereby, authorized to inquire into the official conduct of Andrew Johnson, Vice-President of the United States, discharging the powers and duties of the office of President of the United States, and to report to this House whether, in their opinion, the said Andrew Johnson, while in said office, has been guilty of acts which were designed or calculated to overthrow, subvert, or corrupt the Government of the United States, or any department or officer thereof; and whether the said Andrew Johnson has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes or misdemeanors, requiring the interposition of the constitutional power of this House; and that said committee have power to send for persons and papers and to administer the customary oath to witnesses.

A question of order being raised, the Speaker[2] held that the resolution presented a question of privilege.

A motion by Mr. Rufus P. Spalding, of Ohio, that the resolution be laid on the table, was disagreed to—yeas 39, nays 106.

Then the previous question was ordered, and a motion to reconsider the vote whereby it was ordered was laid on the table by a vote of yeas 95, nays 47.

Then the question being put: "Will the House agree to the proposition submitted by Mr. James M. Ashley?" there appeared yeas 108, nays 39. So the resolution was agreed to.

On January 14,[3] Mr. Loan's resolution was debated, Mr. Loan, in a speech at length, using language interpreted to be a charge that President Johnson was guilty of complicity in the murder of President Lincoln, and further charging him with participation in a conspiracy to capture the Government in the interest of the late participants in the secession movement. On January 28 and February 4 the resolution was further considered, the debate on the later days being principally on a motion made by Mr. Thomas A. Jenckes, of Rhode Island, that the resolution be referred to the Committee on the Judiciary, which was already considering the subject.

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[1] Journal, pp. 121–124; Globe, pp. 320, 321.

[2] Schuyler Colfax, of Indiana, Speaker. The Speaker cited as a precedent the decision made in the Twenty-seventh Congress on a point of order made by Mr. Horace Everett, of Vermont.

[3] Journal, pp. 163, 277, 320; Globe, pp. 443–446, 806–808, 991.

This motion was agreed to, although it was urged in opposition that there was much business before the Judiciary Committee, and that the matter would be expedited by reference to a select committee.

2401. The first attempt to impeach President Johnson, continued.

The Thirty-ninth Congress having expired during investigation of President Johnson's conduct, the House in the next Congress directed the Judiciary Committee to resume the investigation.

A resolution directing the Judiciary Committee to resume an investigation with a view to an impeachment was held to be privileged.

On February 28,[1] Mr. James F. Wilson, of Iowa, chairman of the Judiciary Committee, submitted a report which in effect stated that considerable testimony had been taken, but that it would be impracticable to conclude the subject during the then existing Congress; and expressed the opinion that the evidence indicated the desirability of a further prosecution of the case. This report was signed by eight members of the committee. Mr. Andrew J. Rogers, of New Jersey, submitted minority views, in which he declared "that the most of the testimony that has been taken is of a secondary character, and such as would not be admitted in a court of justice," and advised discontinuance of the proceedings.

On March 2[2] the report was laid on the table and ordered printed.

At the beginning of the next Congress, on March 7, 1867,[3] Mr. James M. Ashley, of Ohio, as a question of privilege, submitted a preamble and resolution, which, after modification, were as follows:

Whereas the House of Representatives of the Thirty-ninth Congress adopted on the 7th of January, 1867, a resolution authorizing an inquiry into certain charges preferred against the President of the United States; and

Whereas the Judiciary Committee, to whom said resolution and charges were referred, with authority to investigate the same, were unable for want of time to complete said investigation before the expiration of the Thirty-ninth Congress; and

Whereas in the report submitted by said Judiciary Committee on the 2d of March, they declare that the evidence taken is of such a character as to justify and demand a continuation of the investigation by this Congress: Therefore, be it

Resolved by the House of Representatives, That the Judiciary Committee when appointed, be, and they are hereby, instructed to continue the investigation authorized in said resolution of January 7, 1867, and that they have power to send for persons and papers, and to administer the customary oath to witnesses; and that the committee have authority to sit during the sessions of the House, and during any recess which Congress or this House may take.

Resolved, That the Speaker of the House be requested to appoint the Committee on the Judiciary forthwith, and that the committee so appointed be directed to take charge of the testimony taken by the committee of the last Congress; and that said committee have power to appoint a clerk at a compensation not to exceed $6 per day, and employ the necessary stenographer.

Resolved further, That the Clerk of the House of Representatives be directed to pay, out of the contingent fund of the House, on the order of the Committee on the Judiciary, such sum or sums of money as may be required to enable the said committee to prosecute the investigation above directed, and such other investigations as it may be ordered to make.

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[1] House Report No. 31; Globe p. 1754.

[2] Journal, p. 585; Globe, p. 1754.

[3] First session Fortieth Congress, Journal, pp. 19–21; Globe, pp. 18–25.

Mr. Samuel J. Randall, of Pennsylvania, having raised a question as to the presentation of the resolution, the Speaker [1] said:

The Chair has entertained the resolution as a question of privilege, as it has reference to proceedings for the impeachment of the President of the United States.[2]

A motion by Mr. William S. Holman, of Indiana, that the resolutions be laid on the table was disagreed to, yeas 33, nays 119; and then after debate, largely as to the political expediency of reviving the proceedings, the preamble and resolutions were agreed to by the House, without division.

Throughout this session of Congress, which continued with intermissions until November 30, various resolutions were offered [3] with the object of hastening the work of the Judiciary Committee or of procuring the printing of the testimony. On March 29 a resolution requesting the committee to report within a certain time was agreed to.

2402. The first attempt to impeach President Johnson, continued.

A verbal report as to progress made by a committee in an impeachment investigation was offered as privileged.

A proposition to instruct a committee to investigate new charges in an impeachment case was held to be privileged.

On July 10,[4] Mr. James F. Wilson, of Iowa, claiming the floor for a question of privilege, reported verbally from the Judiciary Committee, by direction of that committee, that they expected to be able to report on or after October 16. He also stated that as the case now stood five members of the committee were of the opinion that such high crimes and misdemeanors had not been developed as to call for the exercise of the impeachment power on the part of the House. The remaining four members of the committee took the opposite view.

On July 17, 1867,[5] Mr. John Covode, of Pennsylvania, claiming the floor for a question of privilege, offered the following preamble and resolution:

Whereas Andrew Johnson, President of the United States, did, upon the 4th day of July, 1867, at the request of the counsel of John H. Surratt, caused to be issued to Stephen F. Cameron, of the rebel army, and one of the most notorious violators of the laws of war, a full pardon for all his crimes, in order that his credibility might be increased as a witness to aid in the exculpation of said Surratt from his participation in the murder of Mr. Lincoln, thus showing his sympathy with the men who murdered the President: Therefore, be it

Resolved, That the Committee on the Judiciary be instructed to inquire into the foregoing charge, and report the evidence to the House in the first week of its next session, together with all the testimony already taken in the impeachment case.

Mr. Benjamin M. Boyer, of Pennsylvania, raised a question as to the privilege of the resolution.

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[1] Schuyler Colfax, of Indiana, Speaker.

[2] It is to be noticed that several nonprivileged matters are contained in the resolutions, which under the present practice would destroy the privilege—notably the provisions for a clerk and for payments from the contingent fund.

[3] Journal, pp. 146, 189, 211, 213, 220, 226, 248; Globe, pp. 446, 452, 592, 656, 657, 720, 725, 762, 765, 766, 778, 779.

[4] Globe, p. 565.

[5] Journal, pp. 220, 221; Globe, p. 697.

The Speaker [1] said:

It does unquestionably, in the opinion of the Chair, present a question of the very highest privilege.

The resolution was then agreed to; but the preamble was amended by striking out all after the word "whereas" and inserting the words: "It is reported that a pardon has been issued by the President to Stephen F. Cameron," and as amended was agreed to.

2403. The first attempt to impeach President Johnson, continued.

The first proposition to impeach President Johnson was reported from a committee divided as to fact and law.

In the first attempt to impeach President Johnson the committee reported the testimony and also majority and minority arguments.

The first investigation of President Johnson's conduct was conducted ex parte and in executive session.

It does not appear that President Johnson sought to be represented before the committee making the first investigation.

Instance wherein a Member of the House not a member of the committee was permitted to examine a witness.

In the first investigation of the conduct of President Johnson the committee relaxed the strict rules of evidence.

On November 25 [2] Mr. George S. Boutwell, of Massachusetts, from the Committee on the Judiciary, submitted the report of the majority of that committee, signed by five of the members, while Mr. James F. Wilson, of Iowa, presented minority views signed by himself and Mr. Frederick E. Woodbridge, of Vermont. Also Mr. Samuel S. Marshall, of Illinois, presented other minority views, signed by himself and Mr. Charles A. Eldridge, of Wisconsin.

On motion of Mr. Boutwell,

Ordered, That the said testimony and reports be printed (the report of the majority and the views of the minorities to be printed together), and that the further consideration of the subject be postponed until Wednesday, the 4th day of December next.

The report of the committee presents the testimony in full. It appears that the examination was conducted ex parte, there being no one present to crossexamine witnesses on behalf of the President, nor does it appear that any testimony was introduced at his suggestion or sought to be introduced. The witnesses were examined generally by the chairman or other members of the committee. In one instance [3] Mr. Benjamin F. Butler, a Member of the House, but not a member of the committee, was permitted to examine a witness; but his examination was in no sense an appearance in behalf of the President, but rather the reverse. In the minority views [4] presented by Mr. Marshall the investigation is spoken of as "a secret, ex parte one."

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[1] Schuyler Colfax, of Indiana, Speaker.

[2] Journal, p. 265; Globe, pp. 791, 792; House Report No. 7, First session Fortieth Congress. Although presented by Mr. Boutwell, this report was prepared principally by Mr. Thomas Williams, of Pennsylvania.

[3] See p. 56 of the testimony.

[4] See p. 110 of the report.

As to the nature of the testimony taken in the course of the investigation, the majority say [1] that they—

have spared no pains to make their investigations as complete as possible, not only in the explorations of the public archives, but in following every indication that seemed to promise any additional light upon the great subjects of inquiry.

And in the minority views submitted by Mr. Wilson it is stated: [2]

A great deal of matter contained in the volume of testimony reported to the House is of no value whatever. Much of it is mere hearsay, opinions of witnesses, and no little amount of it utterly irrelevant to the case. Comparatively a small amount of it could be used on a trial of this case before the Senate.

It seems to have been assumed in the committee that this was the proper course, since in the minority views presented by Mr. Marshall it is stated: [3]

In what we have said of the character of evidence taken before us, and the means used to procure it, we must not be understood as reflecting upon the action of the committee or any member thereof. Such an interpretation of our remarks would do great injustice to us and to them. Whether such latitude should have been given in the examination of witnesses we will not now inquire. In an investigation before a committee it would be difficult and perhaps impossible to confine the evidence to such as would be deemed admissible before a court of justice. Indeed, it may be questioned whether it would be proper so to restrict it, and it is perhaps better, even for the President, that those who were managing the prosecution from the outside were permitted to present anything that they might call or consider evidence.

The majority of the committee embodied their conclusion in this resolution:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors.

The minority, taking issue, were united in recommending a resolution as follows:

Resolved, That the Committee on the Judiciary be discharged from the further consideration of the proposed impeachment of the President of the United States, and that the subject be laid upon the table.

The fact that all the minority did not unite in submitting views did not arise from any disagreement as to essential facts or law, but merely as to a difference as to whether or not the conduct of the President should be criticized as improper, although not impeachable.

2404. The first attempt to impeach President Johnson, continued.

The first attempt to impeach President Johnson was based on the salient charge of usurpation of power, with many specifications.

The discussion of the committee touched two main branches (1) as to the facts, and (2) as to the law.

1. As to the facts.

In moving the impeachment Mr. Ashley had specified six offenses. The majority of the committee found in general that the evidence sustained these charges, and say that "the great salient point of accusation, standing out in the foreground, and challenging the attention of the country, is usurpation of power." The majority specify as follows:

1. That the President of the United States, assuming it to be his duty to execute the constitutional guaranty, has undertaken to provide new governments for the rebellious States without the consent or

[1] See p. 1 of the report.

[2] See p. 104 of the report.

[3] See p. 110 of the report.

cooperation of the legislative power, and upon such terms as were agreeable to his own pleasure, and then to force them into the Union against the will of Congress and the people of the loyal States, by the authority and patronage of his high office.

2. That to effect this object he has created offices unknown to the law, and appointed to them without the advice or consent of the Senate, men who were notoriously disqualified to take the test oath, at salaries fixed by his own mere will, and paid those salaries, along with the expenses of his work, out of the funds of the War Department, in clear violation of law.

3. That to pay the expenses of the said organizations, he has also authorized his pretended officers to appropriate the property of the Government, and to levy taxes from the conquered people.

4. That he has surrendered, without equivalent, to the rebel stockholders of southern railroads captured by our arms, not only the roads themselves, but the rolling stock and machinery captured along with them, and even roads constructed or renovated at an enormous outlay by the Government of the United States itself.

5. That he has undertaken, without authority of law, to sell and transfer to the same parties, at a private valuation, and on a long credit, without any security whatever, an enormous amount of rolling stock and machinery, purchased by and belonging to the United States, and after repeated defaults on the part of the purchasers has postponed the debt due to the Government in order to enable them to pay the claims of other creditors, along with arrears of interest on a large amount of bonds of the companies guaranteed by the State of Tennessee, of which he was himself a large holder at the time.

6. That he has not only restored to rebel owners large amounts of cotton and other abandoned property that had been seized by the agents of the Treasury, but has presumed to pay back the proceeds of actual sales made thereof at his own will and pleasure, in utter contempt of the law, directing the same to be paid into the Treasury, and the parties aggrieved to seek their remedy in the courts, and in manifest violation of the true spirit and meaning of that clause of the Constitution of the United States which declares that "no money shall be drawn from the Treasury but in consequence of appropriations made by law."

7. That he has abused the pardoning power conferred on him by the Constitution, to the great detriment of the public, in releasing, pending the condition of war, the most active and formidable of the leaders of the rebellion, with a view to the restoration of their property and means of influence, and to secure their services in the furtherance of his policy; and, further, in substantially delegating that power for the same objects to his provisional governors.

8. That he has further abused this power in the wholesale pardon, in a single instance, of 193 deserters, with restoration of their justly forfeited claims upon the Government for arrears of pay, without proper inquiry or sufficient evidence.

9. That he has not only refused to enforce the laws passed by Congress for the suppression of the rebellion, and the punishment of those who gave it comfort and support, by directing proceedings against delinquents and their property, but has absolutely obstructed the course of public justice by either prohibiting the initiation of legal proceedings for that purpose, or where already commenced, by staying the same indefinitely, or ordering absolutely the discontinuance thereof.

10. That he has further obstructed the course of public justice, by not only releasing from imprisonment an important state prisoner, in the person of Clement C. Clay, charged among other things, as asserted by himself in answer to a resolution of the Senate (Ex. Doc., Thirty-ninth Congress, No. 7), "with treason, with complicity in the murder of Mr. Lincoln, and with organizing bands of pirates, robbers, and murderers in Canada, to burn the cities and ravage the commercial coasts of the United States on the British frontier," but has even forbidden his arrest in proceedings instituted against him for treason and conspiracy, in the State of Alabama, and ordered his property, when seized for confiscation by the district attorney of the United States, to be restored.

11. That he has abused the appointing power lodged in him by the Constitution:

"1. In the removal, on system, and to the great prejudice of the public service, of large numbers of meritorious public officers, for no other reason than because they refused to endorse his claim of the right to reorganize and restore the rebel States on conditions of his own, and because they favored the jurisdiction and authority of Congress on the premises.

"2. In reappointing in repeated instances, after the adjournment of the Senate, persons who had been nominated by him and rejected by that body as unfit for the place for which they had been so recommended."

12. That he has exercised the dispensing power over the laws, by commissioning revenue officers and others unknown to the law, who were notoriously disqualified by their participation in the rebellion from taking the oath of office required by the act of Congress of July 2, 1862, allowing them to enter upon and exercise the duties appertaining to their respective offices, and paying to them salaries for their services therein.

13. That he has exercised the veto power conferred on him by the Constitution, in its systematic application to all the important measures of Congress looking to the reorganization and restoration of the rebel States, in accordance with a public declaration that he "would veto all its measures whenever they came to him," and without other reasons than a determination to prevent the exercise of the undoubted power and jurisdiction of Congress over a question that was cognizable exclusively by them.

14. That he has brought the patronage of his office into conflict with the freedom of elections by allowing and encouraging his official retainers to travel over the country, attending political conventions and addressing the people, instead of attending to the duties which they were paid to perform, while they were receiving high salaries in consideration thereof.

15. That he has exerted all the influence of his position to prevent the people of the rebellious States from accepting the terms offered to them by Congress, and neutralized to a large extent the effects of the national victory by impressing them with the opinion that the Congress of the United States was bloodthirsty and implacable and that their only hope was in adhering to him.

16. That, in addition to the oppression and bloodshed that have everywhere resulted from his undue tenderness and transparent partiality for traitors, he has encouraged the murder of loyal citizens in New Orleans by a Confederate mob pretending to act as a police, by hireling correspondence with its leaders, denouncing the exercise of the constitutional right of a political convention to assemble peacefully in that city as an act of treason proper to be suppressed by violence, and commanding the military to assist instead of preventing the execution of the avowed purpose of dispersing them.

17. That he has been guilty of acts calculated, if not intended, to subvert the Government of the United States by denying that the Thirty-ninth Congress was a constitutional body and fostering a spirit of disaffection and disobedience to the law and rebellion against its authority by endeavoring, in public speeches, to bring it into odium and contempt.

The minority of the committee generally dissent from the conclusions of the majority as to the facts. After reviewing the six specifications alleged by Mr. Ashley, they find from a review of the evidence that the acts of the President bear a very different construction from that given by the majority. Messrs. Wilson and Woodbridge admit that many of his acts have been wrong politically, saying:

In approaching a conclusion we do not fail to recognize two standpoints from which this case may be reviewed: The legal and the political. Viewing it from the former, the case upon the law and the testimony fails; viewing it from the latter, the case is a success.

They then go on to state generally that the President

has disappointed the hopes and expectations of those who placed him in power. He has betrayed their confidence and joined hands with their enemies. * * * Judge him politically, we must condemn him. But the day of political impeachments would be a sad one for this country.

But Messrs. Marshall and Eldridge dissent from all criticism of the President, and confine themselves to the simple finding that on the law and the facts he may not be impeached.

2405. The first attempt to impeach President Johnson, continued.

Whether or not an offense must be indictable under a statute in order to come within the impeaching power was discussed fully in the first attempt to impeach President Johnson.

Discussion of the nature of the impeaching power with reference to American and English precedents.

2. As to the law.

On this point the majority, composed of Messrs. Boutwell; Francis Thomas, of Maryland; Thomas Williams, of Pennsylvania; William Lawrence, of Ohio, and John C. Churchill, of New York, advocate one view, and the united minority a radically different one.

The majority first review the English authorities as set forth in May's work and the utterances of Cushing, Story, and Rawle to show that the purpose of impeachment in modem times is the punishment of high crimes and misdemeanors, chiefly of an official or political character, which axe either beyond the reach of the law or which no other authority in the State but the supreme legislative power is competent to prosecute. The Federalist is also quoted to show that such offenses are of a nature which may be denominated political, as they relate chiefly to injuries done immediately to the society itself. The question then arises as to whether the terms of the United States Constitution are such as to change the view which has been taken in England. The majority say in this connection:

> The fourth section of its second article provides that "the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of high crimes and misdemeanors." It therefore names but two offenses specifically, and they are not charged here. Do the facts involved fill, then, within the general description of "other high crimes and misdemeanors," or are they excluded by the enumeration?
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> It is insisted, for the first time, we think, that they do not come within the meaning of the language used, because, although all confessedly in the popular sense the highest and gravest of misdemeanors, and many of them in the technical and common-law signification of the terms, indictable as such in England, and perhaps in most of the older States, they are neither crimes nor misdemeanors here, because it has been held with much diversity of opinion on the bench, and more at the bar, that there is no jurisdiction in the courts of the United States to punish criminally except where an act has been made indictable by statute, which, as the committee are constrained to think, is not a necessary logical result, even if the doctrine were incontrovertible and to be considered as no longer open to discussion in the courts. It would not follow, as they suppose, that what was undoubtedly a crime or misdemeanor at the common law, in view of the framers of the Constitution who sat under it and used its language and recurred so often to its principles, had become any the less a crime before the highest court for the purposes of impeachment because another tribunal, having no jurisdiction at all over the subject, may have decided that it is no longer cognizable before them, even if it were essential, as there is no authority to show, that it should be a true crime within the meaning of the common law. There is a law of Parliament, which is a part of the common law, and by which only this question must be determined.
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> The objection has the merit at least of being a novel as well as a subtle one; well enough, perhaps, for the range of a criminal court, but too subtle by far for those canons of interpretation that are supposed to rule in the construction of the fundamental law of a great state. If it be a sound one, then there is no remedy in the Constitution but for the specific offenses of treason and bribery, as there was no such thing as what it describes as "high crimes or misdemeanors "then known to the laws of the United States, and the Government must perish whenever it is attacked from a quarter that could not have been foreseen. But could the statesmen who framed the Constitution have perpetrated so grave a blunder as this? Did they intend, instead of anchoring that power to the rock by a precision that should fix it there, and leave nothing open to construction, to leave it all afloat for future Congresses to say what offenses should be from time to time impeachable? Did they, when dealing with a question so mighty as the safety of the state, use words without a meaning, except what might be thereafter given to them by an ephemeral legislature or invented by an uncertain and not always consistent court? Or did they stand in the august presence and under the not uncertain light of the common law of England, which they had claimed as their birthright, speaking the language, with a thorough understanding of its import, of the sages and statesmen who had illustrated its principles? Are their oracles to be read as they would

have been in England or would be now in any of its colonies past or present or are their solemn utterances to be measured by a language that they did not know? They committed no such error, and the suggestion that they did is one that does not seem to antedate the case to which it is at present applied.

To ascertain the meaning of the terms in question there are but three possible sources to which the explorer can recur, and they are the Constitution itself, the statutes, and the parliamentary practice, or the common law of which it is a part. The Constitution, however, goes no further, as already shown, than to declare the two political offenses of treason and bribery to be "high crimes and misdemeanors,' and as such impeachable, while no statute has ever attempted it. Nor does it by any means follow that where an offense has been made so punishable as a crime the right to impeach is a corollary. It is not every offense that by the Constitution is made impeachable. It must be not a crime or misdemeanor only, but a "high" one, within the meaning of the law of Parliament. There are, moreover, as suggested by Judge Story in his Commentaries, many offenses of great enormity which are made punishable by statute only when committed in a particular place. What is to be said of them? Are they impeachable if committed under one jurisdiction, and not so if perpetrated under another? There are, too, many others of a purely political character, which have been held again and again to be impeachable, that are not even named in our statute books, and many more may be imagined in the long future for which it would be impossible for human sagacity or perspicuity to provide. There is no alternative, then, left, unless the remedy is to fail altogether, except to resort to the parliamentary practice and the common law, or leave the whole subject in the discretion of the Senate, which would be inadmissible, of course, in a government of law.

The argument asserts that the offense must be an indictable one by statute to authorize an impeachment. It is not even admitted, however, that this high and radical and only effective remedy for official delinquencies—and in this country, at least, it is no more than that—is to be confined to those offenses which are known by these terms, within the technical meaning that has been assigned to them. In such a case as this no narrow interpretation can be allowed to defeat the object of the law. A constitution of government is always to be construed in a broad, catholic sense, in order to suppress the possible mischief and advance the remedy. Those who maintain this doctrine strangely forget that there is a parliamentary sense, which conforms to the popular one, and is as much a common-law sense as the one on which they rely. The object of the law is not to punish crime. That duty is assigned to other tribunals. The purpose here is only to remove the officer whose public conduct has been such as to disqualify him for the proper discharge of his functions, or to show that the safety of the state—which is always the supreme law—requires that he should be deposed. It refers not so much to moral conduct as to official relations—not, indeed, to moral conduct at all, except so far as it may bear on the performance of official duty. The judgment is not fine or imprisonment, as it may be in England, but only removal from office and disqualification for the future. One of the very objects of this extraordinary tribunal, as has been shown already and will be further enforced hereafter, is to reach those very cases of official delinquency against which no human foresight could provide and which the ordinary tribunals are inadequate to punish. No ingenuity of invention, no fertility of resource, can hedge round a high public officer by boundaries which the greater ingenuity of fraud or wickedness may not be able to pass by sap or scale. If a President, it may be that he may prove impracticable. He may ignore the law, and even wage war on the power that is intrusted with the making of it. He may nullify its acts by misconstruing or disregarding them or denying their authority. He may be guilty of offenses which are in their very nature calculated to subvert the Government—all which things Andrew Johnson is shown clearly to have done. And yet these things, although high misdemeanors against the state, and fraught with peril to its life, may not be indictable as crimes. But will anybody say that the Constitution affords no remedy—that the arch offender must be borne with, and the state must die—merely because Congress has failed to provide, not the same, but a different punishment for the same offense? The cases in England show that this is not law there, as it is not reason, which is said to be the life of the law. The ewes here, though all of offenses that were not statutory crimes or misdemeanors, have been so few as to leave this question open, to be decided hereafter upon those great reasons of state that lie at the foundation of the law of Parliament, which is the rule that must govern ultimately here.

The report then goes on to quote from the works of Story and Curtis in support of the view just advanced, and to the effect that, as said by Story, "the offenses to

which the power of impeachment has been and is ordinarily applied as a remedy are of a political character," "growing out of personal misconduct, or gross neglect or usurpation, or habitual disregard of the public interests in the discharge of the duties of political office;" and, as said by Curtis, that "although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for a crime."

Further the report quotes the following from Judge Story:

> The Congress of the United States has itself unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct, and the rules of proceeding and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. * * * In the few cases of impeachment that had theretofore been tried no one of the charges had rested on any statutable misdemeanor.

The report then says:

> When he wrote the cases had been only three. In the first, which was that of Blount, in 1798, where the charge was of a conspiracy to invade the territories of a friendly power, although there was no decision on the merits, the impeachable character of the offense was affirmed by an almost unanimous vote of the Senate, expelling the delinquent from that body as having been guilty of a high misdemeanor in the very language of the Constitution. The second (Pickering's), in which a conviction took place, was against a judge of a district court and purely for official misconduct. The third (Chase's) was against a judge of the Supreme Court of the United States, and was also a charge of official misconduct, but terminated in an acquittal. It is a noteworthy fact, however, that in the last-named case (the only one in which the point was raised) it was conceded by the answer that a civil officer was impeachable for "corruption, or some high crime or misdemeanor, consisting in some act done or omitted in violation of a law commanding or forbidding it." Two other cases have occurred since that time. The first, that of Judge Peck, in December, 1830, was for punishing a refractory barrister for contempt, as for "an arbitrary, unjust, and oppressive arrest and sentence, with intent to injure and oppress under cover of law." The case was clearly not of an indictable offense under any statute of the United States, but, though defended by the very ablest counsel (Messrs. Wirt and Meredith), it did not seem to have occurred to them that the offense charged was not impeachable within the meaning of the Constitution. The other, that of Judge Humphreys, at the commencement of the rebellion, was upon charges of disloyal acts and utterances, some of which clearly did not set forth offenses indictable by statute of the United States, and yet upon all those charges, with one exception only, he was convicted and removed.
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> It is only necessary to add that the conclusion of Judge Story upon the whole case is that "it seems to be the settled doctrine of the high court of impeachment that, though the common law can not be the foundation of a jurisdiction not given by the Constitution or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law, and that what are and what are not 'high crimes and misdemeanors' is to be ascertained by a recurrence to that great basis of American jurisprudence." And he adds to this that "the power of the House to punish contempts, which are breaches of privilege not defined by positive law, has been upheld on the same ground; for if the House had no jurisdiction to punish until the acts had been previously ascertained and defined by positive law, it is clear that the process of arrest would be illegal."
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> And this, it is hoped, will dispose forever of the novel objection that is now interposed in the path of the nation's justice in the defense of its greatest offender, and in a case that has no parallel in enormity in the parliamentary history of England. It is scarcely necessary to repeat that the charges, resting mainly upon record evidence, are not only of usurpation and abuse of admitted power, but of a contempt of law and of the legislative power that transcends anything in the annals of either the Tudore or the Stuarts.
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> It may be answered, however, as it has been, that all this was with the best intent, and that positive corruption must be shown to make the act impeachable. The President alleges a necessity, in one case, of dispensing with the laws in consequence of the absence of Congress. The Attorney-General insists that it was not the true policy of the country to enforce the laws against the rebels, and he accordingly refuses to do it. The Secretary of the Treasury holds the same opinion also as to the subject of

captured and abandoned property, and he returns the proceeds, as the President returns the property itself.

An old but homely proverb says that the place most dreaded by the wicked is paved with good intentions. If such intentions, or even a supposed necessity, could excuse the violation of the law, no transgressor would ever be punished, and no tyrant fail to show that what he had done was with the best designs and for the purpose of saving the constitution of the state. If Andrew Johnson can plead that he gave away or sold the public property to rebels to promote their commerce, or that he dispensed with the test oath only to conciliate the disaffected, or collect the revenue, because of the absence of that Congress which he had refused to convene, the self-willed James II might even with a better grace have asserted that he had dispensed with the religious test in the interests of universal toleration. By way, however, of disposing of this apology, it may not be amiss to cite a few authorities:

"The rule is, that if a man intends to do what he is conscious the law—which every one is conclusively presumed to know—forbids, there need not be any other evil intention. (Bish. Crim. Law, sec. 428.; 11 S. and R., 325.) It is of no avail to him that he means at the same time an ultimate good." (Ibid.)

"When the law imposes a prohibition it is not left to the discretion of the citizen to comply or not. He is bound to do everything in his power to avoid an infringement of it. The necessity which will excuse him for a breach must be instant and imminent. It must be such as to leave him without hope by ordinary means to comply with the requisitions of the law." (Fir. Story, I; 1 Gall., 150 S. P.; 3 Wheat., 39; 1 Bish., sec. 449.)

"Whenever the law, statutory or common, casts on one a duty of a public nature, any neglect of the duty or act done in violation of it is indictable." (I Bish., secs. 389–537.)

"The same doctrine requires all those who have accepted, to discharge faithfully all public trusts. Any act or omission in disobedience of this duty, in a matter of public concern, is, as a general principle, punishable as a crime." (Ibid., see. 913.)

The only remaining question is whether, in view of all these facts, it will be the duty of this House to call the President to answer before the Senate, or whether any consideration of mere public or party expediency, on either side of the House, ought to be allowed to prevail on them to let the accused go free.

2406. The first attempt to impeach President Johnson, continued.

In the first attempt to impeach President Johnson, the minority of the Judiciary Committee held that an indictable offense must be charged.

Elaborate discussion of meaning of the words "high crimes and misdemeanors."

American and English precedents were reviewed carefully by the minority of the Judiciary Committee in the first attempt to impeach President Johnson.

The minority views take issue with the argument of the majority, beginning the argument as follows:

The Constitution of the United States declares that "the House of Representatives * * * shall have the sole power of impeachment." What is the nature and extent of this power? Is it as boundless as it is exclusive? Having the sole power to impeach, may the House of Representatives lawfully exercise it whenever and for whatever a majority of the body may determine? Is it a lawless power, controlled by no rules, guided by no reason, and made active only by the likes or dislikes of those to whom it is intrusted? Have civil officers of the United States nothing to insure them against an exercise of this power except an adjustment of their opinions and official conduct to the standard set up by the dominant party in the House of Representatives? Happily for the nation this power is not without its constitutional boundaries, and is not above the law. When we examine the Constitution to ascertain in what cases the power of impeachment may be exercised—for what acts civil officers may be impeached—we are informed that—

"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." (Art. II, see. 2.)

In these cases only can the power of impeachment be lawfully used. It would seem to be difficult to mistake the import of this plain provision of the fundamental law of the land; and yet it is not free from conflicting interpretations. This conflict does not arise upon the terms "treason" and "bribery," for they are too well understood and too clearly defined in the Constitution and the laws of the land to admit of any disputation concerning them. They are both crimes of a high grade and punishable upon indictment in the courts of the United States. They are offenses against the public weal, with just and adequate penalties prescribed for them by the law of the nation. There is no difficulty in ascertaining the meaning of the Constitution in so far as it relates to these crimes. Whatever conflict of opinion has arisen respecting the extent of the power of impeachment finds its origin in the terms "other high crimes and misdemeanors." These terms, it has been claimed, give a latitude to the power reaching far beyond the field of indictable offenses. This doctrine is denied. Here arises the only doubt concerning the jurisdiction of the impeaching power of the House of Representatives.

The fact that the framers of the Constitution selected by name two indictable crimes as causes of impeachment would seem to go far toward establishing as the true construction of the terms "high crimes and misdemeanors" that all other offenses for which impeachment will lie must also be indictable. Having fettered the House of Representatives by naming two well-defined crimes of the highest grade, it is not to be presumed that the same hands which did it clothed the House with the right to ramble through all grades of crimes and misdemeanors, all instances of improper official conduct and improprieties of official life, grave and unimportant, harmful and harmless, alike. It is unreasonable to say that the men who framed our Constitution, after undertaking to place a limitation on the power of impeachment, ended their effort by throwing away all restraints upon its exercise and placing it entirely within the keeping of those upon whom it was intended to confer only a limited power. There is something more stable than the whims, caprices, and passions of a majority established as a restraint upon this power by the Constitution. The House of Representatives may impeach a civil officer, but it must be done according to law. It must be for some offense known to the law and not created by the fancy of the Members of the House. As was very pertinently remarked by Hopkinson on the trial of Chase, "The power of impeachment is with the House of Representatives, but only for impeachable offenses. They are to proceed against the offense, but not to create the offense and make any act criminal and impeachable at their will and pleasure. What is an offense is a question to be decided by the Constitution and the law, not by the opinion of a single branch of the legislature; and when the offense thus described by the Constitution or the law has been committed, then, and not till then, has the House of Representatives power to impeach the offender."

A civil officer may be impeached for a high crime. What is a crime? It is such a violation of some known law as will render the offender liable to be prosecuted and punished. "Though all willful violations of rights come under the generic name of wrongs, only certain of those made penal are called crimes." (Encyc. Brit., vol. xiii, 275.) The offense must be a violation of the law of the sovereignty which seeks to punish the offender; for no act is a crime in any sovereignty except such as is made so by its own law. In England no act is a crime save such as is so declared either by the written or unwritten law of the Kingdom, and therefore only crimes by the law of England are indictable in England. Crimes are defined and punished by law—by the law of the sovereignty against which the crime is committed—and nothing is a crime which is not thus defined and punished. "Municipal law" (which, among its multiplicity of offices, defines and punishes crimes) "is a rule of action prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." (1 Blackstone, 44.) Nothing is a crime which is not such a breach of this command or prohibition as carries with it a prescribed penalty. Hence Blackstone said: "All laws should be, therefore, made to commence in futuro." The citizen must be notified of what acts are crimes, and he can not be lawfully punished for any others. The reasonableness of this rule was appreciated, and its enforcement provided for, by the convention which framed the Constitution of the United States, when they placed in that instrument the declaration that "no * * * ex post facto law shall be passed." No act which was not a crime at the time of its commission can be made so by subsequent legislative or judicial action; and this doctrine is as binding on the House of Representatives when exercising its powers of impeachment as when employed in ordinary criminal legislation.

All that has been said herein concerning the term "crimes" may be applied with equal force to the term "misdemeanors" as used in the Constitution. The latter term in no wise extends the juris-

diction of the House of Representatives beyond the range of indictable offenses. Indeed, the terms "crime" and "misdemeanor" are, in their general sense, synonymous, both being such violations of law as expose the persons committing them to some prescribed punishment; and, although it can not be claimed that all crimes are misdemeanors, it may be properly said that all misdemeanors are crimes.

In elaboration of its discussion of misdemeanors as crimes the minority views quote Blackstone's Commentaries and Hale's Pleas of the Crown, concluding:

Thus it appears that the terms "crime" and "misdemeanor" merely indicate the different degrees of offenses against law—crime marking the felonious degree, misdemeanor denoting "all offenses inferior to felony." Both indicate indictable offenses. They are terms of well-established legal signification. There is nothing uncertain about them. The framers of the Constitution used these term as terms of art, and we have no authority for expounding them beyond their true technical limits.

The views then go on to examine provisions of the Constitution to show that—

When the Senate is organized * * * as a high court of impeachment, it is simply a court of special criminal jurisdiction—nothing more, nothing less. It is bound by the rules which bind other courts. It is as much restrained by law as any other criminal court. It is not a tribunal above the law and without rule to guide it.

The views quote Burke, Blackstone, and Woodeson to show that this view is in accordance with the character of the House of Lords sitting as a court of impeachment, and continue:

If the Senate sitting as a high court of impeachment is not to be bound by the laws which bind other courts, why require the Senators to be put on oath or affirmation? If this court may declare anything a high crime or misdemeanor which may be presented as such by the House of Representatives, and pronounce judgment against a civil officer thereon, why swear the members of the court at all? The oath is not a solemn mockery. It is prescribed for some good purpose. What is it? The form of oath adopted by the Senate in Chase's case affords a very satisfactory answer, and it is, therefore, here quoted, as follows: "You solemnly swear or affirm, that in all things appertaining to the trial of the impeachment of ——— ———, you will do impartial justice according to the Constitution and laws of the United States." (Chase's Trial, vol. 1, p. 12.) This oath is very comprehensive. It covers the charge, the evidence, and all the rules thereof; the decisions upon all questions arising during the progress of the trial, and the final judgment. In all these several respects the members of the court are to be guided by the Constitution and laws of the United States. They can try upon no charges other than treason, bribery, or other high crimes and misdemeanors; and the offense charged must be known to the Constitution, or to the laws of the United States. The rules of evidence under and in pursuance of which crimes may be proved upon indictment in the courts of the United States are to be observed. The judgment "shall not extend further than a removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." The office of the oath is to insure a strict observance of these requirements of the Constitution and the laws. This seems clear without further reference to other provisions of the Constitution; but it is proper that we should look at all of its clauses bearing upon the question under discussion.

The Constitution having created a court for the trial of impeachments, prescribed its jurisdiction and placed a limitation on its power to pronounce judgment, then declares that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." It would seem difficult, indeed, to misunderstand this language. A civil officer convicted on impeachment is, notwithstanding such conviction, still liable to a prosecution for the same offense in the courts of ordinary criminal jurisdiction. How can this be if his offense be not an indictable crime? The court of impeachment can not apply the usual statutory punishment. It can not go beyond removal from, and disqualification to hold, office under the United States. The enforcement of other penalties for the same criminal conduct is left to the criminal courts of the country, after conviction upon indictment. Is not this substantially a constitutional direction to the court of impeachment not to convict a civil officer of any crime or misdemeanor for which an indictment will not lie? This view of the question was very forcibly stated by Mr. Martin, in his argument in Chase's case, in these

words: "The very clause in the Constitution, of itself, shows that it was intended the persons impeached and removed from office might still be indicted and punished for the same offense, else the provision would have been not only nugatory but a reflection on the enlightened body who framed the Constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for one offense, could prevent the same person from being indicted and punished for another and different offense." (Chase's Trial, vol. 2, p. 137.) How can the force of this argument be avoided? Wherein does it lack the support of sound reason and good sense? But it does not rest merely upon the clauses of the Constitution above quoted; others, yet to be noticed, give it much additional strength, and these will now be examined.

The section of the Constitution securing the trial by jury reads as follows: "The trial of all crimes, except in cases of impeachment, shall be by jury." (See. 2, art. 3.) Can it be successfully claimed that the word "crimes," as here used, is less comprehensive than it is where it occurs in section 4 of article 2? If not, then the crimes for which a civil officer may be impeached are the subjects of indictment or presentment; for such only can be tried by a jury. Any act which is a crime within the meaning of the last-named section is also a crime within the intent of the former, although the converse of this proposition is not true, as it is not every crime which a jury may try that will render a civil officer committing it liable to impeachment. For the latter purpose the crime must "have reference to public character and official duty." (Rawle on the Constitution, 204.) The plain inference to be drawn from the section is "that cases of impeachment are cases of trials for crimes."

Again, in that part of the Constitution which clothes the President with the power to grant pardons, it is said, "He shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Art. 2, sec. 2.) What is the meaning of the term "offenses?" It can not mean less than such acts as render offenders liable to punishment, else why is a pardon necessary, or even desirable? No one needs a pardon who has not committed a crime. A pardon shields from or relieves of punishment. Punishment follows trial and conviction. Trial and conviction for crime can be had only for a violation of an existing law declaring the act done a crime. The term offenses, then, means crimes, in which, of course, is included misdemeanors. High crimes and misdemeanors are subject to two jurisdictions—first, in the ordinary criminal courts of the country; second, in the high court of impeachment. The same party, for the same acts, may be on trial in both tribunals at the same time. If convicted in both cases the President may pardon the criminal and relieve him of the consequences resulting from a conviction by the first-named jurisdiction, but the Constitution forbids his interference with the last. The grant of power and the exceptions are both in the same clause of the same section, and the fact that they are thus intimately associated shows that they relate to the same subjects—indictable offenses.

The views refer in this connection to a fact recorded in the Chase trial as significant:

Eight articles were preferred against him by the House of Representatives. It seems to have been admitted that all of the articles except the fifth charged him with criminal conduct. In regard to the fifth, his counsel made the point that it did not "charge in express terms some criminal intent on the respondent." The proof was as clear upon this point as it was upon the remaining seven. Thirty-four Senators voted on the several articles, and while the votes on seven of them ranged from 4 to 19 for conviction, every Senator answered "not guilty" on the fifth. It is fair to conclude, in view of the proof submitted in proof of the several articles, that the members of the court approved the position taken by the counsel of Chase on the trial.

The minority next examine the precedents, denying that either in this country or in England did they sustain the contention of the majority.

(*a*) As to precedents in this country.

The views discuss first the Blount case, saying of the charges that "they were undoubtedly regarded as indictable offenses;" but the court did not pass upon them, deciding that Blount was not a civil officer, and hence not within the jurisdiction of the court.

The Pickering case is next discussed, and after setting forth the charges, the views take up the issue of insanity raised by Judge Pickering's son, and say:

This issue was a grave and pertinent one, and yet the court, after deciding to entertain it, and proceeding to its trial, finally disposed of the case as though no such issue had been raised. This conduct of the court is both remarkable and discreditable; but not more so than its final action on the question of the guilt or innocence of the accused. Pickering was impeached for high crimes and misdemeanors. If convicted at all, the Constitution required that it should be for high crimes and misdemeanors, as there were no charges of treason or bribery in the case. In order that the guilt or innocence of the respondent should be directly passed upon by the court, without any improper evasion of its real and legal merits, Senator White moved that the "following question be put to each Member upon each article of impeachment, viz, Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the —— article of impeachment, or not guilty?" The mover stated that he had borrowed the form of the question from the one used in the case of Warren Hastings. The question was fair in form, and presented the identical issue which the court was about to decide; but it did not suit the purposes of those who were determined to convict, and it was rejected by a vote of yeas 10, nays 18. Thereupon Senator Anderson moved the following form, viz, "Is John Pickering, district judge of the district of New Hampshire, guilty as charged in the —— article of the impeachment exhibited against him by the House of Representatives?" This form was adopted by yeas 18, nays 9. (Ibid., 364.) So the court, after entertaining the plea of insanity and neglecting to decide it, on the foregoing evasive and unmeaning question, convicted Pickering on each article, and removed him from office; but this end was reached by a strict party vote. Senator Dayton said of the form of the question and the reason of its adoption: "They were simply to be allowed to vote whether Judge Pickering was guilty as charged—that is, guilty of the facts charged in each article—aye or no. If voted guilty of the facts, the sentence was to follow, without any previous question whether those facts amounted to a high crime or misdemeanor. The latent reason of this course was too obvious. There were members who were disposed to give sentence of removal against this unhappy judge upon the ground of the facts alleged and proved who could not, however, conscientiously vote that they amounted to high crimes and misdemeanors, especially when committed by a man proved at the very time to be insane, and to have been so ever since, even to the present moment." (Ibid., 365.) If this rule is to be followed, any civil officer may be impeached, convicted, and removed from office for acts entirely proper and strictly lawful. Who can wonder that members of the court denounced the whole proceeding as "a mere mockery of trial?" Surely the case reflects no credit on the Senate which tried it, and in one short year the members of the body seem to have arrived at the same conclusion; for, on the trial of Judge Chase, the form of the question adopted to be propounded to each member of the court was as follows, viz, "Mr. ——, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the —— article of impeachment?" (Ibid., 2d sess., 8th Cong., 664.) It is to be hoped that no one will ever quote the Pickering case as an authority to guide the House in presenting, or the Senate in trying, a case of impeachment. It decided nothing except that party prejudice can secure the conviction of an officer impeached in spite of law and evidence.

The case against Judge Chase is next reviewed at length:

The next case carried to the Senate by the House of Representatives has gone into history as one "without sufficient foundation in fact or law." (Hildreth's History of the United States, Vol. V, 254.) The case of Samuel Chase, a judge of the Supreme Court of the United States, is now referred to. Chase was impeached for high crimes and misdemeanors in eight articles. It is not necessary to set out the substance of these articles. One of them was founded on his conduct at the trial of John Fries for treason, before the circuit court of the United States at Philadelphia, in April and May, 1800—more than four years before his impeachment. Five of them were based on his conduct at the trial of James Thompson Callender "for printing and publishing, against the form of the act of Congress, a false, scandalous, and malicious libel," etc., "against John Adams, then President of the United States," etc. The remaining two rested on his charge to the grand jury in and for the district of Maryland, in May, 1803, and his refusal to discharge the grand jury in and for the district of Delaware, in June, 1800. The articles portrayed the conduct of Judge Chase in as offensive a manner as the committee could command. The bitterness of Randolph appeared in every article, and the enemies of the accused felt confident of his conviction.

Chase answered minutely and elaborately to the several articles, and filed against each the following plea, viz: "And the said Samuel Chase, for plea to the said article of impeachment, saith that he is not guilty of any high crime or misdemeanor, as in and by said first article is alleged; and this he prays may be inquired of by this honorable court in such manner as law and justice shall seem to them to require." (Ibid., 117.) This was the issue on which the case went to trial. The result was the acquittal of Chase on each article. This result was not owing to a failure of the evidence produced to support the facts alleged; for, so far as at least four of the articles are concerned, the allegations were supported in almost every particular; and had the same form of question been used on the conclusion of the trial as was adopted in the Pickering case, Chase doubtless would have been convicted. The questions propounded in both cases have already been quoted, and a mere glance at them will show how Pickering was convicted and Chase acquitted.

If this case establishes anything, it is that an impeachment can not be supported by any act which falls short of an indictable crime or misdemeanor. This point was urged by the able counsel for Chase with great ability and pertinacity; and the force with which it was presented drove the managers of the House of Representatives to seek shelter under that clause of the Constitution which says: "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior." (Manager Nicholson's speech, ibid., 597.) This provision, respecting the tenure of the judicial office, it was claimed, would authorize the impeachment of a judge for misbehavior which would not support an indictment. The court did not approve this position, and very properly, for as the Constitution provides that civil officers may be impeached for high crimes or misdemeanors, and nothing is known to the law as a high crime or misdemeanor which is not indictable, of course an impeachment for anything else would be improper.

If the position assumed by the managers in the Chase case, that a judge may be impeached for mere misbehavior in office not amounting to an indictable offense, because such conduct is a breach of the tenure by which the judicial office is held, is correct, what would be its effect on the case which this committee now have in hand? If resort must be had to the clause of the Constitution which prescribes the tenure of the judicial office to justify an impeachment of a judge on account of conduct not known to the law as a crime, does it not reach too far to serve the purposes of those who would impeach the President of the United States because of acts for which he may not be indicted? The President holds his office by a different tenure. The Constitution says: "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years." (Art. 2, sec. 1.) This provision of the Constitution stands firmly in the way of those persons who would tone down the term misdemeanor below the indictable standard by resorting to the clause fixing the judicial tenure. Judges hold their respective offices during good behavior; the President holds for a definite time—four years. If, therefore, the argument proves anything in the former case, it proves too much for the latter. If a judge may be impeached for nonindictable conduct, because he holds his office during good behavior, it follows logically that an officer who holds for a term of years can not be so impeached. This exposes the fallacy of the entire argument.

The case of Judge Peck is commented on only so far as to record that the court sustained the respondent's contention that his conduct was proper, lawful, and right.

As to the case of Judge Humphries, the views say:

Humphries was convicted, as it was right he should be. He was charged with a crime against the known law of the land; he was a traitor against the Government of the United States.

(*b*) As to the English precedents.

At the outset of this branch of the inquiry, the minority say:

Cases can doubtless be found wherein Parliament has exercised this high power in a most extraordinary manner and convicted persons upon charges not indictable. The power of Parliament over the subject is far greater than that which the two Houses of Congress can exercise over the citizen. * * * In times of high party excitement this power has been in some cases most shamefully and oppressively exercised.

Then follows a review of some of these cases, concluding:

Individual resentment, partisan prejudice and excitement, and desire for revenge, instigated very many of the English impeachment cases. This is very well illustrated in the speech of Lord Carnarvon on the trial of the Earl of Danby—a speech that forms one of the footprints in the history of parliamentary impeachments which should ever remind the people of this nation that great caution should be used in the selection of English precedents. Carnarvon said: "My lords, I understand but little of Latin, but a good deal of English, and not a little of English history, from which I have learned the mischiefs of such kind of prosecutions as these, and the ill fate of the prosecutors. I could bring many instances, and those ancient; but, my lords, I shall go no further than the latter end of Queen Elizabeth's reign, at which time the Earl of Essex was run down by Sir Walter Raleigh. My Lord Bacon, he ran down Sir Walter Raleigh, and your lordships know what became of my Lord Bacon. The Duke of Buckingham, he ran down my Lord Bacon, and your lordships know what happened to the Duke of Buckingham. Sir Thomas Wentworth, afterwards Earl of Strafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Strafford, and your lordships know what became of Sir Harry Vane. Chancellor Hyde (Lord Clarendon) ran down Sir Harry Vane, and your lordships know what became of the chancellor. Sir Thomas Osborn, now Earl of Danby, ran down Chancellor Hyde; but what will come of the Earl of Danby your lordships best can tell. But let me see that man that dare run the Earl of Danby down, and we shall soon see what will become of him." (11 Howell, S. T., 632, 633.)

Did chance weld the chain which so closely holds these names together in the history of parliamentary impeachment? Was it not rather the natural product of misused power? The officer or party who misuses power may be considered fortunate indeed if the wheel of fortune returns no retribution.

The minority, then go on to discuss the "well-considered cases of parliamentary impeachments," those of the Earl of Macclesfield, Warren Hastings, and of Viscount Melville, and to deduce therefrom support for the view which they take. In their.opinion these cases should be followed, and they say:

The idea that the House of Representatives may impeach a civil officer of the United States for any and every act for which a parliamentary precedent can be found is too preposterous to be seriously considered.

The minority views then take up the remaining branch of the question:

If only indictable crimes and misdemeanors are impeachable, by what law must they be ascertained? Must it be by the law of the United States, of the States, the common law, or by any or all of these?

In the case of the United States *v.* Hudson and Goodwin (7 Cranch, 32) it was held that "the legislative authority must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense" before the courts of the United States can exercise jurisdiction over it. This doctrine was affirmed by the case of the United States *v.* Coolidge et al. (1 Wheaton, 415), and Chief Justice Marshall, in delivering the opinion of the court in Ex parte Ballman and Swartwout (4 Cranch, 95), said: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, can not transcend that jurisdiction." And it was in following these cases that Justice McLean held, in the United States *v.* Lancaster (2 McLean's R., 433), that "the Federal Government has no jurisdiction of offenses at common law. Even in civil cases the Federal Government follows the rule of the common law as adopted by the States, respectively. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act, criminally, except as the statute provides." The same doctrine is followed in 1 Wash. C. C. R., 84; 2 Brock, 96; 1 Wood. and Minot, 401; 3 Howard, 103; 12 Peters, 654; 4 Dallas, 10, and note; 1 Kent's Com., 354; Sedgwick on Statutory and Constitutional Law, 17; and Wharton, in reviewing this question, says: "However this may be on the merits, the line of recent decisions puts it beyond doubt that the Federal courts will not take jurisdiction over any crimes which have not been placed directly under their control by act of Congress." (Am. Criminal Law, 174.)

Are these authorities founded in reason? If they are, why should they not be followed by the high court of impeachment, as well as other courts of the United States? The principle on which they proceed is that nothing is a crime against the United States which has not been declared so to be by the sovereignty of the Republic; that only the laws of the United States can be enforced in the courts of the United States; that the United States do what other civilized and Christian governments do—enforce their own laws, for such only are rules of conduct prescribed for their own citizens. This seems to be reasonable; and if it is so, it would be difficult to find an excuse, or form a pretext, for not applying it to the tribunal intrusted with the jurisdiction to try cases of impeachment.

But it is claimed that the high court of impeachment is exempt from this jurisdictional limitation by the terms of the Constitution itself; that the Constitution establishes the courts, confers its jurisdiction, and includes within it common-law crimes, inasmuch as it says: "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." This, it is said, opens the broad field of the common law for the ascertainment of offenses for the commission of which civil officers may be impeached; that the terms treason, bribery, and other high crimes and misdemeanors are common-law terms, and are to be understood in the sense given them by the common law; that, as used in the Constitution, their import is the same as at common law. Is this true to the extent stated? Suppose the impeachment is to be for treason and some common-law treason is attempted to be set up, what would be the result? The Constitution says: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." This puts an end to all attempts to impeach a civil officer of the United States for treason at common law. Then the term treason, as used in the Constitution, although it be a common-law term, is shoorn of its common-law signification.

But it may be said that the term "bribery" is not defined in the Constitution, and therefore a civil officer may be impeached for bribery at common law. If this be true, why is it true? Bribery was, at the time the Constitution was formed, a crime known not only to the common law, but also to the laws of each of the thirteen States participating in the organization of the Government of the United States. It was selected by name because it affected the administration of the affairs of the Government in all of its departments—executive, legislative, and judicial—as treason touched the very life of the nation. Being thus selected by name, recourse may be had to the common law to ascertain the constituent elements of the crime thus named. "Courts may properly resort to the common law to aid in giving construction to words used in the Constitution" (3 Wheaton, 610; 1 Wood. and Minot, 448); and as the Constitution used the word bribery, resort can be had to the common law to determine its meaning. Thus, the framers of the Constitution placed within the jurisdiction of the high court of impeachment the two crimes which peculiarly affect the life and well-being of the nation—both being specifically named.

How is it with other offenses? The Constitution says: "or other high crimes and misdemeanors." What other high crimes and misdemeanors? To what extent can the common law aid us in answering this question? If we go to the common law to find what a crime is, we discover that it is some act or omission in violation of law which may be punished in the mode prescribed by law. This is the general signification of the term crime at common law. It is not a naming of a specific offense. If the Constitution had named murder, arson, burglary, larceny, or any other crime by its title the common law could have aided us in arriving at its meaning, for all these, and a multitude of others, are crimes at common law. After wandering over the entire field of common-law crimes, how are we to tell those which will support an impeachment? Learned writers assert that those offenses which may be committed by any person—such as murder, burglary, robbery, etc.—are not the subjects of impeachment. (Rawle on the Constitution, 204.) But these are all crimes, high crimes, and they meet us at every step in our gropings among the winding passages of the common law engaged in vain endeavors to determine what the Constitution means by the terms high crimes and misdemeanors. Can any mode of escape from this perplexity be devised except that which shall affirm that the phrase "or other high crimes and misdemeanors" means such other high crimes and misdemeanors as may be declared by the lawmaking power of the United States? It is unreasonable to conclude that a civil officer can be impeached only for some crime or misdemeanor named by the Constitution or laws of the United States? This is the course pursued toward the citizen in private life. Why should greater uncertainty attend the public officer?

It will not do to answer these suggestions by stating hypothetical cases and affirming that an officer who should do this, that, or another thing ought to be impeached, and that it would be unsafe for the nation to permit such conduct to pass unchallenged and unpunished. The obvious answer to all this is that everything which ought to be made a crime can be made so by legislation. The power is ample and the machinery perfect for all such work. If they are not used, the fault may not lie at the door of the delinquent officer. The statement of a supposed case of itself proves that a remedy may be provided. The remedy is to prohibit the doing of the thing supposed, and declaring its commission a crime. A case can not be stated which will not suggest its own remedy. Every difficulty may be surmounted by appropriate legislation; and the question may very well be asked, What right has the House of Representatives and the Senate of the United States to sleep on their undisputed legislative powers and then resort to the common law of England for the punishment of civil officers, when no civil court of the United States can punish a citizen or foreigner for any crime from the highest to the lowest degree, except it be first prescribed by an act of Congress? The decisions of the courts of the United States that they have jurisdiction of no crimes not found in the statutes of Congress give great force to the statement of Mr. Rawle in his work on the Constitution, that "The doctrine that there is no law of crimes except that founded in statutes, renders impeachment a nullity in all cases except the two expressly mentioned in the Constitution—treason and bribery—until Congress shall pass laws declaring what shall constitute the other high crimes and misdemeanors." (P. 265.)

Rawle combatted the doctrine of the decisions referred to, and this it is which gives peculiar force to the language just quoted from him; for had he accepted the doctrine of the decision in the case of the United States *v.* Hudson and Goodwin, it is perfectly evident that he would have declared the impeaching power inoperative, except so far as it relates to treason and bribery, until Congress, by legislation, should give it vitality.

Story also combatted this doctrine and denied the correctness of the decisions upon which it is based. It was this which gave direction to those parts of his Commentaries on the Constitution so freely quoted by those who claim that the power of impeachment is unlimited. He cites approvingly the works of Rawle above quoted. (Sec. 796.) He affirmed that the courts of the United States have jurisdiction of common-law crimes; but the decisions are against him. He states in his Commentaries on the Constitution that impeachments will lie for nonindictable offenses; but the authorities which he cites are against him. He cites Rawle; but it has already appeared how that author surrenders the entire position. He quotes 2 Woodeson, Lecture 40, but in this very lecture Woodeson says: "Impeachments, as we have seen, are founded and proceed upon the laws in being. A more extraordinary course is sometimes adopted. New and occasional laws have been passed for the punishment of offenders. Such ordinances are called bills of attainder and bills of pains and penalties." (2 Woodeson, 620.)

Offenses known to the laws in being are indictable; and the Congress of the United States may not resort to bills of attainder and bills of pains and penalties; these are forbidden by the Constitution. But to what laws must the offenses be known? To the law of the sovereignty against which they are alleged to have been committed.

Is there any foundation on which to rest a contrary doctrine? May not the case be stated as a syllogism thus: No officer is subject to the impeaching power for the commission of an act which is not indictable; common-law crimes are not indictable in the courts of the United States; ergo, common-law crimes will not sustain an impeachment by the House of Representatives of the United States?

The case of the United States *v.* Hudson and Goodwin was decided by the Supreme Court of the United States in February, 1812, and its doctrine has been adhered to from that day to the present time. It is of some importance to remember this date, as it is subsequent to the impeachment of Blount, Pickering, and Chase, which may account for the failure to raise the question in those cases: "Can a civil officer be impeached for an offense which is not indictable under the laws and in the courts of the United States?" It was not necessary to raise it in the Peck case, for his defense, as has already been stated, was a justification of his conduct, while the Humphreys case was founded on statutory offenses, and no defense was made.

2407. The first attempt to impeach President Johnson, continued.

The first attempt to impeach President Johnson continued over a recess of the Congress.

In the first inquiry the House decided not to impeach President Johnson.

At the time of the impeachment of President Johnson it was conceded that he was entitled to exercise the duties of the office until convicted by the Senate.

Reference to argument of Senator Charles Sumner that President Johnson should be suspended during impeachment proceedings.

An instance where the power of obstruction by dilatory motions was used to compel a direct vote on an issue.

On December 6, 1867,[1] at the next session of Congress, the House took up for consideration the resolution proposed by the majority of the committee:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors.

The debate was confined to two speeches, one by Mr. Boutwell in favor of the resolution and one by Mr. Wilson against it.[2] While the speakers discussed both the law and the facts, Mr. Boutwell laid greatest stress on the law, as he conceded that—

if the theory of the law submitted by the minority of the committee be in the judgment of this House a true theory, then the majority have no case whatever.

It appears also that some question had been raised as to the effect of impeachment on the duties of the office of President, and Mr. Boutwell said:

After much deliberation I can not doubt the soundness of the opinion that the President, even when impeached by this House, is still entitled to his office until he has been convicted by the Senate.[3]

At the close of his speech, Mr. Wilson moved to lay the resolution on the table. As the effect of this motion was to prevent debate and also a direct vote on the issue, dilatory proceedings were begun by those favoring impeachment and continued until December 7, when Mr. Wilson withdrew his motion to lay on the table as a compromise step and thus conceded to the obstructors their demand for a direct vote.

On the question on the resolution, "Will the House agree thereto?" there appeared—yeas 57, nays 108.[4]

So the first attempt to impeach the President failed.

Although debate was not permitted generally when the resolution was under consideration, Members availed themselves of the freedom of debate in Committee of the Whole House on the state of the Union, and on December 13[5] the subject was discussed at length by several Members.

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[1] Second session Fortieth Congress, Journal, pp. 42, 44–54; Globe, pp. 61, 65–68.

[2] See Appendix of Globe, pp. 54, 62.

[3] Globe, appendix, p. 54. This view was sustained by the event. The House impeached President Johnson on February 24, 1868, and the trial ended May 26, 1868. During that time he continued in the ordinary performance of his duties, as is shown by his communications to the House. (See House Journal, pp. 480, 515, 572, 655, second session Fortieth Congress.) On March 5, 1868 (second session Fortieth Congress, Globe, pp. 1676, 1677), Mr. Charles Sumner, of Massachusetts, in the Senate, made an interesting and elaborate argument to show that it was the intention of the framers of the Constitution that the President should be suspended during impeachment proceedings.

[4] Journal, p. 53; Globe, p. 68.

[5] Globe, pp. 172–193.

Chapter LXXVI.

THE IMPEACHMENT AND TRIAL OF THE PRESIDENT.

2408. The impeachment and trial of Andrew Johnson, President of the United States.

The impeachment of President Johnson was set in motion by a resolution authorizing a general investigation as to the execution of the laws.

The House referred to the Committee on Reconstruction the evidence taken by the Judiciary Committee in the first attempt to impeach President Johnson.

A proposition to impeach President Johnson was held to be privileged, although at this session a similar resolution had been considered and negatived.

Secretary Stanton communicated directly to the House the fact of the President's attempt to remove him.

The first attempt to impeach Andrew Johnson, President of the United States, failed on December 7, 1867,[1] Thereafter the subject was debated at length on December 13[2] in the Committee of the Whole House on the state of the Union, but not with any proposition for action pending, and rather with reference to the questions of law and fact raised in the preceding discussions.

On January 22, 1868,[3] Mr. Rufus P. Spalding, of Ohio, moved that the rules be suspended in order that he might present the following resolution:

Resolved, That the Committee on Reconstruction be authorized to inquire what combinations have been made or attempted to be made to obstruct the due execution of the laws, and to that end the committee have power to send for persons and papers and to examine witnesses on oath, and report to this House what action, if any, they may deem necessary, and that said committee have leave to report at any time.

The motion was agreed to, yeas 103, nays 37; and the resolution being before the House, motions to lay it on the table, to fix the day to which the House should stand adjourned, and to adjourn were successively disagreed to. Then, under operation of the previous question, the resolution was agreed to, yeas 99, nays 31.

On February 10[4] Mr. Thaddeus Stevens, of Pennsylvania, by unanimous consent, submitted the following resolution; which was agreed to by the House:

Resolved, That the evidence taken on impeachment by the Committee on the Judiciary[5] be referred to the Committee on Reconstruction, and that the committee have leave to report at any time.

On February 21[6] the Speaker laid before the House the following communication:

WAR DEPARTMENT,
Washington City, February 21, 1868.

SIR: General Thomas has just delivered to me a copy of the inclosed order, which you will please communicate to the House of Representatives.

E. M. STANTON, *Secretary of War.*

HON. SCHUYLER COLFAX,
Speaker House of Representatives.

EXECUTIVE MANSION,
Washington, D. C., February 21, 1868.

SIR: By virtue of the power and authority vested in me, as President, by the Constitution and laws of the United States, you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon the receipt of this communication.

You will transfer to Bvt. Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

Respectfully, yours,

ANDREW JOHNSON.

TO HON. EDWIN M. STANTON, *Washington, D. C.*

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[1] Second session Fortieth Congress, Journal, p. 53; Globe, p. 68.

[2] Globe, pp. 172–193.

[3] Journal, pp. 259–262; Globe, pp. 784, 785.

[4] Journal, p. 330; Globe, p. 1087.

[5] It was on this evidence that the first attempt to impeach had been made.

[6] Journal, p. 382; Globe, pp. 1326, 1327.

Mr. Elihu B. Washburne, of Illinois, moved that the communication be referred to the Committee on Reconstruction. This motion was agreed to without division, although there were suggestions that the letter should go to the Judiciary Committee or to a select committee.

On the same day, and thereafter,[1] Mr. John Covode, of Pennsylvania, rising to a question of privilege, presented this resolution:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors.

Mr. Fernando Wood, of New York, having objected, the Speaker[2] said:

It is a privileged question.

Then, on motion of Mr. George S. Boutwell, of Massachusetts, the resolution was referred to the Committee on Reconstruction.

2409. President Johnson's impeachment, continued.

The second and successful proposition to impeach President Johnson was reported from the Committee on Reconstruction.

The second investigation of the conduct of President Johnson was ex parte.

The full report justifying the proposition to impeach President Johnson.

On February 22[3] Mr. Thaddeus Stevens, of Pennsylvania, presented from the Committee on Reconstruction the following report:

That in addition to the papers referred to the committee, the committee find that the President, on the 21st day of February, 1868, signed and issued a commission or letter of authority to one Lorenzo Thomas, directing and authorizing said Thomas to act as Secretary of War ad interim, and to take possession of the books, records, and papers, and other public property in the War Department, of which the following is a copy:

EXECUTIVE MANSION,
Washington, February 21, 1868.

SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office. Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully, yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. Lorenzo Thomas,
Adjutant-General of the United States Army, Washington, D. C.

Official copy respectfully furnished to Hon. Edwin M. Stanton.

L. THOMAS,
Secretary of War ad interim.

Upon the evidence collected by the committee, which is herewith presented, and in virtue of the powers with which they have been invested by the House, they are of the opinion that Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors. They therefore recommend to the House the adoption of the accompanying resolution.

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors in office.

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[1] Journal, p. 385; Globe, pp. 1329, 1330.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] Journal, p. 390; Globe, p. 1336.

This report was signed by Messrs. Stevens, George S. Boutwell, of Massachusetts, John A. Bingham, of Ohio, C. T. Hulburd, of New York, John F. Farnsworth, of Illinois, F. C. Beaman, of Michigan, and H. E. Paine, of Wisconsin. There were no minority views, Mr. James Brooks, of New York, who dissented, stating that he had not had the time to prepare them. Mr. James B. Beck, of Kentucky, also a member of the committee, dissented.

2410. President Johnson's impeachment, continued.

The committee reporting the second proposition to impeach President Johnson disagreed as to the grounds thereof.

The question whether impeachment must be confined to indictable offenses was in issue as to the second report favoring impeachment of President Johnson.

Argument of Mr. Thaddeus Stevens that impeachment is a purely political proceeding.

The resolution was debated at length on February 22 and 24.[1] It appears from this debate that the specific act most relied upon by the committee was violation of the law known as the tenure-of-office act,[2] and which provided in its first section:

> That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any office, and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided,* That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General shall hold their offices respectively for and during the term of the President by whom they have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

And in its sixth section:

> That every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed and are hereby declared to be high misdemeanors, and upon trial and conviction thereof every person guilty thereof shall be punished by a fine not exceeding $10,000, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

It was urged generally that the removal of Mr. Stanton and the appointment of General Thomas ad interim constituted specific violations of this law. Members of the House who had by their votes assisted in defeating the first attempt at impeachment, supported the pending resolution on the ground that it was based on an offense indictable under Federal law. Thus, Mr. James F. Wilson, of Iowa, who had submitted the minority views on which the defeat of the former attempt was based, said [3] in this case:

> The considerations which weighed upon my mind and molded my conduct in the case with which the Committee on the Judiciary of this House was charged are not to be found in the present case. The logic of the former case is made plain, not to say perfect, by its sequence in the present one. The President was working to an end suspected by others, known to himself. His then means were not known to the law as crimes or misdemeanors, either at common law or by statute, and we so pronounced. He

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[1] Globe, pp. 1336, 1360, 1382, 1393.

[2] Act of March 2, 1867, 14 Stat. L., p. 430.

[3] Globe, pp. 1386, 1387.

mistook our judgment for cowardice, and worked on until he has presented to us, as a sequence, a high misdemeanor known to the law and defined by statute.

Others who had voted against impeachment in the former instance expressed similar views. Mr. Thaddeus Stevens, of Pennsylvania, in closing the debate,[1] indicated, however, that he did not consider the case as narrowed to this point alone:

The charges, so far as I shall discuss them, are few and distinct. Andrew Johnson is charged with attempting to usurp the powers of other branches of the Government; with attempting to obstruct and resist the execution of the law; with misprision of bribery; and with the open violation of laws which declare his acts misdemeanors and subject him to fine and imprisonment; and with removing from office the Secretary of War during the session of the Senate without the advice or consent of the Senate; and with violating the sixth section of the act entitled "An act regulating the tenure of certain civil offices." There are other offenses charged in the papers referred to the committee which I may consider more by themselves.

In order to sustain impeachment under our Constitution I do not hold that it is necessary to prove a crime as an indictable offense, or any act malum in se. I agree with the distinguished gentleman from Pennsylvania, on the other side of the House, who holds this to be a purely political proceeding. It is intended as a remedy for malfeasance in office and to prevent the continuance thereof. Beyond that, it is not intended as a personal punishment for past offenses or for future example.

Impeachment under our Constitution is very different from impeachment under the English law. The framers of our Constitution did not rely for safety upon the avenging dagger of a Brutus, but provided peaceful remedies which should prevent that necessity. England had two systems of jurisprudence—one for the trial and punishment of common offenders, and one for the trial of men in higher stations, whom it was found difficult to convict before the ordinary tribunals. This latter proceeding was by impeachment or by bills of attainder, generally practiced to punish official malefactors, but the system soon degenerated into political and personal persecution, and men were tried, condemned, and executed by this court from malignant motives. Such was the condition of the English laws when our Constitution was framed, and the convention determined to provide against the abuse of that high power, so that revenge and punishment should not be inflicted upon political or personal enemies. Here the whole punishment was made to consist in removal from office, and bills of attainder were wholly prohibited. We are to treat this question, then, as wholly political, in which, if an officer of the Government abuse his trust or attempt to pervert it to improper purposes, whatever might be his motives, he becomes subject to impeachment and removal from office. The offense being indictable does not prevent impeachment, but is not necessary to sustain it. (See Story's Commentaries, Curtis on the Constitution, Madison, and others.) Such is the opinion of our elementary writers, nor can any case of impeachment tried in this country be found where any attempt was made to prove the offense criminal and indictable.

2411. President Johnson's impeachment, continued.

Discussion as to whether President Johnson was justified in attempting to test the constitutionality of the tenure-of-office law.

It was urged against the proposed resolution that the tenure-of-office act was unconstitutional, and therefore that the President had committed no specific violation of law. This view was set forth[2] most forcibly by Mr. James B. Beck, of Kentucky, a member of the Committee on Reconstruction:

All questions growing out of the combinations and conspiracies lately charged upon the President were ruled by the Reconstruction Committee to be insufficient and were not brought before this House. And the sole question now before us is, Is there anything in this last act of the President removing Mr. Stanton and appointing Adjutant-General Thomas Secretary of War ad interim to justify his impeachment by this House?

I maintain that the President of the United States is in duty bound to test the legality of every law which he thinks interferes with his rights and powers as the Chief Magistrate of this nation. When-

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[1] Globe, p. 1399.

[2] Globe, pp. 1349–1351.

ever he has powers conferred upon him by the Constitution of the United States, and an act of Congress undertakes to deprive him of those powers or any of them, he would be false to his trust as the Chief Executive of this nation, false to the interests of the people whom he represents, if he did not by every means in his power seek to test the constitutionality of that law, and to take whatever steps were necessary and proper to have it tested by the highest tribunal in the land, and to ascertain whether he has a right under the Constitution to do what he claims the right to do, or whether Congress has the right to deprive him of the powers which he claims have been vested in him by the Constitution of the United States, and that is all that he proposes to do in this case.

Now, if that is the object, and the only object, of the President, as I contend the facts show, then I can hardly bring myself to believe that any set of sane men can seriously entertain the opinion that in anything the President has done in the removal of Mr. Stanton he has been guilty of either a high crime or misdemeanor. But "whom the gods wish to destroy they first make mad," and if ever a party was stricken with judicial madness and blindness the action of this party now proves that they are the victims of it.

That the President should be considered guilty of a high crime or misdemeanor for desiring and attempting to bring to the test of judicial decision one of the powers with which he considers that the Constitution has clothed him, and of which power an act of Congress has attempted to divest him, and that, too, in regard to an officer who agrees with him in regard to that constitutional power, seems to me an idea too preposterous to be entertained outside of a lunatic asylum.

The humblest citizen has the undoubted right to try judicially his constitutional rights. In regard to an officer whose office is created by the Constitution it is not only the right but the official duty of the President to bring to the test of judicial decision every power of which Congress endeavors to deprive him and which he believes is vested in him by the Constitution. He can not obey the Constitution nor faithfully fulfill his oath of office without vindicating in a legal, orderly, and judicial mode those powers. A void act of Congress is no excuse before a court or even before the bar of enlightened public opinion for a failure to attempt in a constitutional, legal, and orderly manner to fulfill his constitutional duties. If, therefore, the President is guilty of a crime, that crime consists in his believing that the tenure-of-office bill is unconstitutional or that it does not apply to the case of Mr. Stanton; for if he does so believe it is a duty he can not, without violating his oath, decline to bring to the test of judicial decision whenever the duties of his office require him to remove an officer under his constitutional authority.

Mr. Beck then quoted Madison, Story, and Kent, and cited the attitude of Mr. Stanton himself, at the time the President declined to approve the tenure-of-office act, to show that by the Constitution the right to remove executive officers was vested solely in the President, and that he could not be deprived of this power by an act of Congress.

In opposition to this view it was urged,[1] in the first place, that on the day before this report was made in the House the Senate had solemnly passed on the question of prerogative by agreeing to the following:

Whereas the Senate have read and considered the communication of the President, stating that he had removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant-General of the Army to act as Secretary of War ad interim: Therefore,

Resolved by the Senate of the United States, That under the Constitution and laws of the United States the President has no power to remove the Secretary of War and designate any other officer to perform the duties of that officer ad interim.

Further, it was urged:[2]

The Constitution does not make him a judge of the law, but an executor thereof, and he is bound to execute that which the law-making power decrees to be the law of the land. Whatever may be his opinion of the law as a mere individual member of the national family, he is bound to yield it to that higher duty which the Constitution imposes on him as an officer of the state. If his conscience forbid,

[1] Globe, p. 1341.

[2] By Mr. James F. Wilson, of Iowa, Globe, p. 1387.

he may resign the trust, but he has no right to retain the power of a public officer and subordinate that to the judgment of a mere individual member of the community or nation which has clothed him with executive power for the enforcement of its laws. As an individual he maybe justified in an assumption of the risks attendant upon a disobedience of the law; as a public officer no such plea can be properly entered in his behalf, for he is not only sworn to execute the law, but he also possesses the right of resignation. If his conscience will not permit him to execute a given law, he may resign his trust, and leave to his successor the performance of a duty which his judgment, as an individual, will not surrender to his obligations as a public officer. A willingness to submit to the penalty prescribed for the violation of a law may, to some extent, excuse disobedience on the part of a private citizen, and at the same time avail nothing to the public officer. The latter may at anytime, by resignation, become a private citizen, but the former can not become a public officer in this country except by the suffrages of his fellow citizens. If he accepts the result of their suffrages, he merges his individuality into that official creature which binds itself by an oath as an executive officer to do that which, as a mere individual, he may not believe to be just, right, or constitutional. Such an acceptance removes him from the sphere of the right of private judgment to the plane of the public officer, and binds him to observe the law, his judgment as an individual to the contrary notwithstanding.

The Constitution invests the President with executive power in order that he may "take care that the laws be faithfully executed." Every abuse of this power, whether it be by an improper exercise of it or by neglect or refusal to exercise it at all, is a breach of official duty. But it is not every breach of official duty that can be charged as a crime or misdemeanor against the delinquent officer. Whatever doubt may have arisen in other cases of the criminal character of the official conduct involved in them, the one we are now considering presents no basis on which to rest a doubt. Deliberately, not to say defiantly, the President has violated a penal statute of the United States, and has thereby committed a high misdemeanor which the law says "shall be punished by a fine not exceeding $10,000, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court." (Act of March 2, 1847, sec. 6.) All of the circumstances attendant upon this case show that the President's action was deliberate and willful. * * *

Mr. Speaker, it has been urged in this debate that the President's sole object is to secure a judgment of the courts as to the constitutionality of the act regulating the tenure of certain civil offices. Such an intent will not justify the commission of a high crime or misdemeanor. Suppose the courts should hold the act to be constitutional, would the fact that his intent was to have that question decided be a good plea to an indictment for a violation of its provisions? Who is so insane as to assert so preposterous a proposition? Whoever acts in the way and for the purpose suggested does it at his peril. The work belongs to the President in this case, not to the law. This plea in his defense demonstrates that his action was not the result of inadvertence or of mistaken judgment, and that it is the fruit of cool calculation and deliberate purpose. He committed a high misdemeanor in order to secure a judgment of the court.

2412. President Johnson's impeachment, continued.

On the report from the Committee on Reconstruction the House voted the impeachment of President Johnson.

Forms of resolutions directing the carrying of the impeachment of President Johnson to the Senate.

The House authorized a committee of seven to prepare articles impeaching President Johnson, with power to compel testimony.

The impeachment of President Johnson was carried to the Senate by a committee of two.

The Speaker appointed the committee to carry the impeachment of President Johnson to the Senate from those favoring impeachment and from the majority party.

The Speaker appointed the committee to draw articles impeaching President Johnson from those favoring impeachment and from the majority party.

After full debate, on February 24,[1] the question was taken on the resolution proposed by the committee, "Will the House agree thereto?" and there appeared yeas 128, nays 47.

So the House determined upon the impeachment of the President.

Immediately thereafter Mr. Thaddeus Stevens proposed the following:

Resolved, That a committee of two be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of the said Andrew Johnson to answer to said impeachment.

2. Resolved, That a committee of seven be appointed to prepare and report articles of impeachment against Andrew Johnson, President of the United States, with power to send for persons, papers, and records, and to take testimony under oath.

After an attempted obstruction had been prevented by the adoption, under suspension of the rules, of an order preventing dilatory motions, the House agreed to the resolutions by a vote of yeas 124, nays 42.[2]

The Speaker announced as the committee under the first resolution Messrs. Thaddeus Stevens, of Pennsylvania, and John A. Bingham, of Ohio. Both were members of the Committee on Reconstruction and had signed the report, and both belonged to the majority party in the House.

As the committee under the second resolution the Speaker announced Messrs. George S. Boutwell, of Massachusetts, Thaddeus Stevens, of Pennsylvania, John A. Bingham, of Ohio, James F. Wilson, of Iowa, John A. Logan, of Illinois, George W. Julian, of Indiana, and Hamilton Ward, of New York. All of these belonged to the majority party in the House and had voted for the impeachment. The first three were members of the Committee on Reconstruction.

2413. President Johnson's impeachment, continued.

The ceremonies of presenting the impeachment of President Johnson at the bar of the Senate.

A message was sent to inform the Senate that a committee would present the impeachment of President Johnson.

Form of declaration by the chairman of the House committee in presenting the impeachment of President Johnson in the Senate.

The message of the House impeaching President Johnson was referred to a committee of seven Senators appointed by the Chair.

The Senate received the message impeaching President Johnson in its legislative capacity and not as a court.

The committee having impeached President Johnson, returned to the House and reported orally in the usual form.

On February 25,[3] in the Senate, the Clerk of the House delivered a message in form as follows:

Mr. President, I have been directed to inform the Senate that the House of Representatives has passed the following resolution:

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[1] Journal, p. 392; Globe, p. 1400.

[2] Journal, pp. 393, 396; Globe, pp. 1400–1402.

[3] Senate Journal, p. 217; Globe, p. 1403.

"Resolved, That a committee of two be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of said Andrew Johnson to answer to said impeachment."

And that the House has appointed Mr. Thaddeus Stevens and Mr. John A. Bingham such committee.

Soon thereafter [1] the Sergeant-at-Arms announced a committee from the House of Representatives, Mr. Thaddeus Stevens and Mr. John A. Bingham, who appeared at the bar of the Senate, when the following occurred:

Mr. STEVENS. Mr. President——

The PRESIDENT pro tempore.[2] The committee from the House of Representatives.

Mr. STEVENS. Mr. President, in obedience to the order of the House of Representatives, we appear before you, and in the name of the House of Representatives and of all the people of the United States we do impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office; and we further inform the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and in their name we demand that the Senate take order for the appearance of the said Andrew Johnson to answer said impeachment.

The PRESIDENT pro tempore. The Senate will take order in the premises.

The committee of the House thereupon withdrew.

Thereupon Mr. Jacob M. Howard, of Michigan, proposed a resolution as follows:

Resolved, That the message of the House of Representatives relating to the impeachment of Andrew Johnson, President of the United States, be referred to a select committee of seven, to consider and report thereon.

Mr. James A. Bayard, of Delaware, objected that the Senate in its legislative capacity might not act on a question of impeachment, and that it should form itself into a court of impeachment before adopting the resolution. In answer to this it was stated that this was a mere preliminary proceeding, and that the procedure followed the precedent of the trial of Judge Peck.

After the resolution had been amended, on the suggestion of Mr. Roscoe Conkling, of New York, and in accordance with the precedent in the trial of Judge Humphreys, by adding after the word "seven" the words "to be appointed by the Chair," the resolution was agreed to.

The President pro tempore thereupon appointed Messrs. Howard, Lyman Trumbull, of Illinois, Roscoe Conkling, of New York, George F. Edmunds, of Vermont, Oliver P. Morton, of Indiana, Stephen C. Pomeroy, of Kansas, and Reverdy Johnson, of Maryland.

On the same day [3] the committee from the House, having returned from the Senate, reported orally at the bar of the House through Mr. Stevens, the chairman, as follows:

Mr. Speaker, in obedience to the order of the House, we proceeded to the bar of the Senate, and in the name of this body and of all the people of the United States we impeached, as we were directed to do, Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and we demanded that the Senate should take order to make him appear before that body to answer for the same,

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[1] Journal of Senate, p. 217; Globe, pp. 1405, 1406.

[2] Benjamin F. Wade, of Ohio, President pro tempore.

[3] House Journal, p. 405; Globe, p. 1421.

and announced that the House would soon present articles of impeachment and make them good; to which the response was, "Order shall be taken."

2414. President Johnson's impeachment, continued.

To prevent dilatory tactics the House adopted, under suspension of the rules, a special order for consideration of the articles impeaching President Johnson.

Form of resolution in which the Senate took order for the impeachment of President Johnson.

For the trial of President Johnson the Senate readopted most of the existing rules, with amendments and additions.

On February 25,[1] in the House, Mr. Elihu B. Washburne, of Illinois, offered, under suspension of the rules, the following:

Resolved, That the rules be suspended, and that it is hereby ordered as follows:

"When the committee to prepare articles of impeachment of the President of the United States report the said articles the House shall immediately resolve itself into the Committee of the Whole thereon that speeches in committee shall be limited to fifteen minutes each, which debate shall continue till the next legislative day after the report, to the exclusion of all other business except the reading of the Journal; that at 3 o'clock on the afternoon of said second day the fifteen-minute debate shall cease, and the committee shall then proceed to consider and vote upon amendments that may be offered under the five-minute rule of debate, but no merely pro forma amendment shall be entertained; that at 4 o'clock on the afternoon of said second day the committee shall rise and report their action to the House, which shall immediately and without dilatory motions vote thereon: that if the articles of impeachment are agreed on the House shall then immediately and without dilatory motions elect by ballot seven managers to conduct said impeachment on the part of the House; and that during the pendency of resolutions in the House relative to said impeachment thereafter no dilatory motions shall be received except one motion on each day that the House do now adjourn."

This resolution, which was intended to prevent obstructive action on the part of the minority, was agreed to, yeas 106, nays 37.

On the same day[2] by a vote of yeas 105, nays 36, the House agreed to the following, on motion of Mr. George S. Boutwell, of Massachusetts:

Resolved, That the committee appointed to prepare and report articles of impeachment against, Andrew Johnson, President of the United States, have leave to sit during the sessions of the House.

Resolved further, That the Committee on Reconstruction be authorized to sit during the sessions of the House.

On February 26,[3] in the Senate, Mr. Howard, from the select committee, reported the following resolution; which was agreed to, and of which the House was duly notified:

Whereas the House of Representatives, on the 25th day of the present month, by two of their members, Messrs. Thaddeus Stevens and John A. Bingham, at the bar of the Senate, impeached Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and likewise demanded that the Senate take order for the appearance of said Andrew Johnson to answer to the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

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[1] Journal, pp. 407, 408; Globe, pp. 1425, 1426.

[2] Journal, p. 410; Globe, p. 1427.

[3] Senate Journal, p. 222; House Journal, p. 418; Globe, pp. 1431, 1453.

On February 28,[1] in the Senate, Mr. Howard, from the select committee, presented a report "prescribing certain rules of proceeding for the Senate when sitting as a high court of impeachment." The rules comprised the rules of the Chase trial, with some modifications in minor details, and also several new rules. The Senate considered the report on February 29 and March 2,[2] and after amending the rules agreed to them.

2415. President Johnson's impeachment, continued.

The articles impeaching President Johnson were considered in Committee of the Whole.

At the time of President Johnson's impeachment it was agreed that he should be described as President and not as Acting President.

On February 29,[3] in the House, Mr. George S. Boutwell, of Massachusetts, from the committee appointed to prepare articles of impeachment, submitted their report, which was at once considered in Committee of the Whole in accordance with the special order. At the outset Mr. Boutwell said:[4]

In considering and preparing these articles the committee met with a difficulty in the outset which it becomes me to present to the Committee of the Whole House in the beginning of this discussion. That difficulty is this: What should be the description, so far as the office is concerned, in which Andrew Johnson should be arraigned for these misdemeanors; whether as President of the United States or as Vice President of the United States upon whom the powers and duties of the office of President had devolved.

After such consideration as the committee were able to give to this matter during the period of time assigned to the consideration of this subject they are, I believe I may say, unanimously of opinion that the manner of description used in the articles we have reported is that manner of description on which we shall be compelled to rely. Without undertaking at this moment to advise the House finally as to what they ought to do upon this branch of the subject, I will venture to suggest this consideration, derived from the Constitution: That it is only when the President is on trial before the Senate that the Chief Justice of the Supreme Court of the United States is to preside. Therefore it follows that a different court must be organized for the trial of the Vice-President from that authorized by the Constitution to try the President.

Later, on March 2,[5] Mr. John A. Bingham, of Ohio, said:

I desire to say, Mr. Chairman, to the House this question was considered by the committee, and I was not aware when the report was made there was a member of that committee who entertained the slightest doubt on the subject that Andrew Johnson is President of the United States. I desire to say that he must be impeached, if he be impeached at all, either distinctively as President of the United States or as Vice-President of the United States. I desire to say, further, that in both capacities he can not be impeached at the same time and on the same trial, for the reason that the court, as was well said by the chairman of the committee, is differently constituted by the terms of the Constitution to try the President of the United States. The Chief Justice of the United States must, by the terms of the Constitution, preside if the President be tried; the Chief Justice shall not preside if the Vice-President be tried.

Again, Andrew Johnson is estopped by record in five hundred instances from denying that he is President of the United States. The Senate of the United States is estopped; the House of Representatives is estopped. Your Constitution declares that no bill shall be a law until it be presented to the President for his approval or disapproval. If he be not President, if the people have no President, then you can pass no law. If he be President, then let him be called President on your record.

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[1] Senate Journal, pp. 230, 231; Globe, pp. 1486, 1515; Senate Report No. 59.

[2] Senate Journal, pp. 236–252; Globe, pp. 1515–1535, 1568–1603.

[3] House Journal, pp. 433, 437; Globe, pp. 1542–1559.

[4] Globe, p. 1544.

[5] Globe, p. 1615.

Mr. Luke P. Poland, of Vermont, said:

We have had some Congressional history to which I call the attention of the House. In all that has been said upon the subject I have heard no allusion to the settlement of this question in Congress. The first instance of the accession of Vice-President to the office of President was that of John Tyler on the death of President Harrison, in 1841. Before the first message of Mr. Tyler was sent in at the special session, as it was called, in 1841 the following proceedings took place in the House:

"Mr. Wise offered the usual resolution for the appointment of a committee on the part of the House to join such committee as might be appointed by the Senate to wait on the President of the United States and inform him that a quorum of the two Houses had assembled, and that Congress was ready to proceed to business.

"Mr. McKeon moved to amend the resolution by striking out the word 'President' and inserting the words 'Vice President, now exercising the office of President.' "

After considerable debate the vote was taken in the House, and the amendment was rejected. The yeas and nays do not seem to have been taken.

When the message was sent to the Senate the same question was raised there. A similar amendment was offered to a similar resolution. There was more debate than in the House, participated in by Mr. Huntington, Mr. Allen, Mr. Tappan, Mr. Walker, and Mr. Calhoun. The yeas and nays were taken on this amendment in the Senate, and were as follows:

"Yeas—Messrs. Allen, Benton, Henderson, Linn, McRoberts, Tappan, Williams, and Wright—8.

"Nays—Messrs. Archer, Barrow, Bates, Bayard, Berrien, Buchanan, Calhoun, Choate, Clay of Kentucky, Clayton, Dixon, Evans, Fulton, Graham, Huntington, Kerr, King, Mangum, Merrick, Miller, Moorehead, Nicholson, Pierce, Porter, Prentiss, Preston, Rives, Sevier, Simmons, Smith of Indiana, Southard, Sturgeon, Tallmadge, Walker, White, Woodbridge, Woodbury, and Young—38."

So that the question seems to have been settled by a vote of both Houses at that time, and during the whole administration, nearly four years of President Tyler and three years of President Fillmore, and now almost three years of President Johnson, this question has been regarded as settled by the decision of Congress in 1841.

As appears in the articles of impeachment, this reasoning was conclusive.

2416. President Johnson's impeachment, continued.

As reported from the committee, the articles impeaching President Johnson were confined to a few acts chiefly concerning Secretary Stanton.

Although the charges in the articles impeaching President Johnson were at first narrowed to a few charges, there was a protest against the theory that only an indictable offense was impeachable.

A statement as to the sentiments of the House on the nature of the power of impeachment during the first and second attempts to impeach President Johnson.

In the case of the Johnson impeachment, the question "Will the House agree thereto?" was put as to each article after they had been open to amendment.

The first or headline paragraph and the last or reservation clause were agreed to after the articles impeaching the President had been agreed to.

Mr. Boutwell stated that in the articles as reported the committee had confined themselves to the matters brought forward in the present proceedings, and had not gone into that broad field of general charges on which the first attempt at impeachment had failed. In the course of the debate, however, Mr. William Lawrence, of

Ohio, argued again that the President might be impeached for other than indictable offenses, and said in the course of his remarks:[1]

I have taken some pains to ascertain the opinions of members of this House, and I think there are but few, even among those who voted against the impeachment of the President in December last, who entertain the idea or now hold that he must be guilty of an offense indictable either by the common or statute law to render him liable to impeachment. Such a doctrine is at variance with the whole theory and practice in cases of impeachment.

On March 2[2] the articles were discussed at length, amended somewhat, and agreed to. In the Committee of the Whole a committee amendment in the nature of a substitute was agreed to. When the articles were reported to the House this substitute was agreed to, and then, on each article, begining with Article 1, the question was put: "Will the House agree thereto?" And on the nine articles the result was:

	Yeas.	Nays.
Article 1	127	42
Article 2	124	41
Article 3	124	40
Article 4	117	40
Article 5	127	42
Article 6	127	42
Article 7	127	42
Article 8	127	42
Article 9	108	41

Then, by unanimous consent, the first and last paragraphs were agreed to, as follows:[3]

Articles exhibited by the House of Representatives of the United States, in the name of themselves and all the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

* * * * * *

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every put thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

2417. President Johnson's impeachment, continued.

The managers of the Johnson impeachment were chosen by ballot.

The Speaker appointed four tellers to count the ballots for managers of the Johnson impeachment.

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[1] Globe. pp. 1549, 1550.

[2] House Journal, pp. 439–450; Globe. pp. 1603–1618.

[3] House Journal, p. 450; Globe, p. 1618.

Mr. Speaker Colfax tendered to several members of the minority a place as one of the tellers to count the ballots for managers of the Johnson impeachment.

Members of the minority declining to serve as tellers to count the ballots for managers of the Johnson impeachment, the Speaker appointed all from the majority party.

In the balloting for managers of the Johnson impeachment nominations were made before the vote.

Mr. Speaker Colfax held that when managers of an impeachment were elected by ballot the managers, and not the House, chose the chairman.

Usage of the House in the selection of chairman of the managers of an impeachment. (Footnote.)

The House excused one Member from voting on the ballot for managers of the Johnson impeachment, but refused to excuse others.

It appears that the minority party generally refrained from participating in the ballot for managers of the Johnson impeachment.

Forms of resolutions providing for carrying to the Senate the articles impeaching President Johnson and notifying the Senate thereof.

Then, under the order, the House proceeded[1] to choose, by ballot, seven managers to conduct the impeachment.

The Speaker appointed as tellers Messrs. Luke P. Poland, of Vermont; Rufus P. Spalding, of Ohio; Thomas A. Jenckes, of Rhode Island, and Samuel S. Marshall, of Illinois. All of these but Mr. Marshall were of the number voting for the articles of impeachment. Mr. Marshall, at his request, was excused, and Mr. Samuel J. Randall, of Pennsylvania, was appointed, but he asked to be excused, on the ground that he did not wish in any way to participate in the proceedings. Mr. William E. Niblack, of Indiana, further said that the minority party did not intend to vote for managers.

The Speaker,[2] understanding that the minority did not wish to be represented, appointed Mr. Austin Blair, of Michigan, as fourth teller.

Mr. Luke P. Poland, of Vermont, nominated the following for managers:

Thaddeus Stevens, of Pennsylvania; Benjamin F. Butler, of Massachusetts; John A. Bingham, of Ohio; George S. Boutwell, of Massachusetts; James F. Wilson, of Iowa; Thomas Williams, of Pennsylvania; John A. Logan, of Illinois.

Mr. John A. Peters, of Maine, rising to a parliamentary inquiry, asked if the order in which the names were presented would determine who should be chairman.

The Speaker said:

The Chair cannot answer that question. It is a matter that does not affect the House of Representatives. The managers are to present themselves at the bar of the Senate. They can settle that matter among themselves.

Mr. Halbert E. Paine, of Wisconsin, then asked:

Suppose members should designate on their ballots their choice for chairman, would the gentleman having the greatest number of votes as such be the chairman?

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[1] House Journal, pp. 450, 451; Globe, pp. 1618, 1619.

[2] Schuyler Colfax, of Indiana, Speaker.

The Speaker said:

The Chair would not declare any such result, because it is not in accordance with the usage for the House to select a chairman. In the case of the impeachment of Judge Chase, in which Mr. John Randolph was the leading manager, the House did not select him as such; he was simply selected by the managers themselves, they deeming it proper to have him act as their spokesman.[1]

Mr. Michael C. Kerr, of Indiana, on his request, was excused from voting. Then, a proposition to excuse all who wished to be excused was objected to, the Chair declining to entertain it except by unanimous consent.

Thereupon, Mr. Samuel J. Randall, of Pennsylvania, said:

The members on this side do not wish to vote, as they are in favor of no part of this proceeding, and I know of no way by which they can be forced to vote. Therefore there is no necessity for excusing them.

The ballot resulted as follows:

Whole number of votes, 118; necessary to a choice, 60; of which—

John A. Bingham received	114	G. W. Scofield	3
George S. Boutwell	113	Luke P. Poland	3
James F. Wilson	112	G. S. Orth	2
Benjamin F. Butler	108	John A. Peters	1
Thomas Williams	107	Austin Blair	1
John A. Logan	106	J. C. Churchill	1
Thaddeus Stevens	105	J. F. Benjamin	1
Thomas A. Jenckes	22	C. Upson	1

The Speaker thereupon announced the names of the seven elected.

Then, on motion of Mr. Boutwell, the following resolutions were agreed to:

Resolved, That a message be sent to the Senate to inform them that this House have appointed managers to conduct the impeachment against the President of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by this House, to be exhibited in maintenance of their impeachment against said Andrew Johnson, and that the Clerk of the House do go with said message.

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of all the people of the United States, against Andrew Johnson, President of the United States, in maintenance of their impeachment against him of high crimes and misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

2418. President Johnson's impeachment, continued.

It was held in the Johnson impeachment that the managers or any Member of the House might propose an additional article as a question of privilege.

After the House had agreed to articles impeaching President Johnson the managers reported two additional articles, which were also agreed to.

On the tenth and eleventh articles in the Johnson impeachment the House, after debate, concluded to impeach for other than indictable offenses.

On March 3,[2] in the House, Mr. Benjamin F. Butler, of Massachusetts, from the managers and by their instruction, reported an additional article of impeach-

[1] In the trial of Judge Humphreys, where the managers were appointed by the Speaker, the first named acted as chairman. In the Belknap trial the managers were chosen by resolution, and the principle was recognized that the first named should be chairman.

[2] House Journal, pp. 461–464; Globe, pp. 1638–1642.

ment. This article Mr. Butler had previously offered as an amendment,[1] but it had been rejected in Committee of the Whole by a vote of ayes 45, noes 56, on a statement of Mr. James F. Wilson, of Iowa, that the committee appointed to frame articles had already considered it and determined against it. The article proposed (which subsequently became Article X of the articles as presented in the Senate) charged the President with bringing his office into contempt by his utterances.

Mr. William S. Holman, of Indiana, made the point of order that this was an amendment to a proposition not before the House.

The Speaker[2] said:

The Chair rules, as he has ruled in all such cases, that this is a privileged question. And the Chair will also refer to the following paragraph of the original report adopted by the House yesterday:

"And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson," etc.

Mr. Charles A. Eldridge, of Wisconsin, made the further point of order that the managers might not report additional articles. Their functions were different from those of the committee appointed to prepare articles

The Speaker ruled:

The Chair overrules the point of order on two grounds. In the first place, the usage of the House has been, in all cases of impeachment, that the replication made by the person accused should be referred to the managers, to which the managers prepare a reply and submit it to the House before it is sent to the Senate. This follows precisely the language of the report adopted by the House on yesterday. * * * The second ground is this: That any Member of the House of Representatives, whether one of the board of managers or not, can, as a question of privilege, propose additional articles of impeachment. The Chair makes his ruling so broad in order to cover the entire case. Such article of impeachment may come with more formality from the board of managers, or from a committee specially appointed for the purpose. But the Member from Wisconsin [Mr. Eldridge], if he sees proper to do so, or any other Member, can propose articles of impeachment against any officer of the Government.

Mr. Butler explained the purpose of the article, saying that it followed the precedent of the eighth article of those preferred against Judge Chase, which received more votes in favor of conviction than any other.

Mr. Frederick E. Woodbridge, of Vermont, who had joined with Mr. James F. Wilson, of Iowa, in arguing that impeachment might be had only for indictable offenses, and whose views had been followed by the House in the first attempt at impeachment, now said:[3]

I wish simply to say now, in order that the gentleman from Massachusetts [Mr. Butler] may answer the objection, that I am opposed to this article for two reasons. The first is that if the President of the United States is put on his trial under this specification it will take a long time, almost equal, perhaps if the counsel desire it, to the Warren Hastings trial, which, I believe, was about seven years. For that, if for no other reason, I should be opposed to this article.

The other reason is that there is no offense charged under which a conviction can be had: The article concludes as follows:

"Which said utterances, declarations, threats, and harangues, highly censurable in any, and peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of, a high misdemeanor in office."

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[1] Globe, pp. 1615, 1616.

[2] Schuyler Colfax, of Indiana, Speaker. Globe, p. 1638.

[3] Globe, pp. 1640, 1641.

Now, sir, there axe under the Constitution but two offenses under which a conviction can be had, namely: High crimes and misdemeanors. Neither of these is charged in this article. It is not a crime or misdemeanor in the President to bring himself into public obloquy before the people by reason of his improper speech. It is not a crime for him to make remarks when "swinging round the circle" or elsewhere, that may be distasteful to the Congress of the United States or that may be very improper. I have yet to learn that the President of the United States, or any civil officer, can be impeached, except for a high crime or misdemeanor. The gentleman will not pretend that he has set forth either in this article. He only states that the President had brought himself into public disgrace by reason of public speeches which he made before the country. Now, all I ask of my friend is that he will so frame his article that at least the Senate, sitting as a high court of impeachment, may entertain it as being properly charged.

To this Mr. Butler replied:

What is the proposition of those gentlemen who insist that the President can be impeached for those acts only which are indictable as crimes under some statute? * * * Now, what is this proposition? The proposition is this, that for the lowest degree of indictable crime, to wit: An assault and battery, or, as a friend suggests, selling liquor without license, the President of the United States may be impeached, but he can not be impeached when he usurps the liberties of the people, because there is no indictment under any statute against that. He may be impeached for selling liquor without a license, but he can not be impeached if he gets into an open barouche with two abandoned women, one on each side of him, roaring drunk, and rides up and down Pennsylvania avenue, because there is no statute that I know of against that. He can not be impeached for any violation of public decency which does not happen to be an indictable crime. He can not be impeached for debasing his high office. The statement of this proposition is its best refutation. Here let me say to my friend from Vermont that I have not charged in this article that the President has brought himself into ridicule and contempt. If he had only done that I should have been quite willing to let him go unpunished [laughter], but I do say that he brought the high office which he fills—no, which he occupies into sovereign disgrace, ridicule, and contempt, so that it is hardly respectable for a decent man to fill hereafter; and is not that an impeachable misdemeanor? I do not stand upon this point on the weight of authority of my own words alone. I stand upon the authority of one of the best lawyers that ever sat upon the bench, Judge Story, of the Supreme Court of the United States, who uses these words to define what is impeachable:

"It is a proceeding, probably the fairest that could be devised, by which the people, through the action of that branch of the Government which most directly and fully represents themselves, call in question the fitness of their public officers, and dismiss them if unfit." (Story on the Constitution, see. 810.)

Now, is there any one in this House, or outside of this House anywhere in the country, who would vote that Andrew Johnson is a "fit" man to be President of the United States? Who will say "ay" to that anywhere? This article has been drawn exactly within the precedent of Judge Chase's case. Of all the great lawyers who defended Judge Chase—and he had one, Mr. Wirt, who argued two days in succession for him—no one ventured to say to the Senate that that article, if proved, was not a misdemeanor within the provisions of the Constitution.

Mr. James F. Wilson, of Iowa, stated that he was the only one of the managers who opposed the article. He did so because he believed the offense not impeachable and because the article would prolong the trial.

The question being taken on the article, it was agreed to, yeas 87, nays 43. Both Messrs. Woodbridge and Wilson voted against it.

Mr. Bingham, by the unanimous instruction of the managers, presented another article, which was agreed to, yeas 108, nays 82,[1] and which became Axticle XI.

2419. President Johnson's impeachment, continued.

The House gave to the managers appointed for the Johnson trial the power to send for persons and papers.

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[1] House Journal, pp. 464, 465; Globe, p. 1642.

The articles of impeachment of President Johnson having been amended, the House gave a new direction for carrying them to the Senate.

The message from the House announcing that articles of impeachment would be presented against President Johnson contained the names of the managers.

The Senate having informed the House of its readiness to receive the managers with the articles impeaching President Johnson, the House as Committee of the Whole attended its managers to the Senate.

Then Mr. Bingham offered the following resolutions:

Resolved, That the articles agreed to by the House this day, together with those adopted by the House on yesterday, to be exhibited in the name of the House of Representatives and of all the people of the United States against Andrew Johnson, President of the United States, in maintenance of their impeachment against him for high crimes and misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

Resolved, That the managers on the part of the House, in the matter of the impeachment of the President, be, and hereby are, authorized to appoint a clerk and a messenger, to be paid for their services at the usual rates during the time that they are employed, and that the managers have power to send for persons and papers.

Mr. James Brooks, of New York, questioned the propriety of giving to the managers the power to send for persons and papers; but the resolutions were agreed to by the House, yeas 96, nays 27.[1]

On March 3,[2] in the Senate, the following message was received from the House by its Clerk:

Mr. President, I am directed to inform the Senate that the House of Representatives has appointed Mr. John A. Bingham, of Ohio; Mr. George S. Boutwell, of Massachusetts; Mr. James F. Wilson, of Iowa; Mr. B. F. Butler, of Massachusetts; Mr. J. A. Logan, of Illinois; Mr. Thom Williams, of Pennsylvania, and Mr. Thaddeus Stevens, of Pennsylvania, managers to conduct the impeachment against Andrew Johnson, President of the United States, and has directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House, to be exhibited in maintenance of their impeachment against the said Andrew Johnson.

Thereupon Mr. Jacob M. Howard, of Michigan, offered the following, which was agreed to:

Ordered, That the Secretary of the Senate inform the House of Representatives that the Senate is ready to receive the managers appointed by the House of Representatives to carry to the Senate articles of impeachment against Andrew Johnson, President of the United States.

On March 4,[3] in the House, Mr. Bingham presented this resolution, which was agreed to:

Resolved, That the House resolve itself into the Committee of the Whole and attend the managers appointed by the House to the Senate to present, by its managers, the articles of impeachment exhibited by the House against Andrew Johnson, President of the United States.

Thereupon the Speaker said:

In the absence of the senior Member of the House, Mr. Washburne, of Illinois, the gentleman from Massachusetts, Mr. Dawes, will please take the chair in Committee of the Whole. The Committee of the Whole, preceded by its chairman, who will be supported by the Clerk and Doorkeeper, will follow the managers to the Senate Chamber.

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[1] House Journal, p. 466; Globe, pp. 1642, 1643.

[2] Senate Journal, pp. 254, 255; Globe, p. 1622.

[3] House Journal, p. 470; Globe, p. 1661.

Accordingly, at 1 o'clock p.m., the House, as in the Committee of the Whole preceded by its chairman, Mr. Dawes, who was supported by the Clerk and Doorkeeper of the House, followed the managers of the House to the Senate Chamber.

2420. President Johnson's impeachment continued.

The ceremonies of presenting the articles impeaching President Johnson at the bar of the Senate.

At the presentation of the articles impeaching President Johnson the Speaker was, by order of the Senate, escorted to a seat beside the President pro tempore.

Form of declaration of the chairman of the managers of their readiness to present to the Senate the articles impeaching President Johnson.

The articles impeaching President Johnson.

The articles impeaching President Johnson were read by the chairman of the managers and delivered at the table of the Secretary.

The articles impeaching President Johnson were signed by the Speaker and attested by the Clerk.

The report to the House of the presentation of articles impeaching President Johnson was made by the chairman of the Committee of the Whole.

Mr. Speaker Colfax held that the managers of an impeachment were not a committee. (Footnote.)

The articles impeaching President Johnson were received by the Senate with the President pro tempore presiding.

In the Senate Chamber,[1] when the managers[2] appeared at the bar, their presence was announced by the Sergeant-at-Arms of the Senate.

The President pro tempore 3 (for the Senate had not yet organized for the trial) said:

> The managers of the impeachment will advance within the bar and take the seats provided for them.

The managers did this.

Thereupon, at the suggestion of Mr. Thomas A. Hendricks, of Indiana, a Senator, a seat was provided for the Speaker of the House by the side of the President of the Senate, and the Speaker was escorted by Mr. James W. Grimes, of Iowa, a Senator, to a seat at the right of the President pro tempore.

Mr. Manager Bingham then said:

> Mr. President, the managers of the House of Representatives, by order of the House, are ready at the bar of the Senate, whenever it may please the Senate to hear them, to present articles of impeachment and in maintenance of the impeachment preferred against Andrew Johnson, President of the United States, by the House of Representatives.

The President pro tempore said:

> The Sergeant-at-Arms will make proclamation.

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[1] Senate Journal, pp. 260–268; Globe, pp. 1647–1649.

[2] The managers are not a committee. Mr. Speaker Colfax said: "The managers have been called a board of managers. Their official title is simply managers. They are not a committee." Globe, p. 1660.

[3] Benjamin F. Wade, of Ohio, President pro tempore.

The Sergeant-at-Arms proclaimed:

Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Andrew Johnson, President of the United States.

The managers then rose and remained standing, with the exception of Air. Stevens, who was physically unable to do so, while Mr. Manager Bingham read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and all the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

ARTICLE I.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that be should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of Wax, said Edwin M. Stanton having been theretofore duly appointed and commissioned by and with the advice and consent of the Senate of the United States, as such Secretary, and said Andrew Johnson, President of the United States, on the 12th day of August, in the year of our Lord 1867, and during the recess of said Senate, having suspended by his order Edwin M. Stanton from said office, and within twenty days after the first day of the next meeting of said Senate-that is to say, on the 12th day of December, in the year last aforesaid-having reported to said Senate such suspension, with the evidence and reasons for his action in the case and the name of the person designated to perform the duties of such office temporarily until the next meeting of the Senate, and said Senate thereafterwards, on the 13th day of January, in the year of our Lord 1868, having duly considered the evidence and reasons reported by said Andrew Johnson for said suspension, and having refused to concur in said suspension, whereby and by force of the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, said Edwin M. Stanton did forthwith resume the functions of his office, whereof the said Andrew Johnson had then and there due notice, and said Edwin M. Stanton, by reason of the premises, on said 21st day of February, being lawfully entitled to hold said office of Secretary for the Department of War, which said order for the removal of said Edwin M. Stanton is, in substance, as follows, that is to say:

"EXECUTIVE MANSION,

"Washington, D.C., February 21, 1868.

"SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of Wax, and your functions as such will terminate upon receipt of this communication.

"You Will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of Wax ad interim, all records, books, papers, and other public property now in your custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"HON. EDWIN M. STANTON, *Washington, D.C."*

Which order was unlawfully issued with intent then and there to violate the act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867; and with the further intent, contrary to the provisions of said act, in violation thereof, and contrary to the provisions of the Constitution of the United States, and without the advice and consent of the Senate of the United States, the said Senate then and there being in session, to remove said Edwin M. Stanton from the office of Secretary for the Department of Wax, the said Edwin M. Stanton being then and there Secretary of Wax, and being then and there in the due and lawful execution and discharge of the duties of said office, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office.

ARTICLE II.

That on said 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did, with intent to violate the Constitution of the United States and the act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority, in substance as follows, that is to say:

"EXECUTIVE MANSION,

"Washington, D.C., February 21, 1868.

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"To Brevet Maj. Gen. LORENZO THOMAS,

"Adjutant-General United States Army, Washington, D.C."

Then and there being no vacancy in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit, and was, guilty of a high misdemeanor in office.

ARTICLE III.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did commit and was guilty of a high misdemeanor in office in this, that, without authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War ad interim, without the advice and consent of the Senate and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate, and no vacancy existing in said office at the time, and which said appointment, so made by said Andrew Johnson, of said Lorenzo Thomas' is in substance as follows, that is to say:

"EXECUTIVE MANSION,

"Washington, D.C., February 21, 1868.

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"To Brevet Maj. Gen. LORENZO THOMAS,

"Adjutant-General United States Army, Washington, D.C."

ARTICLE IV.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, in violation of the Constitution and laws of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, with intent, by intimidation and threats, unlawfully to hinder and prevent Edwin M. Stanton, then and there the Secretary for the Department of War, duly appointed under the laws of the United States, from holding said office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States and of the provisions of an act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high crime in office.

ARTICLE V.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, and on divers other days and times in said year, before the 2d day of March, A. D. 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States, from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE VI.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, by force to seize, take, and possess the property of the United States in the Department of War, and then and there in the custody and charge of Edwin M. Stanton, Secretary for said Department, contrary to the provisions of an act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, and with intent to violate and disregard an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high crime in office.

ARTICLE VII.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas with intent unlawfully to seize, take, and possess the property of the United States in the Department of War, in the custody and charge of Edwin M. Stanton, Secretary for said Department, with intent to violate and disregard the act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high misdemeanor in office.

ARTICLE VIII.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in violation of the Constitution of the United States, and without the advice and consent of the Senate of the United States, and while the Senate was then and there in session, there being no vacancy in the office of Secretary for the Department of War, with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows, that is to say:

"EXECUTIVE MANSION.

"Washington, D.C., February 21, 1868.

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"Brevet Maj. Gen. LORENZO THOMAS,

"Adjutant-General United States Army, Washington, D.C.

whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE IX.

That said Andrew Johnson, President of the United States, on the 22d day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, in disregard of the Constitution and the laws of the United States, duly enacted, as Commander in Chief of the Army of the United States, did bring before himself then and there William H. Emory, a major-general by brevet in the Army of the United States, actually in command of the Department of Washington and the military forces thereof, and did then and there, as such Commander in Chief, declare to and instruct said Emory that part of a law of the United States, passed March 2, 1867, entitled "An act making appropriations for the support of the Army for the year ending June 30, 1868, and for other purposes," especially the second section thereof, which provides, among other things, that "all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and, in case of his inability, through the next in rank," was unconstitutional and in contravention of the commission of said Emory, and which said provision of law had been theretofore duly and legally promulgated by general order for the government and direction of the Army of the United States, as the said Andrew Johnson then and there well knew, with intent thereby to induce said Emory, in his official capacity as commander of the Department of Washington, to violate the provisions of said act, and to take and receive, act upon, and obey such orders as he, the said Andrew Johnson, might make and give, and which should not be issued through the General of the Army of the United States, according to the provisions of said act, and with the further intent thereby to enable him, the said Andrew Johnson, to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed. March 2, 1867, and to unlawfully prevent Edwin M. Stanton, then being Secretary for the Department of War, from holding said office and discharging the duties thereof, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE X.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof to meet and receive said Andrew Johnson as the Chief Magistrate of the United States, did, on the 18th day of August, in the year of our Lord 1866, and on divers other days and times, as well before as afterwards, make and deliver with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers, and laughter of the multitudes then assembled and within hearing, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

Specification first.—In this, that at Washington, in the District of Columbia, in the Executive Mansion, to a committe of citizens who called upon the President of the United States, speaking of and concerning the Congress of the United States, said Andrew Johnson, President of the United States, heretofore, to wit, on the 18th day of August, in the year of our Lord 1866, did, in a loud voice, declare in substance and effect, among other things, that is to say:

"So far as the executive department of the Government is concerned, the effort has been made to restore the Union, to heal the breach, to pour oil into the wounds which were consequent upon the struggle, and (to speak in common phrase) to prepare, as the learned and wise physician would, a plaster healing in character and coextensive with the wound. We thought, and we think, that we had partially succeeded; but as the work progresses, as reconstruction seemed to be taking place and the country was becoming reunited, we found a disturbing and marring element opposing us. In alluding to that element, I shall go no further than your convention and the distinguished gentleman who has delivered

to me the report of its proceedings. I shall make no reference to it that I do not believe the time and the occasion justify.

"We have witnessed in one department of the Government every endeavor to prevent the restoration of peace, harmony, and union. We have seen hanging upon the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union when its every step and act tended to perpetuate disunion and make a disruption of the States inevitable. * * * We have seen Congress gradually encroach step by step upon constitutional rights and violate, day after day and month after month, fundamental principles of the Government. We have seen a Congress that seemed to forget that there was a limit to the sphere and scope of legislation. We have seen a Congress in a minority assume to exercise power which, allowed to be consummated, would result in despotism or monarchy itself."

Specification second.—In this, that at Cleveland, in the State of Ohio, heretofore, to wit, on the 3d day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States did, in a loud voice, declare in substance and effect among other things, that is to say:

"I will tell you what I did do. I called upon your Congress that is trying to break up the Government.

* * * * * * *

"In conclusion, beside that, Congress had taken much pains to poison their constituents against him. But what had Congress done? Have they done anything to restore the union of these States? No; on the contrary, they had done everything to prevent it; and because he stood now where he did when the rebellion commenced he had been denounced as a traitor. Who had run greater risks or made greater sacrifices than himself? But Congress, factious and domineering, had undertaken to poison the minds of the American people."

Specification third.—In this, that at St. Louis, in the State of Missouri, heretofore, to wit, on the 8th day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare, in substance and effect, among other things, that is to say:

"Go on. Perhaps if you had a word or two on the subject of New Orleans you might understand more about it than you do. And if you will go back—if you win go back and ascertain the cause of the riot at New Orleans, perhaps you will not be so prompt in calling out 'New Orleans.' If you will take up the riot at New Orleans and trace it back to its source or its immediate cause, you will find out who was responsible for the blood that was shed there. If you will take up the riot at New Orleans and trace it back to the Radical Congress, you will find that the riot at New Orleans was substantially planned. If you will take up the proceedings in their caucuses, you will understand that they there knew that a convention was to be called which was extinct by its power having expired; that it was said that the intention was that a new government was to be organized, and on the organization of that government the intention was to enfranchise one portion of the population, called the colored population, who had just been emancipated, and at the same time disfranchise white men. When you design to talk about New Orleans you ought to understand what you are talking about. When you read the speeches that were made, and take up the facts on the Friday and Saturday before that convention sat, you will there find that speeches were made incendiary in their character, exciting that portion of the population, the black population, to arm themselves and prepare for the shedding of blood. You will also find that that convention did assemble in violation of law, and the intention of that convention was to supersede the reorganized authorities in the State government of Louisiana, which had been recognized by the Government of the United States; and every man engaged in that rebellion in that convention, with the intention of superseding and upturning the civil government which had been recognized by the Government of the United States, I say that he was a traitor to the Constitution of the United States, and hence you find that another rebellion was commenced having its origin in the Radical Congress. * * *

"So much for the New Orleans riot. And there was the cause and the origin of the blood that was shed; and every drop of blood that was shed is upon their skirts, and they are responsible for it. I could test this thing a little closer, but will not do it here to-night. But when you talk about the causes and

consequences that resulted from proceedings of that kind, perhaps as I have been introduced here and you have provoked questions of this kind, though it does not provoke me, I will tell you a few wholesome things that have been done by this Radical Congress in connection with New Orleans and the extension of the elective franchise.

"I know that I have been traduced and abused. I know it has come in advance of me here, as elsewhere, that I have attempted to exercise an arbitrary power in resisting laws that were intended to be forced upon the Government; that I had exercised that power; that I had abandoned the party that elected me, and that I was a traitor because I exercised the veto power in attempting and did arrest for a time a bill that was called a 'Freedman's Bureau' bill; yes, that I was a traitor. And I have been traduced, I have been slandered, I have been maligned, I have been called Judas Iscariot, and all that. Now, my countrymen here to-night, it is very easy to indulge in epithets; it is easy to call a man a Judas and cry out traitor; but when he is called upon to give arguments and facts he is very often found wanting. Judas Iscariot—Judas. There was a Judas, and he was one of the twelve apostles. Oh, yes; the twelve apostles had a Christ. The twelve apostles had a Christ, and he never could have had a Judas unless he had had twelve apostles. If I have played the Judas, who has been my Christ that I have played the Judas with? Was it Thad. Stevens? Was it Wendell Phillips? Was it Charles Sumner? These are the men that stop and compare themselves with the Saviour; and everybody that differs with them in opinion, and to try and stay and arrest the diabolical and nefarious policy, is to be denounced as a Judas.

* * * * * * *

"Well, let me say to you, if you will stand by me in this action; if you will stand by me in trying to give the people a fair chance, soldiers and citizens, to participate in these offices, God being willing, I will kick them out. I will kick them out just as fast as I can.

"Let me say to you, in concluding, that what I have said I intended to say. I was not provoked into this, and I care not for their menaces, the taunts, and the jeers. I care not for threats. I do not intend to be bullied by my enemies nor overawed by my friends. But, God willing, with your help I will veto their measures whenever any of them come to me."

Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of, a high misdemeanor in office.

ARTICLE XI.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, and in disregard of the Constitution and laws of the United States, did heretofore, to wit, on the 18th day of August, 1866, at the city of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same; but, on the contrary, was a Congress of only part of the States, thereby denying and intending to deny that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying and intending to deny the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and, in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, 1868, at the city of Washington, in the District of Columbia, did unlawfully and in disregard of the requirements of the Constitution, that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, by unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson, of said Edwin M. Stanton from said office of Secretary for the Department of War, and also by further unlawfully devising and contriving, and attempting to devise and contrive, means then and there to prevent the execution of an act entitled "An act making appropriations for the support of the Army

for the fiscal year ending June 30, 1868, and for other purposes," approved March 2, 1867, and also to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March 2, 1867; whereby the said Andrew Johnson, President of the United States, did then, to wit, on the 21st day of February, 1868, at the city of Washington, commit and was guilty of a high misdemeanor in office.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

Attest:
EDWARD MCPHERSON,
Clerk of the House of Representatives.

Mr. Bingham having concluded the reading of the articles of impeachment, the President pro tempore informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice would be given to the House of Representatives.

The managers, by their chairman, Mr. Bingham, then delivered the articles of impeachment at the table of the Secretary, and withdrew, accompanied by the Members of the House of Representatives.

The Committee of the Whole, having returned to the Hall of the House,[1] rose and the Speaker resumed the chair, whereupon Mr. Henry L. Dawes, of Massachusetts, the chairman, reported:

Mr. Speaker: The House in the Committee of the Whole, by order of the House, have accompanied their managers to the Senate while they presented, in the name of the House of Representatives and of all the people of the United States, articles of impeachment agreed upon by the House against Andrew Johnson, President of the United States. The President of the Senate announced that the Senate would take order in the premises, of which due notice would be given to the House of Representatives.

2421. President Johnson's impeachment continued.

Resolution providing for introduction of the Chief Justice and the organization of the Senate for the trial of President Johnson.

The Senate ordered a copy of its rules for the trial of President Johnson to be sent to the House.

The notice to the Chief Justice to meet the Senate for the trial of President Johnson was delivered by a committee of three Senators, who were his escort also.

In the Senate, on the same day, Mr. Howard moved[2] the adoption of the following:

Resolved, That at 1 o'clock to-morrow afternoon the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States, at which time the oath or affirmation required by the rules of the Senate sitting for the trial of an impeachment shall be administered by the Chief

[1] House Journal, p. 471; Globe, p. 1661.

[2] Senate Journal, p. 268; Globe, pp. 1657, 1658.

Justice of the United States, as the presiding officer of the Senate, sitting as aforesaid, to each member of the Senate, and that the Senate sitting as aforesaid will at the time aforesaid receive the managers appointed by the House of Representatives.

Ordered, That the Secretary lay this resolution before the House of Representatives.

Ordered, That the articles of impeachment exhibited against Andrew Johnson, President of the United States, be printed.

Ordered, That a copy of the "rules of procedure and practice in the Senate when sitting on the trial of impeachments" be communicated by the Secretary to the House of Representatives, and a copy thereof delivered by him to each member of the House.

Mr. George F. Edmunds proposed a simpler resolution, taking the ground that the pending resolution, in some respects, provided for what had already been provided in the rules. But Mr. Howard replied that the House was not obliged to take cognizance of the rules. The resolutions and orders were then agreed to as offered. The communication was duly received in the House.[1]

Thereupon, on motion of Mr. Stephen C. Pomeroy, of Kansas,

Ordered, That the notice to the Chief Justice of the United States to meet the Senate in the trial of the case of impeachment, and requesting his attendance as presiding officer, be delivered to him by a committee of three Senators, to be appointed by the Chair, who shall wait upon the Chief Justice to the Senate Chamber and conduct him to the chair.

The President pro tempore appointed Messrs. Pomeroy, Henry Wilson, of Massachusetts, and Charles R. Buckalew, of Pennsylvania, the committee.

2422. President Johnson's impeachment continued.

The ceremonies of inducting the Chief Justice and organizing the Senate for the trial of President Johnson.

The President pro tempore left the chair at the hour for the Senate to sit for the trial of the President.

On taking the chair to preside at the trial of President Johnson the Chief Justice had the oath administered by an associate justice.

Having taken the oath himself the Chief Justice administered it to the Senators sitting for the trial of President Johnson.

After the oath had been administered to the Senators sitting for the trial of President Johnson the Sergeant-at-Arms was directed to make proclamation.

The Senate having organized for the trial of President Johnson, rules were adopted and the House was notified of the organization and of readiness to receive the managers.

On March 5[2] in the Senate the hour of 1 o'clock having arrived, the President pro tempore said:

The morning hour having expired, all legislative and executive business of the Senate is ordered to cease for the purpose of proceeding to business pertaining to the impeachment of the President of the United States. The chair is vacated for that purpose.

The President pro tempore then left the chair.

The Chief Justice of the United States entered the Chamber, accompanied by Mr. Justice Nelson, and escorted by Senators Pomeroy, Wilson, and Buckalew, the committee appointed for that purpose.

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[1] House Journal, p. 475.

[2] Senate Journal, pp. 809, 810; Globe, p. 1671.

The Chief Justice took the chair and said:

Senators: I attend the Senate in obedience to your notice, for the purpose of joining with you in forming a court of impeachment for the trial of the President of the United States, and I am now ready to take the oath.[1]

The oath was administered by Mr. Justice Nelson to Chief Justice Chase in the following words:

I do solemnly swear that in all things appertaining to the trial of the impeachment of Andrew Johnson, President of the United States, I will do impartial justice according to the Constitution and laws. So help me God.

[The Senators rose when the Chief Justice entered the Chamber and remained standing till the conclusion of the administration of the oath to him.]

The CHIEF JUSTICE. Senators, the oath will now be administered to the Senators as they will be called by the Secretary in succession. [To the Secretary.] Call the roll.

The administration of the oath then proceeded until the name of Mr. Benj. F. Wade, of Ohio, was called, when a question was raised as to his competency to Vote.[2]

If the managers on the part of the House of Representatives were present during this proceeding, it was informally, as no mention is made of their presence.

On March 6[3] the question as to Mr. Wade's right to vote was withdrawn, and the administration of the oath was concluded.

Thereupon the following occurred:

All the Senators present having taken the oath required by the Constitution, the Senate is now organized for the purpose of proceeding to the trial of the impeachment of Andrew Johnson, President the United States. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment against Andrew Johnson, President of the United States.

After the Chief Justice had submitted the question: "Shall the rules of proceeding adopted by the Senate on the 2d of March be the rules of proceeding in the trial of the impeachment?", and the same had been determined in the affirmative, Mr. Howard offered the following order, which was agreed to:

Ordered, That the Secretary of the Senate notify the House of Representatives that the Senate is now organized for the trial of the articles of impeachment against Andrew Johnson, President of the United States, and is ready to receive the managers of the impeachment at its bar.

2423. President Johnson's impeachment continued.

The House did not attend the managers in making the formal demand that the Senate take process against President Johnson.

The House managers having demanded process against President Johnson, the Senate ordered a summons to issue, returnable on a given date.

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[1] The Journal has this record "By direction of the Chief Justice the following oath was administered to him," etc. The Senate, in adopting rules for the trial, had assumed that the Chief Justice would not be sworn. See proceedings on Rule XXIV, section 2080 of this volume.

[2] For discussion of this question see section 2061 of this volume.

[3] Senate Journal, p. 811; Globe, p. 1701.

The sessions of the Senate sitting for an impeachment trial may adjourn for more than three days.

The managers, having returned from demanding that process be issued against President Johnson, reported verbally to the House.

The managers of the impeachment of President Johnson were given leave to sit during sessions of the House and power to compel testimony.

A question had arisen in the House [1] as to whether or not the House should attend the managers, and Mr. Bingham said:

Mr. Speaker, after consultation with the managers on the part of the House, I am instructed by them to say to the House that, inasmuch as this is a mere formal proceeding to-day, they do not suppose it to be necessary or according to usage to ask the House to attend them to the bar of the Senate until the issue shall be joined.

In due time the managers (excepting Mr. Stevens), appeared [2] at the bar of the Senate, and their presence was announced by the Sergeant-at-Arms.

The Chief Justice said:

The managers of the impeachment on the part of the House of Representatives will please take the seats assigned to them.

The managers having been seated in the area in front of the chair,

Mr. Manager Bingham rose and said:

Mr. President, we are instructed by the House of Representatives, as its managers, to demand that the Senate take process against Andrew Johnson, President of the United States, that he may answer at the bar of the Senate upon the articles of impeachment heretofore preferred by the House of Representatives through its managers before the Senate.

Mr. Howard, a Senator, thereupon moved the following order, which was agreed to: [3]

Ordered, That a summons do issue, as required by the rules of procedure and practice in the Senate when sitting on the trial of impeachments, to Andrew Johnson, returnable on Friday, the 13th day of March instant, at 1 o'clock in the afternoon.

After a subject relating to an amendment of the rules had been disposed of, Mr. Howard moved that the Senate sitting for the trial of the President upon articles of impeachment,[4] adjourn to Friday, the 13th of March instant, at 1 o'clock afternoon.

This motion was agreed to, and the Chief Justice thereupon declared the Senate sitting for the trial of impeachments adjourned to the time named and vacated the chair.

The President pro tempore resumed the chair and called the Senate to order.[5]

The managers, having returned to the House, appeared at the bar,[6] and being recognized by the Speaker, Aft. Bingham said:

I have the honor to report, on behalf of the managers in the matter of the impeachment of Andrew Johnson, President of the United States, that the Senate has organized for the trial of the impeachment;

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[1] Globe, p. 1683.

[2] Senate Journal, p. 816; Globe, p. 1701.

[3] Senate Journal, p. 823; Globe, p. 1701.

[4] The Globe (p. 1701) indicates that Mr. Howard used the word "court," but the Journal does not permit the word.

[5] Senate Journal, pp. 276—823; Globe, p. 1701.

[6] House Journal, p. 484; Globe, p. 1711.

that in the name of the House of Representatives and in the behalf of all the people of the United States, the managers have demanded of the Senate that process be issued against Andrew Johnson, President of the United States, to answer to the articles heretofore exhibited against him at the bar of the Senate; and that the Senate has advised us that process will be issued against him in that behalf, returnable on the 13th instant, at 1 o'clock p.m.

On March 6,[1] also in the House, Mr. Bingham offered the following:

Resolved, That the managers on the part of the House, in the matter of the impeachment of the President, be, and hereby are, authorized to sit during the sessions of the House, and shall have power to send for persons and papers, administer oaths, and take the testimony of witnesses.

Mr. Bingham explained that this was desired to enable the managers to administer oaths to witnesses. The resolution was agreed to, yeas 89, nays 25.

2424. President Johnson's impeachment continued.

Ceremonies at the return of the summons to President Johnson to appear and answer the articles of impeachment.

Form used by the Sergeant-at-Arms in calling President Johnson to appear and answer the articles of impeachment.

President Johnson entered his appearance by a letter addressed to the Chief Justice and naming the counsel to appear for him.

President Johnson by his own letter and by a paper filed and signed by his counsel asked forty days in which to prepare his answer.

The House in Committee of the Whole, on notice from the Senate, attended on the return day of the summons to President Johnson.

The Chief Justice held, in the Senate sitting for the trial of President Johnson, that the journal should be read before other proceedings.

On March 13[2] at 1 p.m. the Chief Justice entered the Senate Chamber, resumed the chair, and said (to the Sergeant-at-Arms):

Make proclamation.

The SERGEANT-AT-ARMS. Hear ye! hear ye. All persons are commanded to keep silence while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Andrew Johnson, President of the United States.

Propositions being made to notify the House of Representatives and also that several Senators be sworn, the Chief Justice said:

The first business is to read the journal of the last session of the court. The Senators will be sworn in afterwards.

The Secretary read the journal of the proceedings of the Senate sitting for the trial of impeachment of Andrew Johnson, President of the United States, on Friday, March 6, 1868.

Mr. Jacob M. Howard, of Michigan, submitted this order, which was agreed to:

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber, and ready to proceed with the trial of Andrew Johnson, President of the United States, and that seats are provided for the accommodation of the Members.

This message being received in the House,[3] that body resolved itself into Committee of the Whole, with Mr. Elihu B. Washburne, of Illinois, in the chair, and thereupon attended the managers to the Senate.

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[1] House Journal, p. 481; Globe, p. 1706.

[2] House Journal, p. 519; Globe, p. 1869.

[3] Senate Journal, p. 824; Globe Supplement, p. 6.

The managers having appeared at the bar, were announced by the Sergeant-at-Arms and conducted to the position assigned them.

The oath was then administered to several Senators not previously sworn.

Then the following proceedings occurred: [1]

The CHIEF JUSTICE. The Secretary of the Senate will read the return of the Sergeant-at-Arms to the summons directed to be issued by the Senate.

The Chief Clerk read the following return appended to the writ of summons:

The foregoing writ of summons, addressed to Andrew Johnson, President of the United States, and the foregoing precept, addressed to me, were this day duly served on the said Andrew Johnson, President of the United States, by delivering to and leaving with him true and attested copies of the same at the Executive Mansion, the usual place of abode of the said Andrew Johnson, on Saturday, the 7th day of March instant, at 7 o'clock in the afternoon of that day.

GEORGE T. BROWN,
Sergeant-at-Arms of the United States Senate.

WASHINGTON, *March 7, 1863.*

The Chief Clerk administered to the Sergeant-at-Arms the following oath:

I, George T. Brown, Sergeant-at-Arms of the Senate of the United States, do swear that the return made and subscribed by me upon the process issued on the 7th day of March, A. D. 1868, by the Senate of the United States against Andrew Johnson, President of the United States, is truly made, and that I have performed said service therein prescribed. So help me God.

The CHIEF JUSTICE. The Sergeant-at-Arms will call the accused.

The SERGEANT-AT-ARMS. Andrew Johnson, President of the United States, Andrew Johnson, President of the United States, appear and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

There being no response, Mr. Reverdy Johnson, of Maryland, a Senator, made this suggestion:

I understand that the President has retained counsel, and that they are now in the President's room attached to this wing of the Capitol. They are not advised, I believe, of the court being organized. I move that the Sergeant-at-Arms inform them of that fact.

The CHIEF JUSTICE. If there be no objection, the Sergeant-at-Arms will so inform the counsel of the President.

The Sergeant-at-Arms presently returned with Hon. Henry Stanbery, of Kentucky; Hon. Benjamin R. Curtis, of Massachusetts, and Hon. Thomas A. R. Nelson, of Tennessee, who were conducted to the seats assigned the counsel of the President.

Then the following occurred:

The Sergeant-at-Arms announced the Members of the House of Representatives, who entered the Senate Chamber preceded by the chairman of the Committee of the Whole House (Mr. E. B. Washburne, of Illinois), into which that body had resolved itself to witness the trial, who was accompanied by the Speaker and Clerk.

The CHIEF JUSTICE (to the counsel for the President). Gentlemen, the Senate is now sitting for the trial of the President of the United States, upon articles of impeachment exhibited by the House of Representatives. The court will now hear you.

Mr. STANBERY. Mr. Chief Justice, my brothers Curtis and Nelson and myself are here this morning as counsel for the President. I have his authority to enter his appearance, which, with your leave, I will proceed to read:

"In the matter of the impeachment of Andrew Johnson, President of the United States.

"Mr. CHIEF JUSTICE: I, Andrew Johnson, President of the United States, having been served with a summons to appear before this honorable court, sitting as a court of impeachment to answer certain articles of impeachment found and presented against me by the honorable the House of Repre-

[1] Globe Supplement, p. 6.

sentatives of the United States, do hereby enter my appearance by my counsel, Henry Stanbery, Benjamin R. Curtis, Jeremiah S. Black, William M. Evarts, and Thomas A. R. Nelson, who have my warrant and authority therefore, and who are instructed by me to ask of this honorable court a reasonable time for the preparation of my answer to said articles.

"After a careful examination of the articles of impeachment and consultation with my counsel, I am satisfied that at least forty days will be necessary for the preparation of my answer, and I respectfully ask that it be allowed.

"ANDREW JOHNSON."

The CHIEF JUSTICE. The paper will be filed.

Mr. STANBERY. Mr. Chief Justice, I have also a professional statement in support of the application. Whether it is in order to offer it now or to wait until the appearance is entered your Honor will decide.

The CHIEF JUSTICE. The appearance will be considered as entered. You may proceed.

Mr. STANBERY. I will read the statement.

"In the matter of the impeachment of Andrew Johnson, President of the United States.

"Henry Stanbery, Benjamin R. Curtis, Jeremiah S. Black, William M. Evarts, and Thomas A. R. Nelson, of counsel for the respondent, move the court for the allowance of forty days for the preparation of the answer to the articles of impeachment, and in support of the motion make the following professional statement:

"The articles are eleven in number, involving many questions of law and fact. We have, during the limited time and opportunity afforded us, considered as far as possible the field of investigation which must be explored in the preparation of the answer, and the conclusion at which we have arrived is that with the utmost diligence the time we have asked is reasonable and necessary.

"The precedents as to time for answer upon impeachments before the Senate, to which we have had opportunity to refer, are those of Judge Chase and Judge Peck.

"In the case of Judge Chase time was allowed from the 3d of January until the 4th of February next succeeding to put in his answer, a period of thirty-two days; but in this case there were only eight articles, and Judge Chase had been for a year cognizant of most of the articles, and had been himself engaged in preparing to meet them.

"In the case of Judge Peck there was but a single article. Judge Peck asked for time from the 10th to the 25th of May to put in his answer, and it was granted. It appears that Judge Peck had been long cognizant of the ground laid for his impeachment, and had been present before the committee of the House upon the examination of the witnesses, and had been permitted by the House of Representatives to present to that body an elaborate answer to the charges.

"It is apparent that the President is fairly entitled to more time than was allowed in either of the foregoing cases. It is proper to add that the respondents in these cases were lawyers, fully capable of preparing their own answers, and that no pressing official duties interfered with their attention to that business; whereas the President, not being a lawyer, must rely on his counsel. The charges involve his acts, declarations, and intentions, as to all which his counsel must be fully advised upon consultation with him, step by step, in the preparation of his defense. It is seldom that a case requires such constant communication between client and counsel as this, and yet such communication can only be had at such intervals as are allowed to the President from the usual hours that must be devoted to his high official duties.

"We further beg leave to suggest for the consideration of this honorable court that as counsel, careful as well of their own reputation as of the interests of their client in a case of such magnitude as this, so out of the ordinary range of professional experience, where so much responsibility is felt, they submit to the candid consideration of the court that they have a right to ask for themselves such opportunity to discharge their duty as seems to them to be absolutely necessary.

"HENRY STANBERY,
"B. R. CURTIS,
"JEREMIAH S. BLACK, per H. S.
"WILLIAM M. EVARTS, per H. S.
"THOMAS A. R. NELSON,
"Of Counsel for the Respondent.

"MARCH 13, 1868."

2425. President Johnson's impeachment continued.

The Senate denied the motion of President Johnson's counsel that he be allowed forty days to answer and granted ten days.

The managers urged, in view of Rule VIII, that President Johnson should answer on the return day, but were overruled.

Review of English precedents as to the distinction between the pleadings and the trial of an impeachment.

The Senate deliberated in secret session on the application of President Johnson for time to prepare his answer.

The proceedings of secret sessions of the Senate in the Johnson trial appear in the Journal, but the debates were not recorded.

Immediately [1] Mr. Manager Bingham raised the question that under the language of the eighth rule the motion for continuance was not allowable, the provision of the rule being that if the respondent appeared he should answer, the terms of the rule being:

> If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor, as aforesaid, or appearing shall fail to file his answer to such articles of impeachment, the trial shall proceed nevertheless as upon a plea of not guilty.

Counsel for the respondent argued that it would be oppressive for the proceedings to be so hastened, and an innovation upon even the worst precedents in English history. Assuming, apparently, that they must at once proceed to trial, they stated that they could not summon their witnesses until the pleadings were prepared. Mr. Henry Stanbery further said:

> Rule 9 provides:
>
> "At 12 o'clock and 30 minutes afternoon of the day appointed for the return of the summons against the person impeached."
>
> This is the return day; it is not the trial day. The letter answers the gentlemen. According to the letter of the eighth rule they say "this is the trial day; go on; not a moment's delay; file your answer and proceed to trial; or without your answer let a general plea of not guilty be entered, and proceed at once with the trial." The ninth rule says this is the return day, not the trial day. Then the tenth rule says:
>
> "The person impeached shall then be called to appear and answer the articles of impeachment against him."
>
> That is the call made on the return day. The accused is called to appear and answer. He is here; he appears; he states his willingness to answer; he only asks a reasonable time to prepare the answer. Then rule 11 speaks "of the day appointed for the trial." That is not this day. This day, the day which the gentlemen would make the first day of the trial, is, in your own rules, put down for the return day, and you must have some other day for the trial day to suit the convenience of the parties; so that the letter of one rule answers the letter of another rule.

Mr. Manager Bingham replied that the making up of the issue and the trial were distinct matters. Citing a precedent, he said:

> A very remarkable case in the twelfth volume of State Trials lies before me, wherein Lord Holt presided, on the trial of Sir Richard Grahme, Viscount Preston, and others, charged with high treason. In that case the accused appeared, as the accused by the learned gentlemen appears this morning, after the indictment presented in the court, and before plea asked for continuance. The answer that fell from the lips of the Lord Chief justice was, we are not to consider the question of trial or the time of trial until plea be pleaded. Let me give his very words:

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[1] Globe Supplement, p. 7.

"L. C. HOLT. My lord, we debate the time of your trial too early; for you must put yourself upon your trial first by pleading."

And when Lord Preston presses him again on the point Lord Chief Justice Holt responds:

"My lord, we cannot dispute with you concerning your trial till you have pleaded. I know not what you will say to it; for aught I know there may be no occasion for a trial. I can not tell what you will plead; your lordship must answer to the indictment before we can enter into the debate of this matter." (12 State Trials, 664.)

The eighth rule of the Senate, last clause, provides that if the party appearing shall plead guilty there may be no further proceedings in the case, no trial about it; nothing remains to be done but to pronounce judgment under the Constitution. It is time enough for us to talk about a trial when we have an issue. The rule is a plain one, a simple one.

And I may be pardoned for saying that I fail to perceive anything in rules 10 or 11 to which the learned counsel have referred that by any kind of construction can be supposed to limit the effect of the words in rule 8, to wit:

"If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or appearing shall fail to file his answer [on the day on which he is summoned to appear], the trial shall proceed nevertheless as upon a plea of not guilty."

When words are plain in a written law there is an end to all construction; they must be followed. The managers so thought when they appeared at this bar. All they ask is the enforcement of the rule, not a postponement of forty days, and at the end of that time to be met with a dilatory plea—a motion, if you please—to quash the articles, or a question raising the inquiry whether this is the Senate of the United States.

The Chief Justice being about to put the motion submitted by the counsel for the respondent, Mr. George F. Edmunds, of Vermont, submitted [1] the following:

Ordered, That the respondent file his answer to the articles of impeachment on or before the 1st day of April next, and that the managers of the impeachment file their replication thereto within three days thereafter, and that the matter stand for trial on Monday, April 6, 1868.

Then, on motion of Mr. Oliver P. Morton, of Indiana, it was voted "that the Senate retire to deliberate and confer in regard to its determination of the question." The Journal indicates that the Chief Justice retired with the Senate. The proceedings during the secret session were recorded in the Journal,[2] but not in the report of the trial. As soon as the Senate had assembled in the conference chamber, Mr. Charles D. Drake, of Missouri, moved [3] to strike out of Mr. Edmunds's resolution all after the word "*Resolved*" and insert: "That the respondent file answer to the articles of impeachment on or before Friday, the 20th day of March instant."

At first this was agreed to, yeas 28, nays 20, but on motion of Mr. Lyman Trumbull, of Illinois, and by a vote of yeas 27, nays 23, the vote was reconsidered, and then Mr. Drake's amendment was amended by striking out the words "Friday, the 20th," and inserting "Monday, the 23d." The amendment as amended was agreed to, and then the order as amended was agreed to.

The Senate then returned to its Chamber; and the Chief Justice announced to the counsel for the President that their motion to be allowed forty days to pre-

[1] Senate Journal. p. 826; Globe Supplement, p. 826.

[2] In former trials the Journal did not record the secret sessions. It seems to have been considered that the Constitution and the rules required the Journal to be kept. See remarks of Mr. Edmunds, Globe, p. 1886.

[3] Senate Journal, pp. 826, 827.

pare and file answer to the articles of impeachment was denied, and that the Senate had adopted the following order:

Ordered, That the respondent file answer to the articles of impeachment on or before Monday, the 23d day of March instant.

2426. President Johnson's impeachment continued.

After argument as to the propriety of delay, the Senate determined that the trial of President Johnson should proceed immediately after replication should be filed.

The Chief Justice held, in the Johnson impeachment, that both managers and counsel might be heard on a motion of a Senator to fix the time for the trial to begin.

Then, by instruction of the managers, Mr. Manager Bingham submitted [1] the following motion:

The managers ask, the Senate respectfully to adopt the following order:

"Ordered, That upon the filing of a replication by the managers on the part of the House of Representatives the trial of Andrew Johnson, President of the United States, upon the articles of impeachment exhibited by the House of Representatives shall proceed forthwith."

The question being put on agreeing to the order, there appeared, yeas 25, nays 26. So the order was disagreed to.

Thereupon, Mr. John Sherman, of Ohio, a Senator, offered [2] the following:

Ordered, That the trial of the articles of impeachment shall proceed on the 6th day of April next.

Mr. Henry Wilson, of Massachusetts, a Senator, moved to amend by striking out "the 6th day of April" and inserting "the 1st day of April."

Mr. Manager Butler thereupon asked if the managers might be heard on the motion.

The Chief Justice replied:

The Chair is of opinion that the managers have a right to be heard and also the counsel for the accused.

Mr. Manager Butler thereupon argued for a speedy trial. The precedents for delay, which might be cited from the case of Judge Chase, were not applicable, since the railroads and telegraph had revolutionized means of communication. As justifying and enforcing the need of expedition, Mr. Butler said:

The ordinary delays in court, the ordinary time given in ordinary cases for men to answer when called before tribunals of justice, have no application to this case. The rules by which cases are heard and determined before the Supreme Court of the United States are not rules applicable to the case at bar; and for this reason, if for no other, when ordinary trials are had, when ordinary questions are examined at the bar of any court, there is no danger to the common weal in delay, the Republic may take no detriment if the trial is postponed; to give the accused time injures nobody; to grant him indulgence hurts no one, and may help one, and perhaps an innocent man. But here the House of Representatives have presented at the bar of the Senate, in the most solemn form, the Chief Executive officer of the nation. They say (and they desire your judgment upon their accusation) that he has usurped power which does not belong to him; that he is at this very time breaking the laws solemnly enacted by you, the Senate, and those who present him here, the Congress of the United States, and that he still proposes so to do.

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[1] Senate Journal, p. 827; Globe Supplement, p. 8.

[2] Senate Journal, pp. 827, 828; Globe Supplement, pp. 8–11.

Sir, who is the criminal—I beg pardon for the word—the respondent at the bar? He is the Chief Executive of the nation, and when I have said that, I have taken out from all ordinary rules this trial, because I submit with deference that here and now, for the first time in the history of the world, has any nation brought its ruler to the bar of its highest tribunal in a constitutional method, under the rules and forms prescribed by its Constitution, and therefore all the rules, all the analogies, all the likeness to a common and ordinary trial of any cause, civil or criminal, cease at once, are silent, and ought not to weigh in judgment. Other nations have tried and condemned their kings and rulers, but the process has always been in violence and subversive of their constitutions and framework of government, not in submission to and accordance with it.

When I name the respondent as the Chief Executive, I say he is the Commander in Chief of your armies; he specially claims that command, not by force and under the limitations of your laws, but as a prerogative of his office and subject to his arbitrary will. He controls, through his subordinates, your Treasury. He commands your Navy. Thus he has all elements of power. He controls your foreign relations. In any hour of passion, of prejudice, of revenge for fancied wrong in his own mind, he may complicate your peace with any nation of the earth, even while he is being arraigned as a respondent at your bar. And mark me, sir, may I respectfully submit that the very question here at issue this day and this hour is, whether he shall control beyond the reach of your laws, and outside of your laws, the Army of the United States. The one greatest of all questions here at issue is whether he shall be able, against law—setting aside your laws, setting aside the decrees of the Senate, setting aside the laws enacted by Congress, overriding the legislative power of the country, claiming it as an attribute of executive power only, to control the great military arm of this Government, and control it if he chooses at his own good pleasure, its your ruin and the ruin of the country.

Mr. Nelson, counsel for the respondent, in pleading for delay, said:

Mr. Chief Justice, I need not tell you, nor need I tell many of the honorable Senators whom I address on this occasion, many of whom are lawyers, many of whom have been clothed in times past with the judicial ermine, that in the courts of law the vilest criminal who ever was arraigned in the United States has been given time for preparation, time for hearing, The Constitution of the country secures to the vilest man in the land the right not only to be heard himself, but to be heard by counsel; and no matter how great his crime, no matter how deep may be the malignity of the offense with which he is charged, he is tried according to the forms of law; he is allowed to have counsel; continuances are granted to him; if he is unable to obtain justice, time is given to him, and all manner of preparation is allowed him.

If this is so in courts of common law, that are fettered and bound by the iron rules to which I have adverted, how much more in a great tribunal like this that does not follow the precedents of law, but that is aiming and seeking alone to attain justice, ought we to be allowed ample time for preparation in reference to charges of the nature which we have here? How much more, sir, should such time be given us?

We are told that the President acted in regard to one of the matters which is charged against him by the House of Representatives on the 21st of February, and that by the 4th of March—if I did not mistake the statement of the honorable manager—the House of Representatives had presented this accusation against the President of the United States; and, that, therefore, the President, who knew what he was doing, should be prepared for his defense. Mr. Chief Justice, is it necessary for me to remind you and honorable Senators that you can upon a page of foolscap paper prepare a bill of indictment against an individual which may require weeks in the investigation? Is it necessary for me to remind this honorable body that it is an easy thing to make charges, but that it is often a laborious and difficult thing to make a defense against those accusations?

Reasoning from the analogy furnished by such proceedings at law, I earnestly maintain before this honorable body that suitable time should be given us to answer the charges which are made here. A large number of these charges—those of them connected with the President's action in reference to the Secretary of War—involve questions of the deepest importance. They involve an inquiry running back to the very foundation of the Government; they involve an examination of the precedents which have been set by different administrations; they involve, in short, the most extensive range of inquiry. The two last charges that were presented by the House of Representatives, if I may be pardoned for using the expression in the view which I entertain of them, open Pandora's box, and will cause an inves-

tigation as to the great differences of opinion which have existed between the President and the House of Representatives, an inquiry which, so far as I can perceive, will be almost interminable in its character.

Mr. Manager Bingham, in arguing against delay, commented on the fact that no formal application had been made by the accused himself for delay. Mr. Bingham also referred to the fact that in the case of Judge Chase the trial had been ordered to proceed on the day the answer was received.

Mr. Roscoe Conkling, of New York, a Senator, proposed to the order offered by Mr. Sherman this amendment:

Strike out all after the word "ordered" and insert: "That unless otherwise ordered by the Senate, for cause shown, the trial of the pending impeachment shall proceed immediately after replication shall be filed."

This amendment was agreed to—yeas 40, nays 10; and then the order as amended was agreed to, as follows:

Ordered, That, unless otherwise ordered by the Senate for cause shown, the trial of the pending impeachment shall proceed immediately after replication shall be filed.

Then, on motion of Mr. Jacob M. Howard, of Michigan,

the Senate sitting for the trial of the President upon articles of impeachment, adjourned to Monday, the 23d day of March instant, at 1 o'clock p.m.

2427. President Johnson's impeachment continued.

The House, by a standing order, determined to attend in Committee of the Whole, the trial of President Johnson.

Forms of procedure at the change in the Senate from a legislative session to a session for the trial of the President.

During the trial of the President the Chief Justice was escorted to the chair by the chairman of a committee of the Senate.

The House attended at each session of the trial of the President on notice from the Senate.

The sessions of the Senate for the trial of the President were opened by proclamation.

The managers were announced when they attended in the Senate for the trial of the President, but the counsel for respondent entered unannounced.

The House of Representatives was announced when, as a Committee of the Whole, it attended the trial of the President.

On March 20,[1] in the House, Mr. George S. Boutwell, under suspension of the rules, presented the following resolution, which was agreed to by the House without division:

Resolved, That on the days when the Senate shall sit for the trial of the President upon the articles of impeachment exhibited by the House of Representatives, the House, in Committee of the Whole, will attend with the managers at the bar of the Senate at the hour named for the commencement of the proceedings.

On March 23,[2] in the House, a message was received from the Senate by their Secretary, that—

[1] Second session Fortieth Congress, House Journal, pp. 549, 550; Globe, p. 2021.

[2] House Journal, p. 561; Globe, p. 2071.

the Senate is in its Chamber and ready to proceed on the trial of Andrew Johnson, President of the United States, and that seats are provided for the accommodation of the Members.

This message was ordered by the Senate before the Chief Justice had taken his seat as Presiding Officer.[1]

Thereupon, on motion of Mr. Elihu B. Washburne, of Illinois, the House resolved itself into a Committee of the Whole and with Mr. Washburne as chairman proceeded to the Senate.

In the Senate, at the hour of 1 o'clock, the President pro tempore[2] said:[3]

According to the order of the Senate, the chair will be now vacated, that the Senate may be presided over by the Chief Justice of the United States for the trial of the impeachment.[4]

Thereupon the Chief Justice of the United States entered the Senate Chamber, escorted by Mr. Pomeroy, the chairman of the Senate committee heretofore appointed for that purpose, and took the chair.

The Sergeant-at-Arms made proclamation in the prescribed form; the managers on the part of the House of Representatives appeared, their presence was announced by the Sergeant-at-Arms, and they took their seats; the counsel for the President appeared and took seats, apparently without announcement, and then the Sergeant-at-Arms announced the presence of the House of Representatives; and the Committee of the Whole House, headed by Mr. E. B. Washburne, of Illinois, the chairman of the Committee of the Whole, and the Clerk of the House, entered the Chamber, and the Members were conducted to the seats assigned them.

A Senator who had not taken the oath was sworn, and then the Journal of the preceding sitting was read.[5]

2428. President Johnson's impeachment continued.

The answer of President Johnson to the articles of impeachment.

The answer of the President took up the articles one by one, denying some of the charges, admitting others, but denying that they set forth impeachable offenses and excepting to the sufficiency of others.

President Johnson's answer was signed by himself and counsel.

In his answer President Johnson referred to the Senate as a court.

The answer by President Johnson to the articles of impeachment was accompanied by two exhibits.

The answer of President Johnson to the articles of impeachment was read by his counsel.

After the disposition of a question relating to the competency of the Senate to proceed with the case,[6] the counsel for the President filed his answer and by direction of the Chief Justice read it,[7] beginning in form as follows:

Senate of the United States, sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States.

The answer of the said Andrew Johnson, President of the United States, to the articles of impeachment exhibited against him by the House of Representatives of the United States.

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[1] Globe, pp. 2068, 2069; Senate Journal, p. 334.

[2] B. F. Wade, of Ohio, President pro tempore.

[3] Senate Journal, p. 334; Globe, p. 2069.

[4] Globe supplement, p. 11.

[5] Senate Journal, pp. 828, 829; Globe pp. 11, 12.

[6] See section 2060 of this volume.

[7] Senate Journal, pp. 829–860; Globe supplement, pp. 12–22.

ANSWER TO ARTICLE I.

For answer to the first article he says: That * * * , etc.

The answer then proceeds, article by article:

ARTICLE I. The answer reviews at length the transactions with reference to Secretary Stanton and concludes with these specific denials:

And this respondent, proceeding to answer specifically each substantial allegation in the said first article, says: He denies that the said Stanton, on the 21st day of February, 1868 was lawfully in possession of the said office of Secretary for the Department of War. He denies that the said Stanton, on the day last mentioned, was lawfully entitled to hold the said office against the will of the President of the United States. He denies that the said order for the removal of the said Stanton was unlawfully issued. He denies that the said order was issued with intent to violate the act entitled "An act to regulate the tenure of certain civil offices." He denies that the said order was a violation of the last-mentioned act. He denies that the said order was a violation of the Constitution of the United States, or of any law thereof, or of his oath of office. He denies that the said order was issued with an intent to violate the Constitution of the United States or any law thereof, or this respondent's oath of office; and he respectfully, but earnestly, insists that not only was it issued by him in the performance of what he believed to be an imperative official duty, but in the performance of what this honorable court will consider was, in point of fact, an imperative official duty. And he denies that any and all substantive matters, in the said first article contained, in manner and form as the same are therein stated and set forth, do, by law, constitute a high misdemeanor in office, within the true intent and meaning of the Constitution of the United States.

ART. II. The answer in full is as follows:

And for answer to the second article, this respondent says that he admits he did issue and deliver to said Lorenzo Thomas the said writing set forth in said second article, bearing date at Washington, D. C., February 21, 1868, addressed to Bvt. Maj. Gen. Lorenzo Thomas, Adjutant-General United States Army, Washington, D. C., and he further admits that the same was so issued without the advice and consent of the Senate of the United States, then in session, but he denies that he thereby violated the Constitution of the United States, or any law thereof, or that he did thereby intend to violate the Constitution of the United States, or the provisions of any act of Congress; and this respondent refers to his answer to said first article for a full statement of the purposes and intentions with which said order was issued, and adopts the same as part of his answer to this article; and he further denies that there was then and there no vacancy in the said office of Secretary for the Department of War, or that he did then and there commit, or was guilty of a high misdemeanor in office, and this respondent maintains and will insist:

1. That at the date and delivery of said writing there was a vacancy existing in the office of Secretary for the Department of War.

2. That, notwithstanding the Senate of the United States was then in session, it was lawful and according to long and well established usage to empower and authorize the said Thomas to act as Secretary of War ad interim.

3. That, if the said act regulating the tenure of civil offices be held to be a valid law, no provision of the same was violated by the issuing of said order or by the designation of said Thomas to act as Secretary of War ad interim.

ART. III. The answer is as follows, in full:

And for answer to said third article this respondent says that he abides by his answer to said first and second articles, in so far as the same are responsive to the allegations contained in the said third article, and, without here again repeating the same answer, prays the same be taken as an answer to this third article as fully as if here again set out at length; and as to the new allegation contained in said third article, that this respondent did appoint the said Thomas to be Secretary for the Department of War ad interim, this respondent denies that he gave any other authority to said Thomas than such as appears in said written authority set out in said article, by which he authorized and empowered said

Thomas to act as Secretary for the Department of War ad interim; and he denies that the same amounts to an appointment and insists that it is only a designation of an officer of that Department to act temporarily as Secretary for the Department of War ad interim until an appointment should be made. But, whether the said written authority amounts to an appointment or to a temporary authority or designation, this respondent denies that in any sense he did thereby intend to violate the Constitution of the United States, or that he thereby intended to give the said order the character or effect of an appointment in the constitutional or legal sense of that term. He further denies that there was no vacancy in said office of Secretary for the Department of War existing at the date of said written authority.

ART. IV. In answer to Article IV the charge of conspiracy was denied, as also the charge that intimidation and threats were used in connection with the attempt to supersede Secretary Stanton by General Thomas; and in concluding, the following exception is taken:

This respondent doth here except to the sufficiency of the allegations contained in said fourth article, and states for ground of exception that it is not stated that there was any agreement between this respondent and the said Thomas, or any other person or persons, to use intimidation and threats, nor is there any allegation as to the nature of said intimidation and threats, or that there was any agreement to carry them into execution, or that any step was taken or agreed to be taken to carry them into execution, and that the allegation in said article that the intent of said conspiracy was to use intimidation and threats is wholly insufficient, inasmuch as it is not alleged that the said intent formed the basis or became a part of any agreement between the said alleged conspirators, and, furthermore, that there is no allegation of any conspiracy or agreement to use intimidation or threats.

ART. V. The answer in full, with an exception:

And for answer to the said fifth article this respondent denies that on the said 21st day of February, 1868, or at any other time or times in the same year before the said 2d day of March, 1868, or at any prior or subsequent time, at Washington aforesaid or at any other place, this respondent did unlawfully conspire with the said Thomas, or with any other person or persons, to prevent or hinder the execution of the said act entitled "An act regulating the tenure of certain civil offices," or that, in pursuance of said alleged conspiracy, he did unlawfully attempt to prevent the said Edwin M. Stanton from holding said office of Secretary for the Department of War, or that he did thereby commit, or that he was thereby guilty of, a high misdemeanor in office. Respondent, protesting that said Stanton was not then and there Secretary for the Department of War, begs leave to refer to his answer given to the fourth article and to his answer given to the first article as to his intent and purpose in issuing the orders for the removal of Mr. Stanton and the authority given to the said Thomas, and prays equal benefit therefrom as if the same were here again repeated and fully set forth.

And this respondent excepts to the sufficiency of the said fifth article, and states his ground for such exception, that it is not alleged by what means or by what agreement the said alleged conspiracy was formed or agreed to be carried out, or in what way the same was attempted to be carried out, or what were the acts done in pursuance thereof.

ART. VI. The answer in full:

And for answer to the said sixth article, this respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time or place, he did unlawfully conspire with the said Thomas by force to seize, take, or possess, the property of the United States in the Department of War, contrary to the provisions of the said acts referred to in the said article, or either of them, or with intent to violate either of them. Respondent, protesting that said Stanton was not then and there Secretary for the Department of War, not only denies the said conspiracy as charged, but also denies any unlawful intent in reference to the custody and charge of the property of the United States in the said Department of War, and again refers to his former answers for a full statement of his intent and purpose in the premises.

ART. VII. The answer in full:

And for answer to the said seventh article respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time and place, he did unlawfully conspire with the said Thomas with intent unlawfully to seize, take, or possess the property of the United States in the Department of War with intent to violate or disregard the said act in the said seventh article referred to, or that he did then and there commit a high misdemeanor in office. Respondent, protesting that the said Stanton was not then and there Secretary for the Department of War, again refers to his former answers, in so far as they are applicable, to show the intent with which he proceeded in the premises, and prays equal benefit therefrom, as if the same were here again fully repeated. Respondent further takes exception to the sufficiency of the allegations of this article as to the conspiracy alleged upon the same grounds as stated in the exception set forth in his answer to said article fourth.

ART. VIII. The answer in full:

And for answer to the said eighth article this respondent denies that on the 21st day of February, 1868, at Washington aforesaid, or at any other time and place, he did issue and deliver to the said Thomas the said letter of authority set forth in the said eighth article, with the intent unlawfully to control the disbursements of the money appropriated for the military service and for the Department of War. This respondent, protesting that there was a vacancy in the office of Secretary for the Department of War, admits that he did issue the said letter of authority, and he denies that the same was with any unlawful intent whatever, either to violate the Constitution of the United States or any act of Congress. On the contrary, this respondent again affirms that his sole intent was to vindicate his authority as President of the United States, and by peaceful means to bring the question of the right of the said Stanton to continue to hold the said office of Secretary of War to a final decision before the Supreme Court of the United States, as has been hereinbefore set forth; and he prays the same benefit from his answer in the premises as if the same were here again repeated at length.

ART. IX. In answer to Article IX the President reviews his transactions and conversations with General Emory, admits that he expressed an opinion that the law in question was unconstitutional, shows that he expressed the same opinion to the House of Representatives by message, and summarizes:

Respondent doth therefore deny that by the expression of such opinion he did commit or was guilty of a high misdemeanor in office; and this respondent doth further say that the said article nine lays no foundation whatever for the conclusion stated in the said article, that the respondent, by reason of the allegations therein contained, was guilty of a high misdemeanor in office.

ART. X. In answer to this article the President does not admit that the passages set forth as portions of addresses delivered by him correctly or justly present his speeches, and demands that, in case the matter set forth in the article is deemed to constitute a high misdemeanor cognizable by the court, proof shall be required to be made of the actual speech. He protests that he has not been unmindful of the high duties of his office, or the harmonies and courtesies proper between different branches of the Government, or that he has had designs against the rightful power and authority of Congress; and that in all his communications to the Congress and the public he has acted within and according to his right and privilege as a citizen and his right and duty as President. And in conclusion he says:

And this respondent says that neither the said tenth article nor any specification thereof nor any allegation therein contained touches or relates to any official act or doing of this respondent in the office of President of the United States or in the discharge of any of its constitutional or legal duties or responsibilities; but said article and the specifications and allegations thereof, wholly and in every part thereof, question only the discretion or propriety of freedom of opinion or freedom of speech, as exercised by this respondent as a citizen of the United States in his personal right and capacity, and without allegation or imputation against this respondent of the violation of any law of the United States touching or

relating to freedom of speech or its exercise by the citizens of the United States, or by this respondent as one of the said citizens or otherwise; and he denies that by reason of any matter in said article or its Specifications alleged he has said or done anything indecent or unbecoming in the Chief Magistrate of the United States, or that he has brought the high office of the President of the United States into contempt, ridicule, or disgrace, or that he has committed or has been guilty of a high misdemeanor in office.

ART. XI. The President denies specifically the charges, standing upon his right to freedom of speech as set forth in the answer to the preceding article, and concludes:

And this respondent, further answering the said eleventh article, denies that by means or reason of anything in said article alleged this respondent, as President of the United States, did, on the 21st day of February, 1868, or at any other day or time, commit, or that he was guilty of, a high misdemeanor in office.

And this respondent, further answering the said eleventh article, says that the same and the matters therein contained do not charge or allege the commission of any act whatever by this respondent, in his office of President of the United States, nor the omission by this respondent of any act of official obligation or duty in his office of President of the United States; nor does the said article nor the matters therein contained name, designate, describe, or define any act or mode or form of attempt, device, contrivance, or means, or of attempt at device, contrivance, or means, whereby this respondent can know or understand what act or mode or form of attempt, device, contrivance, or means, or of attempt at device, contrivance, or means, are imputed to or charged against this respondent, in his office of President of the United States, or intended so to be, or whereby this respondent can more fully or definitely make answer unto the said article than he hereby does.

Having answered article by article, the answer concludes:

And this respondent, in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully reserves leave to amend and add to the same from time to time, as may become necessary or proper, and when and as such necessity and propriety shall appear.

ANDREW JOHNSON.
HENRY STANBERY,
B. R. CURTIS,
THOMAS A. R. NELSON,
WILLIAM M. EVARTS,
W. S. GROESBECK,
Of Counsel.

Attached to the answer were two exhibits, one being a message transmitted to the Senate by the President March 2, 1867, wherein the right of removal of officers was discussed; and the other a message of December 12, 1867, relating particularly to the case of Mr. Stanton.

2429. President Johnson's impeachment continued.

The answer of President Johnson to the articles of impeachment having been read, the question was taken on receiving it and placing it on file.

On the request of the managers the Senate ordered an attested copy of the answer of President Johnson to be sent to the House.

The answer of President Johnson having been received, the Senate gave the managers time to consult the House on a replication.

The reading of the answer being concluded, the Chief Justice said:[1]

Senators, you have heard the answer submitted by the counsel for the President of the United States. Those of you who are in favor of receiving and ordering this answer to be filed will say "aye," and those who are of the contrary opinion will say "no." [Having put the question.] It is so ordered; the answer is received and will be filed.

Thereupon Mr. Manager Boutwell presented a request that a copy of the answer be furnished to the House of Representatives. The Chief Justice put the question on the motion suggested by the request of the managers, and it was agreed to, the formal order being:

Ordered, That the managers have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer of the respondent; and

Ordered, That the Secretary communicate to the House of Representatives an attested copy of the answer of the President to the articles of impeachment, together with a copy of the foregoing order.

2430. President Johnson's impeachment continued.

The answer of President Johnson having been read, his counsel offered a paper, signed by themselves, asking thirty days to prepare for trial.

The managers contended that President Johnson's request for time to prepare for the trial should have been signed by himself and under oath.

The managers opposed President Johnson's request for thirty days to prepare for trial, citing American and English precedents in argument.

The Senate granted to President Johnson a less time than his counsel asked to prepare for trial.

In granting to President Johnson time to prepare for trial the Senate intimated that there should be no delays after the beginning of the trial.

The Senate retired to consider President Johnson's application for time to prepare for trial.

The proceedings in the Senate consultation chamber during the Johnson trial appear in the Journal and Globe; but the debates are not given. (Footnote.)

Thereupon Mr. Evarts, in behalf of the respondent, submitted the following motion:[2]

To the Senate of the United States sitting as a court of impeachment:

And now, on this 23d day of March, in the year 1868, the counsel for the President of the United States, upon reading and filing his answer to the articles of impeachment exhibited against him, respectfully represent to this honorable court that after the replication shall have been filed to the said answer, the due and proper preparation of and for the trial of the cause will require, in the opinion and judgment of such counsel, that a period of not less than thirty days should be allowed to the President of the United States and his counsel for such preparation, and before the said trial should proceed.

HENRY STANBERY,
B. R. CURTIS,
THOMAS A. R. NELSON,
WILLIAM M. EVARTS,
W. S. GROESBECK,
Of Counsel.

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[1] Senate Journal, p. 860; Globe supplement, pp. 22, 23.

[2] Senate Journal, pp. 860, 861; Globe supplement, pp. 23–28.

Mr. Manager Logan, on behalf of the House of Representatives, opposed the motion on the ground that the reasons given were not sufficient, and that the trial should be hastened because the respondent was continuing daily in the misuse of power for which he was arraigned. As to the precedents he said:

In the many trials we have reported in this and other countries this application has no precedent. In the case of Judge Chase his application stated, in substance, that it was not in his power to obtain information respecting facts, alleged against him to have taken place in Philadelphia and Richmond, in time to prepare and put in his answer and proceed to trial before the 5th clay of March then next following; and further that he could not get his witnesses or counsel nor prepare his answer, at the same time disclaiming that this was done for delay. This application was sworn to by the respondent; he was given time, and the facts show that his answer was filed and his trial had, and he acquitted in five days' less time than he swore it would take him to prepare for trial.

In Judge Peck's case his application stated his difficulties in obtaining witnesses, the distance they lived from Washington, the time it would require them to travel from St. Louis to Washington, the necessity for copying and obtaining records; that four years had elapsed since the transpiring of the acts complained of against him. This application was also sworn to. If the learned counsel remember the trial of Queen Caroline before the Parliament of Great Britain, when time was granted for the procurement of evidence the learned attorney-general then and there protested against this granting of time becoming a precedent for any future trial, this application being granted merely through courtesy to the Queen, when witnesses were deemed absolutely necessary to protect, if possible, her reputation. This application differs in form and substance from any that our attention has been directed to, made by the counsel, signed by themselves, and sworn to by no one.

Mr. Logan in conclusion said:

I presume no man will doubt that if an application of this kind were made to a court at law the inquiry would be: "Have you issued your subpoenas; have you attempted to get your witnesses; have you attempted to make any preparation to try the cause?" And if the counsel would answer that they had made no preparation whatever; that they had issued no subpoenas; had made no attempt to procure witnesses or get ready for the trial of the cause, but merely desired time for thought and reflection, the application would certainly be denied. And against the granting of this, not made upon the oath of any person, not signed by the President, and merely intended for the benefit of counsel, we, the managers, in the name of the House of Representatives and the whole people of this Republic, do most solemnly protest.

Later Mr. Manager Bingham urged:

I submit that a question of this magnitude has never been decided upon a mere presentation of a statement of counsel, in this country or in any country. To speak more plainly, a motion for continuance arising on a question of this sort, I venture to say, has never been decided affirmatively upon such an issue on a mere statement of counsel. If Andrew Johnson, the accused at this bar, has witnesses that were not within the process of this court up to this day, but whose attendance he can hope to procure if time be allowed him, he can make affidavit before this tribunal that they are material and set forth in his affidavit what he expects to prove by them. I concede that upon such a showing there would be something upon which the Senate might properly act.

Mr. Evarts, of counsel for the respondent, said:

In our estimate of the course of this proceeding before this honorable court we have not yet arrived at a time when it was the duty of counsel or was at the charge of the accused to know or consider what the issues were upon which he was to prepare on his side or expect on the other the production of proofs. Beyond that, we feel no occasion to present by affidavit to this honorable court a matter so completely within its cognizance that our time to plead was fixed so as to offer us but eight working days for that duty of counsel. * * *

It would seem to me that we are placed thus far in the attitude of a defendant in a civil or in a public prosecution who upon the issue joined desires time to prepare for trial. The ordinary course in such a case is that as matter of right, as matter of absolute and universal custom, one is not required or expected

to give any cause of actual obstruction and difficulty in reference to a continuance to what is the term of the court, doubtless in most cases to occur within a brief period after the issue is joined. This court having no such arrangement and no such possible arrangement of its affairs in advance, we are obliged at each stage of regular proceeding to ask your attention as to what you will provide and consider in the particular case is, according to the general nature of the procedure and the understood attitude of both parties to it, a just and reasonable proposition to be made by us as to the time that should be allowed for the preparation in all respects for this trial after the issue shall have been joined.

At the conclusion of the discussion between the managers and the counsel for the respondent Mr. John B. Henderson, a Senator from Missouri, moved that the application of counsel for the respondent be postponed until after the filing of the replication. This motion was disagreed to, yeas 25, nays 28.

The question then recurring on granting the application of counsel for the respondent, it was denied, yeas 12, nays 41.

Thereupon Mr. Evarts, counsel for the respondent, submitted the following:

The counsel for the President now move that there be allowed for the preparation of the President of the United States for the trial, after the replication shall be filed and before the trial shall be required to proceed, such reasonable time as shall now be fixed by the Senate.

Pending its consideration the Senate adjourned until the next day, March 24. When it convened on that day [1] for the trial the replication of the House of Representatives was filed, and then the consideration of the application for time was resumed. In answer to the request of counsel for the respondent, Mr. Reverdy Johnson, of Maryland, a Senator, proposed the following:

Ordered, That the Senate proceed to the trial of the President under the articles of impeachment exhibited against him at the expiration of ten days from this day, unless for causes shown to the contrary.

To this Mr. Charles Sumner, of Massachusetts, a Senator, proposed an amendment, which he subsequently withdrew, striking out all after the word ordered and inserting:

Now that replication has been filed, the Senate, adhering to its rule already adopted, will proceed with the trial from day to day (Sundays excepted) unless otherwise ordered on reason shown.

Pending consideration, the Senate voted, yeas 29, nays 23, to retire for consultation, [2] and being called to order in their conference chamber, Mr. Johnson modified his order to read as follows:

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Thursday, the 2d of April.

On motion of Mr. Sumner, and by a vote of yeas 28, nays 24, this order was amended by striking out "Thursday, the 2d of April," and inserting "Monday, the 30th of March instant."

A proposition to suspend consideration of the subject until the managers had opened their case and submitted their evidence, was presented by Mr. George H. Williams, of Oregon, but was disagreed to, yeas 9, nays 42.

On motion of Mr. Thomas A. Hendricks, of Indiana, and without division, the order proposed by Mr. Johnson was further amended by adding the words—

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[1] Senate Journal, pp. 862–864; Globe supplement, pp. 28, 29.

[2] The proceedings in the consultation chamber appear both in the Journal and Globe. (Globe Journal, p. 863; Globe supplement, p. 28.)

and proceed therein with all convenient dispatch, under the rules of the Senate sitting upon the trial of an impeachment.

The order as amended was then agreed to; and the Senate having returned to their Chamber, the Chief Justice informed the counsel for the respondent that the Senate had agreed upon an order in response to their application, as follows:

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Monday, the 30th of March instant, and proceed therein with all convenient dispatch, under the rules of the Senate sitting upon the trial of an impeachment.

2431. President Johnson's impeachment continued.

The form of President Johnson's answer was commented on during preparation of the replication in the House.

Argument as to whether or not a demurrer is permissible in an impeachment case.

Comment on the use of the phrase "all the people" in the pleadings in an impeachment case.

Form of resolutions adopting the replication in the Johnson trial and directing its presentation in the Senate.

In the House, on March 23,[1] Mr. George S. Boutwell, of Massachusetts, from the managers, reported a form of replication. In reporting it he said:

The attention of the managers was called to the peculiar form of the answer filed by the President. To most of the articles, however, he makes answer, in substance, that he is not guilty, although the form of the answer is different from that which has generally been employed in similar cases. In respect to some of the articles the answer probably amounts to a demurrer merely. But upon the whole the managers have chosen to treat the answer of the President to each and every article as a plea of the general issue of not guilty. And the managers are of opinion that no advantage can be taken, as against the House of Representatives, from the form of replication which has been reported by the managers.

Mr. George W. Woodward, of Pennsylvania, criticising the demurrer, said:

If I understood the answer of the President to the eleventh article of impeachment, it amounts to a demurrer to that article. It denies that there is any impeachable offense charged in the eleventh article. My own private opinion is that the demurrer or answer is very conclusive. I do not think there is any impeachable offense charged in the eleventh article.

The answer of the President putting that point in issue, which is a legal question and amounts to a demurrer, there should be a special replication to that part of the answer which relates to the eleventh article, or a formal rejoinder in demurrer. This general replication does not join an issue upon that article at all; it is what might be called a departure in pleading. Here is a demurrer to the eleventh article which denies that any impeachable offense is charged in it. The managers do not aver in the replication that the eleventh article charges any impeachable offense, and therefore there is no issue upon the record upon that article.

To this Mr. John A. Bingham, of Ohio, replied:

Now, as to the answer of the President, I beg leave to call the attention of the House and the attention of the gentleman from Pennsylvania [Mr. Woodward] to the fact that while it does contain much that is argumentative, much that may be called demurrer, which is never allowed at all in an impeachment case, which was never introduced into the proceedings of an impeachment case—for there never was a demurrer entertained by the Senate in an impeachment case, none ever entertained in the House of Lords of England; there is no such note of record; it does not lie; special pleading is unknown to the whole proceeding—yet this answer of the President to the eleventh article of impeachment, in its

[1] House Journal, pp. 564, 566; Globe, pp. 2073–2075, 2078–2081.

last clause, does expressly deny, and is therefore simply a plea of not guilty—it expressly denies that he committed a crime. As to form, it is nothing; substance is everything.

Mr. Fernando Wood, of New York, objected to the language of the replication, in that it professed to reply in the name of all the people of the United States; but Mr. Benjamin F. Butler, of Massachusetts, replied that this form, using the words "all the people" had been in use five hundred years, and had been questioned only once, in the days of Charles I.

The replication was agreed to on March 24 by a vote of yeas 116, nays 36, whereby the House—

Resolved, That the House hereby adopts the replication to the answer of the President, as now submitted by the managers.

Thereupon, on motion of Mr. Boutwell, the following was agreed to:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of the President of the United States on the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House.

2432. President Johnson's impeachment continued.

The replication of the House to President Johnson's answer to the articles of impeachment.

The replication in the Johnson trial was signed by the Speaker and attested by the Clerk.

The Senate ordered that an authenticated copy of the replication to President Johnson's answer be furnished to counsel of the respondent.

On March 24 [1] in the Senate sitting for the trial, the message authorized by the resolution was received, and immediately upon its being laid before the Senate, Mr. Manager Boutwell presented the replication:

IN THE HOUSE OF REPRESENTATIVES,
UNITED STATES, *March 24, 1868.*

Replication by the House of Representatives of the United States to the answer of Andrew Johnson, President of the United States, to the articles of impeachment exhibited against him by the House of Representatives.

The House of Representatives of the United States have considered the several answers of Andrew Johnson, President of the United States, to the several articles of impeachment against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantage of exception to the insufficiency of his answer to each and all of the several article of impeachment exhibited against said Andrew Johnson, President of the United States, do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, crimes, or misdemeanors charged against said Andrew Johnson in the said articles of impeachment, or either of them; and for replication to said answer do say that said Andrew Johnson, President of the United States, is guilty of the high crimes and misdemeanors mentioned in said articles, and that the House of Representatives are ready to prove the same.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
EDWARD MCPHERSON,
Clerk of the House of Representatives.

[1] Senate Journal, p. 862; Globe Supplement, p. 28.

Thereupon, on motion of Mr. Reverdy Johnson, of Maryland, a Senator, it was:

Ordered, That the Secretary of the Senate be directed to furnish the counsel of the President an authenticated copy of the replication of the House of Representatives to the answer of the President to the articles of impeachment exhibited against him by the House of Representatives.

2433. President Johnson's impeachment continued.

The opening addresses of managers and counsel in the Johnson trial.

The opening addresses in the Johnson trial discussed constitutional questions and outlined evidence.

Definition of impeachable offenses by counsel for President Johnson.

By consent the managers in the Johnson trial reserved the right to supply omissions in evidence after they had closed their testimony.

On motion of counsel for President Johnson, the Senate adjourned over to permit time for preparation of testimony for the defense.

On March 30,[1] the day set for the commencement of the trial, the Senate assembled and the proceedings began with the usual proclamation and ceremonies. The journal having been read, the Chief Justice said:

Gentlemen, managers of the House of Representatives, you will now proceed in support of the articles of impeachment.

Mr. Manager Benjamin F. Butler then opened the case for the managers, speaking nearly three hours, and touching on the following topics: (*a*) What are impeachable offenses, antagonizing the view that only indictable offenses are impeachable; (*b*) whether or not the Senate sat as a court, taking the view that it did not; (*c*) and a review of the issues presented by the articles and the reply, with arguments in support of the articles. Mr. Butler also presented a brief of the authorities upon the law of impeachable crimes and misdemeanors, prepared by Mr. William Lawrence, of Ohio, and revised by himself.[2]

Then the managers proceeded with the testimony, Mr. Manager James F. Wilson proceeding first with certain documentary evidence. The presentation of testimony, documentary and oral, continued until Saturday, April 4,[3] when it was announced on behalf of the managers that the case on behalf of the House of Representatives was substantially closed, but that in looking over their testimony they might find some omissions which they might wish to supply, and therefore they did not wish to be precluded from offering them. The counsel for the President announced that they took no exception to this reservation.

Thereupon Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, announced that they desired time for preparation of their testimony, and therefore he would move that "when this court adjourns, it adjourn to Thursday next."[4]

Thereupon Mr. John Conness, a Senator from California, moved that the Senate sitting for the trial should adjourn until Wednesday. Mr. Reverdy Johnson, a

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[1] Senate Journal, p. 865; Globe supplement, pp. 29–53.

[2] Globe supplement, pp. 41–50.

[3] Senate Journal, pp. 882, 893; Globe supplement, p. 121.

[4] It will be observed that this was merely an adjournment of the Senate sitting for the trial and therefore not governed by the rule of the Constitution. The Senate itself in its legislative capacity was in session during intervening days.

Senator from Maryland, moved an amendment substituting Thursday for Wednesday, and it was agreed to, yeas 37, nays 10. Then the motion as amended was agreed to.

At the reconvening on April 9, the managers occupied a brief time in presenting additional evidence, after which Mr. Benj. R. Curtis, of counsel for the President, opened the defense, speaking the remainder of this day and concluding on April 10.[1] He first reviewed the issues presented by the articles and the answer, and then argued (*a*) that impeachable offenses were "only high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done;" and (*b*) that the Senate, in trying an impeachment, was a court.

At the conclusion of Mr. Curtis's opening the presentation of testimony on behalf of the respondent was begun, and proceeded from day to day until April 18,[2] when Mr. William M. Evarts, of counsel, announced that the defense had concluded its testimony, but would reserve the privilege to offer proof that might have been overlooked because of the illness of Mr. Stanbery, to whom had been intrusted the examination of witnesses.

2434. President Johnson's impeachment continued.

The order of the final arguments in the trial of President Johnson.

Disorder occurring in the galleries during the Johnson trial, they were cleared.

On April 20[3] the managers introduced certain verbal and documentary evidence, after which, on April 23, the Senate, after consideration, agreed to[4] the following:

Ordered, That as many of the managers as desire to do so be permitted to file arguments or to address the Senate orally; but the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

Thereupon Mr. John A. Logan, on behalf of the managers, and in accordance with the above rule, filed an argument.[5] On the same day Mr. Manager George S. Boutwell began an oral argument, which he concluded on the succeeding day.[6] Thereupon Mr. Thomas A. R. Nelson, of counsel for the respondent, began an argument in defense, which he concluded on the succeeding day, April 24.[7]

On April 25,[8] after the consideration of business relative to course of procedure in passing judgment, Mr. William S. Groesbeck, counsel for the President, continued argument for the defense, concluding on that day.

On Monday, April 27, Mr. Manager Thaddeus Stevens argued for the managers.[9] He was followed on the same day by Mr. Manager Thomas Williams, who concluded on the next day.[10]

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[1] Senate Journal, p. 885; Globe supplement, pp. 123–136.

[2] Senate Journal, p. 914; Globe supplement, p. 238.

[3] Senate Journal, p. 914; Globe supplement, p. 239.

[4] Senate Journal, p. 921; Globe supplement, p. 251.

[5] Journal, p. 921; Globe supplement, pp. 251–268.

[6] Journal, p. 921; Globe supplement, pp. 268–286.

[7] Journal, p. 922; Globe supplement, pp. 286–310.

[8] Senate Journal, p. 924; Globe supplement, pp. 310–320.

[9] Senate Journal, p. 925; Globe supplement, pp. 320–324.

[10] Senate Journal, pp. 925, 926; Globe supplement, pp. 324–335.

At the conclusion of Mr. Williams's address, Mr. Manager Benjamin F. Butler asked and obtained leave of the Senate,[1] by unanimous consent, to make "a short narration of facts, made necessary by what fell from Mr. Nelson, of counsel for the President, in his speech of Friday last." Mr. Nelson, also by unanimous consent, was permitted to reply.

On April 28,[2] Mr. William M. Evarts, counsel for the respondent, then began argument for the defense, which he continued daily until May 1, when he concluded. On the same day Mr. Henry Stanbery began the concluding argument for the defense, finishing on May 2.[3]

On May 4, 5, and 6,[4] Mr. Manager John A. Bingham made the concluding argument for the managers.

At the conclusion of Mr. Bingham's address[5] there were in the gallery applause and hisses, whereupon, on motion of Mr. James W. Grimes, of Iowa, it was—

Ordered, That the Sergeant-at-Arms be directed to clear the galleries.

In obedience to this order the galleries were completely cleared. Later the galleries were ordered by the Senate to be reopened.

2435. President Johnson's impeachment continued.

Being excluded from the Johnson trial by a secret session, the House returned to its Hall and determined to attend again when informed that the Senate was ready to receive them.

Shortly after, on motion of Mr. George F. Edmunds, of Vermont, the doors of the Senate were closed for deliberation. The House of Representatives consequently returned to their Chamber,[6] and, the Speaker having resumed the chair, a question was raised as to the course of procedure.

The Speaker[7] had read the rule under which the House was acting:

Resolved, That on the days when the Senate shall sit for the trial of the President upon the articles of impeachment exhibited by the House of Representatives the House, in Committee of the Whole, will attend with the managers at the bar of the Senate at the hour named for the commencement of the proceedings.

and then ruled:

The Chair rules that under this resolution, the Senate having gone into secret session in their own Chamber for deliberation, and it being impossible for the managers and the House as in the Committee of the Whole to attend at the bar of the Senate, it is the duty of the House to return to its Hall, and here, as the House of Representatives, to transact business while waiting for any message from the Senate after the doors of that body have been reopened. * * * The Chair took some time to examine this resolution, and after consultation with others who are excellent parliamentarians he has no doubt of the fact in his own mind that while the Senate is engaged in secret deliberation for one or four and twenty hours it could not be expected or required of the House to remain in the Senate corridors, and the Speaker, as representing the House, could not consent to it without the direct order of the House. The Chair therefore thinks, the order having been made before the House proceeded to the Senate,

[1] Senate Journal, p. 926; Globe supplement, pp. 335, 336.

[2] Senate Journal, pp. 926–930; Globe supplement, pp. 337–368.

[3] Senate Journal, p. 930; Globe supplement, pp. 368–379.

[4] Senate Journal, pp. 931, 932; Globe supplement, pp. 379–406.

[5] Senate Journal, pp. 932, 933; Globe supplement, pp. 406, 407.

[6] House Journal, pp. 655, 656; Globe, pp. 2365, 2368.

[7] Schuyler Colfax, of Indiana, Speaker.

that when the House returns business should be transacted; and the Senate having excluded the House from its Chamber, as it has a right to do under its rules, the House must therefore return to the Hall and await a message from the Senate.

Thereupon the Speaker recognized Mr. Elihu B. Washburne, chairman of the Committee of the Whole, who reported:

The Committee of the Whole have, according to order, attended the managers to the bar of the Senate, sitting as a court of impeachment for the trial of Andrew Johnson; and the argument having been closed and the Senate having ordered its doors to be shut for deliberation, the committee thereupon returned with the managers to the Hall of the House.

The Speaker appears to have sent a letter to the Senate asking that the House might be notified when the doors should be opened. This must have been done informally by the Speaker, but the Chief Justice laid it before the Senate, whereupon it was— [1]

Ordered, That the Secretary inform the House of Representatives that the Senate, sitting for the trial of the President upon articles of impeachment, will notify the House when it is ready to receive them at the bar.

2436. President Johnson's impeachment continued.

The Senate declined to make public its debates in secret session on the final judgment in the Johnson trial.

After the doors of the Senate had been closed,[2] it resumed consideration of this resolution, which had been proposed by Mr. George F. Edmunds, of Vermont, on April 24:

Ordered, That after the arguments shall be concluded, and when the doors shall be closed for deliberation upon the final question the official reporters of the Senate shall take down the debates upon the final question, to be reported in the proceedings.

This order, with pending amendments relating to restriction of debate, was laid on the table by a vote of 28 yeas, 20 nays.[3]

2437. President Johnson's impeachment continued.

The Senate adopted an order governing its deliberations and voting on the final question in the Johnson trial.

Deliberation having been had in secret session, the Senate voted on the articles of impeachment without debate.

While the deliberations on the final question in the Johnson trial were secret, the Senators were permitted to file written opinions.

Thereupon the Senate proceeded to consider [4] a proposition originally submitted by Mr. Charles Sumner, of Massachusetts, on April 24:

Ordered, That the Senate, sitting for the trial of Andrew Johnson, President of the United States, will proceed to vote on the several articles of impeachment at 12 o'clock on the day after the close of the arguments.

After propositions to amend had been considered, the order was laid on the table, and then, after further consideration, the Senate, without division, agreed to the following, proposed by Mr. Justin S. Morrill, of Vermont:

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[1] Senate Journal, p. 933; Globe supplement, p. 408.

[2] Senate Journal, p. 933; Globe supplement, pp. 294, 407.

[3] While the debates were not taken down, a statement of what was done in the secret session appears in the Journal and Globe. (Senate Journal, pp. 933–940; Globe supplement, pp. 407–410.)

[4] Senate Journal, pp. 934–937; Globe supplement, pp. 408, 409.

Ordered, That when the Senate adjourns to-day, it adjourn to meet on Monday next, at 11 o'clock a.m., for the purpose of deliberation, under the rules of the Senate, sitting on the trial of impeachments, and that on Tuesday next following, at 12 o'clock m., the Senate shall proceed to vote without debate on the several articles of impeachment; and each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

2438. President Johnson's impeachment continued.

Having disagreed as to the form of final question in the Johnson trial, the Senate left it to the Chief Justice.

On May 7 [1] the Senate proceeded to the consideration of the form in which the question should be put, and various propositions were offered, as follows, for amendment to the rules:

By Mr. Charles Sumner, of Massachusetts:

Rule 23. In taking the votes of the Senate on the articles of impeachment, the Presiding Officer shall call each Senator by his name, and upon each article propose the following question, in the manner following: "Mr. ———, how say you, is the respondent, ———, guilty or not guilty, as charged in the ——— article of impeachment?" whereupon each Senator shall rise in his place and answer "guilty" or "not guilty."

At the suggestion of Mr. Roscoe Conkling, of New York, Mr. Sumner modified this by striking out the words "as charged in" and inserting "of a high crime or misdemeanor (as the case may be) within."

Mr. Charles R. Buckalew, of Pennsylvania, proposed to amend by changing the form of question to the following, which Mr. Sumner accepted:

Mr. ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime or misdemeanor (as the case may be) as charged in the article of impeachment?

Mr. John Conness, of California, proposed to amend by substituting for the latter portion of Mr. Sumner's proposition, the following:

Each of the articles Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, and 11 propose the following question in the manner following: Mr. Senator, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime or misdemeanor as charged in this article? And upon each of the articles Nos. 4 and 6 he shall propose the following question: Mr. Senator, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime charged in this article? Whereupon each Senator shall rise in his place and answer "guilty" or "not guilty."

After voting on an amendment proposed by Mr. Thomas A. Hendricks, of Indiana, which provided for voting separately on the several clauses of the eleventh article, the whole subject was, on motion of Mr. Sumner, laid on the table by a vote of, yeas 24, nays 11.

Thereupon, and as appeared later, after an understanding that the Chief Justice should propose a rule, the Senate adjourned to Monday, May 11.

2439. President Johnson's impeachment continued.

Views of the Chief Justice on form of final question in the Johnson trial and on division of the articles for voting.

In the Johnson trial the Senate adopted the form of final question and method of voting suggested by the Chief Justice.

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[1] Senate Journal, pp. 937, 938; Globe supplement, p. 409.

On May 11[1] the Chief Justice presented the following views, which were ordered to be entered on the Journal:

Senators: In conformity with what seemed to be the general wish of the Senate when it adjourned last Thursday, the Chief Justice, in taking the vote on the articles of impeachment, will adopt the mode sanctioned by the practice in the cases of Chase, Peck, and Humphreys.

He will direct the Secretary to read the several articles successively, and after the reading of each article will put the question of guilty or not guilty to each Senator, rising in his place, in the form used in the case of Judge Chase:

"Mr. Senator ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?"

In putting the question on articles 4 and 6, each of which charges a crime, the word "crime" will be substituted for the word "misdemeanor."

The Chief Justice has carefully considered the suggestion of the Senator from Indiana [Mr. Hendricks], which appeared to meet the approval of the Senate, that in taking the vote on the eleventh article, the question should be put on each clause, and has found himself unable to divide the article as suggested. The article charges several facts, but they are so connected that they make but one allegation, and they are charged as constituting one misdemeanor.

The first fact charged is, in substance, that the President publicly declared in August, 1866, that the Thirty-ninth Congress was a Congress of only part of the States and not a constitutional Congress, intending thereby to deny its constitutional competency to enact laws or propose amendments of the Constitution; and this charge seems to have been made as introductory, and as qualifying that which follows, namely, that the President, in pursuance of this declaration, attempted to prevent the execution of the tenure of office act by contriving and attempting to contrive means to prevent Mr. Stanton from resuming the functions of Secretary of War after the refusal of the Senate to concur in his suspension, and also by contriving and attempting to contrive means to prevent the execution of the appropriation act of March 2, 1867, and also to prevent the execution of the rebel States governments act of the same date.

The gravamen of the article seems to be that the President attempted to defeat the execution of the tenure of office act, and that he did this in pursuance of a declaration which was intended to deny the constitutional competency of Congress to enact laws or propose constitutional amendments, and by contriving means to prevent Mr. Stanton from resuming his office of Secretary, and also to prevent the execution of the appropriation act and the rebel States governments act.

The single substantive matter charged is the attempt to prevent the execution of the tenure of office act; and the other facts are alleged either as introductory and exhibiting this general purpose, or as showing the means contrived in furtherance of that attempt.

This single matter, connected with the other matters previously and subsequently alleged, is charged as the high misdemeanor of which the President is alleged to have been guilty.

The general question, guilty or not guilty of a high misdemeanor as charged, seems fully to cover the whole charge, and will be put as to this article as well as to the others, unless the Senate direct some mode of division.

In the tenth article the division suggested by the Senator from New York [Mr. Conkling] may be more easily made. It contains a general allegation, to the effect that on the 18th of August, and on other days, the President, with intent to set aside the rightful authority of Congress and bring it into contempt, delivered certain scandalous harangues, and therein uttered loud threats and bitter menaces against Congress and the laws of the United States enacted by Congress, thereby bringing the office of President into disgrace, to the great scandal of all good citizens, and sets forth, in three distinct specifications, the harangues, threats, and menaces complained of.

In respect to this article, if the Senate sees fit so to direct, the question of guilty or not guilty of the facts charged may be taken in respect to the several specifications, and the question of guilty or not guilty of a high misdemeanor, as charged in the article, can also be taken.

The Chief Justice, however, sees no objection to putting the general question on this article in the same manner as on the others; for, whether the particular questions be put on the specifications

[1] Senate Journal, pp. 938–940; Globe supplement, pp. 409, 410.

or not, the answer to the final question must be determined by the judgment of the Senate, whether or not the facts alleged in the specifications have been sufficiently proved, and whether, if sufficiently proved, they amount to a high misdemeanor within the meaning of the Constitution.

On the whole, therefore, the Chief Justice thinks that the better practice will be to put the general question on each article without attempting to make any subdivision, and will pursue this course if no objection is made. He will, however, be pleased to conform to such directions as the Senate may see fit to give in this respect.

On motion of Mr. Charles Sumner, of Massachusetts, it was

Ordered, That the questions be put as proposed by the presiding officer of the Senate, and each Senator shall rise in his place and answer "guilty" or "not guilty" only.

2440. President Johnson's impeachment continued.

Form of voting in the Senate on the final question in the trial of President Johnson.

In the Johnson trial the Senate voted on the articles in an order different from the numerical order.

By direction of the Senate the Chief Justice announced the result after the vote on each article in the Johnson trial.

The House in Committee of the Whole attended in the Senate during the voting on the final question in the Johnson trial.

On May 12,[1] the day set for voting on the articles of impeachment, the illness of a Senator caused the voting to be postponed to May 16. On that day the Chief Justice took his seat at the hour of 12 o'clock, the usual proclamation was made by the Sergeant-at-Arms, etc., and then, on motion of Mr. George F. Edmunds, of Vermont, it was—

Ordered, That the Secretary be directed to inform the House of Representatives that the Senate, sitting for the trial of the President upon articles of impeachment, is now ready to receive them in the Senate Chamber.

Soon thereafter the Sergeant-at-Arms announced the presence of the House of Representatives at the bar, and the Members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

Thereupon, by a vote of yeas 34, nays 19, the Senate agreed to the following order, offered by Mr. George H. Williams, of Oregon:

Ordered, That the Chief Justice, in directing the Secretary to read the several articles of impeachment, shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter the other ten successively as they stand.

Then, on motion of Mr. Edmunds, it was [2]—

Ordered, That the Senate now proceed to vote upon the articles, according to the rules of the Senate.

Thereupon the Chief Justice directed the reading of the eleventh article, which being done, the following procedure occurred:

The CHIEF JUSTICE. Call the roll.

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[1] Senate Journal, pp. 941, 942; Globe supplement, p. 411.

[2] Senate Journal, pp. 942–945; Globe supplement, p. 411.

The Chief Clerk called the name of Mr. Anthony.

Mr. Anthony rose in his place.

The CHIEF JUSTICE. Mr. Senator Anthony, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?

Mr. ANTHONY. Guilty.

[This form was continued in regard to each Senator as the roll was called alphabetically, each rising in his place as his name was called and answering "guilty" or "not guilty." When the name of Mr. Grimes was called, he being very feeble, the Chief Justice said he might remain seated. He, however, with the assistance of friends, rose and answered. The Chief Justice also suggested to Mr. Howard that he might answer in his seat, but he preferred to rise.]

The Chief Justice did not vote.

Immediately upon the vote being completed, a motion for a recess was made and disagreed to, whereupon a motion was made to adjourn. Mr. Reverdy Johnson, of Maryland, asked if it was in order for the Senate to adjourn while pronouncing judgment.

The Chief Justice said:

The precedents seem to be, except in one case, and that is the case of Humphreys, that the announcement be not made by the presiding officer until after the vote has been taken on all the articles. The Chair will, however, take the direction of the Senate. If they desire the announcement of the vote which has been taken to be now made he will make it.

It being the general opinion of the Senate that the announcement be made, the Chief Justice said:

Upon this article thirty-five Senators vote "guilty," and nineteen Senators vote "not guilty." Two-thirds not having pronounced guilty, the President is, therefore, acquitted upon this article.

2441. President Johnson's impeachment continued.

The Senate, overruling the Chief Justice, decided that a motion to adjourn over was in order during the voting on the articles in the Johnson trial.

After voting on one article in the Johnson trial, the Senate adjourned to a day fixed.

Thereupon the question recurred on the motion, made by Mr. George H. Williams, of Oregon, that the Senate adjourn until Tuesday, the 26th instant.

Mr. Thomas A. Hendricks, of Indiana, made the point of order that as the Senate was engaged in executing an order, any motion except the simple motion to adjourn was not in order.

The Chief Justice ruled [1] —

A motion that when the Senate adjourns it adjourn to meet at a certain day could not now be entertained, because the Senate is in process of executing an order. A motion to adjourn to a certain day seems to the Chair to come under the same rule. He will, therefore, decide the motion not to be in order.

Mr. John Conness, of California, having appealed, the decision of the Chair was overruled, yeas 24, nays 30.[2]

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[1] Globe supplement, p. 412.

[2] On May 26, on the same question, the Chief Justice decided as he had first decided, and was again overruled, 35 to 18. (Globe supplement, p. 414.)

Thereupon the question recurred on the motion of Mr. Williams, which was agreed to, yeas 32, nays 21, after several amendments proposing a different day had been disagreed to.

2442. President Johnson's impeachment continued.

The Senate, overruling the Chief Justice, held in order a motion to rescind its rule governing the voting on the articles of impeachment in the Johnson trial.

The Senate rescinded its order prescribing the method of voting on the articles in the Johnson trial, although it was partially executed.

On May 26,[1] after the Senate had assembled in the usual form, and after the House of Representatives, informed by message, had attended, Mr. George H. Williams, of Oregon, offered the following:

Resolved, That the resolution heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. Charles R. Buckalew, of Pennsylvania, having objected, the Chief Justice held:

The Chief Justice is under the impression that it changes the rule, and he will state the case to the Senate, in order that the Senate may correct him if he is wrong. The twenty-second rule of the Senate provides that—

"On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately."

That necessarily implies that they be taken in their order unless it is otherwise prescribed by the Senate. Subsequently the framing of a question to be addressed to the Senators was left to the Chief Justice, and he stated the views which seemed to him proper to be observed. In the course of that statement he said that "he will direct the Secretary to read the articles successively, and after the reading of each article will put the question of guilty or not guilty to each Senator, rising in his place, in the form used in the case of Judge Chase," and then stated the form.

After the statement was made—

"Mr. Sumner submitted the following order; which was considered by unanimous consent, and agreed to:

"Ordered, That the questions be put as proposed by the presiding officer of the Senate, and each Senator shall rise in his place and answer guilty or not guilty, only."

That was the order under which the Senate was acting until on the 16th of May the Senate adopted the following order moved by the Senator from Oregon [Mr. Williams]:

"Ordered, That the Chief Justice, in directing the Secretary to read the several articles of impeachment, shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter the other ten successively as they stand."

This order changing the rule was in order on the 16th of May, having been voted some days before. Subsequently, after the House had been notified that the Senate was ready to receive them, the Senator from Vermont [Mr. Edmunds] moved—

"That the Senate do now proceed to vote upon the articles according to the order of the Senate just adopted."

The Senate proceeded to vote upon the eleventh article, and after that adjourned until to-day. The present motion is to change the whole of these orders, for changing only the order of the 16th will not reach the effect intended. It must change, also, the order adopted on the motion of the Senator from Massachusetts [Mr. Sumner], and also, as the Chief Justice conceives, the rule. He is of opinion, therefore, that a single objection will take it over this day, but will submit the question directly to the Senate without undertaking to decide it, as it is a matter which relates especially to the present order of business.

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[1] Senate Journal, p. 946; Globe supplement, p. 413.

The Senate, by a vote of yeas 29, nays 25, decided that the motion was in order. A second point of order, made by Mr. Lyman Trumbull, of Illinois, that an order partially executed might not be rescinded, was also overruled, yeas 24, nays 30.

After propositions to amend and to adjourn had been disagreed to, the motion of Mr. Williams was agreed to.

2443. President Johnson's impeachment continued.

Having voted on three of the eleven articles, the Senate sitting for the trial of President Johnson adjourned without day.

Before announcing the adjournment voted by the Senate, the Chief Justice directed the Clerk to enter a judgment of acquittal of President Johnson.

Form of acquittal entered in the Journal of the trial of President Johnson.

The acquittal of President Johnson was announced in the House through the report of the chairman of the Committee of the Whole.

Thereupon, on motion of Mr. Williams, the Senate decided to proceed to vote on the second article of impeachment.[1] And the second article having been read, the question was put in the prescribed form, and the Chief Justice announced:

Thirty-five Senators have pronounced the respondent, Andrew Johnson, President of the United States, guilty; nineteen have pronounced him not guilty. Two-thirds not having pronounced him guilty, he stands acquitted upon this article.

In a similar manner the Senate determined to vote on the third article, and the vote having been taken, and having resulted 35 guilty and 19 not guilty, the acquittal was pronounced as before.

Thereupon Mr. William moved—

That the Senate, sitting for the trial of the President upon the articles of impeachment, do now adjourn without day.[2]

And there appeared yeas 34, nays 4.

Before announcing the result the Chief Justice said:

The Chief Justice begs leave to remind the Senate that the twenty-second rule provides that "if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered." * * * The Clerk will enter, if there be no objection, a judgment according to the rules—a judgment of acquittal.

And the Journal has this entry:

The Senate having tried Andrew Johnson, President of the United States, upon articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained in the second, third, and eleventh articles of impeachment, it is therefore

Ordered and adjudged, That the said Andrew Johnson, President of the United States, be, and he is, acquitted of the charges in said articles made and set forth.

The Chief Justice then announced the vote on the motion of Mr. Williams to be yeas 34, nays 16; and thereupon declared the Senate, sitting as a court of impeachment for the trial of Andrew Johnson,

[1] Senate Journal, pp. 948, 950; Globe supplement, pp. 414, 415.

[2] Senate Journal, pp. 950, 951; Globe supplement, p. 415.

President of the United States, upon articles of impeachment exhibited against him by the House of Representatives, adjourned without day.

After this adjournment the House of Representatives returned to their Hall, and the Speaker having resumed the chair, Mr. Washburne, of Illinois, made the following report:

The Committee of the Whole have, according to order, attended the managers to the bar of the Senate, sitting as a court of impeachment for the trial of Andrew Johnson; that the respondent has been declared to be acquitted on the second and third articles severally preferred by the House; and that then, without action on the other articles, the Senate, sitting as a court of impeachment, adjourned sine die.[1]

[1] House Journal, p. 735; Globe, p. 2587.

Chapter LXXVII.

THE IMPEACHMENT AND TRIAL OF WILLIAM W. BELKNAP.

2444. The impeachment and trial of William W. Belknap, late Secretary of War.

The impeachment of Secretary Belknap was set in motion through the findings of a committee empowered to investigate generally.

Form of resolution authorizing a general investigation of the Departments of the Government in 1876.

A committee empowered to investigate generally reported a resolution for the impeachment of Secretary Belknap.

The committee reported a resolution for the impeachment of Secretary Belknap, although they had been informed of his resignation of the office.

The work of drawing up the articles impeaching Secretary Belknap was referred to the Judiciary Committee.

On January 14, 1876,[1] Mr. William R. Morrison, of Illinois, from the Committee

[1] First session Forty-fourth Congress, House Journal,, pp. 183, 184; Record, p. 414.

on Ways and Means, reported the following resolution in lieu of several resolutions which had been referred to the said committee:

Resolved, That the several committees of this House having in charge matters pertaining to appropriations, foreign affairs, Indian affairs, military affairs, naval affairs, post-office and post-roads, public lands, public buildings and grounds, claims, and war claims be, and they are hereby, instructed to inquire, so far as the same may properly be before their respective committees, into any errors, abuses, or frauds that may exist in the administration and execution of existing laws affecting said branches of the public service, with a view to ascertain what change and reformation can be made so as to promote integrity, economy, and efficiency therein; that the Committees on Expenditures in the State Department, in the Treasury Department, in the War Department, in the Navy Department, in the Post-Office Department, in the Interior Department, in the Department of Justice, and on Public Buildings be, and they are hereby, instructed to proceed at once, as required by the rules of the House, to examine into the state of the accounts and expenditures of the respective Departments submitted to them, and to examine and report particularly whether the expenditures of the respective Departments are justified by law; whether the claims from time to time satisfied and discharged by the respective Departments are supported by sufficient vouchers, establishing their justness both as to their character and amount; whether such claims have been discharged out of funds appropriated therefor, and whether all moneys have been disbursed in conformity with appropriation laws; whether any, and what, provisions are necessary to be adopted to provide more perfectly for the proper application of the public moneys and to secure the Government from demands unjust in their character or extravagant in their amount; whether any, and what, retrenchment can be made in the expenditures of the several Departments without detriment to the public service; whether any, and what, abuses at any time exist in the failure to enforce the payment of moneys which may be due to the United States from public defaulters or others, and to report from time to time such provisions and arrangements as may be necessary to add to the economy of the several Departments and the accountability of their officers; whether any offices belonging to the branches or Departments, respectively, concerning whose expenditures it is their duty to inquire, have become useless or unnecessary; and to report from time to time on the expediency of modifying or abolishing the same also to examine into the pay and emoluments of all officers under the laws of the United States and to report from time to time such a reduction or increase thereof as a just economy and the public service may require. And for the purpose of enabling the several committees to fully comprehend the workings of the various branches or Departments of Government, respectively, the investigations of said committees may cover such period in the past as each of said committees may deem necessary for its own guidance or information or for the protection of the public interests in the exposing of frauds or abuses of any kind that may exist in said Departments; and said committees are authorized to send for persons and papers, and may report by bill or otherwise.

Resolved further, That the Committee on Public Expenditures be instructed to investigate and inquire into all matters set forth in the foregoing resolutions in the legislative departments of the Government, except in so far as the Senate is exclusively concerned, particularly in reference to the public printing and binding, and shall have the same authority that is conferred upon the other committees aforesaid.

This resolution, under the operation of the previous question, was agreed to without debate or division.

On March 2,[1] Mr. Hiester Clymer, of Pennsylvania, chairman of the Committee on Expenditures in the War Department, presented the following as the unanimous report of that committee:

That they found at the very threshold of their investigation such unquestioned evidence of the malfeasance in office by Gen. William W. Belknap, then Secretary of War, that they find it to be their duty to lay the same before the House.

They further report that this day at 11 o'clock a.m. a letter of the President of the United States was presented to the committee accepting the resignation of the Secretary of War, which is hereto

[1] House Journal, p. 496; Record, pp. 1426–1433.

attached, together with a copy of his letter of resignation, which the President informs the committee was accepted about 10 o'clock and 20 minutes this morning. They therefore unanimously report and demand that the said William W. Belknap, late Secretary of War, be dealt with according to the laws of the land, and to that end submit herewith the testimony in the case taken, together with the several statements and exhibits thereto attached, and also a rescript of the proceedings of the committee had during the investigation of this subject. And they submit the following resolutions, which they recommend shall be adopted:

"Resolved, That William W. Belknap, late Secretary of War, be impeached of high crimes and misdemeanors while in office.

"Resolved, That the testimony in the case of William W. Belknap, late Secretary of War, be referred to the Committee on the Judiciary, with instructions to prepare and report without unnecessary delay suitable articles of impeachment of said William W. Belknap, late Secretary of War.

"Resolved, That a committee of five Members of this House be appointed and instructed to proceed immediately to the bar of the Senate, and there impeach William W. Belknap, late Secretary of War, in the name of the House of Representatives and of all the people of the United States of America, of high crimes and misdemeanors while in office, and to inform that body that formal articles of impeachment will in due time be presented, and to request the Senate to take such order in the premises as they deem appropriate."

2445. Belknap's impeachment continued.

The committee which ascertained questionable facts concerning the conduct of Secretary Belknap gave him opportunity to explain, present witnesses, and cross-examine witnesses.

The House, after a review of English precedents, determined to impeach Secretary Belknap, although he had resigned.

The impeachment of Secretary Belknap was carried to the Senate by a committee of five.

The minority party were represented on the committee to carry the impeachment of Secretary Belknap to the Senate.

Appended to this report,[1] were extracts from the proceedings of the committee showing—

That the Secretary of War had been informed of the testimony, which was read to him in the committee room by the chairman; and that, on his request, he was permitted to employ counsel and cross-examine the witness;

That the committee also gave the Secretary of War permission to appear and make a sworn statement; but that he failed to appear; and

That the evidence against the Secretary of War consisted of the testimony of a single witness, Caleb P. Marsh, partially substantiated as to the charges against the Secretary by a copy of a certain contract between Marsh and one John S. Evans, and substantiated as to certain collateral matters by statements of other persons.

The question being on agreeing to the resolutions accompanying the report, a brief discussion arose. Mr. George F. Hoar, of Massachusetts, objected that impeachment should not be voted so hastily when they were confronted with the important question whether or not an officer could be impeached after resignation. The cases of Warren Hastings and Lord Francis Bacon were hardly applicable, since in England any man might be impeached, while in America only civil officers were subject to that proceeding. Mr. Hoar also cited Story on the Constitution as taking the view that an officer might not be impeached after resignation. Mr. J. C. S.

[1] See Record, p. 1426.

Blackburn, of Kentucky, contended, however, that such was not the import of Judge Story's words, and cited, besides the English cases, the Durell case in the Forty-third Congress as justifying the action proposed by the committee.

Debate having been closed by the previous question, the resolutions were agreed to without division.

And thereupon, under authority of the third resolution, the Speaker [1] appointed as a committee Messrs. Hiester Clymer, of Pennsylvania; William M. Robbins, of North Carolina; J. C. S. Blackburn, of Kentucky; Lyman K. Bass, of New York, and Lorenzo Danford, of Ohio.

These gentlemen were the members of the Committee on Expenditures in the War Department, and a portion of them represented the minority party in the House.

2446. Belknap's impeachment continued.

Ceremonies and forms of presenting the impeachment of Secretary Belknap at the bar of the Senate.

Having carried the impeachment of Secretary Belknap to the Senate, the committee returned and reported verbally to the House.

Forms of resolutions in the Senate providing for taking order on the impeachment of Secretary Belknap.

The message informing the Senate that a committee would impeach Secretary Belknap at the bar of the Senate included the names of the committee.

On March 3,[2] in the Senate, the following message was received from the House of Representatives at 12 o'clock and 55 minutes p.m., by the hands of Mr. Green Adams, its Chief Clerk:

Mr. President, the House of Representatives has passed the following resolution:

"Resolved, That a committee of five Members of this House be appointed and instructed to proceed immediately to the bar of the Senate, and there impeach William W. Belknap, late Secretary of War, in the name of the House of Representatives and of all the people of the United States of America, of high crimes and misdemeanors while in office, and to inform that body that formal articles of impeachment will in due time be presented, and to request the Senate to take such order in the premises as they may deem appropriate."

And it has

"Ordered, That Messrs. Hiester Clymer, of Pennsylvania; W. M. Robbins, of North Carolina; J. C. S. Blackburn, of Kentucky; L. K. Bass, of New York, and Lorenzo Danford, of Ohio, be the committee aforesaid."

At 1 o'clock p.m. the Sergeant-at-Arms announced the committee from the House of Representatives, who appeared at the bar of the Senate.

The committee advanced to the area in front of the Chair, when

Mr. Clymer said:

Mr. President, in obedience to the order of the House of Representatives we appear before you, and, in the name of the House of Representatives and of all the people of the United States of America, we do impeach William W. Belknap, late Secretary of War of the United States, of high crimes and misdemeanors while in office; and we further inform the Senate that the House of Representatives will in due time exhibit articles of impeachment against him, and make good the same. And in their

[1] Michael C. Kerr, of Indiana, Speaker.

[2] Senate Journal, pp. 271, 272; Record, p. 1436.

name we demand that the Senate shall take order for the appearance of the said William W. Belknap to answer said impeachment.

The PRESIDENT pro tempore.[1] Mr. Chairman and gentlemen of the committee of the House of Representatives, the Senate will take order in the premises.

The committee thereupon withdrew.

Thereupon Mr. George F. Edmunds, of Vermont, following the usual precedents, offered this order, which was agreed to:

Ordered, That the message of the House of Representatives relating to the impeachment of William W. Belknap be referred to a select committee to consist of five Senators.

The President pro tempore, by authorization of the Senate, appointed the following committee: Messrs. George F. Edmunds, of Vermont; Roscoe Conkling, of New York; Frederick T. Frelinghuysen, of New Jersey; Allen G. Thurman, of Ohio, and John W. Stevenson, of Kentucky.

Meanwhile the committee on the part of the House had returned to the Hall of Representatives, and Mr. Clymer reported[2] verbally—

that, in obedience to the order of the House, the committee proceeded to the bar of the Senate and, in the name of this body and of all the people of the United States, impeached William W. Belknap, late Secretary of War, of high crimes and misdemeanors in office, and demanded that the Senate shall take order to make him appear before that body and answer for the same, and stated that the House would in due time present articles of impeachment and make them good; to which the response was, Order shall be taken."

On March 6,[3] in the Senate, Mr. Edmunds reported from the select committee the following orders, which were agreed to without division:

Whereas the House of Representatives on the 3d day of March, 1876, by five of its Members, Messrs. Clymer, Robbins, Blackburn, Bass, and Danford, at the bar of the Senate, impeached William W. Belknap, late Secretary of War, of high crimes and misdemeanors, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same; and likewise demanded that the Senate take order for the appearance of the said William W. Belknap to answer the said impeachment: Therefore,

Ordered, That the Senate will, according to its standing rules and orders in such cases provided, take proper order thereon (upon the presentation of articles of impeachment), of which due notice shall be given to the House of Representatives.

Ordered, That the Secretary acquaint the House of Representatives herewith.

2447. Belknap's impeachment continued.

In the Belknap case the committee in drawing up articles needed certain special powers as to witnesses.

Discussion of the law giving immunity to witnesses testifying before committees of the House.

On March 8[4] Mr. J. Proctor Knott, of Kentucky, from the Committee on the Judiciary, who had been directed to report articles of impeachment on the evidence referred to them, submitted the following report:

The Committee on the Judiciary would respectfully report that, in pursuance of the instructions of the House, they have prepared articles of impeachment against William W. Belknap, late Secretary

[1] Thomas W. Ferry, of Michigan, President pro tempore.

[2] House Journal, p. 503.

[3] Senate Journal, pp. 278, 279.

[4] House Journal, pp. 537, 538; Record, pp. 1564–1566; House Report No. 222.

of War, for high crimes and misdemeanors in office, but that, since preparing the same, they have been informed and believe that Caleb P. Marsh, upon whose testimony before the Committee on Expenditures in the War Department, and referred to them by the House, said articles were framed, has gone beyond the jurisdiction of the Government of the United States, and that probably his attendance as a witness before the Senate sitting as a court of impeachment can not be procured; and that they are also informed and believe that other evidence may be procured sufficient to convict said William W. Belknap of high crimes and misdemeanors in office as Secretary of War. They therefore recommend the adoption of the following resolution:

"Resolved, That the resolution instructing the Committee on the Judiciary to prepare articles of impeachment against William W. Belknap, late Secretary of War, for high crimes and misdemeanors in office, be recommitted to said committee with power to take further proof, to send for persons and papers, to sit during the sessions of the House, and to report at any time."

Your committee, impressed with the importance of securing the fullest indemnity to such witnesses as may be required to testify in behalf of the Government before either House of Congress, or any committee of either House, or before the Senate sitting as a court of impeachment, would also recommend the immediate passage of the accompanying bill, entitled "A bill to protect witnesses who shall be required to testify in certain cases." They would further recommend that the accompanying bill, entitled "A bill in relation to witnesses," be introduced, printed, and referred to the Committee on the Judiciary, with leave to report thereon at any time.

In the course of the debate it was urged that so grave a proceeding as the presentation of articles of impeachment should not be undertaken on the testimony of a single witness when, by greater deliberation, other testimony might be procured.

The resolution was agreed to without division.

Immediately thereafter [1] Mr. Knott called up the bill referred to in the report:

A bill (H.R. No. 2572) to protect witnesses who shall be required to testify in certain cases.

Be it enacted, etc., That whenever any person shall be required to testify against his protest before either House of Congress or any committee thereof, or the Senate sitting as a court of impeachment, and shall so testify under protest, he shall not thereafter be held to answer criminally in any court of justice, or subject to any penalty or forfeiture, on account of any fact or act concerning which he shall be so required to testify: *Provided,* That nothing herein contained shall be so construed as to relieve any person from liability to impeachment.

Mr. Knott explained that this provision was necessary because the existing law, section 859 of the Revised Statutes, giving indemnity to witnesses, did not go far enough. A witness might decline to answer on the ground that his answer might uncover other evidence which would incriminate him.

After debate the bill was passed, yeas 206, nays 8.

In the Senate on April 11 [2] the bill was reported adversely and did not become a law.

2448. Belknap's impeachment continued.

The articles impeaching Secretary Belknap were considered in the House and agreed to without amendment.

The House decided to appoint the managers of the Belknap impeachment by resolution instead of by ballot.

One of the managers of the Belknap impeachment being excused, the House chose another.

The minority party were represented among the managers of the Belknap impeachment.

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[1] House Journal, pp. 537, 538; Record, pp. 1566–1572.

[2] Senate Journal, p. 413; Senate Report, No. 253.

It seems to have been conceded in the Belknap impeachment that the managers should be in accord with the sentiments of the House.

Method of designating the chairman of the managers in the Belknap impeachment.

Forms of resolutions providing for presenting in the Senate the articles impeaching Secretary Belknap.

The message informing the Senate that articles would be presented against Secretary Belknap contained the names of the managers.

On March 30,[1] in the House, Mr. Knott, from the Committee on the Judiciary, submitted a report, consisting of articles of impeachment (not accompanied by testimony) and a resolution. The articles appear in full in the House Journal. The resolution:

Resolved, That seven managers be appointed by ballot to conduct the impeachment exhibited against William W. Belknap, late Secretary of War of the United States.

On April 3[2] the report on the articles of impeachment was called up in the House:

The Committee on the Judiciary, having had under consideration the resolution of the House directing them to prepare and report articles in support of the impeachment of William W. Belknap, late Secretary of War, for high crimes and misdemeanors in office, respectfully report the following articles and accompanying resolutions for the action of the House:

"Resolved, That the following articles be adopted and presented to the Senate in maintenance and support of the impeachment for high crimes and misdemeanors in office of William. W. Belknap, late Secretary of War:" [Here followed the articles.]

These articles were considered in the House without any question being raised as to the propriety of considering them in Committee of the Whole. Under operation of the previous question the resolution adopting the articles, with the accompanying articles, was agreed to, a separate vote not being demanded on any article and no proposition to amend being made.

Then the resolution providing for the appointment of seven managers by ballot was considered, and Mr. Hiester Clymer proposed the following amendment in the nature of a substitute:

Strike out all after the word "resolved" and insert:

That Messrs. J. Proctor Knott, of Kentucky; Scott Lord, of New York; William P. Lynde, of Wisconsin; John A. McMahon, of Ohio; George A. Jenks, of Pennsylvania; William A. Wheeler, of New York; and George F. Hoar, of Massachusetts, be, and they are hereby, appointed managers on the part of this House to conduct the impeachment exhibited against William W. Belknap, late Secretary of War of the United States.

The amendment was agreed to, and the resolution as amended was agreed to.

Thereupon Mr. Wheeler, of New York, asked to be excused from service, and the request was granted by the House.

Mr. Elbridge G. Lapham, of New York, was nominated to fill the vacancy, whereupon Mr. Eppa Hunton, of Virginia, expressed the opinion that the managers should be in accord with the sentiments of the House on the question, and asked if Mr. Lapham was thus qualified. Mr. Fernando Wood, of New York, said that in

[1] House Journal, pp. 696–703; Record, pp. 2081, 2082; House Report No. 345.

[2] House Journal, pp. 726–733; Record, pp. 2159–2161.

selecting managers they had not gone into any very severe examination of qualifications, assuming that they would represent the House in the opinions which it had expressed unanimously. Without further objection Mr. Lapham was chosen by the House as a manager.

Then, at the request of Mr. Knott, the name of Mr. Lord was placed at the head of the list of managers.

Of the managers, as thus chosen, the first five were Members of the majority party in the House and the remaining two were Members of the minority party.

On motion of Mr. Clymer the following resolutions were agreed to:

Resolved, That the articles agreed to by this House to be exhibited in the name of themselves and of all the people of the United States against William W. Belknap, late Secretary of War, in maintenance of their impeachment against him of high crimes and misdemeanors in office be carried to the Senate by the managers appointed to conduct said impeachment.

Resolved, That a message be sent to the Senate to inform them that this House have appointed Mr. Scott Lord, of New York; Mr. J. Proctor Knott, of Kentucky; Mr. William P. Lynde, of Wisconsin; Mr. John A. McMahon, of Ohio; Mr. George A. Jenks, of Pennsylvania; Mr. Elbridge G. Lapham, of New York; and Mr. George F. Hoar, of Massachusetts, managers to conduct the impeachment against William W. Belknap, late Secretary of War, and have directed the said managers to carry to the Senate the articles agreed upon by this House to be exhibited in maintenance of their impeachment against said William W. Belknap, and that the Clerk of the House do go with said message.

As first offered, the second resolution did not contain the names of the managers; but Mr. James A. Garfield, of Ohio, suggested that inasmuch as the Senate was always informed of the names of the managers of a conference, it seemed right that they should be similarly informed in this far more important proceeding. So the names were included.

2449. Belknap's impeachment continued.

Ceremonies and forms in presenting in the Senate the articles impeaching Secretary Belknap.

The articles of impeachment in the Belknap case.

Forms of messages preceding the presentation of the articles impeaching Secretary Belknap.

The House did not accompany their managers when articles of impeachment were presented against Secretary Belknap.

The articles impeaching Secretary Belknap were signed by the Speaker and attested by the Clerk.

The chairman of the managers having read the articles impeaching Secretary Belknap, laid them on the table of the Senate.

Having presented in the Senate the articles impeaching Secretary Belknap, the managers reported verbally in the House.

On April 3,[1] in the Senate, Mr. George M. Adams, Clerk of the House of Representatives, appeared at the bar of the Senate and said:

Mr. President, I am directed to inform the Senate that the House of Representatives has passed the following resolutions: [Here followed the resolutions.]

The President pro tempore said:

The Secretary will inform the House of Representatives that the Senate will receive the managers for the purpose of exhibiting articles of impeachment agreeably to notice received.

[1] Senate Journal, p. 378; Record, p. 2155.

The Clerk of the House thereupon withdrew.

On April 4,[1] in the House, the Secretary of the Senate delivered this message:

I am directed to inform the House that the Senate is ready to receive the managers appointed by the House of Representatives to carry to the Senate articles of impeachment against William W. Belknap, Secretary of War.

Soon after the receipt of this message Mr. Manager Lord, rising to a question of privilege,[2] asked if it was the wish of the House to accompany the managers in the presentation of the articles of impeachment. It was recalled that in the cases of Judge Humphreys and President Johnson the House had accompanied the managers; but, on the other hand, it was pointed out that the message of the Senate referred only to the managers. No proposition that the House attend was made and the matter dropped.

Soon after, in the Senate,[3] the managers of the impeachment on the part of the House of Representatives appeared at the bar (at 1 o'clock and 25 minutes p.m.) and their presence was announced by the Sergeant-at-Arms.

The PRESIDENT pro tempore. The managers on the part of the House of Representatives are admitted and the Sergeant-at-Arms will conduct them to seats provided for them within the bar of the Senate.

The managers were thereupon escorted by the Sergeant-at-Arms of the Senate to the seats assigned to them in the area in front of the Chair.

Mr. Manager LORD. Mr. President, the managers on the part of the House of Representatives are ready to exhibit on the part of the House articles of impeachment against William W. Belknap, late Secretary of War.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against William W. Belknap, late Secretary of War.

Mr. Manager Lord rose and read the articles of impeachment,[4] as follows:

Articles exhibited by the House of Representatives of the United States of America in the names of themselves and of all the people of the United States of America, against William W. Belknap, late Secretary of War, in maintenance and support of their impeachment against him for high crimes and misdemeanors while in said office.

ARTICLE I.

That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the 8th day of October, 1870, had the power and authority, under the laws of the United States, as Secretary of War, as aforesaid, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States; that said Belknap, as Secretary of War, as aforesaid, on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading establishment at said military post; that thereafter, to wit, on the day and year aforesaid, the said Caleb P. Marsh and one John S. Evans entered into an agreement in writing substantially as follows, to wit:

Articles of agreement made and entered into this 8th day of October, A. D. 1870, by and between John S. Evans, of Fort Sill, Indian Territory, United States of America, of the first part, and Caleb P. Marsh, of No. 51 West Thirty-fifth street, of the city, county, and State of New York, of the second part, witnesseth, namely:

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[1] House Journal, p. 743; Record, p. 2182.

[2] Record, p. 2194.

[3] Senate Journal, pp. 383–390; Record, pp. 2178–2180.

[4] These articles appear in full in the Senate Journal.

"Whereas the said Caleb P. Marsh has received from Gen. William W. Belknap, Secretary of War of the United States, the appointment of posttrader at Fort Sill, aforesaid; and whereas the name of said John S. Evans is to be filled into the commission of appointment of said posttrader at Fort Sill, aforesaid, by permission and at the instance and request of said Caleb P. Marsh and for the purpose of carrying out the terms of this agreement; and whereas said John S. Evans is to hold said position of posttrader, as aforesaid, solely as the appointee of said Caleb P. Marsh and for the purposes hereinafter stated:

"Now, therefore, said John S. Evans, in consideration of said appointment and the sum of $1 to him in hand paid by said Caleb P. Marsh, the receipt of which is hereby acknowledged, hereby covenants and agrees to pay to said Caleb P. Marsh the sum of $12,000 annually, payable quarterly in advance, in the city of New York, aforesaid; said sum to be so payable during the first year of this agreement absolutely and under all circumstances, anything hereinafter contained to the contrary notwithstanding; and thereafter said sum shall be so payable, unless increased or reduced in amount, in accordance with the subsequent provisions of this agreement.

"In consideration of the premises, it is mutually agreed between the parties aforesaid as follows, namely:

"First. This agreement is made on the basis of seven cavalry companies of the United States Army, which are now stationed at Fort Sill aforesaid.

"Second. If at the end of the first year of this agreement the forces of the United States Army stationed at Fort Sill, aforesaid, shall be increased or diminished not to exceed one hundred men, then this agreement shall remain in full force and unchanged for the next year. If, however, the said forces shall be increased or diminished beyond the number of one hundred men, then the amount to be paid under this agreement by said John S. Evans to said Caleb P. Marsh shall be increased or reduced in accordance therewith and in proper proportion thereto. The above rule laid down for the continuation of this agreement at the close of the first year thereof shall be applied at the close of each succeeding year so long as this agreement shall remain in force and effect.

"Third. This agreement shall remain in force and effect so long as said Caleb P. Marsh shall hold or control, directly or indirectly, the appointment and position of posttrader at Fort Sill, aforesaid.

"Fourth. This agreement shall take effect from the date and day the Secretary of War, aforesaid, Shall sign the commission of posttrader at Fort Sill, aforesaid, said commission to be issued to said John S. Evans at the instance and request of said Caleb P. Marsh and solely for the purpose of carrying out the provisions of this agreement.

"Fifth. Exception is hereby made in regard to the first quarterly payment under this agreement, it being agreed and understood that the same may be paid at any time within the next thirty days after the said Secretary of War shall sign the aforesaid commission of posttrader at Fort Sill.

"Sixth. Said Caleb P. Marsh is at all times, at the request of said John S. Evans, to use any proper influence he may have with said Secretary of War for the protection of said John S. Evans while in the discharge of his legitimate duties in the conduct of the business as posttrader at Fort Sill, aforesaid.

"Seventh. Said John S. Evans is to conduct the said business of posttrader at Fort Sill, aforesaid, solely on his own responsibility and in his own name, it being expressly agreed and understood that said Caleb P. Marsh shall assume no liability in the premises whatever.

"Eighth. And it is expressly understood and agreed that the stipulations and covenants aforesaid are to apply to and bind the heirs, executors, and administrators of the respective parties.

"In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

"JOHN S. EVANS. [SEAL.]
"C. P. MARSH. [SEAL.]

"Signed, sealed, and delivered in presence of—

"E. T. BARTLETT."

That thereafter, to wit, on the 10th day of October, 1870, said Belknap, as Secretary of War, aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans, so made by him as Secretary of War, as aforesaid, the said Belknap did, on or about the 2d day of November, 1870, unlawfully and corruptly receive from said Caleb P. Marsh the sum of $1,500, and that at divers times thereafter, to wit, on or about the 17th of

January, 1871, and at or about the end of each three months during the term of one whole year, the said William. W. Belknap, while still in office as Secretary of War, as aforesaid, did unlawfully receive from said Caleb P. Marsh like sum of $1,500, in consideration of the appointment of the said John S. Evans by him, the said Belknap, as Secretary of War, as aforesaid, and in consideration of his permitting said Evans to continue to maintain the said trading establishment at said military post during that time; whereby the said William W. Belknap, who was then Secretary of War, as aforesaid, was guilty of high crimes and misdemeanors in office.

ARTICLE II.

That said William W. Belknap, while he was in office as Secretary of War of the United States of America, did, at the city of Washington, in the District of Columbia, on the 4th day of November, 1873, willfully, corruptly, and unlawfully take and receive from one Caleb P. Marsh the sum of $1,500, in consideration that he would continue to permit one John S. Evans to maintain a trading establishment at Fort Sill, a military post of the United States, which said establishment said Belknap, as Secretary of War, as aforesaid, was authorized by law to permit to be maintained at said military post, and which the said Evans had been before that time appointed by said Belknap to maintain; and that said Belknap, as Secretary of War, as aforesaid, for said consideration, did corruptly permit the said Evans to continue to maintain the said trading establishment at said military post. And so the said Belknap was thereby guilty, while he was Secretary of War, of a high misdemeanor in his said office.

ARTICLE III.

That said William W. Belknap was Secretary of War of the United States of America before and during the month of October, 1870, and continued in office as such Secretary of War until the 2d day of March, 1876; that as Secretary of War as aforesaid said Belknap had authority, under the laws of the United States, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States, not in the vicinity of any city or town; that on the 10th day of October, 1870, said Belknap, as Secretary of War as aforesaid, did, at the city of Washington, in the District of Columbia, appoint one John S. Evans to maintain said trading establishment at said military post; and that said John S. Evans, by virtue of said appointment, has since, till the 2d day of March, 1876, maintained a trading establishment at said military post, and that said Evans, on the 8th day of October, 1870, before he was so appointed to maintain said trading establishment as aforesaid, and in order to procure said appointment and to be continued therein, agreed with one Caleb P. Marsh that, in consideration that said Belknap would appoint him, the said Evans, to maintain said trading establishment at said military post, at the instance and request of said Marsh, he, the said Evans, would pay to him a large sum of money, quarterly, in advance, from the date of his said appointment by said Belknap, to wit, $12,000 during the year immediately following the 10th day of October, 1870, and other large sum of money, quarterly, during each year that he, the said Evans, should be permitted by said Belknap to maintain said trading establishment at said post; that said Evans did pay to said Marsh said sum of money quarterly during each year after his said appointment, until the month of December, 1875, when the last of said payments was made; that said Marsh, upon the receipt of each of said payments, paid one-half thereof to him, the said Belknap. Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time, and to appoint some other person to maintain said trading establishment, but criminally disregarding his duty as Secretary of War, and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said military post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy, and to the great disgrace and detriment of the public service.

Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office.

ARTICLE IV.

That said William W. Belknap, while he was in office and acting as Secretary of War of the United States of America, did, on the 10th day of October, 1870, in the exercise of the power and authority vested in him as Secretary of War as aforesaid by law, appoint one John S. Evans to maintain a trading establishment at Fort Sill, a military post of the United States, and he, the said Belknap, did receive, from

one Caleb P. Marsh, large sums of money for and in consideration of his having so appointed said John S. Evans to maintain said trading establishment at said military post, and for continuing him therein, whereby he has been guilty of high crimes and misdemeanors in his said office.

Specification 1.—On or about the 2d day of November, 1870, said William W. Belknap, while Secretary of War as aforesaid, did receive from Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and for continuing him therein.

Specification 2.—On or about the 17th day of January, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and for continuing him therein.

Specification 3.—On or about the 18th day of April, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 4.—On or about the 25th day of July, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 5—.On or about the 10th day of November, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 6.—On or about the 15th day of January, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 7.—On or about the 13th day of June, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 8.—On or about the 22d day of November, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 9.—On or about the 28th day of April, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,000, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 10.—On or about the 16th day of June, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,700, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 11.—On or about the 4th day of November, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 12.—On or about the 22d day of January, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 13.—On or about the 10th day of April, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 14.—On or about the 9th day of October, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 15.—On or about the 24th day of May, 1875, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 16.—On or about the 17th day of November, 1875, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb F. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 17.—On or about the 15th day of January, 1876, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $750, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

ARTICLE V.

That one John S. Evans was, on the 10th day of October, in the year 1870, appointed by the said Belknap to maintain a trading establishment at Fort Sill, a military post on the frontier, not in the vicinity of any city or town, and said Belknap did, from that day continuously to the 2d day of March, 1876, permit said Evans to maintain the same; and said Belknap was induced to make said appointment by the influence and request of one Caleb P. Marsh; and said Evans paid to said Marsh, in consideration of such influence and request and in consideration that he should thereby induce said Belknap to make said appointment, divers large sums of money at various times, amounting to about $12,000 a year from the date of said appointment to the 25th day of March, 1872, and to about $6,000 a year thereafter until the 2d day of March, 1876, all which said Belknap well knew; yet said Belknap did, in consideration that he would permit said Evans to continue to maintain said trading establishment and in order that said payments might continue and be made by said Evans to said Marsh as aforesaid, corruptly receive from said Marsh, either to his, the said Belknap's, own use or to be paid over to the wife of said Belknap, divers large sums of money at various times, namely: The sum of $1,500 on or about the 2d day of November, 1870; the sum of $1,500 on or about the 17th day of January, 1871; the sum of $1,500 on or about the 18th day of April, 1871; the sum of $1,500 on or about the 25th day of July, 1871; the sum of $1,500 on or about the 10th day of November, 1871; the sum of $1,500 on or about the 15th day of January, 1872; the sum of $1,500 on or about the 13th day of June, 1872; the sum of $1,500 on or about the 22d day of November, 1872; the sum of $1,000 on or about the 28th day of April, 1873; the sum of $1,700 on or about the 16th day of June, 1873; the sum of $1,500 on or about the 4th day of November, 1873; the sum of $1,500 on or about the 22d day of January, 1874; the sum of $1,500 on or about the 10th day of April, 1874; the sum of $1,500 on or about the 9th day of October, 1874; the sum of $1,500 on or about the 24th day of May, 1875; the sum of $1,500 on or about the 17th day of November, 1875; the sum of $750 on or about the 15th day of January, 1876; all of which acts and doings were while the said Belknap was Secretary of War of the United States, as aforesaid, and were a high misdemeanor in said office.

And the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said William W. Belknap, late Secretary of War of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said William W. Belknap may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

MICHAEL C. KERR,
Speaker of the House of Representatives.

Attest:

GEO. M. ADAMS,
Clerk of the House of Representatives.

The reading of the articles of impeachment having been concluded, the President pro tempore informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice would be given to the House of Representatives.

The managers, by their chairman, Mr. Lord, then delivered the articles of impeachment at the table of the Secretary and withdrew.

Soon thereafter, in the House, the Speaker pro tempore [1] directed that business be suspended to receive a report from the managers on the part of the House of the impeachment of W. W. Belknap, late Secretary of War.

The managers appeared at the bar, when Mr. Lord said:

Mr. Speaker, the managers of impeachment beg leave to report to the House that the articles of impeachment prepared by the House of Representatives against William W. Belknap, late Secretary of War, have been exhibited and read to the Senate, and the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, due notice of which would be given to the House of Representatives.[2]

2450. Belknap's impeachment continued.

At the organization of the Senate for the Belknap trial the oath was administered by the Chief Justice.

The Senate organized for the Belknap trial after the articles of impeachment had been presented.

The Senate, having organized for the Belknap trial, informed the House by message.

On April 5,[3] in the Senate, Mr. Edmunds offered this resolution, which was thereupon agreed to:

Ordered, That a committee of two Senators be appointed by the Chair to wait upon the Chief Justice of the United States and invite him to attend in the Senate Chamber at 1 o'clock p. m. this day, or, in case of his inability to attend, any one of the associate justices.

The Chair thereupon appointed Messrs. Edmunds and Allen G. Thurman, of Ohio, as the committee.

Soon thereafter the following proceedings occurred:

The Chief Justice of the United States, Hon. Morrison R. Waite, entered the Senate Chamber, escorted by Messrs. Edmunds and Thurman, the committee appointed for the purpose.

The PRESIDENT pro tempore. The hour of 1 o'clock having arrived, the Senate, according to its rule, will now proceed to the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War. The Chief Justice will take the seat provided for him at the right of the Chair.

The Chief Justice took a seat by the side of the President pro tempore of the Senate.

The PRESIDENT pro tempore. The Senate will give attention while the constitutional oath is being administered.

The Chief Justice administered the oath to the President pro tempore, as follows:

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[1] William A. Wheeler, of New York, Speaker pro tempore.

[2] House Journal, p. 745; Record, p. 2186.

[3] Senate Journal, pp. 394, 908, 909; Record, pp. 2212, 2215, 2216.

You do solemnly swear that in all things appertaining to the trial of the impeachment of William W. Belknap, late Secretary of War, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The PRESIDENT pro tempore. The Secretary will now call the roll of Senators alphabetically in groups of six, and Senators as they are so called will advance to the desk and take the oath.

After the oaths had been administered Mr. Frederick T. Frelinghuysen, of New Jersey, offered the following, which was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against William W. Belknap, late Secretary of War, and is ready to receive the managers on the part of the House at its bar.

And in obedience thereto the Secretary delivered the following message at the bar of the House: [1]

Mr. Speaker, I am directed to inform the House of Representatives that the Senate is now organized for the trial of articles of impeachment against William W. Belknap, late Secretary of War, and it is ready to receive the managers of impeachment on the part of the House at its bar.

2451. Belknap's impeachment continued.

The House being notified that the Senate was organized for the trial of Secretary Belknap, the managers attended and demanded that process issue.

On the demand of the managers the Senate ordered process to issue against Secretary Belknap, fixing the day of return.

Having demanded of the Senate that process issue against Secretary Belknap, the managers reported verbally to the House.

At 1 o'clock and 40 minutes p.m. the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant-at-Arms.[2]

The PRESIDENT pro tempore. The Sergeant-at-Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDENT pro tempore. Gentlemen managers, the Senate is now organized for the trial of the impeachment of William W. Belknap, late Secretary of War.

Thereupon Mr. Manager Lord, chairman of the managers, rose and said:

We are instructed by the House of Representatives, as its managers, to demand that the Senate issue process against William W. Belknap, late Secretary of War; that he answer at the bar of the Senate the articles of impeachment heretofore exhibited by the House of Representatives, through its managers, before the Senate.

Thereupon Mr. Edmunds offered the following, which was agreed to by the Senate:

Ordered, That a summons be issued, as required by the rules of procedure and practice in the Senate when sitting for the trial of impeachment, to William W. Belknap, returnable on Monday, the 17th day of the present month, at 1 o'clock in the afternoon.

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[1] House Journal, p. 750; Record, p. 2228.

[2] Senate Journal, p. 909; Record of trial, p. 4.

Thereupon, after a discussion caused by the fact that the rules for impeachment trials provided for the return of the summons at 12.30, while the order just adopted fixed 1 o'clock as the hour, Mr. Edmunds moved that the Senate sitting for the trial of impeachment adjourn to Monday, the 17th instant at 12.30 o'clock. And this motion was agreed to, yeas 38, nays 10.

And thereupon the Senate resumed its legislative session.[1]

In the House meanwhile the managers had returned[2] and reported—

that, in answer to the summons from the Senate, they proceeded to its bar, and that the Senate had fixed Monday, the 17th of this month, as the day on which the process against William W. Belknap, late Secretary of War, shall be returnable.

2452. Belknap's impeachment continued.

Ceremonies and forms of the return of the writ of summons against Secretary Belknap.

Secretary Belknap appeared in person and with counsel to answer the articles of impeachment.

The Chief Justice administered the oath to the Sergeant-at-Arms on the return of the writ of summons in the Belknap case.

On April 17[3] the following record appears:

The Chief Justice of the United States entered the Senate Chamber, escorted by Messrs. Edmunds and Thurman, the committee appointed for the purpose.

The PRESIDENT pro tempore. The hour of 12 o'clock and 30 minutes having arrived, in pursuance of rule the legislative and executive business of the Senate will be suspended and the Senate will proceed the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The Chief Justice took a seat by the side of the President pro tempore of the Senate.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make the opening proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The PRESIDENT pro tempore. The Secretary will now call the names of those Senators who have not been sworn, and such Senators, as they are called, will advance to the desk and take oath.

Certain Senators having been sworn,

On motion of Mr. Edmunds, it was

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber and ready to proceed with the trial of the impeachment of William W. Belknap, and that seats are provided for the accommodation of the Members.

The PRESIDENT pro tempore. The Secretary will invite the House accordingly.

The message was presently delivered[4] in the House of Representatives, where a discussion arose as to whether the House should attend or not, and as to the manner of attendance. Mr. Lord stated that the usual custom had been for the House to go over on the trial, but for some reason the Senate had seen fit to change the custom and invite the House on this day, and it seemed to him that the House should attend

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[1] Senate Journal, p. 395.

[2] House Journal, p. 750; Record, p. 2229.

[3] Senate Journal, p. 910; Record of trial, pp. 5, 6.

[4] House Journal, p. 811; Record, pp. 2512, 2513.

in a body, headed by the Speaker. Mr. George F. Hoar, of Massachusetts, suggested that an examination of the precedents showed that it would be better to go over as a Committee of the Whole; and on his motion—

the House resolved itself into a Committee of the Whole House, and proceeded in that capacity of the Senate Chamber.

Meanwhile, at 1 o'clock p.m., William W. Belknap entered the Senate Chamber, accompanied by his counsel, Hon. Jeremiah S. Black, Hon. Montgomery Blair, and Hon. M. H. Carpenter, who were conducted to the seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

At 1 o'clock and 2 minutes p.m., the Sergeant-at-Arms announced the managers on the part of the House of Representatives.

The PRESIDENT pro tempore. The managers will be admitted and conducted to seats provided for them within the bar of the Senate.

The managers were conducted to seats provided in the space in front of the Secretary's desk on the left of the Chair, namely: Hon. Scott Lord, of New York; Hon. J. Proctor Knott, of Kentucky; Hon. William P. Lynde, of Wisconsin; Hon. J. A. McMahon, of Ohio; Hon. G. A. Jenks, of Pennsylvania; Hon. E. G. Lapham, of New York, and Hon. George F. Hoar, of Massachusetts.

Mr. Manager LORD. Mr. President, in accordance with the invitation extended, the House of Representatives has resolved itself into a Committee of the Whole and will attend upon this sitting of this court on being waited upon by the Sergeant-at-Arms.

The PRESIDENT pro tempore. The Sergeant-at-Arms will wait upon the House of Representatives and invite them to the Chamber of the Senate.

At 1 o'clock and 5 minutes p.m., the Sergeant-at-Arms announced the presence of the Members of the House of Representatives, who entered the Senate Chamber preceded by the chairman of the Committee of the Whole House (Mr. Samuel J. Randall, of Pennsylvania), into which that body had resolved itself to witness the trial, who was accompanied by the Speaker and Clerk of the House.

The PRESIDENT pro tempore. The Secretary will now read the minutes of the sitting on Wednesday, the 5th instant.

The Secretary read the Journal of proceedings of the Senate sitting for trial of the impeachment of Wednesday, April 5, 1876.

The PRESIDENT pro tempore. The Secretary will now read the return of the Sergeant-at-Arms to the summons directed to be served.

The Secretary read the following return appended to the writ of summons:

The foregoing writ of summons addressed to William W. Belknap and the foregoing precept addressed to me were duly served upon the said William W. Belknap by delivering to and leaving with him true and attested copies of the same at No. 2022 G street, Washington City, the residence of the said William W. Belknap, on Thursday the 6th day of April, 1876, at 6 o'clock and 40 minutes in the afternoon of that day.

JOHN R. FRENCH,

Sergeant-at-Arms of the Senate of the United States.

The PESIDENT pro tempore. The Chair understands that Rule 9 will be suspended for reasons already stated, and the Chief Justice will now administer the oath to the officer attesting the truth of this return.[1]

[1] The Rule No. 9 provided for the administration of the oath by the Presiding Officer, but as a doubt had arisen as to the legal competency of an oath administered by one not especially empowered by statute so to do, the Chief Justice had been invited to attend.

The Chief Justice administered the following oath to the Sergeant-at-Arms:

I, John R. French, do solemnly swear that the return made by me upon the process issued on the 6th day of April, by the Senate of the United States, against W. W. Belknap, is truly made, and that I have performed such service as therein described: So help me God.

The PRESIDENT pro tempore. The committee will please escort the Chief Justice to the Supreme Court Room.

The Chief Justice retired, escorted by the committee, Mr. Edmunds and Mr. Thurman.

The PRESIDENT pro tempore. The Sergeant-at-Arms will now call William. W. Belknap, the respondent, to appear and answer the charges of impeachment brought against him.

The SERGEANT-AT-ARMS. William W. Belknap, William W. Belknap, appear and answer the articles of impeachment exhibited against you by the House of Representatives.

William W. Belknap, accompanied by Mr. Matt. H. Carpenter, Mr. Jeremiah S. Black, and Mr. Montgomery Blair, as counsel, having appeared at the bar of the Senate, were directed by the Presiding Officer to take the seats assigned them.

The Presiding Officer then informed the respondent that the Senate is now sitting for the trial of William W. Belknap, late Secretary of War, upon articles of impeachment exhibited by the House of Representatives, and will now hear him in answer thereto.

2453. Belknap's impeachment continued.

The answer of Secretary Belknap to the articles of impeachment.

The answer of Secretary Belknap demurred to the articles, alleging that he was not a civil officer of the United States when they were exhibited.

Form of announcing the appearance of counsel in the Belknap trial.

The answer of Secretary Belknap being presented, the Senate, on request, ordered a copy of the answer to be furnished to the managers.

The Senate allowed to the House time for preparation of a replication in the Belknap trial, and informed the House thereof by message.

The House determined, after respondent's answer, that it would be represented at the Belknap trial by its managers only.

Whereupon, Mr. Carpenter, of counsel, on behalf of the said William W. Belknap, made answer:

That William W. Belknap a private citizen of the United States and of the State of Iowa, in obedience to the summons of the Senate sitting as a court of impeachment to try the articles presented against him by the House of Representatives of the United States, appears at the bar of the Senate sitting as a court of impeachment and interposes the following plea; which I will ask the Secretary to read and request that it may be filed.

The Secretary read as follows:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap, named in the said articles of impeachment, comes here before the honorable the Senate of the United States sitting as a court of impeachment, in his own proper person, and says that this honorable court ought not to have or take further cognizance of the said

articles of impeachment exhibited and presented against him by the House of Representatives of the United States, because, he says, that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now an officer of the United States; but at the said times was, ever since hath been, and now is a private citizen of the United States and of the State of Iowa; and this he, the said Belknap, is ready to verify; wherefore he prays judgment whether this court can or will take further cognizance of the said articles of impeachment.

WM. W. BELKNAP.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

William W. Belknap, being first duly sworn on oath, says that the foregoing plea by him subscribed is true in substance and fact.

WM. W. BELKNAP.

Subscribed and sworn to before me this 17th day of April, 1876.

DAVID DAVIS,
Associate Justice of the Supreme Court of the United States.

Mr. CARPENTER. Mr. President, Judge Jeremiah S. Black, Hon. Montgomery Blair, and myself also appear as counsel for Mr. Belknap.

The PRESIDENT pro tempore. The Secretary will note the appearance of the respondent and the presence of the counsel named.

Mr. Manager Lord thereupon submitted this motion:

The Managers on the part of the House of Representatives request a copy of the plea filed by W. W. Belknap, late Secretary of War, and the House of Representatives desire time until Wednesday, the 19th instant, at 1 o'clock, to consider what replication to make to the plea of the said W. W. Belknap, late Secretary of War.

It was ordered accordingly, and the Secretary was directed to notify the House of Representatives thereof.

Thereupon the Senate sitting for the trial adjourned to Wednesday, the 19th instant, at 12.30 o'clock.

The House, in Committee of the Whole House, returned to their Hall—

and the Speaker having resumed the Chair, Mr. Randall reported that the committee, in pursuance of the order of the House, had attended the Senate sitting as a court of impeachment, in company with the Managers on the part of the House.[1]

Soon thereafter the Secretary of the Senate delivered a message as to the time set for the trial, which message was, on motion of Mr. Hoar, referred to the managers.

Later, on this day, Mr. Randall presented this resolution, which was agreed to without debate or division:[2]

Resolved, That in the future proceedings of the impeachment trial of W. W. Belknap, late Secretary of War, the House appear, in the prosecution of said impeachment before the Senate sitting as a court of impeachment by its managers only.

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[1] House Journal, pp. 811, 812.

[2] House Journal, p. 814; Record, p. 2533.

2454. Belknap's impeachment continued.

The replication of the House to the answer of respondent in the Belknap trial.

Forms and ceremonies of presenting in the Senate the replication in the Belknap trial.

The House, in their replication in the Belknap trial, alleged a new matter not set forth in the articles.

In the House, on April 19,[1] Mr. Lord, by direction of the managers, reported the replication, and without debate or division it was—

Ordered, That the House adopt the replication to the answer of William W. Belknap, as now submitted by the managers.

Then it was

Resolved, That a message be sent to the Senate, by the Clerk of the House, informing the Senate that the House of Representatives has adopted a replication to the plea of William W. Belknap, late Secretary of War, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House.

This message was presently delivered in the Senate sitting for the impeachment, the sitting having been opened in due form and the respondent and his counsel being present. The managers presently attended and were assigned seats, whereupon, according to the record—[2]

The PRESIDENT pro tempore. Gentlemen managers, in accordance with the order of the Senate fixing the hour of 1 o'clock as the time at which it will hear you, the Senate is now ready to hear you.

Mr. Manager LORD. Mr. President, the House of Representatives having adopted a replication to the plea of William W. Belknap to the jurisdiction of this court, as advised by the resolution just read, the managers are instructed to present the replication to the Senate sitting as a court of impeachment, and to request that the same may be read by the Secretary and filed among the Senate's papers.

The PRESIDENT pro tempore. The replication will be read by the Secretary.

The Secretary read as follows:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

The replication of the House of Representatives of the United States in their own behalf, and also in the name of the people of the United States, to the plea of William W. Belknap to the articles of impeachment exhibited by them to the Senate against the said William W. Belknap.

The House of Representatives of the United States, prosecuting, on behalf of themselves and the people of the United States, the articles of impeachment exhibited by them to the Senate of the United States against said William W. Belknap, reply to the plea of said William W. Belknap, and say that the matters alleged in the said plea are not sufficient to exempt the said William W. Belknap from answering the said articles of impeachment, because they say that at the time all the acts charged in said articles of impeachment were done and committed, and thence continuously done, to the 2d day of March, A. D. 1876, the said William W. Belknap was Secretary of War of the United States, as in said articles of impeachment averred, and, therefore, that by the Constitution of the United States the House of Representatives had power to prefer the articles of impeachment, and the Senate have full and the sole power to try the same. Wherefore they demand that the plea aforesaid of the said William W. Belknap be not allowed, but that the said William W. Belknap be required to answer the said articles of impeachment.

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[1] House Journal, pp. 822, 823; Record, p. 2592.

[2] Senate Journal, pp. 913, 914; Record of trial, pp. 7, 8.

II.

The House of Representatives of the United States, so prosecuting in behalf of themselves and the people of the United States the said articles of impeachment exhibited by them to the Senate of the United States against the said William W. Belknap, for a second and further replication to the plea of the said William W. Belknap, say that the matters alleged in the said plea are not sufficient to exempt the said William W. Belknap from answering the said articles of impeachment, because they say that at the time of the commission by the said William W. Belknap of the acts and matters set forth in the said articles of impeachment he, said William W. Belknap, was an officer of the United States, as alleged in the said articles of impeachment; and they say that the said William W. Belknap, after the commission of each one of the acts alleged in the said articles, was and continued to be such officer, as alleged in said articles, until and including the 2d day of March, A. D. 1876, and until the House of Representatives, by its proper committee, had completed its investigation of his official conduct as such officer in regard to the matters and things set forth as official misconduct in the said articles, and the said committee was considering the report it should make to the House of Representatives upon the same, the said Belknap being at the time aware of such investigation and of the evidence taken and of such proposed report.

And the House of Representatives further say that, while its said committee was considering and preparing its said report to the House of Representatives recommending the impeachment of the said William W. Belknap for the matters and things set forth in the said articles, the said William W. Belknap, with full knowledge thereof, resigned his position as such officer on the said 2d day of March, A. D. 1876, with intent to evade the proceedings of impeachment against him. And the House of Representatives resolved to impeach the said William W. Belknap for said matters as in said articles set forth on said 2d day of March, A. D. 1876. And the House of Representatives say that by the Constitution of the United States the House of Representatives had power to prefer said articles of impeachment against the said William W. Belknap, and that the Senate sitting as a court of impeachment has full power to try the same.

Wherefore the House of Representatives demand that the plea aforesaid be not allowed, but that the said William W. Belknap be compelled to answer the said articles of impeachment.

MICHAEL C. KERR,
Speaker of the House of Representatives.

Attest:

GEORGE M. ADAMS,
Clerk of the House of Representatives.

The PRESIDENT pro tempore. If there be no objection, the replication will be filed. The Chair hears none.

2455. Belknap's impeachment continued.

Forms of rejoinder, surrejoinder, and similiter filed in the Belknap trial.

Form of application of respondent for time to prepare a rejoinder in the Belknap trial.

The later pleadings in the Belknap trial were filed with the Secretary of the Senate during a recess of the Senate sitting for the trial.

The surrejoinder of the House of Representatives in the Belknap trial was signed by the Speaker and attested by the Clerk.

Thereupon Mr. Carpenter, of counsel for the respondent, submitted in writing this motion:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment presented by the House of Representatives against the said William W. Belknap.

Mr. President, the respondent asks for copies of the replications this day filed by the managers and asks for time until Monday next to frame pleadings to meet the same.

WILLIAM W. BELKNAP.

Mr. Edmunds thereupon proposed an order relating to the filing of a rejoinder which would have required the respondent to file at a time when the Senate would not be sitting for the trial. To this Mr. Carpenter objected, saying that in their pleadings they did not desire to deal with anything less than the court. They could not file with the House of Representatives, because they had no standing there. So, on suggestion of Mr. Roscoe Conkling, of New York, Mr. Edmunds submitted a modified order, which was agreed to, as follows:

Ordered, That the respondent file his rejoinder with the Secretary on or before the 24th day of April instant, who shall deliver a copy thereof to the Clerk of the House of Representatives, and that the House of Representatives file their surrejoinder, if any, on or before the 25th day of April instant, a copy of which shall be delivered by the Secretary to the counsel for the respondent.

Ordered, That the trial proceed on the 27th day of April instant, at 12 o'clock and 30 minutes afternoon.

Thereupon the Senate, sitting for the trial, adjourned to April 27.

On April 27 [1] the Senate at the appointed hour discontinued its legislative business and the session for the impeachment proceedings was opened with the usual proclamation by the Sergeant-at-Arms.

The managers, and the respondent with his counsel, having attended, the President pro tempore directed the journal of the last session's proceedings to be read.

Then, the journal having been read, the President pro tempore directed the reading of the rejoinder filed by the respondent with the Secretary on the 24th instant under the orders of the Senate of the 19th instant:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap saith that the replication of the House of Representatives first above pleaded to the said plea of him, the said Belknap, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said House of Representatives to have or maintain impeachment thereof against him, the said Belknap, and that he, the said Belknap, is not bound by law to answer the same.

And this the said defendant is ready to verify. Wherefore, by reason of the insufficiency of the said replication in this behalf, he, the said Belknap, prays judgment if the said House of Representatives ought to have or maintain this impeachment against him, etc.

WM. W. BELKNAP.

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap, as to the second replication of the House of Representatives of the United States, secondly above pleaded, saith that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he says that it is not true, as in that replication alleged, that he, the said Belknap, was Secretary of War of the United States from any time until and including the 2d day of March, A. D. 1876, and of this he, the said Belknap, demands trial according to law.

[1] Senate Journal, pp. 915–920; Record of trial, pp. 8–10.

II.

And the said Belknap further saith, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he saith that it is not true, as in that replication alleged, that he, the said Belknap, was Secretary of War until the said House of Representatives, by any committee of the said House raised or instructed for that purpose, or having any authority from the House of Representatives in that behalf, had investigated the official conduct of him, the said Belknap, as Secretary of War, in regard to the matters and things set forth as official misconduct in the said articles of impeachment; and of this he, the said Belknap, demands trial according to law.

III.

And the said Belknap, as to the said second replication of the said House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he says that at the city of Washington, in the District of Columbia, on the 2d day of March, A. D. 1876, at 10 o'clock and 20 minutes in the forenoon of that day, he, the said Belknap, resigned the office of Secretary of War, by written resignation under his hand, addressed and delivered to the President of the United States, and the President of the United States then and there accepted the said resignation, by acceptance in writing under his hand, then and there indorsed upon the said written resignation; so that the said Belknap then and there ceased to be Secretary of War of the United States, and since that time he, the said Belknap, has not been an officer of the United States, but has been a private citizen of the United States and of the State of Iowa, as stated by said Belknap in his said plea; and that at the time he, the said Belknap, resigned as aforesaid, and the said resignation was accepted as aforesaid, the said House of Representatives had not taken any proceeding for the investigation or examination of any of the charges set forth in the said articles of impeachment as official misconduct of him, the said Belknap, as Secretary of War; nor had the said House of Representatives raised any committee of the said House, nor directed nor instructed any committee of the said House, to make inquiry or investigation in that behalf.

And this the said Belknap is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

IV.

And the said Belknap, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives of the United States, by reason of anything in that replication alleged, ought not to have or maintain the said impeachment against him, the said Belknap, because he says that when the said House of Representatives took the first proceeding in relation to the impeachment of him, the said Belknap, and when the matter was first mentioned in the said House—that is, in the afternoon of the 2d day of March, A. D. 1876—the said House of Representatives was fully advised and well knew that he, the said Belknap, had before then resigned the said office of Secretary of War, by resignation in writing, under his hand addressed and delivered to the President of the United States, and that the President of the United States had also before that time, as President as aforesaid, accepted the said written resignation, by acceptance in writing, signed by him and indorsed on the said written resignation, and that he, the said Belknap, was not then an officer of the United States, as the facts were.

And this he, the said Belknap, is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

V.

And the said Belknap, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives of the United States, by reason of anything in that replication alleged, ought not to have or maintain the said impeachment against him, the said Belknap, because he says that, although true it is that a certain committee of the said House, called the Committee on the Expenditures of the War Department, had

been pretending to make some inquiry into or investigation of the matters and things set forth in said articles of impeachment as official misconduct of him, the said Belknap, but without any authority from or direction by the House of Representatives in that behalf, yet he, the said Belknap, says that said committee had not completed its said pretended investigation, but was engaged in the examination of witnesses, when said committee was informed that the said Belknap had resigned as Secretary of War, by resignation in writing, under his hand, addressed and delivered to the President of the United States, and that the President of the United States had accepted the said resignation by acceptance in writing, under his hand, indorsed upon the said written resignation; that said committee received the said information during and before the completion of the said pretended investigation into the alleged facts in that behalf, to wit, at 11 o'clock in the forenoon of the 2d day of March, A. D. 1876, and that thereupon the said committee declared that they, the said committee, had no further duty to perform in the premises.

And this the said Belknap is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

VI.

And said Belknap, as to said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives ought not, by anything in that replication alleged, to have or maintain said impeachment against him, said Belknap, because he says that, although true it is that he did resign his position as Secretary of War on the 2d day of March, A. D. 1876, at 10 o'clock and 20 minutes in the forenoon of that day, at the city of Washington, in the District of Columbia, by a resignation in writing, under his hand, addressed to and then and there delivered to the President of the United States, and the President of the United States did then and there accept said resignation, by acceptance in writing, under his hand, then and there by him indorsed upon said written resignation, nevertheless it is not true, as alleged in that replication, that he, said Belknap, resigned his said position with intent to "evade" any proceedings of said House of Representatives to impeach him, said Belknap; but, on the contrary thereof, he avers the fact to be that a standing committee of said House, known as the Committee on the Expenditures of the War Department, without any authority from or direction of said House of Representatives to examine, inquire, or investigate in regard to the matters and things set forth in said articles as official misconduct of him, said Belknap, had examined one Marsh, and he had made a statement to said committee, which said statement, if true, would not support articles of impeachment against him, said Belknap, but which said statement was of such a character in respect to other persons, some of whom had been and one of whom was so nearly connected with him, said Belknap, by domestic ties as greatly to afflict him, said Belknap, and make him willing to secure the suppression of so much of said statement as affected such other persons at any cost to himself, therefore he, said Belknap, proposed to said committee that if said committee would suppress that part of said statement which related to said other persons he, said Belknap, though contrary to the truth, would admit the receipt by him, said Belknap, of all the moneys stated by said Marsh to have been received by him from one Evans, mentioned in said statement, and paid over by said Marsh to any other person or persons, but said committee declined to accede to said proposition, and Hon. Hiester Clymer, chairman of said committee, then declared to said Belknap that he, said Clymer, should move in the said House of Representatives, upon the statement of said Marsh, for the impeachment of him, said Belknap, unless the said Belknap should resign his position as Secretary of War before noon of the next day, to wit, March the 2d, A. D. 1876; and said Belknap regarding this statement of said Clymer, chairman as aforesaid, as an intimation that he, said Belknap, could, by thus resigning, avoid the affliction inseparable from a protracted trial in a forum which would attract the greatest degree of public attention and the humiliation of availing himself of the defense disclosed in said statement itself which would cast blame upon said other persons, he yielded to the suggestion made by said Clymer, chairman as aforesaid, believing that the same was made in good faith by the said Clymer, chairman as aforesaid, and that he, said Belknap, would, by resigning his position as Secretary of War, secure the speedy dismissal of said statement from the public mind, which said statement, though it involved no criminality on his part, was deeply painful to his feelings, and did resign his said position as Secretary of War, as hereinbefore stated, at 10 o'clock and 20 minutes in the forenoon of the 2d day of March, A. D. 1876; and at 11 o'clock in the forenoon of the day and year last aforesaid he, said Belknap, caused said committee to be notified of his said resignation and of

the acceptance thereof by the President of the United States as aforesaid; all of which was in pursuance and in consequence of the said suggestion so made by said Clymer; and thereupon said committee declared that they, the said committee, had no further duty to perform in the premises. And he, said Belknap, submits that, while said House of Representatives claims that said Clymer was acting on its behalf in said pretended examination of said Marsh, said House ought, in honor and in law, to be estopped to deny that said Clymer was also acting on behalf of said House in suggesting the resignation of him, said Belknap, as aforesaid, and ought not to be heard to complain of a resignation thus induced.

And this he, the said Belknap, is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the impeachment against him, the said Belknap.

WM. W. BELKNAP.

The President pro tempore then said:

This rejoinder will be considered duly filed, if there be no objection. The Secretary will now read the surrejoinder of the House of Representatives to the rejoinder of William W. Belknap.

The Secretary read as follows:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

By the House of Representatives of the United States, April 25, 1876.

The House of Representatives of the United States, in the name of themselves and of all the people of the United States, say that the said first replication to the plea of the said William W. Belknap to the articles of impeachment exhibited against him as aforesaid, and the matters therein contained, in manner and form as the same are above set forth and stated, are sufficient in law for the said House of Representatives to have and maintain the said articles of impeachment against the said William W. Belknap, and that the Senate sitting as a court of impeachment has jurisdiction to hear, try, and determine the same; and the House of Representatives are ready to verify and prove the same, as the Senate sitting as a court of impeachment shall direct and award: Wherefore, inasmuch as the said William W. Belknap hath not answered the said articles of impeachment or in any manner denied the same, the said House of Representatives, for themselves and for all the people of the United States, pray judgment thereon according to law.

II.

And the said House of Representatives as to the first and second subdivisions of the rejoinder to the second replication of the House of Representatives to the plea of the defendant to the said articles of impeachment, wherein the said defendant demands trial according to law, the said House of Representatives, in behalf of themselves and all the people of the United States, do the like; and as to the third, fourth, fifth, and sixth subdivisions of the rejoinder of the said defendant to the said second replication, they say that the said House of Representatives, by reason of anything by the said defendant in the last-named subdivisions of said rejoinder above alleged, ought not to be barred from having and maintaining the said articles of impeachment against the said defendant, because they say that, reserving to themselves all advantage of exception to the insufficiency of the said subdivisions of said rejoinder to said second replication, they deny each and every averment in said several rejoinders to said second replication contained, or either of them, which denies or traverses the acts and intents charged against said defendant in said second replication, and they reaffirm the truth of the matters stated therein; and this the said House of Representatives pray may be inquired of by the Senate sitting as a court of impeachment.

Wherefore the said House of Representatives, in the name of themselves and of all the people of the United States, pray judgment thereon according to law.

MICHAEL C. KERR,
Speaker of the House of Representatives.
GEO. M. ADAMS,
Clerk of the House of Representatives.

The President pro tempore said:

The surrejoinder will be considered as duly filed also. The Senate sitting for the trial is now ready to hear the parties.

Mr. Carpenter, of counsel for the respondent, next closed the issue of fact on the plea to jurisdiction by submitting the following similiter:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment of the House of Representatives of the United States of America of high crimes and misdemeanors.

And the said Belknap, as to the surrejoinders of said House of Representatives to the third, fourth, fifth, and sixth rejoinders of the said Belknap to the second replication of said House of Representatives above pleaded, whereof said House of Representatives have demanded trial, the said Belknap doth the like.

WILLIAM W. BELKNAP.

Mr. Manager Lord submitted [1] a motion relating to the giving of evidence on questions pertaining to the plea to the jurisdiction and to the carrying on of the trial as to the main issue.

2456. Belknap's impeachment continued.

The Senate declined to grant the motion of the counsel for Belknap that the trial be continued to a later date.

The Senate declined to consult the managers before passing on the application of respondent for a continuance of the Belknap trial.

The Senate in secret session passed on the motion for a continuance in the Belknap trial.

After this motion had been submitted by Mr. Lord, Mr. Matt. H. Carpenter, of counsel for the respondent, offered [2] this motion:

That the further hearing and trial of this impeachment of William W. Belknap be continued to the first Monday of December next.

In argument in support of this the counsel for the respondent urged that in the existing political excitement a fair trial was not likely to result. The precedents of the Blount and Peck impeachments were cited to justify the postponement.

The Senate having retired for consultation (of which consultation the debates were not public and not reported), Mr. Edmunds moved that the motion for postponement be denied.

Mr. John Sherman, of Ohio, moved to amend by substituting the following:

That the President pro tempore ask the managers if they desire to be heard on the pending motion of Mr. Carpenter, of counsel for respondent.

This motion was disagreed to, yeas 28, nays 31.

Mr. Edmunds's motion, that the request for a postponement be not granted, was agreed to, yeas 59, nays 0.

Thereupon the Senate returned to their Chamber and the President pro tempore said:

The Presiding Officer is directed to state to the counsel for the respondent that their motion is denied.

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[1] Senate Journal, p. 920; Record of trial, p. 9.

[2] Senate Journal, pp. 920–923; Record of trial, pp. 10–15.

2457. Belknap's impeachment continued.

The Senate overruled the motion of the managers that the evidence on the question of the jurisdiction of the Senate in the Belknap case be given before the arguments relating thereto.

The Senate determined in the Belknap case to hear first the question of law as to jurisdiction.

The Senate denied the motion of the managers in the Belknap case to fix the time of answer and trial on the merits before decision on the demurrer.

The Senate ordered a discussion in argument on the right of the House to allege in the replication matters not touched in the articles.

References to American and English precedents in determining order of deciding the question of jurisdiction in the Belknap case.

The Senate in secret session determined on the time of having the arguments as to jurisdiction in the Belknap trial.

Thereupon the motion proposed previously by Mr. Manager Lord was taken up.[1]

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

On motion of the managers,

Ordered, That the evidence on the questions pertaining to the plea to the jurisdiction of this court be given before the arguments relating thereto are heard, and if such plea is overruled that the defendant be required to answer the articles of impeachment within two days, and the House of Representatives to reply if they deem it necessary within two days; and that the trial proceed on the next day after the joining of issue.

In support of this Mr. Manager Lord argued:

With the permission of the court, Mr. President, I will give the following reasons why we think this order should be entered:

All of the issues of law and fact relate to the question of jurisdiction. It is but a single question, upon which the Senate can make but one decision, and the facts pertaining thereto should be proved before the arguments, so that the questions of law and of fact may be considered and decided at the same time. This is the course in all legal tribunals in which questions of law and fact are decided by the same judge or judges.

Now let me refer to some authorities on this point:

"In cases where the jury are to decide on both the law and the fact a general verdict may be rendered on the whole matter." (Starkie's Law of Libel, p. 203.)

In the case of Baylis *v.* Laurance (11 Adolphus and Ellis, 920), referred to by Starkie on the same page, it was held that the law was the same in regard to both civil and criminal cases.

The same author, page 580, states:

"A jury sworn to try the issue may give the general verdict of guilty or not guilty upon the whole matter put in issue, * * * and shall not be required or directed by the court or judge * * * to find the defendant or defendants guilty merely on the proof of the publication."

When by the Constitution the sole power to try impeachments was conferred upon the Senate without any direction as to the mode of procedure, it must have been intended that the rules governing the House of Lords when sitting as a court of impeachment, so far as applicable, should control the Senate sitting as a court of impeachment.

Mr. Erskine, before the Court of King's Bench, in the case of the Dean of Asaph, in regard to the abolition of the king's court and the distribution of its powers, says:

[1] Senate Journal, pp. 920–926; Record of trial, pp. 9, 10, 15–19.

"The barons preserved that supreme superintending jurisdiction which never belonged to the justices, but to themselves only as the jurors in the king's court."

And in a note to his argument found in Goodrich's British Eloquence, page 659, it is said:

"During a trial before the House of Peers every peer present on the trial has always been judge both of the law and the fact; hence no special verdict can be given on the trial of a peer."

Bouvier, in his Law Dictionary, volume 2, page 540, says:

"A special verdict is one by which the facts of the case are put on the record and the law is submitted to the judges."

See also Bacon's Abridgment, Verdict, D. A.

A special finding or verdict is therefore only necessary when the questions of fact are found in one tribunal and the law is applied by another.

But there is a direct authority on this question from a court of impeachment only second in dignity to this high tribunal. The court of impeachment of the State of New York is composed of the president of the senate, who is the lieutenant-governor, of the senators, and of the judges of the court of appeals. In the case of the People of the State of New York against George G. Barnard, then one of the justices of the supreme court (see vol. 1, pp. 106–108), the respondent interposed a plea to the jurisdiction on the ground that the articles of impeachment were not adopted by the assembly by a vote of the majority of all the members elected thereto, as required by the constitution. A replication to the plea was filed that the assembly did impeach the respondent by a vote of a majority of all the members elected thereto. Witnesses were then examined in regard to this question on both sides; counsel were heard for the respondent in support of the plea, and for the prosecution in opposition; after which the president stated that the question before the court was whether the plea of the respondent should be sustained. Upon the decision not to sustain the plea replications were filed, and the trial on the merits proceeded.

This precedent sustains the motion in this case more fully for the reason that the respondent in that case more than a month before he interposed the plea to the jurisdiction had pleaded to the merits by filing a general answer denying each and every allegation in the articles of impeachment; but discovering a month afterwards, as he thought, that the articles of impeachment had not been properly presented, on the ground that a majority of the members elected to the assembly had not concurred therein, he put in a plea to the jurisdiction, and the proceedings were had which I have already stated.

Therefore we submit to this honorable court that the managers, by asking the entry of this order, have suggested the proper method of trial.

In opposition, on April 28, Mr. Carpenter, of counsel for the respondent, argued:

The first part of this order, "That the evidence on the questions pertaining to the plea to the jurisdiction of this court be given before the arguments relating thereto are heard," we have no objection to. It is a matter of total indifference to us what is the order which the Senate may make in that particular. Whether the testimony shall be taken and the argument on the facts and the law in regard to the jurisdiction of the court be heard together, or whether they shall be proceeded with at different times is a matter of indifference to us.

To the residue of the order, however, we do seriously object, upon several grounds. In the first place, we object to the managers controlling this case on both sides. We are perfectly willing that they should ask such orders as they please for their own government and their own pleadings; but we object to their fixing or asking any order in regard to our pleadings. This part of the order is:

"And if such plea is overruled, that the defendant be required to answer the articles of impeachment within two days."

I suppose that means answer the articles on the merits.

"And the House of Representatives to reply, if they deem it necessary, within two days; and that the trial proceed on the next day after the joining of issue."

I submit to this honorable court that a proper reply to the managers of the House in regard to this part of the proposed order would be the famous reply which Coke made to the King: "When the question arises and is debated, I will do what is fit and proper for a judge to do; and further, I decline to pledge myself to Your Majesty." When this plea to the jurisdiction shall be disposed of, the defendant may demur to the articles of impeachment, or may not, as he shall be advised; and what will be the circumstances of this court, or of the counsel, or even of the managers, who, although numerous, are

not incorporated and are still mortal, this court can not to-day determine. They may not want to make their reply to whatever we may say so speedily as they now think.

In the next place, if the court please, while, as I say, we shall not attempt to make any delays in this ewe beyond what are absolutely necessary, the argument of the question of the jurisdiction of this court can not be made properly on the day indicated in this order.

Mr. Carpenter then gave reasons, such as the preoccupation of counsel in other duties, the difficulty in getting books of authority, etc., to show why the arguments should be delayed.

Mr. Roscoe Conkling, of New York, proposed the following:

Ordered, That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office. The motion that testimony be heard touching the exact time of such resignation, and touching the motive and purpose of such resignation, is reserved without prejudice till the question above stated has been considered.

In opposition to the resolution proposed by Mr. Conkling, Mr. Manager Lord argued:

Mr. President and Senators: It seems to me that under the authorities adduced yesterday such a course of procedure would be protracting the trial and entirely unnecessary. Several authorities were produced yesterday to show that a special finding or verdict is only necessary when the questions of fact are found in one tribunal and the law is applied by another. This question of jurisdiction is a single question, and it ought not to be divided and subdivided. The evidence should be in before the judgment of the court is taken on the question of jurisdiction; and this I understand the other side concede. Very great embarrassment might arise; very great delays might ensue from dividing this question. I cited yesterday an authority in the State of New York, to which I will again call the attention of the Senators—the Barnard case.

The court of impeachment in that State, composed of the president of the senate, the lieutenant-governor, the senators, and the judges of the court of appeals, had precisely this question before them. A plea to the jurisdiction was interposed, as follows:

"And the said respondent, in his own proper person and by his counsel, John H. Reynolds and William A. Beach, comes and says that this court ought not to have or take further cognizance of the articles of impeachment, or any or either of them, presented in this court against him, because, he says, that the said articles of impeachment were not, nor were any nor was either of them, adopted by the assembly of this State by a vote of a majority of all the members elected thereto, as required by section 1 of article 6 of the constitution of this State."

A replication was put in to that plea, asserting

"That it is not true that the articles of impeachment now presented against the said respondent do not appear to be and are not articles of impeachment adopted by the assembly of the State, but that the said articles do appear to be and are articles of impeachment adopted by the said assembly."

Then Edward M. Johnson and Charles R. Dayton were called and sworn on the part of the respondent. Hon. C. P. Vedder and Hon. Thomas G. Alvord were called and sworn on the part of the prosecution, these being respectively members or officers of the house. Counsel then argued the case, Messrs. Beach and Reynolds, of counsel for respondent, and Mr. Van Cott, of coun el for the prosecution.

The president stated that the question before the court was whether the plea of the respondent should be sustained.

Mr. Lewis moved that the chamber be cleared for private consultation.

The president put the question whether the court would agree to said motion, and it was determined in the affirniative.

The president put the question whether the court would sustain said plea of the respondent, and it was determined in the negative, as follows:

Chief Judge Church, of the court of appeals; Judge Allen, also of the court of appeals, and Senator Murphy in that case voted in the affirmative; the other Senators in the negative. I refer to this case of The People *v.* Barnard to show that in a court of impeachment composed of the senators of the State

of New York and the judges of the court of appeals of that State the precise order was taken for which we move; the evidence was in before the question of jurisdiction was passed upon. Why should we be driven to one single question when there are three or four, and all of them, I apprehend, exceedingly important questions in this case? Perhaps in one view it may be the question of the case whether the defendant resigned for the purpose of evading this impeachment. Why should we try one question at one time and try another question at another time?

Mr. Carpenter argued for the respondent:

Mr. President and Senators, the pleadings proper in this case consist of the articles of impeachment, the plea to the jurisdiction, and the first replication of the House of Representatives, to which there is a demurrer by us and a joinder by the managers. Strictly speaking, that is the only issue that could be made in this case. The honorable managers, however, saw fit, without asking leave, to file two replications, instead of one, to our plea. We of course did not care how fully they went into this question; we were ready to follow them in disregard of technical pleading.

I never heard of a case in a court where a single plea had led to an issue of law and fact or where a declaration or any proceeding whatever was followed by two issues, one of law and one of fact, that the court did not always first dispose of the question of law. That being disposed of, the question of fact may or may not be necessary to be inquired into. While on the part of Mr. Belknap we make no objection to this proceeding, its regularity is a question for the court to determine. It seems to me that the more regular proceeding is that indicated by the order offered by the Senator from New York, that the law of this question should be first settled. If we had been captious about pleading, and had moved the court to strike out this second replication, which is drawn not according to common-law form, but according to the free-and-easy style of the New York code, this court would have stricken it out as having been improperly filed, permission not having been granted to reply double. We did not object because we did not care for form, and we followed them after their kind in our reply to their pleas. But certainly the course most in harmony with the method pursued in courts of law would be to settle the law upon thispointfirst. If the Senate has no jurisdiction over a man who is not in office at the time the impeachment commences, that ends the question. That is a mere question of law; and we shall contend, of course, that any officer of the Government has a perfect right to resign at any moment and that the motives of a man's resignation can not affect the legal consequences which follow the act of resignation. The Supreme Court of the United States has held where a citizen who wishes to have a litigation with a citizen of his own State moves into another State for the express purpose of giving the Federal courts jurisdiction, that is no objection to the jurisdiction; that a man may change his residence from one State to another for the purpose of obtaining a footing in a Federal court, as well as he may change it for the purpose of improving his health or his financial condition.

I do not regard the issues made as of any substantial consequence to this case. We care nothing about them. We are willing to try them or not try them, as the court directs. But the question is whether this man was in office at the time he was impeached by the House of Representatives? That is fully presented by the articles, by our plea to the jurisdiction, and by the first, which is the only regular, replication on the part of the House and our demurrer thereto. If the Senate shall be of opinion that none but a person in office can be impeached, of course that ends this proceeding. At all events, the method suggested by the order last offered is the method which should be pursued in a court of law. It will be borne in mind that we interposed the first demurrer, and are therefore entitled to open and close in the argument.

The Senate having retired for consultation (of which the proceedings, but not the debates, are reported in the Journal and record of trial), consideration was first given to a motion by Mr. Edmunds to strike out the second sentence of the pending order and insert:

And that the managers and counsel in such argument discuss the question whether the issues of fact are material.

Mr. Allen G. Thurman, of Ohio, moved the following amendment, which was agreed to:

Add to the words proposed by Mr. Edmunds to be inserted the following:

And whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

Then Mr. Edmunds's motion, as amended, was agreed to.

Mr. Thurman moved further to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting:

That the Senate will first hear the evidence on the issues of fact relating to the question of jurisdiction, and after hearing the same will fix a time for hearing the argument upon the questions of law and fact relating to such jurisdiction.

The amendment was rejected.

Thereupon Mr. Conkling's resolution, as amended, was agreed to, as follows:

Ordered, That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such argument discuss the question whether the issues of fact are material, and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

2458. Belknap's trial continued.

The Senate by rule determined the order and time of arguments, and the numbers of counsel and managers to speak, on the plea to jurisdiction in the Belknap trial.

Thereupon Mr. Edmunds moved the following:

Ordered, That the hearing proceed on the 4th day of May, 1876; and that three of the managers and three of the counsel for the respondent be heard thereon, as follows: One counsel for the respondent shall open and shall be followed by one manager, and he shall be followed by one counsel for the respondent, who shall be followed by two managers, and one counsel for the respondent shall close the argument; and that such time be allowed for argument as the managers and counsel may desire.

Motions to amend by changing the date from the 4th to the 15th, 16th, and 8th were severally disagreed to, the last-named date, the 8th, being negatived by a vote of yeas 23, nays 32.

Mr. Conkling then moved to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting—

That the hearing proceed on the 4th day of May, 1876, at 12 o'clock and 30 minutes p. m.; that the opening and close of the argument be given to the respondent; that three counsel and three managers may be heard in such order as may be agreed upon between themselves, and that such time be allowed for argument as the managers and counsel may desire.

After debate,

The amendment was agreed to.

The resolution of Mr. Edmunds, as amended, was then agreed to.

Thereupon the Senate returned to the Senate Chamber and the President pro tempore directed the two orders to be reported.

On May 4,[1] the next session of the Senate sitting for the trial, Mr. Carpenter,

[1] Senate Journal, pp. 928, 929; Record of trial, pp. 27, 28.

of counsel for the respondent, suggested an adjournment until May 15. Thereupon Mr. John Sherman, of Ohio, offered this order:

Ordered, That this court adjourn until Monday, May 15, at 12 o'clock and 30 minutes p. m., and that the argument of the question of jurisdiction be confined to eight hours on each side.

Mr. Aaron A. Sargent, of California, moved to amend by striking out that portion of the order limiting the time of the arguments, and the amendment was agreed to, without division. The order as amended was then disagreed to, yeas 21, nays 40.

Thereupon Mr. Sherman offered the following:

Ordered, That this court adjourn until Monday, May 15, at 12 o'clock and 30 minutes p. m.; and that the argument of the question of jurisdiction be confined to nine hours on each side, to be divided between them as the managers and counsel may agree.

This order was disagreed to, yeas 22, nays 38.

The arguments thereupon began [1] and continued during May 5 and 6 and for a portion of May 8. Mr. Black, of counsel for the respondent, opened, and was followed by Mr. Manager Lord, who was followed by Mr. Carpenter, of counsel for the respondent. Messrs. Managers Knott, Jenks, and Hoar followed Mr. Carpenter, and then Mr. Black closed for the respondent. On May 6 [2] Mr. Manager Knott, after speaking some time, stated that he was unable to proceed further, on account of indisposition, and asked the indulgence of the Senate to conclude his argument on Monday, May 8. This leave was granted; and Mr. Manager Jenks continued the argument on May 6.

2459. Belknap's trial continued.

The Senate decided that it had jurisdiction to try the Belknap impeachment case, although the respondent had resigned the office.

In the Belknap case the Senate decided that respondent's plea in demurrer was insufficient, and that the articles were sufficient.

While deliberating on the question of jurisdiction in the Belknap case the Senate notified the managers and counsel that their attendance was not required.

In the Belknap trial the Senate declined to permit the debates in secret session to be recorded.

Each Senator was permitted to file a written opinion on the question of jurisdiction in the Belknap trial.

After the conclusion of the arguments, on May 8,[3] it was

Ordered, That until further notice the attendance before the Senate, sitting for the trial of the impeachment, of the managers and the respondent will not be required.

Thereupon the Senate adjourned to Monday, May 15.

From May 15 to May 29 [4] the Senate in secret session deliberated on the pending question. The record of the proceedings only appear in the Journal; but none of the speeches are printed. On May 16 [5] Mr. William B. Allison, of Iowa, proposed

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[1] Senate Journal, pp. 929–931; Record of trial, pp. 28–72.

[2] Senate Journal, p. 930.

[3] Senate Journal, p. 932; Record of trial, p. 72.

[4] Senate Journal, pp. 932–947; Record of trial, pp. 72–77.

[5] Senate Journal, p. 934; Record of trial, p. 73.

a motion "that the consultations and opinions expressed in secret session be taken down by the reporters and printed in confidence for the use of Senators;" but on the next day, when the motion was called up, the Senate refused to consider it.

On May 29,[1] on motion of Mr. William Pinkney Whyte, of Maryland, it was

Ordered, That each Senator be permitted to file his opinion in writing upon the question of jurisdiction in this case on or before the 1st day of July, 1876, to be printed with the proceedings in the order in which the same shall be delivered, and the opinions pronounced in the Senate shall be printed in the order in which they were so pronounced.

Also the following resolutions, proposed by Mr. Allen G. Thurman, of Ohio, were, after minor amendments, agreed to,[2] the first by a vote of yeas 37, nays 29; the second by a vote of yeas 45, nays 4, and the third by 35 yeas to 22 nays:

Resolved, That in the opinion of the Senate William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

Resolved, That the House of Representatives and the respondent be notified that on Thursday, the lst day of June, 1876, at 1 o'clock p. m., the Senate will deliver its judgment, in open Senate, on the question of jurisdiction raised by the pleadings, at which time the managers on the part of the House and the respondent are notified to attend.

Resolved, That at the time specified in the foregoing resolution the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate, sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and, it being the opinion of the Senate that said plea is insufficient in law and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught;" which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid.

Before the second resolution was agreed to Mr. Isaac P. Christiancy, of Michigan, proposed the following resolution, but withdrew it after debate:

Whereas the Constitution of the United States provides that no person shall be convicted on impeachment without the concurrence of two-thirds of the members present; and whereas more than one-third of all the members of the Senate have already pronounced their conviction that they have no right or power to adjudge or try a citizen holding no public office or trust when impeached by the House of Representatives; and whereas the respondent, W. W. Belknap, was not when impeached an officer, but a private citizen of the United States, and of the State of Iowa; and whereas said Belknap has, since proceedings of impeachment were commenced against him, been indicted and now awaits trial before a judicial court for the same offenses charged in the articles of impeachment, which indictment is pursuant to a statute requiring in case of conviction (in addition to fine and imprisonment) in infliction of the utmost judgment which can follow impeachment in any case, namely, disqualification ever again to hold office:

Resolved, That in view of the foregoing facts it is inexpedient to proceed further in the case.

On June 1,[3] in open session of the Senate, sitting for the trial, the President pro tempore announced the decision on the question of jurisdiction:

On the question of jurisdiction raised by the pleadings in this trial, it is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against

[1] Senate Journal, pp. 943–947; Record of trial, pp. 76, 77.

[2] For the arguments on the questions involved in these resolutions, see section 2007 of this volume.

[3] Senate Journal, p. 947; Record of trial, pp. 158–161.

William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and, it being the opinion of the Senate that said plea is insufficient in law and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught.

2460. Belknap's impeachment continued.

The question of jurisdiction being settled, the Senate gave Secretary Belknap ten days to answer on the merits.

The Senate provided that in default of answer from respondent on the merits, the Belknap trial should proceed as on a plea of not guilty.

The Senate fixed the time of proccedings with the evidence in the Belknap trial before respondent's answer on the merits.

In the Belknap trial managers and counsel were directed to furnish one another with their lists of witnesses.

Thereupon Mr. William Pinkney Whyte, of Maryland, proposed the following:

Ordered, That W. W. Belknap is hereby ordered to plead further or answer the articles of impeachment within ten days from this date.

Mr. Francis Kernan, a Senator from New York, proposed this amendment:

Resolved, That in default of an answer within ten days by the respondent to the articles of impeachment, the trial shall proceed as on a plea of not guilty.

Mr. John Sherman, of Ohio, proposed this:

Ordered, That this court adjourn until Tuesday next, and in the meantime the defendant have leave to plead, answer, or demur herein.

The Senate, sitting for the trial, having adjourned to June 6,[1] on that day[2] the order proposed by Mr. Whyte came up for consideration, and on motion of Mr. Sherman it was amended by striking out the words "is hereby ordered to plead further," and inserting the words "have leave to plead further."

Thereupon, at the suggestion of Mr. Manager Scott Lord, Mr. Allen G. Thurman, a Senator from Ohio, proposed to amend by adding thereto:

And that, in default of an answer to the merits within ten days by respondent to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

This amendment was agreed to, yeas 35, nays 7.

Thereupon, after further amendment at the suggestion of Mr. Whyte, the order was agreed to by a vote of yeas 33, nays 4, in this form:

Ordered, That W. W. Belknap have leave to answer the articles of impeachment within ten days from this date; and that, in default of an answer to the merits within ten days by respondent to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

Thereupon Mr. Manager Lord proposed the following:

Resolved, That on the 6th day of July, 1876, the Senate sitting as a court of impeachment will proceed to hear the evidence on the merits in the trial of this case.

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[1] Senate Journal, pp. 948–951; Record of trial, pp. 162–169.

[2] On this day also counsel for respondent raised a question affecting the recently made decision as to the jurisdiction.

Thereupon several propositions were made as to the time of proceeding with the evidence, the counsel for the respondent asking for a much longer time. Mr. Francis M. Cockrell, of Missouri, proposed June 19 instant [this day being the 6th], but the proposition was disagreed to, yeas 19, nays 27. A proposition made by Mr. George F. Edmunds, of Vermont, fixing the date as July 6 was agreed to, yeas 36, nays 9. Then the order was agreed to as follows:

Ordered, That on the 6th of July, 1876, at 1 o'clock p. m., the Senate sitting as a court of impeachment will proceed to hear the evidence on the merits of the trial in this case.

Then it was further

Ordered, That the managers furnish to the defendant, or his counsel, within four days, a list of witnesses, as far as at present known to them, that they intend to call in this case; and that, within four days thereafter, the respondent furnish to the managers a list of witnesses, as far as known, that he intends to summon.

Thereupon the Senate, sitting for the trial, adjourned to June 16, that day being selected in order to provide for the answer, which was to be filed within ten days, if at all.

2461. Belknap's impeachment continued.

In the Belknap trial respondent declined to plead on the merits, but filed a protest against the continuance of the trial.

In the Belknap trial the right of the Senate to take jurisdiction by a majority vote was the subject of protest.

A protest filed on behalf of respondent in the Belknap trial was signed by respondent and his counsel.

The Senate, after debate and close division, permitted the filing of a protest by respondent in the Belknap trial.

The Senate considered in secret session the protest of respondent in the Belknap impeachment.

On June 16,[1] Mr. Jeremiah S. Black, of counsel for the respondent, announced that they declined to put in any plea, but asked that this paper be filed:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

And now, to wit, this 16th day of June, 1876, the said William W. Belknap comes into court, and being called upon to plead further to the said articles of impeachment, doth most humbly and with profoundest respect represent and show to this honorable court that on the 17th day of April last past he did plead to the said articles of impeachment, and in his said plea did allege that at the time when the House of Representatives of the United States ordered the said impeachment, and at the time when the said articles of impeachment were exhibited at the bar of the Senate against him, the said Belknap, he, the said Belknap, was and ever thereafter had been not a public officer of the United States, but a private citizen of the United States and of the State of Iowa; and that the plea aforesaid and all the matters and things therein contained were by him, said Belknap, fully verified by proofs, namely, by admissions of the said House of Representatives before said court; and the said Belknap further represents and shows to the court here that the truth and sufficiency of the plea pleaded by him as aforesaid were thereupon debated by the managers of the said House of Representatives and the counsel of this respondent, and thereupon submitted to this court for its determination and judgment thereon; and that such proceedings were thereupon had in this court on that behalf in this cause; that afterwards, to wit, on the

[1] First session Forty-fourth Congress, Senate Journal, pp. 952, 954, 955; Record of trial, pp. 169–173.

29th day of May last past, the members of this court, to wit, the Senators of the United States sitting as a court of impeachment as aforesaid, did severally deliver their several judgments, opinions, and votes on the truth and sufficiency in law of the said plea, when and whereby it was made duly to appear that only thirty-seven Senators concurred in pronouncing said plea insufficient or untrue; whereas twenty-nine Senators sitting in said court, by their opinions and votes, affirmed and declared their opinion to be that said plea was sufficient in law and true in point of fact; so that the said Belknap in fact saith that, on the day and year last aforesaid, twenty-nine Senators sitting in said court declared therein that the said Belknap having ceased to be a public officer of the United States by reason of his resignation of the office of Secretary of War of the United States before proceedings in impeachment were commenced against him by the House of Representatives of the United States, the Senate can not take jurisdiction of this cause; and that seven Senators did not vote upon said question, and only thirty-seven Senators, by their votes, declared their opinion to be that the Senate could take jurisdiction of said cause. And afterwards thirty-seven Senators sitting in said court, and no more, concurred in a resolution declaring that "in the opinion of the Senate William W. Belknap is amenable to trial on impeachment for acts done as Secretary of War, notwithstanding his resignation of said office," and that twenty-nine of said Senators sitting in said court, by their votes, affirmed and declared their opinion to be to the contrary thereof. And afterwards, on the day and year last aforesaid, it was proposed in said court that the President pro tempore of the said Senate should declare the judgment of the said Senate, sitting as aforesaid, to be that said plea of said respondent should be held for naught, and a vote was taken upon said proposition; and, as said vote showed, two-thirds of the said Senators present did not concur therein; but, on the contrary thereof, only thirty-six Senators did concur therein, and twenty-seven Senators then and there present, and voting on said proposition, did by their votes dissent from and vote against said proposition. All of which appears more fully and at large upon the record of this court in this cause, to which record he, said Belknap, prays leave to refer.

Therefore the said Belknap, referring to the Constitution of the United States, article 1, section 3, clause 6, which provides that "no person shall be convicted without the concurrence of two-thirds of the Members present" (meaning on trial on impeachment), avers that his said plea has not been overruled or held for naught by the Senate sitting as aforesaid, no such judgment having been concurred in by two-thirds of the Senators sitting in said court and voting thereon; but, on the contrary thereof, as the vote aforesaid fully shows, the said plea of the said respondent was sustained, and its truth in fact and sufficiency in law duly affirmed by the said Senate sitting as aforesaid, more than one-third of the Senators of said Senate, sitting as aforesaid, having by their votes so declared, to wit, twenty-seven Senators as aforesaid, and said twenty-seven Senators having by their votes declared and affirmed their opinion to be that said plea of said respondent was true in fact, and was sufficient in law to prevent the Senate sitting as aforesaid from taking further cognizance of said articles of impeachment.

Wherefore the respondent avers that he has already been substantially acquitted by the Senate sitting as aforesaid; and that he, the said respondent, is not bound further to answer said articles of impeachment; the said order requiring this respondent to answer over not having been made with the concurrence of two-thirds of the said Senators sitting as aforesaid and voting upon the question of the passage of said order; and said order having been passed with the concurrence only of less than two-thirds of the said Senators sitting as aforesaid and voting on the question of making and passing said order, the said order ought not to have been entered of record as an order of said court of impeachment in this cause; and said order appearing upon the whole record of said cause to be null and void, as an order of said court.

And the said respondent prays the court now here, as he has before formally moved said court, to vacate said order; and the said respondent hereby prays said court that he may be hence dismissed.

WILLIAM W. BELKNAP.

MATT. H. CARPENTER,
J. S. BLACK,
MONTGOMERY BLAIR,
Of Counsel for said Respondent.

Mr. George F. Edmunds, a Senator from Vermont, objected to the filing of the paper at present, and Mr. Manager Lord entered a formal objection:

Mr. President and Senators, the objection of the managers to filing this paper is that it is in direct contravention of the order of the Senate, as we view it. The order of the Senate was that on this day the respondent should plead to the merits or that the case should go to trial as upon a plea of not guilty. The Senate have not forgotten that the learned counsel who makes this motion stated distinctly in this tribunal at the last hearing that the question now raised could not be settled until the final determination of the case, for it is utterly impossible to tell at this time what the organization of the Senate will be then. The managers then said, and say now, that on this point we are prepared to argue the question at a proper time, but it seems entirely premature to attempt to argue it now, when it is impossible, as I have already said, to tell what the organization of the Senate will be when the verdict is to be taken. How many it will take to make two-thirds of the Members present at that time it is impossible now to tell; and I repeat the counsel stated emphatically that the question could not be determined until then. He now comes here, declines to plead, and asks that this rather extraordinary paper be filed. And we say there is no precedent for filing it, there is no reason for filing it, and it is a violation of the order of the Senate.

Mr. Montgomery Blair, of counsel for the respondent, said:

We wish a formal paper on the records of this body showing to the Senate and to the country the position and attitude we take upon that subject, and we think that now is the proper time. Of course, we do not say that we stand here to prevent the Senate from proceeding to the trial of the facts. We can not do that, because they have already said—and we take it that what they have said they mean—that, if we do not on this occasion file a plea to the merits of this case, they would proceed and put in a plea of the general issue for us themselves; and we expect that now, as my colleague has said to you. All we ask is that this paper, which states formally the attitude that we hold and shall claim to hold to the end of this trial, shall be noted on the records of this body. I think that any impartial tribunal would grant us that liberty of claiming the right to argue as matter of law that this court has already decided this question in its action upon the special plea heretofore put in. I do not call for any argument from the managers now or at any time hereafter (if they choose to permit it) upon this question.

On June 19,[1] in secret session, Mr. John Sherman, a Senator from Ohio, submitted an order, of which the first portion was as follows:

Ordered, That the paper presented by the defendant on the 16th instant be filed in this cause.

Mr. Allen G. Thurman, of Ohio, moved to amend by inserting after the word "be" the word "not." The amendment was disagreed to, yeas 24, nays 24.

Thereupon the order as proposed by Mr. Sherman was agreed to, yeas 26, nays 24. So the paper was ordered filed.

2462. Belknap's impeachment continued.

After settling the question of jurisdiction, the Senate overruled respondent's motion for a continuance of the Belknap trial.

The Senate determined that an impeachment might proceed only while Congress was in session.

On June 17[2] Mr. Black, of counsel for the respondent, proposed this order:

Ordered, That this case be now continued until some convenient day in the month of November.

On June 19 the Senate, in secret session, considered the order, and on motion of Mr. Allen G. Thurman, of Ohio, it was, without division,

Ordered, That the application of the respondent for postponement of the time for proceeding with trial be overruled.

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[1] Senate Journal, pp. 954, 955; Record of trial, pp. 172, 173.

[1] Senate Journal, pp. 952–954; Record of trial, pp. 171, 172.

On June 16 [1] Mr. Manager Lord had proposed the following:

Ordered, That the respondent, W, W. Belknap, shall not be allowed to make any further plea or answer to the articles of impeachment preferred against him on the part of the House of Representatives, but that the future proceedings proceed as upon a general plea of not guilty.

But subsequently he modified it to this form:

Ordered, That W. W. Belknap having made default to plead or answer to the merits within the time fixed by the order of the Senate, the trial proceed as upon a plea of not guilty, in pursuance of the former order.

On June 19 Mr. John Sherman, of Ohio, in secret session, presented an order, the first portion of which provided for the filing of the paper presented by counsel for respondent, and the second portion of which,

Ordered, That * * * the defendant having' failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty.

Mr. William B. Allison, of Iowa, proposed an amendment substituting "19th day of November" for "6th day of July." This was disagreed to, yeas 9, nays 37.

On motion of Mr. Conkling, by a vote of yeas 21, nays 19, the words "*Provided*, That the impeachment can only proceed while Congress is in session" were added.

Then, as amended, the portion of the order as given was agreed to, as follows, by a vote of yeas 21, nays 16:

And the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty: *Provided*, The impeachment can only proceed while Congress is in session.

2463. Belknap's impeachment continued.

The Senate provided that subpoenas for respondent's witnesses in the Belknap trial should be issued on recommendation of a committee.

An approved number of witnesses for respondent in the Belknap trial were summoned at public expense.

Thereupon Mr. George F. Edmunds proposed the following, which was agreed to [2] by unanimous consent:

Ordered, That the Secretary issue subpoenas that may be applied for by the respondent for such witnesses to be summoned at the expense of the United States as shall be allowed by a committee, to consist of Senators Frelinghuysen, Thurman, and Christiancy, and that subpoenas for all other witnesses for the respondent shall contain the statement that the witnesses therein named are to attend upon the tender on behalf of the respondent of their lawful fees.

This order was apparently in response to a letter from the Chief Clerk of the Senate, presented on June 16,[3] transmitting a list of witnesses to be summoned on behalf of the respondent, which list had been filed in his office.

2464. Belknap's impeachment continued.

The opening address and presentation of testimony in the Belknap impeachment.

Counsel for respondent made no opening address before presenting testimony in the Belknap trial.

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[1] Senate Journal, pp. 952, 954, 959; Record of trial, pp. 170, 173.

[2] Senate Journal, p. 959; Record of trial, p. 174.

[3] Senate Journal, p. 952; Record of trial, p. 170.

Forms and ceremonies of opening the proceedings of the Senate on a day of the Belknap trial.

The Senate daily informed the House of its readiness to proceed with the Belknap trial.

On July 6,[1] the day set for the trial to proceed, the proceedings opened with the usual formalities. In the Senate the President pro tempore said:

> The hour of 12 o'clock having arrived, pursuant to the order of the Senate made on June 19 the legislative and executive business of the Senate will be suspended and the Senate will proceed to the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The usual proclamation was made by the Sergeant-at-Arms.

Messrs. Lord, Lynde, McMahon, Jenks, Lapham, and Hoar, of the managers on the part of the House of Representatives, appeared and were conducted to the seats assigned them.

The respondent appeared with his counsel, Messrs. Blair, Black, and Carpenter.

The President pro tempore said:

> The Secretary will notify the House of Representatives that the Senate is ready to proceed with the trial and that seats are provided for their accommodation.[2]

The Secretary read the Journal of proceedings of the Senate sitting for the trial of the impeachment of William W. Belknap of Monday, June 19, 1876.

The President pro tempore said:

> The Senate in trial is now ready to proceed.

Mr. Manager William P. Lynde then made the opening address on behalf of the House of Representatives, after which witnesses were called and sworn, and after examination by the managers were cross-examined by counsel for the respondent.

On July 12[3] the testimony presented by the managers was closed, and the President pro tempore said:

> The defense will proceed, the case being closed on the part of the managers.

Thereupon at once, without any opening address, the counsel for the respondent began the introduction of testimony.

On July 19[4] the testimony for the respondent was concluded. The managers announced that they had nothing in rebuttal.

2465. Belknap's impeachment continued.

In the Belknap trial the Senate permitted three managers and three counsel to argue on the final question, in such order as might be agreed on.

The Senate declined to restrict the time of final arguments in the Belknap trial.

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[1] Senate Journal, p. 960; Record of trial, pp. 174, 175.

[2] This message was sent daily in accordance with rule. The House, however, had voted not to attend.

[3] Senate Journal, p. 975; Record of trial, p. 256.

[4] Senate Journal, p. 983; Record of trial, p. 285.

In the Belknap trial the closing speech of the final arguments was by one of the managers.

The illness of counsel or managers was certified to as reason for disarranging the order of final argument in the Belknap trial.

In the Belknap trial the witnesses were discharged before the final arguments.

Thereupon [1] Mr. Matt. H. Carpenter, of counsel for the respondent, asked for an order permitting three of the counsel for the respondent to be heard in final argument instead of two, as provided in Rule XXI.

Mr. George F. Edmunds, a Senator from Vermont, offered this order:

Ordered, That three persons on each side be allowed six hours for summing up, to be arranged between them.

Mr. Roscoe Conkling, a Senator from New York, proposed to amend by striking out all after the word "*Ordered*," and inserting:

That three managers and three counsel for the respondent may be heard in the concluding argument, in the order in which they state to the Senate they have agreed.

Mr. Edmunds moved to amend the amendment of Mr. Conkling by adding—

and that the argument be limited to six hours on each side.

This amendment was disagreed to, ayes 15, noes 29.

Then, without division, Air. Conkling's substitute was agreed to, and the original order as amended by the substitute was also agreed to without division.

Then the President pro tempore said:

Will the Senate allow the Chair to state that the Chair understands the witnesses on both sides can be discharged? He makes that announcement so that they can leave.

On July 20 [2] the President pro tempore announced that the arguments would begin, and that the managers would have the opening. Then it was announced that as Mr. Matt. H. Carpenter, of counsel for the respondent, was detained by illness, it had been arranged between the managers and counsel for respondent that Mr. Montgomery Blair, of counsel for the respondent, should open, thereby relieving Mr. Carpenter of the misfortune of not hearing the speech of the manager, to whom he was to reply. At the conclusion of Mr. Blair's address a motion to adjourn was disagreed to. Thereupon Mr. Jeremiah S. Black, of counsel for respondent, said it would be a hardship to have an argument from the managers in the absence of Mr. Carpenter. It was suggested that an argument made this day would be in print in the morning in time for counsel to examine it before replying. Thereupon Mr. Manager William P. Lynde proceeded in argument.

On the next day, July 21,[3] Mr. Manager Lynde having concluded his argument on the preceding day, Mr. Black, of counsel for the respondent, submitted a motion that the Senate sitting for the trial adjourn until the 24th, justifying the motion by the following affidavit:

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[1] Senate Journal, p. 983; Record of trial, pp. 285, 286.

[2] Senate Journal, p. 983; Record of trial, p. 287.

[3] Senate Journal, p. 994; Record of trial, p. 298.

United States Senate sitting as a court of impeachment.

THE UNITED STATES *v.* WILLIAM W. BELKNAP.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me D. W. Bliss, who, being sworn according to law, says that he has been the family physician of Matt. H. Carpenter for seven years when in Washington; that he is now under my care and seriously ill with acute gastritis (inflammation of the stomach); that he has been confined to his bed for the past thirty-six hours, and is not able to leave his room today, and I state my belief that he will be able to resume his duties on Monday, the 24th instant.

D. W. BLISS, M. D.

Subscribed and sworn before me this 21st day of July, A. D. 1876. [Seal]

A. E. BOONE, *Notary Public.*

Mr. Black's motion was agreed to, yeas 34, nays 5.

On the assembling of the Senate for the trial, on July 24,[1] Mr. Manager Scott Lord presented an affidavit showing:

United States Senate sitting as a court of impeachment.

THE UNITED STATES *v.* WILLIAM W. BELKNAP.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me, D. W. Bliss, M. D., a practicing physician, who, being sworn according to law, said that Hon. A. G. Lapham has been under his professional care during the past three days and unable to leave his bed by reason of acute cellulitis and perineal abscess, and he will not, in my opinion, be able to resume his official duties before Wednesday, the 26th instant.

D. W. BRASS, M. D.

Sworn and subscribed to before me this 24th day of July, 1876.

A. E. BOONE, *Notary Public.*

Mr. Manager Lord stated that the managers were prepared to go on in Mr. Lapham's absence, but preferred not to, and asked an adjournment to the 26th. The Senate declined to adjourn, whereupon Mr. Manager Lord asked that Mr. Lapham's argument might be printed. And the argument was ordered printed.

Mr. Manager George A. Jenks next proceeded in argument,[2] and was followed[3] by Mr. Jeremiah S. Black, of counsel for respondent.

On July 25 and 26[4] Mr. Matthew H. Carpenter, of counsel for respondent, submitted argument.

Following Mr. Carpenter, Mr. Manager Scott Lord, on behalf of the House of Representatives, closed the argument.[5]

2466. Belknap's impeachment continued.

The Senate in secret session adopted an order to govern the voting on the articles in the Belknap impeachment.

There was much deliberation over the form of the final question in the Belknap trial.

The voting on the articles in the Belknap impeachment was without debate, but each Senator was permitted to file an opinion.

The Senate in the Belknap trial declined to renounce the practice of deliberating in secret session.

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[1] Senate Journal, p. 985; Record of trial, p. 299.

[2] Record of trial, pp. 306–313.

[3] Record of trial, pp. 314–318.

[4] Record of trial, pp. 319–334.

[5] Record of trial, pp. 334–341.

On July 31,[1] as the Senate sitting for the trial was about to determine its method of procedure, Mr. Hannibal Hamlin, a Senator from Maine, proposed such amendment to the rules as would prevent secret sessions; but the Senate, by a vote of 23 yeas to 32 nays, declined to consider it. Then, on motion of Mr. George F. Edmunds, of Vermont, and by a vote of yeas 32, nays 25, the doors were closed for deliberation. Thereupon the following occurred:

Mr. Roscoe Conkling, of New York, submitted the following order for consideration:

Ordered, That when called to vote whether the articles of impeachment or either of them are sustained, any Senator who votes in the negative shall be at liberty to state, if he chooses, that he rests his vote on the absence of guilt proved in fact, or on the want of jurisdiction, as the case may be; and the vote shall be entered in the Journal accordingly.

Mr. Edmunds moved to amend by striking out all after the word "ordered" and inserting:

That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment. The presiding officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, viz: "Mr. Senator ——, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime or high misdemeanor, as the charge may be, as charged in this article?" Whereupon such Senator shall rise in his place and answer "guilty" or "not guilty" only. And each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

Mr. John Sherman, of Ohio, moved to amend the amendment of Mr. Edmunds by striking out the word "only" after "guilty," and in lieu thereof inserting:

And each Senator shall be at liberty to state the ground of his vote in a single sentence, which shall be entered on the Journal.

Mr. Aaron A. Sargent, of California, moved to amend the amendment of Mr. Sherman by inserting in lieu of the words proposed to be inserted:

Any Senator who votes in the negative shall be at liberty to state if he chooses that he rests his vote on the absence of guilt proved in fact, or on the want of jurisdiction, as the case may be; and any Senator who votes in the affirmative may add that he holds the vote of a majority heretofore in favor of jurisdiction binding on him, and the vote shall be entered on the Journal accordingly.

Mr. Edmunds moved to amend the order proposed by Mr. Conkling by striking out all after the word "that" and in lieu thereof inserting:

Each Senator may in giving his vote state his reasons therefor, occupying not more than one minute, which reasons shall be entered in the Journal in connection with his vote.

Mr. Conkling moved to amend the amendment of Mr. Edmunds by adding thereto the words:

And immediately following his name and vote.

The amendment of Mr. Conkling to Mr. Edmunds's amendment was agreed to.

On the question to agree to the order of Mr. Edmunds as amended, it was determined in the affirmative.

Mr. Edmunds then withdrew the amendment first offered by him to the order proposed by Mr. Conkling.

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[1] Senate Journal, pp. 987–991; Record of trial, pp. 341, 342.

The question then being on the order of Mr. Conkling as amended, as follows:

Ordered, That each Senator may, in giving his vote, give his reasons therefor, occupying not more than one minute, which reasons shall be entered in the Journal in connection with his vote and immediately following his name and vote,

It was determined in the affirmative.

Mr. Edmunds submitted the following order for consideration:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote without debate on the several articles of impeachment. The presiding officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, namely: "Mr. Senator ———, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime," or "high misdemeanor," as the charge may be, "as charged in this article?" Whereupon such Senator shall rise in his place and answer "guilty" or "not guilty," with his reasons, if any, as provided in the order already adopted; and each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

Mr. John J. Ingalls, of Kansas, moved to amend the order by striking out all after the word "impeachment," in line 4, and in lieu thereof inserting:

And that in taking the final question the presiding officer shall call each Senator by name in alphabetical order and upon each article propose as follows:

"Mr. Senator ———, how say you, is the impeachment under this article sustained?"

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may, as provided in the order already adopted, state the ground of his vote.

The question being taken on this amendment by yeas and nays, resulted—yeas 24, nays 27.

So the amendment of Mr. Ingalls was rejected.

The question recurring on the order of Mr. Edmunds, Mr. William B. Allison, of Iowa, demanded a division of the question; and the question being put on the first branch of the order, namely:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment,

It was agreed to.

The question being on the second clause of the order of Mr. Edmunds, Mr. Ingalls moved to amend the clause by inserting in lieu thereof the following:

And that in taking the final question the presiding officer of the Senate shall call each Senator by name in alphabetical order, and upon each article propose as follows, that is to say: "Mr. Senator ——, how say you, is the impeachment under this article sustained?"

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may also, as provided in the order already adopted, state the grounds of his vote; and each Senator may, within two days thereafter, file his opinion in writing, to be published in the printed proceedings of the case.

Mr. Edmunds demanded a division of Mr. Ingalls's amendment; and the question being put on the first branch thereof, it was disagreed to—yeas 24, nays 26.

The question being put in the second branch of the amendment of Mr. Ingalls—namely, strike out all of the order of Mr. Edmunds after "impeachment" and in lieu thereof insert—

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may also, as provided in the order already adopted, state the grounds of his vote; and each Senator may, within two days thereafter, file his opinion in writing, to be published in the printed proceedings of the case,

It was disagreed to.

The question recurring on the order of Mr. Edmunds, it was agreed to, as follows:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment. The Presiding Officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, namely: "Mr. Senator ———, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime" or "high misdemeanor," as the charge may be, "as charged in this article?" Whereupon such Senator shall rise in his place and answer "guilty" or "not guilty" with his reasons, if any, as provided in the order already adopted.

And each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

The Senate, sitting for the trial, thereupon adjourned.

2467. Belknap's impeachment continued.

The managers alone attended in the Senate on the day the Senate rendered judgment in the Belknap case.

The respondent in the Belknap trial attended throughout until the time of rendering judgment.

The President pro tempore announced the result of the vote on each article and the acquittal of respondent on each.

The vote on the final question in the Belknap trial was affected conclusively by opinions as to the question of jurisdiction.

Having announced the result of the voting in the Belknap case, the President pro tempore directed the entry of a judgment of acquittal.

The adjournment without day of the Senate sitting for the Belknap trial was pronounced after vote of the Senate.

On August 1 [1] the Senate, sitting for the trial, began its proceedings with the usual formalities. The usual message [2] was sent to the House of Representatives; but as usual the managers alone appeared, the House adhering to its resolution made early in the trial. Mr. Matt. H. Carpenter, of counsel for the respondent, appeared. The respondent himself, who had attended with his counsel throughout the trial, was not present either on this or the preceding day.

After the Journal had been read the President pro tempore announced that according to the order already adopted the Senate would now proceed to vote on the several articles. The voting then began, the Secretary reading each article, and each Senator rising in his place and pronouncing his decision, either with or without the permitted explanation.

The result of the voting was as follows:

	Guilty.	Not guilty.
Article I	35	25
Article II	36	25
Article III	36	25
Article IV	36	25
Article V	37	25

[1] Senate Journal, pp. 992–1012; Record of trial, pp. 342–357.

[2] House Journal, p. 1361.

After the vote on each article the President pro tempore made announcement in form as follows:

On this article 37 Senators vote "guilty" and 25 Senators vote "not guilty." Two-thirds of the Senators present not sustaining the fifth article, the respondent is acquitted on this article.

An analysis of the reasons given with the votes shows that of those voting "guilty," 2 believed that the Senate had no jurisdiction, but gave their verdict in good faith, since by vote jurisdiction had been assumed. Of those voting "not guilty," 3 announced that they did so on the evidence, while 22 announced that they voted not guilty because they believed the Senate had no jurisdiction. One Senator stated that he declined to vote because he believed they did not have jurisdiction. He did not ask to be excused from voting.

At the conclusion of the voting the President pro tempore announced:

This concludes the action of the Senate on all the articles of the impeachment. The Chair will call the Senate's attention to Rule 22, which provides:

"And if the impeachment shall not upon any of the articles presented be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered."

If there be no objection to complying therewith, the Secretary will be directed to enter a judgment of acquittal. Is there objection? The Chair hears none, and it will be so entered.

The Senate, sitting for the impeachment, then voted, on motion of Air. George F. Edmunds, a Senator from Vermont, to adjourn without day, and the President pro tempore said:

The Senate sitting for the trial of the impeachment of William W. Belknap, late Secretary of War, stands adjourned without day.

2468. Belknap's impeachment continued.

At the conclusion of the Belknap trial the managers presented to the House a written report of the judgment and certain features of the trial.

On August 2,[1] in the House of Representatives, Mr. Manager Scott Lord presented the following report in writing, which was read to the House and ordered printed:

That the defendant, William W. Belknap, has been acquitted on all the articles presented against him, less than two-thirds of the Senators present voting "guilty." The final vote was 61; 37 of the Senators voted "guilty," 23 "not guilty for want of jurisdiction," 1 "not guilty,"[2] I and I criticized a portion of the articles of impeachment, and stated that the offenses charged in other of the articles were not proved beyond a reasonable doubt. A change of 5 votes would have resulted in the conviction of the defendant by the two-thirds vote required by the Constitution.

The question of jurisdiction, raised by the plea of the defendant, was the first point presented to the court of impeachment. After a protracted and exhaustive argument, the court held that it had jurisdiction, notwithstanding the resignation of the defendant.; and the managers proceeded to prove the offenses charged in the articles of impeachment, and after proving them so conclusively that only two[3] Senators in any manner questioned the guilt of the defendant, the minority of the Senate refused to be governed by the deliberate judgment of the majority, that it had jurisdiction, and, in the form and mode before referred to, prevented the conviction of the defendant.

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[1] House Journal, p. 1373, Record; pp. 5082, 5083.

[2] Three voted "not guilty"—Messrs. Conover, Patterson, and Wright. (See pp. 355–357 of Record of trial.) The number voting "not guilty for want of jurisdiction" was 22, and 1, Jones, of Florida, declined to vote because he considered the Senate had no jurisdiction.

[3] Three Senators voted not guilty.

While exercising the power to vote "not guilty," it was practically asserted that there was no converse to the proposition, and therefore that Senators had no legal right to vote "guilty," however satisfied of the guilt of the accused.

Notwithstanding this result, the managers believe that great good will accrue from the impeachment and trial of the defendant. It has been settled thereby that persons who have held civil office in the United States are impeachable, and that the Senate has jurisdiction to try them, although years may elapse before the discovery of the offense or offenses subjecting them to impeachment. To such as are or may hereafter be among the civil officers of the United States, who have no higher plane of integrity than the rule that "honesty is the best policy," and it is conceded they are comparatively few, this decision will be a constant warning that impeachable offenses, though not discovered for years, may result in impeachment, conviction, and public disgrace. To settle this principle, so vitally important in securing the rectitude of the class of officers referred to, is worth infinitely more than all the time, labor, and expense of the protracted trial closed by the verdict of yesterday.

This report was evidently unanimous, and at the conclusion of the reading Messrs. Managers George F. Hoar and Elbridge G. Lapham addressed the House briefly affirming strongly the positions taken by the report.

Chapter LXXVIII.

THE IMPEACHMENT AND TRIAL OF CHARLES SWAYNE.

2469. The impeachment and trial of Charles Swayne, judge of the northern district of Florida.

A Member, rising in his place, impeached Judge Swayne both on his own responsibility and on the strength of a legislative memorial.

Discussion as to the degree of definiteness of charges required to justify the House in ordering an investigation.

The House declined to have the impeachment of Judge Swayne considered by a committee before ordering an investigation.

Form of resolution instructing the Judiciary Committee to examine the charges against Judge Swayne.

On December 10, 1903,[1] Mr. William B. Lamar, of Florida, claiming the floor for a question of privilege, said:

Mr. Speaker, I believe that the impeachment of a civil officer by this House is a question of privilege. I have made a joint resolution adopted by the legislature of the State of Florida a part of the resolution which I desire to submit to this House for its adoption. In pursuance of this joint resolution of the legislature of the State which I have the honor in part to represent, I impeach Charles Swayne, judge of the northern district of the State of Florida, of high crimes and misdemeanors; and the resolution which I have prepared in accordance with former proceedings of this House in like cases:

[1] Second session Fifty-eighth Congress, Journal, p. 37–1 Record, pp. 95, 103.

"Whereas the following joint resolution was adopted by the legislature of the State of Florida:

"Senate joint resolution in reference to Charles Swayne, judge of the United States court for the northern district of Florida.

"Be it resolved by the legislature of the State of Florida:

"Whereas Charles Swayne, United States district judge of the northern district of Florida, has so conducted himself and his court as to cause the people of the State to doubt his integrity and to believe that his official actions as judge are susceptible to corrupt influences and have been so corruptly influenced;

"Whereas it also appears that the said Charles Swayne is guilty of a violation of section 551 of the Revised Statutes of the United States in that he does not reside in the district for which he was appointed and of which he is judge, but resides out of the State of Florida and in the State of Delaware or State of Pennsylvania, in open and defiant violation of said statute, and has not resided in the northern district of Florida, for which he was appointed, in ten years, and is constantly absent from said district, only making temporary visits for a pretense of discharging his official duties;

"Whereas the reputation of Charles Swayne as a corrupt judge is very injurious to the interests of the entire State of Florida, and his constant absence from his supposed district causes great sacrifice of their rights and annoyance and expense to litigants in his court;

"Whereas it also appears that the said Charles Swayne is not only a corrupt judge, but that he is ignorant and incompetent, and that his judicial opinions do not command the respect or confidence of the people;

"Whereas the administration of the United States bankruptcy act in the court of said Charles Swayne and by his appointed referee has resulted in every instance in the waste of the assets of the alleged bankrupt by being absorbed in unnecessary costs, expenses, and allowances, to the great wrong and injury of creditors and others, until such administration is, in effect, legalized robbery and a stench in the nostrils of all good people:

"Be it resolved by the house of representatives of the State of Florida (the senate concurring), That our Senators and Representatives in the United States Congress be, and they are hereby, requested to cause to be instituted in the Congress of the United States proper proceedings for the investigation of the proceedings of the United States circuit and districts court for the northern district of Florida by Charles Swayne as United States judge for the northern district of Florida, and of his acts and doings as such judge, to the end that he may be impeached and removed from such office.

"Be it resolved further, That the secretary of state of the State of Florida be, and is hereby, instructed to certify to each Senator and Representative in the Congress of the United States, under the great seal of the State of Florida, a copy of this resolution and its unanimous adoption by the legislature of the State of Florida.

"STATE OF FLORIDA, OFFICE OF THE SECRETARY OF STATE.

"UNITED STATES OF AMERICA, *State of Florida, ss:*

"I, H. Clay Crawford, secretary of state of the State of Florida, hereby certify that the foregoing is a true and exact copy of senate joint resolution in reference to Charles Swayne, judge of the United States court for the northern district of Florida, passed by the legislature of Florida, session of 1903, and on file in this office.

"Given under my hand and the great seal of the State of Florida at Tallahassee, the capital, this the 7th day of September, A. D. 1903.

[L. S.]

"'H. CLAY CRAWFORD, *Secretary of State.*

"Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Charles Swayne, judge of the United States district court for the northern district of Florida, and say whether said judge has held terms of his court as required by law; whether he has continuously and persistently absented himself from the said State, and whether his acts and omissions in his office of judge have been such as in any degree to deprive the people of that district of the benefits of the court therein to amount to a denial of justice; whether the said judge has been guilty of corrupt conduct in office, and whether his administration of his office has resulted in injury and wrong to litigants of his court.

"And in reference to this investigation the said committee is hereby authorized and empowered to send for persons and papers, administer oaths, take testimony, and to employ a clerk and stenographer, if necessary, to send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. And the said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant-at-arms, by himself or deputy, who shall serve the processes of said committee and subcommittee and execute its orders, and shall attend the sittings of the same as ordered and directed thereby. And that the expense of such investigation shall be paid out of the contingent fund of the House."

Mr. Charles H. Grosvenor, of Ohio, raised the question that the specifications made by the Member from Florida were not sufficiently specific; and after debate Mr. Lamar said:

I charge this judge, first, with continued, persistent, and, if you please, pernicious absenteeism from his district; second, with corrupt official conduct, based upon several matters. * * * Third, I charge Judge Swayne with maladministration of judicial matters in his court, so much so as to embarrass bankrupts and annihilate the assets of litigants and others appearing within his jurisdiction

Renewed objection being made that charges should be more definite and better substantiated in order to initiate proceedings so important, Mr. John F. Lacey, of Iowa, moved that the resolution be referred to the Committee on the Judiciary.

After debate the motion of Mr. Lacey was disagreed to, ayes 53, noes 129.

The resolution was then agreed to without division.

2470. The Swayne impeachment continued.

The resolution impeaching Judge Swayne was reported from a divided committee.

The committee investigating Judge Swayne took testimony in the Judge's district as well as in Washington.

In the investigation of the conduct of Judge Swayne the accused was present in person with counsel and argued his own case.

In investigating the conduct of Judge Swayne both complainants and accused were permitted to introduce sworn testimony.

On March 25, 1904, Mr. Henry W. Palmer, of Pennsylvania, from the Committee on the Judiciary, presented the report [1] of that committee. The report says:

Testimony was taken in Pensacola, Tallahassee, and Jacksonville, Fla., and in the city of Washington upon several days. At all the hearings the Hon. Charles Swayne was present himself and by counsel, except at the last hearings in Washington, when he appeared in propria persona and argued his case before the subcommittee. All the witnesses asked for by the complainants and the respondent were sworn. Their evidence was reduced to writing and is presented with this report.

Specifications of the particular matters covered by the general charges were furnished the committee by the complainants. They were as follows:

Specification 1.—That the said Charles Swayne, judge of the United States court in and for the northern district of Florida, for ten years, while he has been such judge, was a nonresident of the State of Florida, and resided in the State of Delaware. That he never pretended to reside in Florida until May, 1903. That during said time of his nonresidence, by such nonresidence, he has caused great inconvenience, annoyance, injury, and expense to litigants in his court, not so much by failure to hold terms of court as by failing to be in reach for the disposition of admiralty and chancery matters and other matters arising between terms of court needing disposition.

Specification 2.—That said Charles Swayne, as such judge, appointed one B. C. Tunison as United States commissioner; that it was charged that it was an improper appointment, and that testimony was offered to such effect before said appointment.

[1] House Report No. 1905.

Specification 3.—That the said Charles Swayne, as such judge, appointed and maintains one John Thomas Porter as United States commissioner at Marianna, but that said Porter does not reside at Marianna, but at Grand Ridge, 16 miles away, and is never at Marianna or at his office except when notified of an arrest, necessitating people having business with the United States commissioner, often at expense and inconvenience, to go to Grand Ridge, and necessitating the holding of prisoners often for a day or two, at their inconvenience, and in imprisonment at the expense of the Government, until said Porter sees fit to come to Marianna.

The said Swayne, although there is great necessity for a commissioner at Marianna, has refused to appoint such.

Specification 4.—That said Swayne, in the administration of his court, has been guilty of great partiality and favoritism to one B. C. Tunison, mentioned in specification No. 2, and a practicing attorney in said court. That so great and well known has this partiality and favoritism become that it has created the general impression that to succeed in that court before the said Swayne it is necessary to retain the said Tunison.

Specification 5.—That said Swayne has been guilty of oppression and tyranny in his office, incorrectly and oppressively and without just cause imprisoning one W. C. O'Neal, one E. T. Davis, and one Simeon Belding upon feigned, fictitious, and false charges of contempt of his said court.

Specification 6.—That said Charles Swayne has willfully, negligently, and corruptly maladministered bankruptcy cases in his court, to the extent that the assets of bankrupts have, in all or nearly all cases, been squandered and dissipated in paying extraordinary fees and expenses, and never paying any dividends to creditors.

Specification 7.—That said Charles Swayne was guilty of oppression and tyranny in his office to one Charles Hoskins, upon an alleged contempt resulting in the suicide of the said Hoskins, and said alleged contempt proceedings being brought for the purpose of breaking down and injuring one W. R. Hoskins, who was charged in said court with involuntary bankruptcy, but who was defending and resisting such charge.

Specification 8.—That said Swayne corruptly purchased a house and lot in the city of Pensacola while the said house and lot was in litigation in his court.

Specification 9.—Ignorance and incompetency to hold said position. Under this specification many illustrations could be given, among them a case in which he took jurisdiction in admiralty in violation of the treaty between the United States and Sweden and Norway; and in one case, that of Sweet *v.* Owl Commercial Company, in which he charged the jury to exactly and diametrically conflicting theories of law.

Specification 11.—That said Swayne, by reason of his absence from the State, failed to hold the term of court which should have been held at Tallahassee in the fall of the year 1902, during the months of November or December.

Specification 12.—That the said Charles Swayne has been guilty of conduct unbecoming an upright judge, in that he has procured as indorsers on his note, for the purpose of borrowing money, attorneys and litigants having cases pending in his court.

Specification 13.—That the said Charles Swayne has been guilty of maladministration in the affairs of the conduct of his office; that he has discharged people convicted of crime in his court. Illustration, case of Alonzo Love, convicted in the year of 1902, of perjury.

The committee found that the evidence sustained the first, fourth, fifth, and seventh specifications, and concluded:

The charges and specifications not covered by the foregoing findings were not proved by sufficient evidence to warrant action upon them.

Upon the whole case it is plain that Judge Swayne has forfeited the respect and confidence of the bar of his court and of the people of his district who do business there. He has so conducted himself as to earn the reputation of being susceptible to the malign influence of a man of notoriously bad character. He has shown himself to be harsh, tyrannical, and oppressive, unmindful of the common rule of a just and upright judge. He has continuously and persistently violated the plain words of a statute of the United States, and subjected himself to punishment for the commission of a high misdemeanor. He has fined and imprisoned members of his bar for a constructive contempt without the authority of law and without a decent show of reason, either through inexcusable ignorance, a malicious intent to injure,

or a wanton disposition to exercise arbitrary power. He has condemned to a term of imprisonment in the county jail a reputable citizen of the State of Florida over whom he had no jurisdiction, who was guilty of no thought of a contempt of his court, for no offense against him or in the presence of the court, or "in obstruction of any order, rule, command, or decree," and after the accused had purged himself on oath.

For all those reasons Charles Swayne has been guilty of misbehavior in his office of judge and grossly violated the condition upon which he holds this honorable appointment. The honor of the judiciary, the orderly and decent administration of public justice, and the welfare of the people of the United States demand his impeachment and removal from the high place which his conduct has degraded.

It is vitally necessary to maintain the confidence of the people in the judiciary. A weak executive or an inefficient or even dishonest legislative branch may exist, for a time at least, without serious injury to the perpetuity of our free institutions, but if the people lose faith in the judicial branch, if they become convinced that justice can not be had at the hands of the judges, the next step will be to take the administration of the law into their own hands and do justice according to the rule of the mob, which is anarchy, with which freedom can not coexist.

The Committee on the Judiciary recommend the adoption of the following resolution:

"Resolved, That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high misdemeanor."

A minority of the committee composed of Messrs. J. N. Gillett, of California, Robert M. Nevin, of Ohio, D. S. Alexander, of New York, George A. Pearre, of Maryland, Charles E. Littlefield, of Maine, and Richard W. Parker, of New Jersey, joined in minority views dissenting from the conclusions of the committee, and holding that the evidence did not justify impeachment.

2471. The Swayne impeachment continued.

The impeachment of Judge Swayne was postponed to the next session of Congress for further investigation.

In the second investigation Judge Swayne testified on his own behalf and was cross-examined.

The rule as to the pertinency of evidence to the charges was enforced in the investigation of Judge Swayne's conduct.

The closing arguments in the Swayne investigation were heard before the subcommittee which had taken the evidence.

On April 7, 1904,[1] Mr. Palmer offered as a question of privilege the following, which was agreed to without division:

Resolved, That the consideration of the resolution (No. 274) reported by the Committee on the Judiciary in the matter of the impeachment of Charles Swayne, judge of the district court of the United States in the northern district of Florida, be postponed until the 13th day of December, 1904, and that the Committee on the Judiciary be, and it is hereby, authorized to take such further testimony as may be offered by the complainants or the respondent, and report the same to the House, with its conclusions thereon. The said committee and subcommittee shall have all the authority conferred by the original resolution (No. 86), and the further authority to take testimony when Congress is not in session.

In accordance with this resolution a subcommittee composed of Messrs. Palmer, Clayton, and Gillett took testimony at various times from February 13 to November 29, 1904.[2] In the course of these proceedings[3] Judge Swayne, besides having

[1] Record, p. 4431.

[2] See published evidence, "Washington: Government Printing Office, 1904."

[3] See page 211 of testimony.

counsel, also appeared for himself, offered evidence, and cross-examined witnesses; and Hon. B. S. Liddon appeared for the complainants. In the course of the testimony Judge Swayne made "a statement to the stenographer," which is published with the evidence, and later it appears that "Charles Swayne, having been recalled, testified as follows."[1] After he had concluded his direct statement he was cross-examined by Mr. Liddon at length.[2]

As to the character of the testimony permitted in the examination before the subcommittee, the chairman, Mr. Palmer, stated[3] that no testimony would be received on irrelevant questions or on charges which, if proven, would not be considered grounds of impeachment. Hearsay testimony was, on objection, ruled out.[4] On the question of relevancy one notable ruling was made.[5] Judge Swayne was charged with having certified as expenses sums greater than he had actually expended. His counsel attempted to introduce documents to show that other Federal judges did likewise. This evidence was excluded by the subcommittee on the ground that it was not relevant to Judge Swayne's case. In the course of the proceedings a question arose as to whether the briefs or arguments should be heard before the subcommittee or before the whole Judiciary Committee.[6] In fact, they were heard before the subcommittee.

On December 9, 1904,[7] Mr. Palmer reported from the Judiciary Committee the testimony, with the following resolution, adopted by a majority of the committee:

Resolved, That the Committee on the Judiciary respectfully report to the House the testimony taken in the case of Charles Swayne since Congress adjourned, with the conclusion that in their opinion said testimony strengthens the case against the said Charles Swayne.

The minority views, submitted by Mr. Richard Wayne Parker, of New Jersey, and concurred in by Messrs. John J. Jenkins, of Wisconsin; D. S. Alexander, of New York; Vespasian Warner, of Illinois; Charles E. Littlefield, of Maine; Lot Thomas, of Iowa; J. N. Gillett, of California, and George A. Pearre, of Maryland, contended that the additional evidence weakened rather than strengthened the case, except as to the charge as to false certificates of expenses of travel. On this point the minority say:

Evidence as to the alleged practice of other judges in this respect was offered and excluded, and we think properly. It would have been competent for him, when a witness in his own behalf, to have stated why he made those certificates. As a witness he answered and explained every other charge. This charge he made no effort as a witness to answer or explain. The inference from the record, on general principles, is that the charge is admitted to be true and that he has no answer or explanation thereto. Whether a satisfactory explanation can be made we do not say. We must take the record as it stands.

Upon this record, unanswered and unexplained, we are of the opinion that in this particular an impeachable offense has been made out.

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[1] Pages 240, 578.

[2] Page 591.

[3] Page 7 of testimony; also p. 240.

[4] Pages 8, 46.

[5] Pages 433–435.

[6] Pages 242, 243.

[7] House Report No. 3021, third session Fifty-eighth Congress.

2472. The Swayne impeachment continued.

Form of resolutions impeaching Judge Swayne and directing that the impeachment be carried to the bar of the Senate.

The House decided that the articles impeaching Judge Swayne should be prepared by a select committee.

Constitution of the committee to carry the Swayne impeachment to the Senate.

The Speaker, in the committee to draw the articles in the Swayne case, gave minority representation to those opposed generally to the impeachment.

On December 13, 1904,[1] the reports were considered in the House, the pending resolution being:

Resolved, That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high misdemeanor.

At the conclusion of the debate, on motion of Mr. Palmer, the House agreed to the following amendment:

Amend by striking out all after the word *"Resolved"* and inserting "That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high crimes and misdemeanors."

The previous question was then ordered on the amendment and original resolution by a vote of ayes 198, noes 61. The amendment was then agreed to, and then the resolution as amended was agreed to without division.

Then, on motion of Mr. Palmer, it was—

Resolved, That a committee of five be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of said Charles Swayne to answer said impeachment.

Mr. Palmer then offered[2] the following:

Resolved, That a committee of seven be appointed to prepare and report articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida, with power to send for persons, papers, and records.

Mr. Palmer explained that this resolution was in accordance with all the precedents except that of the Belknap case, wherein the Judiciary Committee had framed the articles.

Mr. Charles E. Littlefield, of Maine, proposed this amendment:

Strike out "a committee of seven is appointed" and insert "the Committee on the Judiciary be empowered."

The question being taken, the amendment was disagreed to, ayes 113, noes 140. Then the original resolution was agreed to without division.

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[1] Third session Fifty-eighth Congress; Record, pp. 214–249.

[2] House Journal, p. 51; Record, p. 248.

On the same day[1] the Speaker[2] appointed the following committee to carry the impeachment to the bar of the Senate: Messrs. Henry W. Palmer, of Pennsylvania; John J. Jenkins, of Wisconsin; J. N. Gillett, of California; Henry D. Clayton, of Alabama, and David H. Smith, of Kentucky. All of these were members of the Committee on the Judiciary, two of them belonged to the minority party in the House, and two had signed the minority views which accompanied the report from the Judiciary Committee.

On December 14,[3] the Speaker announced the appointment of the following committee to prepare articles of impeachment: Messrs. Henry W. Palmer, of Pennsylvania; J. N. Gillett, of California; Richard Wayne Parker, of New Jersey; Charles E. Littlefield, of Maine; Samuel L. Powers, of Massachusetts; Henry D. Clayton, of Alabama, and David A. De Armond, of Missouri. Three of these gentlemen had signed the minority views on the question of impeachment. The minority party in the House was also represented by three members of the committee.

2473. The Swayne impeachment continued.

Forms and ceremonies of presenting the Swayne impeachment in the Senate.

On December 14,[4] in the Senate, a message from the House of Representatives by Mr. W. J. Browning, its Chief Clerk, was delivered, as follows:

Mr. President, I am directed by the House of Representatives to communicate to the Senate the following resolution:

"Resolved, That a committee of five be appointed to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles Swayne, judge of the district court of the United States, for the northern district of Florida, of high crimes and misdemeanors in office, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate take order for the appearance of said Charles Swayne to answer said impeachment.

"The Speaker announced the appointment of Mr. Palmer of Pennsylvania, Mr. Jenkins of Wisconsin, Mr. Gillett of California, Mr. Clayton of Alabama, and Mr. Smith of Kentucky, members of said committee."

The Assistant Sergeant-at-Arms (B. W. Layton) announced the presence of the committee from the House of Representatives.

The President pro tempore[5] said:

The Senate will receive the committee from the House of Representatives.

The committee from the House of Representatives was escorted by the Sergeant-at-Arms (D. M. Ransdell) to the area in front of the Vice-President's desk, and its chairman, Mr. Palmer, said:

Mr. President, in obedience to the order of the House of Representatives we appear before you, and in the name of the House of Representatives and of all the people of the United States of America we do impeach Charles Swayne, judge of the district court of the United States for the northern district of

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[1] House Journal, p. 51; Record, p. 249.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] House Journal, p. 55; Record, p. 277.

[4] Senate Journal, p. 38; Record, p. 257.

[5] William P. Frye, of Maine, President pro tempore.

Florida, of high crimes and misdemeanors in office; and we do further inform the Senate that the House of Representatives will in due time exhibit articles of impeachment against him and make good the same. And in their name we demand that the Senate shall take order for the appearance of the said Charles Swayne to answer the said impeachment.

The President pro tempore said:

Mr. Chairman and gentlemen of the committee of the House of Representatives, the Chair begs to assure you that the Senate will take proper order in the premises, notice of which will be given to the House.

The committee of the House of Representatives thereupon retired from the Chamber.

On the same day, in the Senate,[1] Mr. Orville H. Platt, of Connecticut, presented the following resolution, which was agreed to:

Resolved, That the message of the House of Representatives relating to the impeachment of Charles Swayne be referred to a select committee to consist of five Senators to be appointed by the President pro tempore.

The President pro tempore thereupon appointed Messrs. Platt, of Connecticut; Clarence D. Clark, of Wyoming; Charles W. Fairbanks, of Indiana; Augustus A. Bacon, of Georgia, and Edmund W. Pettus, of Alabama.

In the House of Representatives, on the same day,[2] the committee appointed to go to the Senate and at the bar thereof and, in the name of the House of Representatives and of all the people of the United States, to impeach Judge Charles Swayne, appeared at the bar of the House.

Mr. Palmer being recognized, reported verbally:

Mr. Speaker, in obedience to the order of the House, we proceeded to the bar of the Senate, and, in the name of this body and of all the people of the United States, we impeached, as we were directed to do, Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and we demanded that the Senate should take order to make him appear before that body to answer for the same; and announced that the House would soon present articles of impeachment and make them good, to which the response was: "Order shall be taken."

On December 15,[3] in the Senate, Mr. Platt, from the select committee, reported the following, which was agreed to by the Senate:

Whereas the House of Representatives, on the 14th day of December, 1904, by five of its Members (Mr. Palmer, of Pennsylvania; Mr. Jenkins, of Wisconsin; Mr. Gillett, of California; Mr. Clayton, of Alabama, and Mr. Smith, of Kentucky), at the bar of the Senate impeached Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and likewise demanded that the senate take order for the appearance of the said Charles Swayne to answer the said impeachment: Therefore,

Ordered, That the Senate will, according to its standing rule and orders in such cases provided, take proper order thereon (upon the presentation of the articles of impeachment), of which due notice shall be given to the House of Representatives.

Ordered, That the Secretary acquaint the House of Representatives herewith.

On the same day,[4] in the House, the message was received, and having been read, was ordered to lie on the table.

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[1] Senate Journal, p. 39; Record, p. 265.

[2] House Journal, p. 56; Record, p. 281.

[3] Senate Journal, p. 40; Record, pp. 295, 296.

[4] House Journal, p. 69; Record, p. 321.

2474. The Swayne impeachment continued.

The articles impeaching Judge Swayne were reported from a divided committee and agreed to by a divided House.

On January 10, 1905,[1] Mr. Palmer, from the select committee appointed to prepare articles of impeachment, presented the report of the majority of that committee as follows:

The select committee appointed to prepare and report articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida, appointed December 13, 1904, submit the following report:

That the evidence heretofore taken in the matter of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, sustains twelve articles of impeachment, which are submitted herewith, with the recommendation that they be adopted by the House and exhibited to the Senate. [Here followed the articles.]

Messrs. Littlefield, Parker, and Gillett filed minority views. Messrs. Littlefield and Parker in their views said:

The House must establish the truth of these articles, by competent testimony, beyond reasonable doubt.

The only articles which, in our judgment, the record as it now stands would sustain are based upon the certificates of expenses. As to these it was claimed in the hearings that other judges have construed the law as it was construed by Judge Swayne, and evidence was offered to establish that claim and excluded.

We dissent from all the other articles, and especially as to those based upon the contempt proceedings in the Davis, Belden, and O'Neal cases. These cases clearly involved willful and marked contempt of court, and demanded exemplary and summary punishment from any self-respecting court.

The charge as to nonresidence is not supported by such evidence as warrants the adoption of articles in that regard.

The use of the private car, which is the proper subject of adverse criticism, taking into account the fact that there is no intimation or claim that any judicial act was influenced, or attempted to be influenced thereby, is not of such gravity as to justify impeachment proceedings therefor.

The car incident occurred more than ten years ago, and no residence question has existed for more than four years. No statute of limitations can apply, but the great proceeding of impeachment is not to be used as to stale charges not affecting the moral character or the present fitness of the officer to perform his duty.

Mr. Gillett concurred in these views except as to the certificates of expenses, saying:

I concur in all that is said in the foregoing "Views of the minority" except as to the certificates for expenses. At the hearing before the committee Judge Swayne offered to prove the custom and practice of the Federal judges in making certificates for their reasonable expenses for travel and attendance when holding court out of their district, the purpose being to show a judicial construction of the statute under which these expenses were allowed. This offer was denied by the committee and an inquiry upon this subject shut off.

Therefore, for this reason, the record is silent upon matters which, in my judgment, should have been submitted to the consideration of this House. The record is silent as to the custom and practice of other judges in this particular, as to the construction which they placed upon the statute, and as to the construction which the disbursing and auditing officers of the Government gave it.

The intent with which Judge Swayne made these certificates is of controlling importance, and all of the facts and circumstances surrounding the matter, the practice and customs of other judges, and the construction placed upon the statute by them and by the Government, if any, are and were proper subjects of inquiry. While the record is silent on these questions, for the reason above stated, still it appears from official records, some of which have been furnished to me by the Treasury Depart-

[1] House Journal, p. 115; Record, pp. 665–667; House Report, No. 3477.

ment, that a majority of the district and circuit judges in five circuits, selected at random, make out certificates for $10 a day, and in two of these districts every judge made out such certificates,

I am inclined to believe that where a practice has been so general these judges acted in good faith with an honest belief that a fair construction of the statute gave them $10 a day for an allowance for travel and attendance while attending court out of their district, and I also feel that this House would with great reluctance pass a resolution impeaching them all; and if not all, why one?

On this article my mind is not satisfied beyond a reasonable doubt that Judge Swayne, in following a practice so well established by so many honorable men, committed a criminal offense for which he should either be prosecuted or impeached, and giving him the benefit of this doubt I can not consent to any impeachment on that ground.

On January 12, 13, 16, 17, and 18,[1] the articles were debated at length, and on the latter day the question was taken first on a motion of Mr. Charles E. Littlefield, of Maine, to lay the first three articles on the table. This motion was disagreed to,[2] yeas 159, nays 167.

Then the question was taken on agreeing to the first three articles (relating to the false certificates), and they were agreed to-yeas 165, nays 160.

The question was next taken on the fourth and fifth articles, a division of the question being demanded so as to vote on those two articles separated from the remaining articles.

Then, by unanimous consent, it was permitted that the House, by a single vote, should pass on two similar amendments which Mr. Marlin E. Olmsted, of Pennsylvania, proposed, the one to article 4 and the other to article 5. Mr. Olmsted explained the amendments as follows:

The change which I propose is perhaps not very material; but it may be. He is charged in article 4 and again in article 5, as they now stand, with having appropriated to his own use, under a claim of right, the car of a certain railroad company and the provisions therein under the claim that, being in the hands of a receiver, he had a right to use them. Now, the facts are, according to the testimony of Judge Swayne himself and of Mr. Axtell, attorney for the receiver, that Judge Swayne did not appropriate the car, nor demand it, nor claim it as a right. It was the receiver's own suggestion. The receiver tendered Judge Swayne the car and the provisions therein, and Judge Swayne accepted them.

The question being taken, Mr. Olmsted's amendments were disagreed to without division.

Then, by yeas 162, nays 138, articles 4 and 5 were agreed to.

Articles 6 and 7 were then agreed to, yeas 159, nays 136.

Articles 8, 9, 10, and 11, were agreed to, without division.

Also articles 12 and 13 were agreed to without division.

2475. The Swayne impeachment continued.

Forms of resolutions authorizing the appointment of managers of the Swayne impeachment and directing the articles to be exhibited in the Senate.

Constitution of the managers of the Swayne impeachment.

Then, on motion of Mr. Palmer, the following resolutions were severally agreed to:[3]

Resolved, That seven managers be appointed by the Speaker of this House to conduct the impeachment against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

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[1] Record, pp. 754–764, 806–822, 925–950, 972–993, 1021–1058.

[2] House Journal, pp. 158–163; Record, pp. 1053–1058.

[3] Home Journal, pp. 162, 163; Record, p. 1058.

Resolved, That the articles agreed to by this House to be exhibited in the name of themselves and of all the people of the United States against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, in maintenance of their impeachment against him of high crimes and misdemeanors in office be carried to the Senate by the managers appointed to conduct said impeachment.

On January 21,[1] the Speaker announced the appointment of the following managers:

Messrs. Henry W. Palmer, of Pennsylvania; Samuel L. Powers, of Massachusetts; Marlin E. Olmsted, of Pennsylvania; James B. Perkins, of New York; Henry D. Clayton, of Alabama; David A. De Armond, of Missouri, and David H. Smith, of Kentucky.

Four of the managers belonged to the majority party in the House and three to the minority. All but two were members of the Judiciary Committee. The entire number were favorable to the impeachment, and all had voted for all the articles of impeachment so far as appeared by record votes, except Mr. Powers, who was absent, and Mr. Olmsted, who answered present on the roll call on articles 4 and 5. He voted for the other articles. Mr. Powers was of the committee which framed the articles, and joined in the report favorable to them.

The managers having been appointed, Mr. Palmer offered this resolution, which was agreed to:

Resolved, That a message be sent to the Senate to inform them that this House has appointed Mr. Palmer, Mr. Powers, of Massachusetts, Mr. Olmsted, Mr. Perkins, Mr. Clayton, Mr. De Armond, and Mr. Smith, of Kentucky, managers to conduct the impeachment against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, and have directed the said managers to carry to the Senate the articles agreed upon by this House to be exhibited for maintenance of their impeachment against said Charles Swayne, and that the Clerk of the House do go with said message.

On the same day[2] the message was transmitted to the Senate and received there. Thereupon, on motion of Mr. Platt, of Connecticut, it was

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Charles Swayne, judge of the distaict court of the United States for the northern district of Florida, agreeably to the notice communicated to the Senate.

On January 23,[3] Mr. Palmer, in the House, claiming the floor for a matter of privilege, offered the following resolution, which was agreed to by the House:

Resolved, That the managers on the part of the House in the matter of the impeachment of Charles Swayne, district judge of the United States in and for the northern district of Florida, be, and they are hereby, authorized to employ a clerk, stenographer, and messenger, and to incur such expense as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House.

2476. The Swayne impeachment continued.

Ceremonies of the exhibition of the articles impeaching Judge Swayne.

The articles of impeachment of Judge Charles Swayne.

Having exhibited in the Senate the articles impeaching Judge Swayne, the managers reported verbally to the House.

On January 24[4] in the Senate, at 12 o'clock and 30 minutes p.m. the managers

[1] House Journal, p. 183; Record, p. 1202.

[2] Senate Journal, p. 108; Record, p. 1176.

[3] House Journal, p. 186; Record, p. 1246.

[4] Senate Journal, p. 119; Record, pp. 1281–1283.

of the impeachment, on the part of the House of Representatives, of Judge Charles Swayne appeared below the bar of the Senate, and the Assistant Sergeant-at-Arms (Alonzo H. Stewart) announced their presence as follows:

I have the honor to announce the managers on the part of the House of Representatives to conduct the impeachment against Charles Swayne, judge of the United States district court for the northern district of Florida.

The PRESIDENT pro tempore. The managers on the part of the House will be received, and the Sergeant-at-Arms will assign them their seats.

The managers were thereupon escorted by the Assistant Sergeant-at-Arms of the Senate to the seats assigned to them in the area in front of the Chair.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms (D. M. Ransdell) made proclamation as follows:

Hear ye, hear ye, hear ye. All persons will keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida.

Mr. Manager PALMER. Mr. President.

The PRESIDENT pro tempore. Mr. Manager.

Mr. Manager PALMER. The managers on the part of the House of Representatives are ready to exhibit articles of impeachment against Charles Swayne, district judge of the United States in and for the northern district of Florida, as directed by the House, in the words and figures following: [1]

Articles exhibited by the House of Representatives of the United States of America, in the name of themselves and of all the people of the United States of America, against Charles Swayne, a judge of the United States, in and for the northern district of Florida, in maintenance and Support of their impeachment against him for high crimes and misdemeanor in office.

ARTICLE 1. That the said Charles Swayne, at Waco, in the State of Texas, on the 20th day of April, 1897, being then and there a United States district judge in and for the northern district of Florida, did then and there, as said judge, make and present to R. M. Love, then and there being the United States marshal in and for the northern district of Texas, a false claim against the Government of the United States in the sum of $230, then and there knowing said claim to be false, and for the purpose of obtaining payment of said false claim, did then and there as said judge, make and use a certain false certificate then and there knowing said certificate to be false, said certificate being in the words and figures following:

"UNITED STATES OF AMERICA, *Northern District of Texas, ss:*

"I, Charles Swayne, district judge of the United States for the northern district of Florida, do hereby certify that I was directed to and held court at the city of Waco, in the northern district of Texas, twenty-three days, commencing on the 20th day of April, 1897; also, that the time engaged in holding said court, and in going to and returning from the same, was twenty-three days, and that my reasonable expenses for travel and attendance amounted to the sum of two hundred and thirty dollars and ——— cents, which sum is justly due me for such attendance and travel.

CHAS. SWAYNE, *Judge.*

"WACO, *May 15, 1897.*

"Received of R. M. Love, United States marshal for the northern district of Texas, the sum of 230 dollars and no cents in full payment of the above account.

"$230.

"CHAS. SWAYNE."

when in truth and in fact, as the said Charles Swayne then and there well knew, there was then and there justly due the said Swayne from the Government of the United States, and from said United States marshal a far less sum, whereby he has been guilty of a high crime and misdemeanor in his said office.

ART. 2. That the said Charles Swayne, having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office as judge, as aforesaid, the said Charles Swayne was entitled

[1] The articles were enrolled on parchment, following the practice of the early trials. In the later trials of Johnson and Belknap the articles had been engrossed on ordinary white paper.

by law to be paid his reasonable expenses for travel and attendance when lawfully directed to hold court outside of the northern district of Florida, not to exceed $10 per diem, to be paid upon his certificate by the United States marshal for the district in which the court was held, and was forbidden by law to receive compensation for such services. Yet the said Charles Swayne, well knowing these provisions, falsely certified that his reasonable expenses for travel and attendance were $10 per diem while holding court at Tyler, Tex., twenty-four days commencing December 3, 1900, and seven days going to and returning from said Tyler, Tex., and received therefor from the Treasury of the United States, by the hand of John Grant, the United States marshal for the eastern district of Texas, the sum of $310, when the reasonable expenses incurred and paid by the said Charles Swayne for travel and attendance did not amount to the sum of $10 per diem.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself and was and is guilty of a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office.

ART. 3. That the said Charles Swayne having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office of judge as aforesaid was, entitled by law to be paid his reasonable expenses for travel and attendance when lawfully directed to hold court outside of the northerns district of Florida, not to exceed $10 per diem, to be paid upon his certificate by the United States marshal of the district in which the court was held, and was forbidden by law to receive any compensation for such services. Yet the said Charles Swayne, well knowing these provisions, falsely certified that his reasonable expenses for travel in going to and coming from and attendance were $10 per diem while holding court at Tyler, Tex., thirty-five days from January 12, 1903, and six days going to and returning from said Tyler, Tex., and received therefor from the Treasury of the United States, by the hand of A. J. Houston, the United States marshal for the eastern district of Texas, the sum of $410, when the reasonable expenses of the said Charles Swayne incurred and paid by him during said period were much less than said sum.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself and was and is guilty of a high crime, to wit, obtaining money from the United States by a false pretense, and of a high misdemeanor in office.

ART. 4. That the said Charles Swayne having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office as judge as aforesaid heretofore, to wit, A. D. 1893, did unlawfully appropriate to his own use, without making compensation to the owner, a certain railroad car, belonging to the Jacksonville, Tampa and Key West Railroad Company, for the purpose of transporting himself, his family, and friends from Guyencourt, in the State of Delaware, to Jacksonville, Fla., the said railroad company being at the time in the possession of a receiver appointed by said Charles Swayne, judge as aforesaid, on the petition of creditors.

The said car was supplied with provisions by the said receiver, which were consumed by said Swayne and his friends, and was provided with a conductor or porter at the cost and expense of said railroad company, and with transportation over connecting lines. The expenses of the trip were paid by the said receiver out of the funds of the said Jacksonville, Tampa and Key West Railroad Company, and the said Charles Swayne, acting as judge, allowed the credit claimed by the said receiver for and on account of the said expenditure as a part of the necessary expenses of operating said road. The said Charles Swayne, judge as aforesaid, used the said property without making compensation to the owner, and under a claim of right, for the reason that the same was in the hands of a receiver appointed by him.

Wherefore the said Charles Swayne, judge as aforesaid, was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 5. That the said Charles Swayne was duly appointed, commissioned, and confirmed as judge of the United States in and for the northern district of Florida, and entered upon the duties of said office, and while in the exercise of his office of judge as aforesaid heretofore, to wit, A. D. 1893, did unlawfully appropriate to his own use, without making compensation to the owner, a certain railroad car belonging to the Jacksonville, Tampa and Key West Railroad Company for the purpose of transporting himself, his family, and friends from Jacksonville, Fla., to California, said railroad company being at the time in the possession of a receiver appointed by the said Charles Swaye, judge as aforesaid, on the petition of creditors.

The car was supplied with some provisions by the said receiver, which were consumed by the said Swayne and his friends, and it was provided with a porter at the cost and expense of the railroad company and also with transportation over connecting lines. The wages of said porter and the cost of said provisions were paid by the said receiver out of the funds of the Jacksonville, Tampa and Key West Railroad Company, and the said Charles Swayne, acting as judge as aforesaid, allowed the credits claimed by the said receiver for and on account of the said expenditures as a part of the necessary expenses of operating the said railroad. The said Charles Swayne, judge as aforesaid, used the said property without making compensation to the owner under a claim of right, alleging that the same was in the hands of a receiver appointed by him and he therefore had a right to use the same.

Wherefore the said Charles Swayne, judge as aforesaid, was and is guilty of an abuse of judicial power and of high misdemeanor in office.

ART. 6. That the said Charles Swayne, having been duly appointed and confirmed, was commissioned district judge of the United States in and for the northern district of Florida on the 1st day of April, A. D. 1890, to serve during good behavior, and thereafter, to wit, on the 22d day of April, A. D. 1890, took the oath of office and assumed the duties of his appointment, and established his residence at the city of St. Augustine, in the State of Florida, which was at that time within the said northern district. That subsequently, by an act of Congress approved the 23d of July, A. D. 1894, the boundaries of the said northern district of Florida were changed, and the city of St. Augustine and contiguous territory were transferred to the southern district of Florida; whereupon it became and was the duty of the said Charles Swayne to change his residence and reside in the northern district of Florida and to comply with the five hundred and fifty-first section of the Revised Statutes of the United States, which provides that—

"A district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

Nevertheless the said Charles Swayne, judge as aforesaid, did not acquire a residence, and did not, within the intent and meaning of said act, reside in his said district, to wit, the northern district of Florida, from the 23d day of July, A. D. 1894, to the 1st day of October, A. D. 1900, a period of about six years.

Wherefore the said Charles Swayne, judge as aforesaid, willfully and knowingly violated the aforesaid law and was and is guilty of a high misdemeanor in office.

ART. 7. That the said Charles Swayne, having been duly appointed and confirmed, was commissioned district judge of the United States in and for the northern district of Florida on the 1st day of April, A. D. 1890, to serve during good behavior, and thereafter, to wit, on the 22d day of April, A. D. 1890, took the oath of office and assumed the duties of his appointment, and established his residence at the city of St. Augustine, in the State of Florida, which was at that time within the said northern district. That subsequently, by an act of Congress of the United States approved the 23d day of July, A. D. 1894, the boundaries of the said northern district of Florida were changed, and the city of St. Augustine, with the contiguous territory, was transferred to the southern district of Florida, whereupon it became and was the duty of the said Charles Swayne to change his residence and reside in the northern district of Florida, as defined by said act of Congress, and to comply with section 551 of the Revised Statutes of the United States, which provides that—

"A district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

Nevertheless, the said Charles Swayne, judge as aforesaid, totally disregarding his duty as aforesaid, did not acquire a residence, and within the intent and meaning of said act did not reside in his said district, to wit, the northern district of Florida, from the 23d day of July, A. D. 1894, to the 1st day of January, A. D. 1903, a period of about nine years.

Wherefore the said Charles Swayne, judge as aforesaid, willfully and knowingly violated the aforesaid law, and was and is guilty of a high misdemeanor in office.

ART. 8. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge, as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States, heretofore, to wit, on the 12th day of November, A. D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida,

did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge, and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 9. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States heretofore, to wit, on the 12th day of November, A. D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did knowingly and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 10. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States heretofore, to wit, on the 12th day of November, A. D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 11. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a circuit judge of the United States heretofore, to wit, on the 12thdayof November, A. D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did knowingly and unlawfully adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swane, judge as aforesaid, misbehaved himself in his office as judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 12. That the said Charles Swayne, having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office of judge heretofore, to wit, on the 9th day of December, A. D. 1902, at Pensacola, in the county of Escambia, in the State of Florida, did unlawfully and knowingly adjudge guilty of contempt and did commit to prison for the period of sixty days one W.C. O'Neal, for an alleged contempt of the district court of the United States for the northern district of Florida.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge, as aforesaid, and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

And the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Charles Swayne, judge of the United States court for the northern district of Florida, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article or accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Charles Swayne may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

J.G. CANNON,
Speaker of the Home of Representatives.

Attest:
A. MCDOWELL, *Clerk.*

The articles of impeachment were handed to the Secretary of the Senate.

The PRESIDENT pro tempore. The Senate will take proper order in the matter of the impeachment of Judge Swayne, and communicate to the House of Representatives its action.

The managers thereupon withdrew from the Chamber.

Having returned to the House,[1] the managers appeared at the bar, and Mr. Palmer reported orally:

Mr. Speaker, the managers of impeachment beg leave to report to the House that the articles of impeachment prepared by the House of Representatives against Charles Swayne, district judge of the United States in and for the northern district of Florida, have been exhibited and read to the Senate, and the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, due notice of which would be given to the House of Representatives.[2]

2477. The Swayne impeachment continued.

The organization of the Senate for the Swayne impeachment trial.

The oath to the Senators for the Swayne trial was administered by the Chief Justice.

At the request of the President pro tempore the Senate elected a Presiding Officer for the Swayne impeachment trial.

The Senate being organized for the Swayne impeachment, the House was notified by message.

In the Senate, after the retirement of the managers, Mr. Platt, of Connecticut, offered the following resolutions, which were severally agreed to:[3]

Ordered, That the articles of impeachment presented this day by the House of Representatives be printed for the use of the Senate.

Ordered, That at 2 o'clock this afternoon the Senate will proceed to the consideration of the articles of impeachment of Charles Swayne, judge of the United States district court for the northern district of Florida, presented this day.

Ordered, That a committee of two Senators be appointed by the Chair to wait upon the Chief Justice of the United States and invite him to attend in the Senate Chamber at 2 o'clock this day, to administer to Senators the oath required by the Constitution, in the matter of the impeachment of Charles Swayne, or in case of his inability to attend, any one of the associate justices.

In accordance with the last resolution, Messrs. Charles W. Fairbanks, of Indiana, and Augustus O. Bacon, of Georgia, were appointed as the committee.

Later, on the same day, in the Senate,[4] the President pro tempore[5] requested that he be relieved of the duty of presiding at the trial. Thereupon, Mr. John C. Spooner, of Wisconsin, offered this resolution, which was agreed to:

Resolved, That in view of the statement just made to the Senate by the President pro tempore of his inability, because of recent illness, to discharge the duties of his office, other than those involved in presiding over the Senate in legislative and executive session, the Hon. Orville H. Platt, Senator from the State of Connecticut, be, and he is hereby, appointed presiding officer on the trial of the impeachment of Charle Swayne, district judge of the United States for the northern district of Florida.

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[1] House Journal, p. 195; Record, p. 1310.

[2] The House itself did not attend its managers to the Senate on this occasion or at any other time during the trial.

[3] Senate Journal, p. 121; Record, p. 1283.

[4] Senate Journal, p. 121; Record, p. 1289.

[5] William P. Frye, of Maine, President pro tempore.

A message announcing this action was transmitted to the House.[1]

At 2 o'clock p.m., on motion of Mr. Platt, of Connecticut, Rule III of the Senate, sitting for impeachment trials, providing that the presiding officer should administer the oath, was suspended.[2]

Then[3] the presence of the Chief Justice of the United States, Hon. Melville W. Fuller, was announced by the Assistant Sergeant-at-Arms.

The Chief Justice entered the Senate Chamber, escorted by Mr. Fairbanks and Mr. Bacon, the committee appointed for the purpose, and was conducted by them to a seat by the side of the President pro tempore.

Mr. FAIRBANKS. Mr. President, the committee appointed by the Senate to wait upon the Chief Justice of the Supreme Court of the United States and request him to administer to Senators the oath required by the Constitution in the matter of the impeachment of Judge Charles Swayne report that they have discharged that duty. The Chief Justice of the Supreme Court, complying with the request of the Senate, is now present in the Senate and ready to administer the oath required to be administered to the members of the Senate sitting in the trial of impeachments.

The Chief Justice administered the oath to the President pro tempore as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Charles Swayne, judge of the district court of the United States for the northern district of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The PRESIDENT pro tempore. The Senator from Connecticut will please present himself as Presiding Officer of the Senate while in court and take the necessary oath.

Mr. Platt, of Connecticut, advanced to the Vice-President's desk, and the oath was administered to him by the Chief Justice.

The PRESIDENT pro tempore. The Secretary will call the roll, and as their names axe called Senators will present themselves at the desk in groups of ten, and the oath will be administered to them.

The oath having been administered to all the Senators present, Mr. Platt, of Connecticut, thereupon took the chair, and announced:

Senators, the Senate is now sitting for the trial of the impeachment of Charles Swayne, judge of the United States district court in and for the northern district of Florida.

Then, on motion of Mr. Charles W. Fairbanks, of Indiana, the following resolution was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Charles Swayne, judge of the United States district court for the northern district of Florida, and is ready to receive the managers on the part of the House at its bar.

This message was delivered in the House soon after.[4]

2478. The Swayne impeachment continued.

Ceremonies of demanding that process issue in the Swayne impeachment.

The Senate having ordered, on demand of the managers, that process issue against Judge Swayne, the managers returned and reported verbally to the House.

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[1] House Journal, p. 195; Record, p. 1312.

[2] The Senate had overlooked the law relating to this subject.

[3] Senate Journal, pp. 122, 346; Record, pp. 1289–1290.

[4] House Journal, p. 185; Record, p. 1310.

Then, on the same day,[1] in the Senate, at 2 o'clock and 27 minutes p. m., the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant-at-Arms.

The PRESIDING OFFICER. The Sergeant-at-Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDING OFFICER. Gentlemen managers, the Senate is now organized for the trial of the impeachment of Charles Swayne, United States judge in and for the northern district of Florida.

Mr. Manager Palmer rose and said:

Mr. President, we are instructed by the House of Representatives, as its managers, to demand that the Senate shall issue process against Charles Swayne, district judge of the United States in and for the northern district of Florida, that he answer at the bar of the Senate the articles of impeachment heretofore exhibited by the House of Representatives through its managers.

Then, on motion of Mr. Fairbanks, the following resolutions were severally agreed to:

Ordered, That a summons be issued, as required by the rules of procedure and practice in the Senate when sitting for the trial of impeachment of Charles Swayne, returnable on Friday, the 27th day of the present month, at 1 o'clock in the afternoon.

Ordered, That the Senate, sitting for the trial of impeachment of Charles Swayne, adjourn until Friday, the 27th instant, at 1 o'clock in the afternoon.

The Presiding Officer then said:

The order having been agreed to, the Senate, sitting for the trial of the impeachment, stands adjourned until 1 o'clock on Friday, the 27th instant. The Senate will resume its legislative session.

Mr. Platt, of Connecticut, thereupon vacated the chair, which was resumed by the President pro tempore.

On January 26,[2] in the House, Mr. Palmer, on behalf of the managers, reported orally:

Mr. Speaker, I have the honor to report on behalf of the managers in the matter of the impeachment of Charles Swayne, district judge of the United States in and for the northern district of Florida, that the Senate has organized for the trial of the impeachment; that in the name of the House of Representatives and in behalf of all the people of the United States, the managers have demanded of the Senate that process be issued against Charles Swayne, judge as aforesaid, to answer to the articles hereinbefore exhibited against him at the bar of the Senate; and that the Senate has advised us that process will be issued against him in that behalf returnable on the 27th instant, at 1 o'clock p.m.

2479. The Swayne impeachment continued.

Proceedings on the return of the writ of summons in the Swayne impeachment.

In response to the writ of summons, Judge Swayne entered appearance by his counsel.

In the Swayne impeachment, in response to the motion of respondent's counsel, the Senate granted time after the appearance to present the answer.

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[1] Senate Journal, p. 346; Record, p. 1290.

[2] House Journal, p. 205; Record, p. 1415.

The managers and respondent in the Swayne case were directed to furnish a list of their witnesses to the Sergeant-at-Arms of the Senate.

The oath to Senators in the Swayne impeachment trial was administered by the Presiding Officer after the organization was completed.

On January 27,[1] in the Senate, the President pro tempore said:

The hour of 1 o'clock, to which the Senate sitting as a court in the impeachment of Judge Charles Swayne adjourned, has arrived. Will the Senator from Connecticut [Mr. Platt] please take the chair?

Mr. Platt, of Connecticut, thereupon took the chair as Presiding Officer.

The PRESIDING OFFICER. The Sergeant-at-Arms will make the opening proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

The PRESIDING OFFICER. The Secretary will now call the names of those Senators who have not been sworn, and such of those Senators as are present in the Chamber will, as their names are called, advance to the desk and take the oath.

The Secretary called the names of the Senators who had not been heretofore sworn, whereupon Senators Blackburn, Depew, Dryden, Knox, and McLaurin advanced to the area in front of the Secretary's desk, and the oath was administered to them by the Presiding Officer.[2]

Mr. Charles W. Fairbanks, of Indiana, then offered this resolution, which was agreed to, as follows:

Resolved, That the Secretary inform the House of Representatives that the Senate is sitting in its Chamber and ready to proceed with the trial of the impeachment of Charles Swayne.[3]

At 1 o'clock and 7 minutes p. m. the Assistant Sergeant-at-Arms announced the managers on the part of the House of Representatives.

The PRESIDING OFFICER. The managers will be admitted and conducted to the seats provided for them within the bar of the Senate.

The managers were conducted to seats provided in the space in front of the Secretary's desk on the left of the Chair, namely: Hon. Henry W. Palmer, of Pennsylvania; Hon. Marlin E. Olmsted, of Pennsylvania; Hon. James B. Perkins, of New York; Hon. Henry D. Clayton, of Alabama; Hon. David A. De Armond, of Missouri, and Hon. David H. Smith, of Kentucky.

At 1 o'clock and 14 minutes p. m. Hon. Anthony Higgins and Hon. John M. Thurston, counsel for the respondent, Charles Swayne, entered the Senate Chamber and were conducted to the seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

The PRESIDING OFFICER. The Secretary will read the minutes of the proceedings of the last session of the Senate while sitting in the trial of the impeachment of Charles Swayne.

The Secretary read the Journal of proceedings of the Senate, sitting for the trial of the impeachment, of Tuesday, January 24, 1905.

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[1] Senate Journal, p. 346; Record, pp. 1449–1451.

[2] The House managers called the attention of the Senate to the law permitting the Presiding Officer to administer the oath.

[3] This message was duly received in the House, Record, p. 1479.

The PRESIDING OFFICER. The Secretary will now read the return of the Sergeant-at-Arms to the summons directed to be served.

The Secretary read the following return appended to the writ of summons:

The foregoing writ of summons, addressed to Charles Swayne, and the foregoing precept, addressed to me, were duly served upon the said Charles Swayne by delivery to and leaving with him true and attested copies of the same at 1215 Tatnall street, Wilmington, Del., the residence of Henry G. Swayne, on Tuesday, the 24th day of January, 1905, at 7 o'clock and 45 minutes in the afternoon of that day.

DANIEL M. RANSDELL,
Sergeant-at-Arms United States Senate.

The PRESIDING OFFICER. The Secretary will now administer to the Sergeant-at-Arms an oath in support of the truth of his return.

The Secretary (Mr. Charles G. Bennett) administered the following oath to the Sergeant-at-Arms:

You, Daniel M. Ransdell, Sergeant-at-Arms of the Senate of the United States, do solemnly swear that the return made by you upon the process issued on the 24th day of January, 1905, by the Senate of the United States against Charles Swayne, is truly made, and that you have performed such service as therein described: So help you God.

The SERGEANT-AT-ARMS. I do so swear.

The PRESIDING OFFICER. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Charles Swayne, Charles Swayne, Charles Swayne, judge of the district court of the United States for the northern district of Florida: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

Mr. HIGGINS. Mr. President, on behalf of the respondent, Charles Swayne, I beg to enter the following appearance:

To the honorable the Senate of the United States, sitting as a Court of Impeachment:

I, Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, now present in the city of Washington, having been served with a summons to be in the city of Washington on the 27th day of January, 1905, at 1 o'clock afternoon, to answer certain articles of impeachment presented against me by the honorable the House of Representatives of the United States, do hereby enter my appearance by my counsel, Anthony Higgins and John M. Thurston, who have my warrant and authority therefor, and who are instructed by me to ask this court for a reasonable time for the preparation of my answer to said articles.

CHARLES SWAYNE.

Dated at Washington, D. C., this 27th day of January, A. D. 1905.

I ask this be filed, and I submit a copy for the managers.

The PRESIDING OFFICER. It will be placed on file.

Mr. THURSTON. On behalf of the respondent we make the following motion:

In the Senate of the United States, sitting as a court of impeachment. The United States of America *v.* Charles Swayne. Upon articles of impeachment presented by the House of Representatives of the United States of America.

The respondent, by his counsel, now comes and moves the court to grant him the period of seven days in which to prepare and present his answer to the articles of impeachment presented against him herein.

ANTHONY HIGGINS.
JOHN M. THURSTON.

Then, on motion of Mr. Fairbanks, it was

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes post meridian on the 3d day of February next.

Also, on motion of Mr. Fairbanks, at the suggestion of the managers, it was

Ordered, That lists of witnesses be furnished the Sergeant-at-Arms by the managers and the respondent, who shall be subpoenaed by him to appear on the 10th day of February, at 1 o'ciock post meridian.

A proposition of the managers that the trial proceed on the 13th of February was objected to by counsel for respondent, who suggested the 10th of February instead, and it was not pressed.

Then, on motion of Mr. Fairbanks, the Senate, sitting for the trial of the impeachment, adjourned until Friday, February 3, 1905, at 12.30 o'clock p. m.

The managers on the part of the House and the counsel for the respondent withdrew from the Chamber.

The President pro tempore resumed the Chair.

2480. The Swayne impeachment continued.

Forms and ceremonies in the Senate at the session for receiving respondent's answer in the Swayne case.

Proclamation of the Sergeant-at-Arms at opening of session of the Senate sitting for the Swayne impeachment trial.

At the presentation of the answer in the Swayne case the respondent was represented by his counsel.

Rule of the Senate in the Swayne trial for submitting of requests or applications by managers or counsel.

Rule governing the Senators in the Swayne trial as to colloquys and questions.

On February 3,[1] in the Senate,

The PRESIDENT pro tempore (at 12 o'clock and 30 minutes p. m.). The hour has arrived to which the Senate sitting as a court of impeachment adjourned, and the Senator from Connecticut will please take the chair.

Mr. Platt, of Connecticut, assumed the chair.

The PRESIDING OFFICER (Mr. Platt, of Connecticut). The Senate is now sitting for the trial of the impeachment of Charles Swayne, a judge of the United States in and for the northern district of Florida. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms made proclamation as follows:

Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives of the United States against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

The oath was then administered to certain Senators not previously sworn.

The PRESIDING OFFICER. The Sergeant-at-Arms will notify the managers, if they are in waiting, that the Senate is ready to proceed.

At 12 o'clock and 32 minutes p. m. the managers on the part of the House of Representatives were announced, and they were conducted by the Assistant Sergeant-at-Arms to the seats assigned them in the area in front of the Secretary's desk.

The PRESIDING OFFICER. The Sergeant-at-Arms will also notify the counsel for the respondent.

Mr. Anthony Higgins and Mr. John M. Thurston, counsel for the respondent, entered the Chamber and were assigned to the seats provided for them in the area in front of the Secretary's desk.

The PRESIDING OFFICER. The Journal of the proceedings of the last session of the Senate sitting for the trial of the impeachment of Charles Swayne will now be read.

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[1] Senate Journal, p. 347; Record, pp. 1818–1832.

The Journal of the proceedings of the Senate sitting as a court on Friday, January 27, 1905, was read and approved.

Then, on motion of Mr. Augustus O. Bacon, a Senator from Georgia, it was—

Ordered, That in all matters relating to the procedure of the Senate sitting in the trial of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, whether as to form or otherwise, the managers on the part of the House, or the counsel representing the respondent, may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.

It shall not be in order for any Senator to engage in colloquy, or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

2481. The Swayne impeachment continued.

The answer of Judge Swayne to the articles of impeachment.

Judge Swayne's answer was signed by himself and his counsel.

The answer of Judge Swayne as to the first seven articles raised a question as to the jurisdiction of the Senate to try the charges.

Then Mr. Thurston, of counsel for the respondent, said:

Mr. President, counsel for the respondent now come, and for answer of said Charles Swayne under impeachment herein say:

And the said Charles Swayne, named in said articles of impeachment, comes before the honorable Senate of the United States, sitting as a court of impeachment, and says that this honorable court ought not to have or take further cognizance of the first of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said first article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said first article, the said respondent, saving to himself all advantages of exception to said first article, for answer thereto saith:

He admits that on the 20th day of April, 1897, at Waco, in the State of Texas, acting as United States judge in and for the northern district of Florida, he made and presented to R. N. Love, the United States marshal in and for the northern district of Texas, the certificate in writing as set forth in the said first article, and did then and there receive from the said R. N. Love, United States marshal as aforesaid, the sum of $230 in full payment of the account certified to as aforesaid, and the respondent says that he then and there believed, and still believes and insists, that, under the true meaning and intent of the statutes of the United States allowing the expenses of a district judge of the United States for travel and expenses while holding court outside of his own district, the said claim was just and in strict accordance with the provisions of the law of Congress in that respect enacted; and he denies that he then and there knew or believed said claim to be false, as set forth in said article; and he denies that he signed and presented the said certificate for the purpose of obtaining payment of any false claim; and he denies that he then and there made and used a false certificate knowing or believing said certificate to be false. [Etc., specifying at length.]

* * * And respondent says that he attaches to this, his answer to the said article 1, copies of certificates of the honorable the Secretary of the Treasury, marked, respectively, Exhibits A et seq., and asks that the same be accepted and taken as a part of this his answer to the said article 1. * * *

These exhibits were attached, not at the end of the answer, but at the end of article first.

To articles second and third, which related to the offense set forth in article 1, answer was made in similar form.

As to article 4, the answer says:

And the said Charles Swayne, named in the articles of impeachment, says that this honorable court ought not to have or take further cognizance of the fourth of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in the said fourth article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said fourth article, the said respondent, saving to himself all advantages of exception to said fourth article, for answer thereto saith:

He admits that he was duly appointed, confirmed, and commissioned as a district judge of the United States in and for the northern district of Florida, and that he had entered upon the duties of his office prior to 1893 and had continued in the performance of the duties and in the exercise of his office of judge up to the present time.

He denies that at the time specified in said article 4, to wit, A. D. 1893, he did unlawfully appropriate to his own use, without making compensation to the owner, a certain railway car belonging to the Jacksonville, Tampa and Key West Railroad Company, for the purposes stated in said article 4, or for any other purpose or purposes whatsoever; and as to the true facts of the transaction referred to in said article 4, he says, etc.

To article 5, which related to the same offense as article 4, a similar answer was given.

As to article 6 the answer was:

And the said Charles Swayne, named in said articles of impeachment, says that this honorable court ought not to have or take further cognizance of the sixth of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said sixth article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said sixth article, the said respondent, saving to himself all advantages of exceptions to said sixth article, for answer thereto saith:

He admits that prior to the year 1900 he had been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, and had entered upon the duties of his office, and that he was in the exercise of his office as judge as aforesaid at all times in the said article specified and as therein alleged.

The respondent denies that he did not acquire a residence in the northern district of Florida and did not, within the intent and meaning of the five hundred and fifty-first section of the Revised Statutes of the United States, reside in said district from the 23d day of July, 1894, to the 1st day of October, 1900; and denies that he violated said section; and denies that he was and is guilty of a high misdemeanor in office as charged in said article 6.

The respondent further says, etc.

As to article 7, which related to the same offense as set forth in article 6, the answer is similar.

As to the remaining articles, relating to the contempt cases, the answer begins as to each with a saving clause, and proceeds generally as follows:

And the said respondent, saving to himself all advantages of exception or otherwise to article 8 of the said articles of impeachment, for answer thereto saith:

He admits that prior to the 12th day of November, A. D. 1901, he had been duly appointed, confirmed, and commissioned as a district judge of the United States in and for the northern district of Florida, and had entered upon the duties of his office prior to said date, and continued in the performance of the duties and in the exercise of his office of judge up to the present time, and he says that at all the times mentioned in said article 8 he was exercising and performing the duties of a district judge in and for the northern district of Florida, and that on the 12th day of November, A. D. 1901, he was holding a session of the district and circuit court of said district at the city of Pensacola, in the State of Florida,

and he admits that on said date he did adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days one E. T. Davis, an attorney and counselor at law, as set forth in said article 8, but he denies that said judicial action on his part was malicious or unlawful, and, on the contrary, he insists and asserts that said judgment was rendered and said sentence imposed by him from a high sense of judicial and public duty, and that upon the proceedings then pending and heard before him he could not have done otherwise than to have adjudged the said E. T. Davis guilty of the contempt of court stated in said article 8.

Respondent, further answering, says, etc.

And in conclusion the form of the answer was:

And this respondent, in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully reserves leave to amend and add to the same from time to time as may become necessary or proper and when said necessity and propriety shall appear.

CHAS. SWAYNE.

ANTHONY HIGGINS,
JOHN M. THURSTON,
Of Counsel for Respondent.

2482. The Swayne impeachment continued.

Forms of procedure of authorizing, preparing, and presenting the replication in the Swayne impeachment trial.

Mr. Manager Palmer then asked [1] that the following order be agreed to:

Ordered, That the managers have time until Monday next, at 2 p. m., to consult the House of Representatives on the subject of filing exceptions, demurrer, or replication to the answer of the respondent, and that they be furnished with a copy of the said answer.

Mr. Charles W. Fairbanks, a Senator from Indiana, proposed instead an order which, after a reference to the precedent of the Belknap trial, and some modification as to time, was agreed to as follows:

Ordered, That the managers on the part of the House be allowed until the 6th day of February instant, at 2 o'clock in the afternoon, to present a replication, or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent respectively, so that all pleadings shall be closed on or before the 9th day of February instant, and that the trial shall proceed on the 10th day of February instant, at 2 o'clock p.m.

Then, on motion of Mr. Manager Palmer, the following order was agreed to:

Ordered, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Charles Swayne, judge of the United States in and for the northern district of Florida, to the articles of impeachment, and also a copy of the foregoing order.

After an order had been made for printing the articles and the answer as documents, the Senate, "sitting as a court of impeachment," [2] adjourned until Monday, February 6, 1905, at 2 o'clock p. m.

The managers on the part of the House and the counsel for the respondent retired from the Chamber.

The President pro tempore resumed the chair.

On February 4 [3] a message from the Senate transmitted to the House an attested copy of the respondent's answer, which was referred to the managers.

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[1] Senate Journal, p. 359; Record, p. 1831.

[2] These words appear in the Record. The Senate Journal (p. 359) speaks of the "Senate sitting for the trial."

[3] House Journal, p. 259; Record, p. 1887.

The message also transmitted the resolution of the Senate fixing a time for the filing of the replication and further pleadings.

On February, 6,[1] in the House, Mr. Palmer, from the managers, reported the following replication, which was agreed to without debate or division:

Replication by the House of Representatives of the United States of America to the answer of Charles Swayne, judge of the United States in and for the northern district of Florida, to the articles of impeachment exhibited against him by the House of Representatives.

The House of Representatives of the United States have considered the several answers of Charles Swayne, district judge of the United States in and for the northern district of Florida, to the several articles of impeachment against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantage of exception to the insufficiency, irrelevancy, and impertinency of his answer to each and all of the several answers of impeachment exhibited against the said Charles Swayne, judge as aforesaid, do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, crimes, or misdemeanors charged against Charles Swayne in said articles of impeachment or either of them; and for replication to said answer, do say that said Charles Swayne, district judge of the United States in and for the northern district of Florida, is guilty of the high crimes and misdemeanors mentioned in said articles, and that the House of Representatives are ready to prove the same.

Then, on motion of Mr. Palmer, it was also—

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Charles Swayne, judge of the northern district of Florida, to the articles of impeachment exhibited against him and that the same will be presented to the Senate by the managers on the part of the House.

And also, that the managers have authority to file with the Secretary of the Senate, on the part of the House, any subsequent pleadings they shall deem necessary.

This message was communicated to the Senate very soon thereafter,[2] and received during the legislative session.

On the same day, at 2 p. m., the Senate[3] went into session for the trial in the usual form, and after the reading of the Journal, the Presiding Officer laid before the Senate sitting for the trial the message which had been received during the legislative session.

Thereupon Mr. Palmer, for the managers, who were in attendance, presented and read the replication.

Thereupon the Presiding Officer asked:

Have the managers anything further to offer?

Mr. Manager Palmer replied:

Nothing to offer to-day, sir.

The Presiding Officer then said:

Have counsel for the respondent anything to offer?

Mr. Higgins replied:

Should we be advised there is anything further to offer we assume it can be done without a formal meeting of the Senate. It would be merely to join issue, in technical phrase.

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[1] House Journal, p. 262; Record, p. 1939.

[2] Senate Journal, p. 174; Record, p. 1915.

[3] Senate Journal, p. 360; Record, p. 1922.

The Presiding Officer rejoined:

It may, under the order which bas already been adopted, be filed with the Secretary.

Then, on motion of Mr. Augustus O. Bacon, a Senator from Georgia, it was—

Ordered, That the Senate sitting in the trial of impeachment of Charles Swayne adjourn until Friday, the 10th instant, at 1 o'clock p. m.

2483. The Swayne impeachment continued.

Forms and ceremonies in the Swayne trial during the presentation of testimony.

The House of Representatives, although invited by the Senate, did not at any time attend the Swayne trial.

The respondent attended during the presentation of testimony and the arguments in the Swayne trial.

Instance wherein a witness was examined on the question of issuing process for a witness in the Swayne trial.

On February 10,[1] in the Senate sitting for the trial, Mr. Augustus O. Bacon, a Senator from Georgia, presented the following resolution, which was agreed to:

Ordered, That the pleadings in the matter of the impeachment of Charles Swayne having been closed, the Secretary inform the House of Representatives that the Senate is ready to proceed with the trial of said impeachment according to the rule heretofore communicated to the House, and that provision has been made for the accommodation of the House of Representatives and its managers in the Senate Chamber.[2]

At 1 o'clock and 5 minutes p. m. the managers on the part of the House of Representatives were announced, and they were conducted by the Assistant Sergeant-at-Arms to the seats assigned them in the area in front of the Secretary's desk.

The respondent, Charles Swayne, accompanied by his counsel, Mr. Anthony Higgins and Mr. John M. Thurston, entered the Chamber and took the seats provided for them in the area in front of the Secretary's desk.

The PRESIDING OFFICER. The Journal of the proceedings of the last session of the Senate sitting for the trial of the impeachment of Charles Swayne will now be read.

The Journal of the proceedings of the Senate sitting as a court on Monday, February 6, 1905, was read and approved.

The PRESIDING OFFICER. The Presiding Officer will inquire of the Sergeant-at-Arms whether the names of the witnesses have been furnished him by the managers on the part of the House and by the counsel for the respondent, and whether those witnesses have been summoned for attendance at this time?

The SERGEANT-AT-ARMS. Mr. President, the names of the witnesses for both the managers on the part of the House of Representatives and the respondent have been furnished me and have been served, and many of the witnesses are now in the city.

Then, on motion of Mr. Charles W. Fairbanks, a Senator from Indiana, the following orders were severally agreed to:

Ordered, That the proceedings of the Senate sitting in the trial of impeachment of Charles Swayne be printed daily for the use of the Senate as a separate document.

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[1] Senate Journal, p. 360; Record, p. 2229.

[2] No action was taken by the House, and it did not attend the proceedings at any time.

Ordered, That the daily sessions of the Senate sitting in the trial of impeachment of Charles Swayne, shall, unless otherwise ordered, commence at 2 o'clock in the afternoon and continue until 5 o'clock in the afternoon.

Then, on suggestion of Mr. Manager Palmer, the names of the witnesses were called over to ascertain their presence.

Then Mr. Manager Palmer stated:

Mr. President, in the case of Joseph H. Durkee, of Jacksonville, Fla., we have a certificate of a physician stating that he is not able to attend. The certificate was sent to the Presiding Officer and by him handed to me, and it has been exhibited to counsel on the other side.

Mr. Durkee is a witness who has been subpoenaed by both sides, and is a material and important witness. I have a witness present who will testify with respect to Mr. Durkee's present condition, and I ask that Mr. B. S. Liddon be summoned to testify what Mr. Durkee's present condition is, for the purpose of moving for an attachment.

Thereupon Mr. Liddon was examined under oath; and then the Presiding Officer announced that the Senate would take into account the issuance of an attachment.

Then Mr. Manager Palmer opened the case for the House of Representatives, setting forth what the managers expected to prove.

Then the introduction of testimony on behalf of the managers began.

This presentation of testimony continued until February 20,[1] when Mr. Manager Marlin E. Olmsted, of Pennsylvania, announced that the case of the managers was in.

Immediately thereafter Mr. Anthony Higgins, of counsel for the respondent, proceeded[2] with the opening address in respondent's case. He not only outlined the defense, but entered somewhat into argument on the legal features of the case. Mr. Higgins consumed the remainder of the session on that day, and spoke some time the next day.[3]

The introduction of testimony on behalf of the respondent then began and continued from day to day.

On February 23[4] the Senate agreed to the following:

Ordered, That the session of the Senate sitting this day in the trial of the impeachment of Charles Swayne shall continue until 6 o'clock, when a recess shall be taken until 8 o'clock, and the session shall be continued until 10 o'clock unless otherwise ordered.

2484. The Swayne impeachment continued.

The Senate limited the time of the final arguments in the Swayne impeachment trial.

The Senate, after deliberation, permitted written arguments to be filed in the Swayne case, but only in such way as would permit reply.

Rebuttal evidence was offered by the managers in the Swayne trial.

Order of final arguments in the Swayne case.

On the same day,[5] Mr. Charles W. Fairbanks, a Senator from Indiana, offered the following:

Ordered, That the managers be allowed five hours for the argument of the case, the time to be divided between them as they may agree, but the concluding oral argument shall be by one manager and shall not exceed one hour.

Ordered, That counsel for the respondent be allowed five hours for the argument of the case, the time to be divided between them as they may agree.

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[1] Senate Journal, p. 363; Record, p. 2909.

[2] Record, pp. 2909–2915.

[3] Record, pp. 2975–2979.

[4] Record, p. 3142.

[5] Record, pp. 3142–3145.

These orders were agreed to, but presently the vote was reconsidered on suggestion that the managers would prefer a different division of their time, so that the closing argument might be longer than an hour. So an amendment was adopted to provide that the closing argument by the manager should not exceed one hour and forty minutes. As amended the order was then agreed to.

Thereupon Mr. Manager Henry W. Palmer, of Pennsylvania, offered the following motion:

That any of the managers or counsel for respondent having all or any portion of his argument in manuscript, may deliver a copy of the same to the reporter, and any portion thereof which for lack of time or to save the time of the Senate the managers or counsel shall omit to deliver or read shall be incorporated by the reporter as part of the argument delivered, and any manager who does not address the court may file an argument before the close of the discussion.

Mr. Palmer explained the reasons for this motion:

I wish to explain the reason why we ask for this privilege. We have made no objection to curtailing the time, though this is the first time in the history of impeachment trials where the time of the managers has been curtailed. To be sure, the rule of the Senate provides that a case shall be closed by two managers, but there has never been any limit of time. We have consented to curtail the time of the gentlemen who are to speak in this case so that some of them shall have forty-five, some fifty, and some sixty minutes. Of course they will not be able to go over the case and do themselves or the case justice in that length of time. Their arguments can be printed in the Record and can be read afterwards by anybody who desires to read them.

Again, it was ordered by the Senate the other day that a brief on the part of the counsel for respondent should be printed, and a brief of 48 pages was printed about ten days ago, but we never got a chance to look at it until this morning, when it was printed in the Record. That brief pertains to jurisdictional affairs, and it is particularly desired to print a brief of the law of the case to meet the brief on the part of the gentlemen on the other side.

In the course of argument by Senators, Mr. John C. Spooner, of Wisconsin, said:

I can see no objection to the publication or the printing in the Record of any argument on one side which the other side seasonably will have opportunity to peruse and to answer.

This is a case which involves, of course, the interests of the people. It involves vitally the interests of the respondent. Whether technically this is a court or not, it pronounces a sentence or judgment. It is a court or a tribunal of first instance and of last resort. There is no appeal from its decision. If it commits an error, there is no reviewing tribunal.

Nowhere in any judicial tribunal in the country, I think, in a matter involving not simply the right to hold an office, but the right ever to hold an office of honor, trust, or emolument, would it be tolerated that an argument should be made and communicated to the court without opportunity to counsel on the other side to reply to it as fully as they might be advised.

Now, if the managers have some argument to submit in answer to the brief which is printed in the Record this morning, that, I should think, would be entirely proper to be printed, but that the managers shall be permitted to submit to the Senate, after the counsel for the respondent have finished their argument, further argument on any of these charges or these articles I think is against the justice of judicial procedure.

Mr. John W. Daniel, of Virginia, said:

Mr. President, my disposition would be to vote for any reasonable request made by the managers or by counsel for the respondent here, but I could under no circumstances vote affirmatively on that request. In my opinion it violates the fundamental principles of English and American law. Every accused person is entitled to be present with his counsel, to have an opportunity to hear every charge

and every word of argumentative speech that is made against him, and also to have opportunity to respond thereto. It seems to me that a statement of the case carries an enforcement of its justice. If that request were granted a most serious and grave argument might appear in print after this case was heard, presenting it in aspects which had not occurred either to the accused, to his counsel, or to any of his judges.

In response to these suggestions the proposed order was modified and agreed to as follows:

That any of the managers or counsel for respondent having all or any portion of his argument in manuscript may deliver a copy of the same to the reporter, and any portion thereof, which for lack of time or to save the time of the Senate, the managers or counsel shall omit to deliver or read, shall be incorporated by the reporter as part of the argument delivered, and any manager who does not address the court may file an argument before the close of the discussion: *Provided,* That all briefs and arguments shall be printed before the closing argument for the respondent begins.

On February 23,[1] at the evening session, counsel for the respondent announced that their case was closed.

The managers then began the presentation of rebuttal evidence.

The rebuttal evidence being concluded, and the managers having, in accordance with permission already given, submitted a brief to be printed, Mr. John M. Thurston, of counsel for the respondent, on this day (February 23)[2] offered on behalf of the respondent, and by reason of the approaching end of the Congress with consequent pressure of legislative business, to submit the case without argument. This offer was declined by the managers.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, then began the arguments in closing.

On February 24[3] Mr. Manager James B. Perkins, of New York. argued; and was followed by Messrs. Managers Henry D. Clayton, of Alabama, and Samuel L. Powers, of Massachusetts, and they were followed on the same day by Mr. Anthony Higgins, of counsel for the respondent.

On February 25[4] Mr. John M. Thurston, of counsel for the respondent, argued; and then, on the same day, Mr. Manager David A. De Armond, of Missouri, closed the case for the House of Representatives and the people.

2485. The Swayne impeachment continued.

The Senate in secret session framed the rule for voting on the articles impeaching Judge Swayne.

The respondent did not attend when the articles in the Swayne case were voted on in the Senate.

Forms of voting on the articles and declaring the result in the Swayne impeachment.

Judgment of acquittal entered in the Swayne case by direction of the Presiding Officer.

The Swayne trial being concluded, the Senate, on motion, adjourned without day.

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[1] Record, p. 3178.

[2] Record, p. 3181.

[3] Record, pp. 3246–3265.

[4] Record, pp. 3365–3383.

The Senate announced to the House by message the acquittal of Judge Swayne.

Then, on the same day,[1] on motion of Mr. Charles W. Fairbanks, a Senator from Indiana, it was ordered that the doors be closed for deliberation.

The managers on the part of the House, the respondent, and counsel for the respondent retired from the Chamber.

The Senate proceeded to deliberate with closed doors, and at the expiration of one hour and thirty-five minutes the doors were reopened.

While the doors were closed,

Mr. Augustus O. Bacon, of Georgia, submitted the following resolution, which was agreed to:

Resolved, That on Monday next, the 27th day of February, at 10 o'clock a.m., the Senate shall proceed to vote, without debate, on the several articles of impeachment. The Presiding Officer shall direct the Secretary to read the several articles of impeachment in their regular order. After the reading of each article the Presiding Officer shall put the question following: "Senators, how say you, is the respondent, Charles Swayne, guilty or not guilty as charged in this article?" The Secretary will proceed to call the roll for the response of Senators.

Whereupon, when his name is called, each Senator shall arise in his place and give his response "guilty" or "not guilty," and the Secretary shall record the same.

Resolved, That the Secretary notify the House of Representatives of the foregoing.

On February 27,[2] in the Senate, the following occurred:

The PRESIDENT pro tempore. The hour of 10 o'clock having arrived, to which the Senate sitting in the impeachment trial adjourned, the Senator from Connecticut will please take the chair.

Mr. Platt, of Connecticut, assumed the chair.

The PRESIDING OFFICER (Mr. Platt, of Connecticut). The Senate is now sitting in the impeachment trial of Charles Swayne. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms made the usual proclamation.

The PRESIDING OFFICER. The Sergeant-at-Arms will see if the managers on the part of the House are in attendance.

The managers on the part of the House (with the exception of Mr. Powers, of Massachusetts, and Mr. Perkins) appeared and were conducted to the seats assigned them.

The PRESIDING OFFICER. The Sergeant-at-Arms will see if the respondent and his counsel are in attendance.

Mr. Higgins and Mr. Thurston, the counsel for the respondent, entered the Chamber and took the seats assigned them.

The PRESIDING OFFICER. The Journal of the last trial day will be read.

The Journal of the proceedings of the Senate sitting for the trial of the impeachment of Charles Swayne Friday, February 24, was read.

The PRESIDING OFFICER. The Secretary will read the first article of impeachment exhibited by the House of Representatives against Charles Swayne.

The Secretary read the first article of impeachment, as follows: * * *

The article having been read, the Presiding Officer put the question:

Senators, how say you, is the respondent, Charles Swayne, guilty or not guilty as charged in this article?

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[1] Senate Journal, p. 365; Record, p. 3383.

[2] Senate Journal, pp. 365–369; Record, pp. 3467–3472.

The roll was then called, Senators answering "guilty" or "not guilty." In the same manner the verdict was taken on each article, with result as follows:

	Guilty.	Not guilty.
Article I	33	49
Article II	32	50
Article III	32	50
Article IV	13	69
Article V	13	69
Article VI	31	51
Article VII	19	63
Article VIII	31	51
Article IX	31	51
Article X	31	51
Article XI	31	51
Article XII	35	47

After the vote on the first article the Presiding Officer announced:

Senators, upon Article 1 of the impeachment of Charles Swayne 33 Senators have voted "guilty" and 49 Senators have voted "not guilty." Two-thirds of the Senators present not having voted "guilty," Charles Swayne, the respondent, stands acquitted of the charges contained in the first article.

A similar announcement was made after the vote on each article.

At the conclusion of the voting, after the result on the twelfth article had been recorded, the Presiding Officer said:

The Presiding Officer, following the precedent in the Belknap impeachment case, calls the attention of the Senate to the twenty-second rule of procedure and practice in the trial of impeachments, which provides:

"And if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State."

If there is no objection, the Presiding Officer will direct the Secretary to enter a judgment of acquittal according to the rule. The Chair hears no objection. The Secretary will read it.

The Secretary read as follows:

The Senate having tried Charles Swayne, judge of the district court of the United States for the northern district of Florida, upon twelve several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore

Ordered and adjudged, That the said Charles Swayne be, and he is, acquitted of the changes in said articles made and set forth.

Mr. Charles W. Fairbanks, of Indiana, said:

Mr. President, I move that the Senate sitting for the trial of the impeachment of Charles Swayne adjourn without day.

The motion was agreed to; and (at 11 o'clock and 40 minutes a. m.) the Senate sitting upon the trial of the impeachment of Charles Swayne adjourned without day.

The managers on the part of the House and the counsel for the respondent retired from the Chamber.

The President pro tempore resumed the chair.

On the same day,[1] in the House, this message was received:

IN THE SENATE OF THE UNITED STATES,
February 27, 1905.

The Senate having tried Charles Swayne, judge of the district court of the United States for the northern district of Florida, upon twelve several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore

Ordered and adjudged, That the said Charles Swayne be, and he is, acquitted of the charges in said articles made and set forth.

Attest:

CHARLES G. BENNETT, *Secretary.*

The managers made no report to the House.

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[1] House Journal, p. 393; Record, p. 3593.

Chapter LXXIX.

IMPEACHMENT PROCEEDINGS NOT RESULTING IN TRIAL.

2486. The inquiry into the conduct of Judge George Turner in 1796.

In 1796 the House discontinued impeachment proceedings against a Territorial judge on assurance that he would be prosecuted in the courts.

Opinion of Attorney-General Charles Lee as to impeachment of a Territorial judge holding office during good behavior.

Advice of Attorney-General Lee as to mode of instituting and continuing impeachment proceedings.

On receipt of a petition containing charges against a judge, the House, in 1796, instituted an investigation.

On April 25, 1796,[1] a petition was presented in the House from sundry inhabitants of the county of St. Clair, in the Territory northwest of the Ohio River, stating certain grievances and inconveniences to which they had been subjected by the unwarrantable conduct of George Turner, one of the judges of the said Territory, in the exercise of his official duties, and praying that such relief might be granted in the premises as should seem meet to the wisdom of Congress. This petition specified that the judge held a court "unknown to and contrary to the laws of the Territory" at a remote and inconvenient place; that he imposed heavy fines and forfeitures; that he denied the right reserved to the people by the constitution of the Territory, especially as regarded the descent and conveyance of property, and the use of the French language; and that he managed the affairs of interstate persons to the damage of the heirs and creditors.

The House referred the petition to a committee composed of Messrs. Theophilus Bradbury, of Massachusetts; Nicholas Gilman, of New Hampshire; Thomas Hartley, of Pennsylvania; John Heath, of Virginia, and Alexander D. Orr, of Kentucky.

On May 5,[2] the committee were discharged from further consideration of the petition and the same was referred to the Attorney-General for his opinion thereon.

On May 9,[3] Charles Lee, the Attorney-General, transmitted his opinion:

> That the charges exhibited in the petition against Judge Turner, and especially the first, second, and fifth, are of so serious a nature as to require that a regular and fair examination into the truth of them should be made, in some judicial course of proceeding; and if he be convicted thereof, a removal from office may and ought to be a part of the punishment. His official tenure is during good behavior; and, consequently, he can not be removed until he be lawfully convicted of some malversation in office. A judge may be prosecuted in three modes for official misdemeanors or crimes: by information, or by an indictment before an ordinary court, or by impeachment before the Senate of the United States. The last mode, being the most solemn, seems, in general cases, to be best suited to the trial of so high and important an officer; but, in the present instance, it will be found very inconvenient, if not entirely impracticable, on account of the immense distance of the residence of the witnesses from this city [Philadelphia]. In the prosecution of an impeachment, such rules must be observed as are essential to justice; and, if not exactly the same as those which are practiced in ordinary courts, they must be analogous, and as nearly similar to them as forms will permit. Thus, before an impeachment is sent to the Senate, witnesses must be examined, in solemn form, respecting the charges, before a committee of the House of Representatives, to be appointed for that purpose, as in a case of indictment witnesses are examined by a grand jury. Upon the trial the witnesses must give their testimony before the Senate, as in a case of indictment they do before the ordinary court and petit jury; so, also, perhaps, it would be proper that some responsible person or persons should undertake to answer the costs of trial to the accused, in the event of his acquittal. It ought to be remarked that, if the mode of impeachment be deemed preferable, the aforesaid petition, subscribed by forty-nine citizens, may be regarded as sufficient inducement to the House to appoint a committee of inquiry, with authority to examine witnesses and report the substance of their testimony respecting the charges therein set forth, at the present or next session; and, if the report of the testimony will warrant an impeachment, articles are to be directed to be drawn and presented to the Senate, who will appoint a time of trial, giving reasonable notice thereof to the accused and to the accusers, etc.
>
> However, the Attorney-General is of opinion that it will be more advisable, on account of the expense, the delay, the certain difficulty, if not impossibility, of obtaining the attendance here of the witnesses who reside in the Territory northwest of the Ohio, about the distance of 1,500 miles, that the prosecution should not be carried on by impeachment, but by information on indictment

[1] First session Fourth Congress, Journal, p. 522; American State Papers (miscellaneous), Vol. I, p. 151.

[2] Journal, p. 539.

[3] American State Papers (miscellaneous), Vol. I, p. 151.

before the supreme court of that Territory, which is competent to the trial; and he prays leave to inform the House that, in consequence of affidavits stating complaints against Judge Turner, of oppressions and gross violations of private property, under color of his office, which have been lately transmitted to the President of the United States, the Secretary of State has been by him instructed to give orders to Governor St. Clair to take the necessary measures for bringing that officer to a fair trial, respecting those charges, before the court of that Territory, according to the laws of the land; which course is also recommended to be pursued relative to the matters charged in said petition.

Judge Turner was one of three supreme court judges, "any two of whom to form a court, who shall have a common-law jurisdiction, * * * and their commissions shall continue in force during good behavior." [1]

The report of the Attorney-General was, on May 10,[2] referred to a committee composed of the same members originally appointed to consider the petition, and they were directed to "examine the matter thereof, and report the same, with their opinion thereupon, to the House."

On February 16, 1797,[3] a memorial was presented from Judge Turner praying that the House enter upon an investigation of the allegations and charges brought against him in the petition. On February 22 [4] this memorial was referred to the same committee.

On February 27 [5] that committee reported that the case should come to a hearing before the court of the Territory, where the judge would have an opportunity of defending himself.

The report was laid on the table and not acted on further.[6]

2487. The inquiry into the conduct of Judge Peter B. Bruin, in 1808.

Instance of proceedings looking to the impeachment of a judge of a Territory.

The investigation of Judge Bruin's conduct was set in motion by charges preferred by a Territorial legislature.

The House in the Bruin case declined to impeach before it had made an investigation by its own committee.

Instance wherein a Delegate was made chairman of a committee to investigate the conduct of a judge.

On April 11, 1808,[7] the Speaker presented to the House sundry resolutions of the legislative council and house of representatives of the Mississippi Territory, preferring certain charges against Peter B. Bruin, presiding judge of the Territory, and instructing Mr. George Poindexter, Delegate in Congress from the said Territory, to impeach the said judge, and pledging themselves, "in behalf of the people of this Territory, to substantiate and make good" the said charges, which were specified as "neglect of duty and drunkenness on the bench."

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[1] Organic law of Northwest Territory, 1 Stat. L., pp. 51, 286.

[2] Journal, p. 548.

[3] Second session, Journal, p. 701.

[4] Journal, p. 714.

[5] Journal, p. 724; Annals, p. 2320. 8

[6] It appears that Jonathan Return Meigs was appointed Judge on February 12, 1798, but the records of the State Department do not show whose place he took. The appointment of Judge Meigs was made two years after the proceedings in the House against Judge Turner.

[7] First session Tenth Congress, Journal, p. 204; Annals, p. 2068; American State Papers (miscellaneous), Vol. I, pp. 921, 922.

Mr. Poindexter thereupon presented resolutions as follows:

Resolved, That a committee be appointed to prepare and report articles of impeachment against Peter B. Bruin, one of the judges, of the superior court of the Mississippi Territory; and that the said committee have power to send for persons, papers, and records.

In the debate it was objected by Mr. Timothy Pitkin, Jr., of Connecticut, that it would hardly be dignified for the Congress to proceed to an impeachment on the authority of a resolution of the legislature of a State or Territory. A committee should first be appointed to inquire into the propriety of impeaching. Mr. John Rhea, of Tennessee, drew a distinction between the legislature of a State and that of a Territory, and, furthermore, did not consider the resolutions of a legislature conclusive evidence of fact.

Thereupon Mr. Poindexter modified his resolution by striking out the words "prepare and report," and inserting the words "inquire into the expediency of preferring." He further stated that he had seen Judge Bruin on the bench in a state of intoxication.

On April 18[1] the House further amended the resolution, and agreed to it, as follows:

Resolved, That a committee be appointed to inquire into the conduct of Peter B. Bruin, a judge of the superior court of the Mississippi Territory, and report whether, in their opinion, he hath so acted, in his official capacity, as to require the interposition of the Constitutional powers of this House; and that the said committee have power to send for persons, papers, and records.

The committee were appointed as follows: Messrs. Poindexter, Samuel W. Dana, of Connecticut; Jesse Wharton, of Tennessee; Benjamin Howard, of Kentucky; Jeremiah Morrow, of Ohio; Joseph Calhoun, of South Carolina; and John Campbell, of Maryland.

On April 21[2] Mr. Morrow reported a resolution which, after amendment, was agreed to as follows:

Resolved, That George Poindexter, chairman of the said committee, be authorized to cause to be taken before a magistrate or other proper officer such depositions in relation to the official conduct of the said judge as, in his judgment, may be material to the inquiry, having first notified the said Bruin of the time and place, or places, of taking such depositions, so that he may give his attendance; and that the depositions so taken be laid before Congress at their next session.

On April 25 this session of Congress adjourned.

It does not appear that the matter was again taken up. On March 7, 1809, as the records of the State Department show, Francis Xavier Martin was appointed judge, indicating the death or resignation of Judge Bruin.

It appears that the judges of the court of Mississippi Territory, like the judges of the territory northwest of the Ohio, held office "during good behavior," such being the provision of the statutes.[3]

2488. The inquiry into the conduct of Judge Harry Toulmin, in 1811. Instance of proceedings looking to the impeachment of a judge of a Territory.

The inquiry as to Judge Toulmin was set in motion by action of a grand jury forwarded by a Territorial legislature.

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[1] Journal, p. 277; Annals, p. 2189.

[2] Journal, p. 286; Annals, p. 2251.

[3] 1 Stat. L., pp. 51, 550.

In Judge Toulmin's case the House, after investigating in a preliminary way, declined to order a formal investigation.

On December 16, 1811,[1] the Speaker laid before the House a letter from Cowles Mead, speaker of the house of representatives of the Mississippi Territory, inclosing the copy of a presentment against Harry Toulmin, judge of the superior court for the Washington district, in said Territory[2] made by the grand jury of Baldwin County, specifying charges against the said judge, which were read and ordered to lie on the table.

Mr. George Poindexter, Delegate from Mississippi Territory, also presented a copy of the same presentment; which was ordered to lie on the table.

On December 19[3] Mr. Poindexter submitted this resolution:

Resolved, That a committee be appointed to inquire into the conduct of Harry Toulmin, judge of the district of Washington, in the Mississippi Territory, and report whether, in their opinion, he hath so acted, in his official capacity, as to require the interposition of the constitutional powers of this House; and that said committee have power to send for persons and papers.

On December 21[4] Mr. Poindexter withdrew the resolution, and moved that the letter of Cowles Mead, with the accompanying papers, be referred to a select committee to consider and report thereon to the House.

The committee was appointed as follows: Messrs. Poindexter, John Rhea, of Tennessee, John C. Calhoun, of South Carolina; John Taliaferro, of Virginia; Abijah Bigelow, of Massachusetts, and Epaphroditus Champion, of Connecticut.

On January 14, 1812,[5] sundry documents in refutation of the charges were presented and referred to the committee. Also on February 1[6] other papers of a similar tenor were presented and referred. On March 19 and 25 also, similar papers were referred.

On March 11[7] a motion of Mr. Rhea that the committee be discharged from consideration of the subject was decided in the negative, and on April 13 a motion that the committee be directed to report was likewise decided in the negative.

On May 21[8] Mr. Poindexter, from the committee, reported—

That the charges contained in the presentment aforesaid have not been supported by evidence; and from the best information your committee have been enabled to obtain on the subject it appears that the official conduct of Judge Toulmin has been characterized by a vigilant attention to the duties of his station, and an inflexible zeal for the preservation of the public peace and tranquillity of the country over which his judicial authority extends. They therefore recommend the following resolution:

"Resolved, That it is unnecessary to take any further proceeding on the presentment of the grand jury of Baldwin County, in the Mississippi Territory, against Judge Toulmin."

This report was concurred in by the House.

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[1] First session Twelfth Congress, Journal, p. 67; Annals, p. 522; American State Papers, Vol. II (Miscellaneous), p. 162; Annals, p. 2162.

[2] The Mississippi judges were created by statute which made the tenure during good behavior. (1 Stat. L., pp. 51, 550; 2 Stat. L., pp. 301, 564.)

[3] Journal, p. 78; Annals, p. 559.

[4] Journal, p. 87; Annals, p. 567.

[5] Journal, p. 125.

[6] Journal, pp. 155, 255, 265.

[7] Journal, pp. 242, 288.

[8] Journal, p. 347; Annals, p. 1436.

2489. The inquiry into the conduct of Judges William F. Van Ness, Mathias B. Tallmadge, and William Stephens, in 1818.

Judge William Stephens having resigned his office, the House discontinued its inquiry into his conduct.

In 1818 the House inquired into the official conduct of Judges William P. Van Ness and Mathias B. Tallmadge, of the district courts of New York, and William Stephens of the district court of Georgia.[1] The committee found that Judge Van Ness had shown some remissness in not exercising constant vigilance over the money of the court, which had been purloined by the clerk, and in not vigorously enforcing the provisions of the law and rules of the court. There were also complaints against some decisions and orders of Judge Van Ness, "but the respect which this committee entertains for the constitutional rights of a judge, and for the laws which provide adequate remedies for any errors he may commit, forbids their questioning any judicial opinions." The committee say that they have discovered nothing which furnishes "any ground for the constitutional interposition of the House."[2] The inquiry into the conduct of Judge Van Ness was instituted by a resolution reported from the Judiciary Committee, who had been examining the conduct of the clerk of the court, and found some circumstances connected with the judge's conduct which justified investigation.[3] And the names of Judges Tallmadge and Stephens had been added by way of amendment to the resolution of inquiry.

On November 24, 1818,[4] on motion of Mr. John C. Spencer, of New York, it was

Ordered, That the committee appointed at the last session of Congress, to inquire into the official conduct of certain judges of the courts of the United States, be discharged from so much of their duty as relates to the conduct of William Stephens, who has resigned his office of judge of the court of the United States for the district of Georgia.

On February 17, 1819,[5] Mr. Spencer reported on the case of Judge Tallmadge, who was charged with having omitted to hold the terms of the district court for which he was appointed, according to law. The committee found that at certain times he had omitted sessions, but say:

It appears satisfactorily, from the testimony of several physicians, and of the Hon. Nathan Sanford, given on a former inquiry into the conduct of Judge Tallmadge, that in 1810 his health became extremely delicate, and that very great exertion of body, or any unusual agitation of mind, invariably produced severe sickness, so as to disqualify him for any official duties; and that his life was prolonged by visiting a more genial climate in the winter season.

On entering upon the duties of his office in 1805, Judge Tallmadge encountered a mass of business which had accumulated from the ill health and the death of his predecessor, and from the want of any judge in the court for the time immediately preceding his appointment. The sickness of Judge Patterson, who should have presided in the circuit court, materially increased the labors of the district judge.

The committee are of opinion that there is nothing established in the official conduct of Judge Tallmadge to justify the constitutional interposition of the House.

The report was laid on the table.

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[1] First session Fifteenth Congress, Journal, p. 447; Annals, p. 1715.

[2] Second session Fifteenth Congress, Report No. 136.

[3] Annals, p. 1715.

[4] Second session Fifteenth Congress, Journal, p. 35; Annals, p. 313.

[5] Journal, p. 279; Annals, p. 1222.

2490. The investigations into the conduct of Judge Joseph L. Smith, in 1825 and 1826.

The House decided to investigate the conduct of Judge Smith, on assurance of a Territorial Delegate that the person making the charges was reliable.

Instance wherein charges were presented against a judge in three Congresses.

On February 3, 1825,[1] Mr. Richard K. Call, Delegate from Florida Territory, presented this resolution:

Resolved, That the Committee on the Judiciary be instructed to inquire whether either of the judges of the district courts of Florida have received fees for their services not authorized by law; and, if any, what other malpractices have been committed by the said judges, or either of them; and that the said committee be authorized to compel the attendance of persons and the production of papers to promote this investigation.

In support of this resolution Mr. Call presented a letter addressed to himself by Edgar Macon, United States attorney for East Florida, in response to a request made by Mr. Call for information.

At the May term of the superior court of East Florida—

Says Mr. Macon's letter—

in 1824 Judge Smith established a number of rules for the government of the practice of his court, by which provision is made for the transacting and doing of much business in vacation, which previously had been done in term, viz, such as making orders for commissions to take foreign testimony, and hearing and deciding on motions for amending pleadings, etc., and other matters and questions generally aiding in the usual progress of a suit; for all which services, when performed, Judge Smith has charged fees. I have paid them, and I believe every attorney of his (Judge Smith's) court has done the game. It is proper to mention that in the United States and Territorial cases Judge Smith has never charged fees.

Mr. Call vouched for the reliability of Mr. Macon's word, and asked that the resolution be agreed to.

The House, without division, agreed to the resolution.

On February 28[2] Mr. William Plumer, jr., of New Hampshire, from the Committee on the Judiciary, submitted a report, saying that the committee were—

not able to perceive how any law of the Territory can authorize the judge to receive any compensation in the shape of fees for his official services in the place which he holds under the authority of the United States. The distance of the parties, however, from the seat of government, renders it wholly impracticable to make any investigation into the particular circumstances of the case during the present session of Congress. The committee therefore pray that they may be discharged from any further consideration of the resolution.

The report was read and laid on the table.

At the beginning of the next Congress on December 27, 1825,[3] Mr. Joseph M. White, Delegate from Florida, presented the petition of Joseph L. Smith, judge of the supreme court of said Territory, praying that his conduct as judge might be

[1] Second session Eighteenth Congress, Journal, pp. 197, 198; Debates, pp. 438, 439.

[2] Journal, p. 279; Report No. 87.

[3] First session Nineteenth Congress, Journal, p. 93.

inquired into, and that his character might be freed from the public imputation to which it had been subjected.

Mr. White also presented the petition of Edgar Macon charging Judge Smith with malfeasance and corruption in office, and praying that the charges might be investigated by Congress.

These papers were ordered referred to the Judiciary Committee.

On January 9[1] Mr. White presented a memorial of the legislative council of Florida soliciting an investigation of the charges preferred against Judge Smith.

This paper also was referred to the Judiciary Committee.

On February 7, 1826,[2] Mr. John C. Wright, of Ohio, from the Committee on the Judiciary, reported that the committee had examined the petition, memorial, and evidence offered, and asked that they be discharged from the further consideration of the subject.

This report was agreed to by the House.

On January 11, 1830,[3] Mr. White presented a memorial addressed to the President of the United States, and sundry documents signed by the citizens of East Florida, charging Judge Smith with tyrannical and oppressive conduct, and imploring his removal from the office of judge.

These papers were referred to the Judiciary Committee, but it does not appear that they were ever reported on.[4]

2491. The investigations into the conduct of Judge Buckner Thurston, in 1825 and 1837.

The investigations into the conduct of Judge Thurston were set in motion by memorials.

Form of memorial praying for the impeachment of Judge Thurston, in 1837.

The House sometimes refers for preliminary inquiry a memorial praying impeachment and sometimes orders investigation at once.

In 1825 the House preferred that charges against a judge should be investigated by a committee.

During the investigation of Judge Thurston with a view to impeachment he was present and cross-examined witnesses.

On February 21, 1825,[5] Mr. James Strong, of New York, presented a petition of John P. Van Ness complaining of the official conduct of Buckner Thurston, one of the associate judges of the Circuit Court of the United States for the District of Columbia, and praying that the subject of his complaint might be inquired into by Congress.

The petition was referred to the Committee on the District of Columbia, but on February 24 the reference was changed to the Judiciary Committee.

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[1] Journal, p. 129.

[2] Journal, p. 233.

[3] First session Twenty-first Congress, Journal, p. 146.

[4] The judge of the supreme court of Florida held his office by virtue of a statute, and for the term of four years. (3 Stat. L., p. 753; 4 Stat. L., p. 45.)

[5] Second session Eighteenth Congress, Journal, pp. 254, 267.

On February 28[1] Mr. William Plumer, Jr., of New Hampshire, from the Judiciary Committee, submitted a report that the committee—

Having investigated the matter of the memorial, they are unanimously of opinion that there is nothing in the conduct of Judge Thurston which requires the interposition or reprehension of this House. They therefore ask to be discharged from the further consideration of this memorial.

The report was laid on the table.

On January 30, 1837,[2] the Speaker presented a memorial of Richard S. Coxe and William L. Brent, of the District of Columbia, praying an investigation into the judicial conduct of Judge Thurston. The memorial in part was as follows:

Should this memorial be referred to the appropriate committee we pledge ourselves to prove to the satisfaction of Congress—

1. That Judge Thurston is grossly and avowedly ignorant and regardless of the law which it is his duty to administer.

2. That he is habitually inattentive and neglectful in the discharge of his official duties.

3. That his deportment on the bench is rude, insolent, and undignified, and calculated to bring the administration of the law into contempt.

4. That he is habitually rude and insolent toward his brethren on the bench, to their great annoyance and to the hindrance of justice.

5. That he is habitually rude, insolent, and quarrelsome toward the members of the bar; constantly in a state of irritation and excitement, applying to them, without cause or provocation, the most harsh and vulgar epithets in our vocabulary.

6. That, in these different modes, he incessantly interferes with the administration of justice, gratifies his own personal passions at the expense of truth and justice, involves the Government and the community in enormous expenses and vexatious delays, and employs his official power and station in outraging the feelings and illegally and unjustly injuring those who may accidentally become the objects of his infuriate resentment.

7. That on several occasions he has, from the bench, actually invited members of the bar to leave the court and enter into a personal encounter with him.

8. That he is, from want of professional information, from his neglect of his duties, from his furious and ungovernable temper, wholly unfit for the station he occupies.

These general heads of accusations, with all the necessary details of time, place, person, and circumstance, we tender ourselves ready and prepared to establish by the most plenary proof.[3]

On January 31[4] Mr. Francis Thomas, of Maryland, proposed this resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers, and to inquire into the truth of the charges made in the memorial of William L. Brent and Richard S. Coxe, complaining of the official conduct of Buckner Thruston, one of the judges of the circuit court of the United States for the District of Columbia.

On March 3,[5] the last day of the Congress, Mr. Thomas reported from the committee, without recommendation of any kind, the testimony taken before the committee. The report was ordered to lie on the table and be printed.

The report shows that many witnesses were examined, and that Judge Thurston was permitted to cross-examine.

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[1] Journal, p. 279; Report, No. 85.

[2] Second session Twenty-fourth Congress, Journal, pp. 316, 317.

[3] The memorialists subscribed their names to the memorial, but the signatures were not attested.

[4] Journal, p. 332.

[5] Journal, p. 586; Report No. 327.

Judge W. Cranch, an associate of Judge Thurston, having been called upon to testify in this case, objected on behalf of himself and Judge Morsell to giving testimony, on account of their official relations to the respondent, but the committee overruled this objection.

It does not appear that any action was taken further than the printing of the report.

The records of the State Department indicate that Judge Thurston remained in office until he died, on August 30, 1845. On October 3, 1845, James Dunlop was appointed judge.

2492. The investigation into the conduct of Judge Alfred Conkling in 1829.

In the case of Judge Conkling the memorial preferring charges was referred to the Judiciary Committee for examination before an investigation was ordered.

Views of the minority of the Judiciary Committee, in 1830, as to offenses amounting to high misdemeanor.

On February 16, 1829,[1] Mr. Selah R. Hobbie, of New York, presented a memorial of Martha Bradstreet, of the State of New York, preferring charges against Alfred Conkling, judge of the district court of the United States for the northern district of New York, as grounds for an impeachment of the said judge.

This memorial was referred to the Committee on the Judiciary.

On February 23 the House ordered the committee discharged from consideration of the memorial and gave the memorialist leave to withdraw.

In the next Congress, on February 22, 1830,[2] on motion of Mr. Churchill C. Cambreleng, of New York, it was ordered that the memorial of Martha Bradstreet in relation to Judge Conkling be referred to the Committee on the Judiciary.

On March 22[3] Mr. Cambreleng presented a memorial of Martha Bradstreet, preferring additional charges and praying to be permitted to substantiate them. This memorial was referred to the Judiciary Committee.

On March 26[4] the Judiciary Committee were granted leave to sit during sessions of the House for the purpose of investigating the matters set forth in the memorial.

On April 3[5] Mr. Charles A. Wickliffe, of Kentucky, from the Committee on the Judiciary made an unfavorable report on the memorial, finding no cause for impeachment. This report was concurred in by all the members of the committee except Mr. Warren R. Davis, of South Carolina. Presumably those concurring were Messrs. James Buchanan, of Pennsylvania; Henry R. Storrs, of New York; Thomas T. Bouldin, of Virginia; William W. Ellsworth, of Connecticut, and Edward D. White, of Louisiana. Mr. Davis dissented, and on April 8[6] filed minority views. He states in his views that the memorialist presented thirty-three charges for misdemeanors in office. The majority had concluded that there was nothing in the

[1] Second session Twentieth Congress, Journal, pp. 291, 292, 324.

[2] First session Twenty-first Congress, Journal, 319.

[3] Journal, p. 447.

[4] Journal, p. 462.

[5] Journal, p. 494.

[6] Journal, p. 514; Report No. 342.

charges or in the testimony adduced to support them that required the constitutional interposition of the House. The minority believed that two charges were supported by adequate testimony, and if true amounted to a high misdemeanor:

(*a*) His causing the name of John L. Tillinghast to be struck from the rolls of the said court, for having expressed out of court his opinion of the said Judge Conkling.

(*b*) His having thereby illegally and unconstitutionally assumed to himself the power to act as judge in his own cause. And, in pursuit of his object, violated the immemorial course and practice of courts of justice, and disregarded even the form of law. And this for the mere gratification of his private revenge.

Mr. Davis argued at some length in support of his claim that the two specifications, as supported by the evidence, contained matter amounting to misdemeanor in office.

The report of the majority was laid on the table, and no further action appears.

2493. The investigation of the conduct of Benjamin Johnson, a judge of the superior court of the Territory of Arkansas, in 1833.

In 1833 the Judiciary Committee held that a Territorial judge was not a civil officer of the United States within the meaning of the Constitution.

On January 15, 1833,[1] the Speaker submitted to the House a letter from Egbert Harris, of the Territory of Arkansas, inclosing charges and specifications made by William Cummins against Benjamin Johnson, one of the judges of the superior court of the Territory of Arkansas.

Mr. Ambrose H. Sevier, Delegate from Arkansas, presented sundry documents exculpatory of Judge Johnson.

The letter of Mr. Harris and the other papers were referred to the Committee on the Judiciary.

On February 8[2] Mr. John Bell, of Tennessee, presented the report of the committee on the memorial. The committee included besides Mr. Bell, Messrs.William W. Ellsworth, of Connecticut; Henry Daniel, of Kentucky; Thomas F. Foster, of Georgia; Wm. F. Gordon, of Virginia; Samuel Beardsley, of New York, and Richard Coulter, of Pennsylvania.

The report first dealt with a preliminary question:

> A majority of the committee are strongly inclined to the opinion that such an officer is not a proper subject of trial by impeachment. Some of the reasons upon which that opinion may be supported will be stated.
>
> The Constitution, in Article II, section 4, provides that "all civil officers of the United States shall be removed from office by impeachment." The institution by Congress of those political corporations, denominated, in the language of our legislation upon that subject, Territorial governments, is only authorized by a very liberal construction of the general power given by the Constitution to Congress over the public domain. But, admitting that exercise of power to be well enough founded, still, can a judge of such a government be said to be an officer of the United States within the meaning of the clause already quoted? Should the doubt thrown out by the committee upon this point appear to the House to be without reasonable foundation, they think they will be fully sustained in the opinion, that, whether liable to impeachment or not, the practice of impeaching subordinate officers, and especially such as hold their offices by a tenure not more firm and durable than the judge of a Territorial court, would

[1] Second session Twenty-second Congress, Journal, p. 179.

[2] Journal, p. 290; Report No. 88.

soon be found highly inconvenient and injurious to the public interest. The judge whose conduct in the present instance is alleged to be such as to call for the exercise of the impeaching power of the House, holds his office for a term of four years only, and may, by the express provision of the act of Congress establishing his office, be removed at any time within that term by the President. The trial by impeachment is the highest and most solemn in its nature known in the administration of public justice. It is established for high political purposes, and would seem to be proper only against judges who hold their offices during good behavior, and other high officers of the Government, for such crimes or misdemeanors as the public service and interest require to be punished by removal from office.

Proceeding to the merits of the case, the report says:

The general charges against him are favoritism or partiality to particular counsel in the trial of causes, irritability of temper and rudeness on the bench toward his brother judges and the bar; incapacity, manifested by a vacillating and inconsistent course of judicial decision, and habitual intemperance.

The committee did not find these charges well sustained, and furthermore they found decided and unequivocal testimony in favor of the judge.

The report was laid on the table.

2494. The investigation into the conduct of Judge F. K. Lawrence, in 1839.

The proceedings in the case of Judge Lawrence were set in motion by a memorial setting forth specific charges.

The memorial setting forth charges against Judge Lawrence was referred for examination before an investigation was ordered.

The House referred the charges made against Judge Lawrence, in 1839, to a select committee instead of to the Judiciary Committee.

A select committee recommended the impeachment of Judge P. K. Lawrence, in 1839.

The investigation into the conduct of Judge P. K. Lawrence, in 1839, was entirely ex parte.

On January 7, 1839,[1] Mr. Henry Johnson, of Louisiana, presented a memorial of Duncan N. Hennen, a citizen of the State of Louisiana, making charges of high crimes and misdemeanors against P. K. Lawrence, judge of the district court of the United States for the eastern district of Louisiana, and praying that the House of Representatives would inquire into the facts whether the said Judge Lawrence, in the exercise of the high trust and confidence reposed in him, had not been guilty of corrupt, malicious, and dangerous abuses of power.

The memorial set forth specifically that the memorialist had been appointed clerk of the said court in 1834, and had served until May 18, 1838, when Judge Lawrence sent him a letter of removal and informing him that John Winthrop had been appointed in his place; that the memorialist, being advised that Judge Lawrence had acted without power, refused to deliver the records of the court to the said Winthrop; that Judge Lawrence had issued a writ without authentication of the seal of the court, commanding the marshal to seize the records; that the memorialist, as clerk of the district court, became ex officio clerk of the circuit court for the ninth circuit; that on May 21, 1838, both the memorialist and the said

[1] Third session Twenty-fifth Congress, Journal p. 222; Globe, p. 404; Report, No. 272.

Winthrop presented themselves, each as clerk, before the circuit court, Judge John McKinley and the aforesaid Judge Lawrence, sitting; that the memorialist objected, when arguments were to be heard on the rival claims, to Judge Lawrence sitting in the matter, (*a*) because he professed to have formed and delivered an opinion on the question; (*b*) because, from expressions in the letter of removal, he had confessed partiality toward the said Winthrop; (*c*) because there was no need of the said Judge Lawrence passing on the case since memorialist was willing to acquiesce if Judge McKinley held the removal legal; (*d*) and because a difference of opinion between the judges would lead to adjournment of court until a final decision by the Supreme Court of the United States; that Judge Lawrence persisted in sitting, and there resulted a difference of opinion between him and his associates; that Judge McKinley held that the removal was illegal and that the memorialist was de jure and de facto clerk, to which Judge Lawrence dissented; that the circuit court adjourned without transaction of business; that the memorialist continued in possession of the seals and records of both courts, and that the records of the district court were not seized by the marshal under the writ until the next June; that in November 19, 1838, at the holding of the circuit court, in the absence of Judge McKinley, Judge Lawrence declined to allow the memorialist's deputy to perform the duties of clerk, but made a rule in a civil cause calling upon the deputy to produce the records, and on the succeeding day committed the deputy to prison for alleged contempt; that after release by habeas corpus the deputy was a second time committed for refusing to deliver the records; that the said proceedings were in violation of the act of April 29, 1802, providing "that imprisonment is not allowed, nor punishment in any case inflicted, where the judges of the said court are divided in opinion upon the question touching such imprisonment;" that the said proceedings of Judge Lawrence to take the records were made after the Supreme Court of the United States had granted a rule requiring Judge Lawrence to show cause why the memorialist should not be allowed to discharge the duties of the office; that Judge Lawrence had caused a new seal, not in form required by law, to be made; that Judge Lawrence, on November 26, 1838, had issued a writ authorizing the seizure of the records of the circuit court wheresoever found, thus illegally authorizing a seizure out of his district; that Judge Lawrence had refused to obey a mandate of the Supreme Court in a certain case, giving out that the Supreme Court had grossly mistaken the law; that he had illegally absented himself from his district; that he had for five years been notoriously and inveterately addicted to the intemperate use of ardent spirits, and that by his course in regard to the clerkship he had suspended the administration of justice for a judicial year.

This memorial was signed by the memorialist, but the signature was not attested.

Mr. Johnson asked that the memorial be referred to a select committee. Although it was suggested that the Judiciary Committee should consider it, Mr. Johnson's motion was agreed to, and the committee was composed of Mr. Johnson and Messrs. John Pope, of Kentucky; Thomas T. Whittlesey, of Connecticut; John Campbell, of South Carolina; George W. Owens, of Georgia; William B. Calhoun, of Massachusetts; and George C. Dromgoole, of Virginia.

On January 21,[1] on motion of Mr. Johnson, it was:

Resolved, That the select committee appointed to inquire into the charges of high crimes and misdemeanors against P. K. Lawrence, judge of the district court of the United States for the State of Louisiana, be authorized to send for persons and papers.

On February 11,[2] Mr. Johnson submitted the report of the committee. This report consisted largely of affidavits and records of testimony taken in Louisiana. It is all ex parte. The report concludes:

That, in consequence of the evidence * * * they are of the opinion that Philip K. Lawrence, judge of the district court of the United States for the eastern and western districts of Louisiana, be impeached for high misdemeanors in office.

It was ordered that the report be considered on February 21, but the Congress was nearing its close and no action by the House appears.

On September 3, 1841, as the records of the State Department show, Theodore H. McCaleb was appointed judge of this district.

2495. The investigations into the conduct of John C. Watrous, United States judge for the district of Texas.

The House, in 1852, on the strength of a memorial setting forth charges, investigated the conduct of Judge Watrous with a result favorable to him.

In the investigation of 1852 Judge Watrous, the accused, was permitted to appear before the committee with counsel. (Footnote.)

The conduct of Judge Watrous was the subject of reports, favorable and unfavorable, in four Congresses.

On February 13, 1852,[3] Mr. Abraham W. Venable, of North Carolina, from the committee on the Judiciary reported a resolution as follows:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers, with authority to examine witnesses,[4] under oath, in relation to the charges made against John C. Watrous, judge of the United States court for the district of Texas.

Mr. Venable explained that a memorial of William Alexander, a lawyer of Texas, had been presented to the House, charging Judge Watrous with practicing law and receiving fees in the State of Texas touching matters which had come before and been decided upon by himself, with adjudicating cases in which he was personally interested, and with certain violations of the laws of Texas militating against his judicial purity.

The resolution was agreed to by the House.

On August 27[5] the Speaker laid before the House a letter from Judge Watrous, wherein he stated that the pending inquiry was preventing the decision of important cases in his court, and asked for speedy action by the House. This communication

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[1] Journal, p. 332.

[2] Journal, p. 521; Report, No. 272.

[3] First session Thirty-second Congress, Journal, p. 348; Globe, p. 560.

[4] In his answer filed with the Judiciary Committee in 1858 (first session Thirty-fifth Congress, House Report No. 540, p. 18) Judge Watrous makes a statement which shows that during these proceedings in 1852 he was present with counsel before the committee. It also appears that witnesses were examined at that time (p. 437 of Report No. 540).

[5] Journal, p. 1087; Globe, p. 2382.

was referred to the Committee on the Judiciary, and then, on motion of Mr. Richardson Scurry, of Texas, it was

Ordered, That the Committee on the Judiciary have leave to report upon the case of the said Judge John C. Watrous at any time.

At the next session of Congress, on January 13, 1853,[1] Mr. William A. Howard, of Michigan, presented additional evidence in the case, which was referred to the Judiciary Committee.

On February 28,[2] Mr. Venable submitted the report of the committee, which was as follows:

That after an examination of much documentary evidence, as well as many witnesses, summoned from Texas, they do not recommend that articles of impeachment be directed by this House against the said John C. Watrous.

This report was laid on the table.

2496. The Watrous investigation continued.

In the investigation of 1856 the Judiciary Committee made a report favoring impeachment on the strength of memorials and without the power to compel testimony being given by the House.

The memorials submitting the charges against Judge Watrous, in 1856, were accompanied by a large amount of documentary evidence.

The investigation of the conduct of Judge Watrous, in 1856, was conducted entirely ex parte, but the evidence was documentary and voluminous.

In the Watrous investigation of 1856 the Judiciary Committee, following precedents, reported the evidence but made no specific charges.

The Watrous report of 1856 led to a debate as to the propriety of ex parte investigations and to a citation of English and American precedents.

It appears that a report impeaching a civil officer was not considered, in 1856, privileged to be made at any time. (Footnote.)

On July 30, 1856,[3] Mr. Miles Taylor, of Louisiana, presented the memorial of Jacob Mussina, a citizen of Louisiana, praying for an investigation into the conduct of Judge Watrous; and on August 6, Mr. Peter H. Bell, of Texas, presented a memorial of Eliphas Spencer, of Texas, asking for the impeachment of Judge Watrous. These papers were referred to the Judiciary Committee.

The memorial of Jacob Mussina, who was a party to a chancery suit litigated in Judge Watrous's court in Galveston, set forth in detail charges of conduct oppressive and partial and in entire disregard of the well-established rules of law and evidence and the rights of litigants. The memorial of Eliphas Spencer, who was interested in a tract of land in Texas, charged Judge Watrous with entering into a conspiracy for the purpose of fraudulently and corruptly adjudicating and determining the validity of a certain grant, by means of which the said judge himself secured the title of a portion of the land, or the proceeds of the sale of it.

The two memorials were accompanied by a mass of records and documents,

[1] Second session Thirty-second Congress, Journal, p. 125.

[2] Journal, p. 350; Globe, p. 927; Report No. 7.

[3] Second session Thirty-fourth Congress, Journal, pp. 1326, 1376; Globe, p. 1818.

among which was a joint resolution of the legislature of Texas, approved March 20, 1848, charging Judge Watrous with improper conduct, and suggesting corrupt acts, and requesting him to resign his office.

It is not wholly certain from the report of the Judiciary Committee whether or not they sought evidence beyond the documents furnished with the memorials. If they did, it was purely documentary. It does not appear that they asked the House for authority to take testimony, and they did not take any, unless documentary.

On February 2, 1857,[1] Mr. Lucian Barbour, of Indiana, asked a suspension of the rules to enable him to report from the Committee on the Judiciary,[2] and on February 9, by a vote of yeas 156, nays, 32, the rules were suspended and the report was made, accompanied by this resolution:

Resolved, That John C. Watrous, United States district judge for the district of Texas, be impeached of high crimes and misdemeanors.

In their report, which was unanimous with the exception of one dissenting member, two members being absent, the committee say:

Upon referring to the proceedings in cases of former impeachments, the committee find that specific charges of impeachment have not been preferred in the report of the committee to the House; but in most cases they have simply reported the testimony, with a resolution that the accused be impeached of high crimes and misdemeanors. Specific charges have been preferred afterwards, when the Senate has signified its readiness to proceed with the trial The committee would, however, state very briefly the substance of the charges in the petitions and the grounds upon which they have resolved to report the resolution.

After reviewing the charges, the report concludes:

The committee have examined numerous records, consisting of pleadings, orders of court, affidavits, and depositions, and after a patient and laborious research they have reluctantly come to the conclusion that the conduct of Judge Watrous in the cases above referred to can not be explained without supposing that he was actuated by other than upright and just motives; that in his disregard of the well-established rules of law and evidence he has put in jeopardy and sacrificed the rights of litigants, and in acquiring a title to property in litigation, or held by adverse possession, he has given just cause of alarm to the citizens of Texas for the safety of private rights and property, and of their public domain, and has debarred them from the rights of an impartial trial in the Federal courts of their own district.

The report having been read, two questions at once arose. Mr. Howell Cobb, of Georgia, asked if the testimony had been printed and declared that he should be unwilling to act on the resolution presented by the committee until he had been enabled to read the testimony.

Mr. Humphrey Marshall, of Kentucky, desired, as a member of the Judiciary Committee, to state that he had had nothing to do with the proceedings resulting in the report, since he had come to the conclusion that the investigation ought not to proceed without notice to the party. Mr. John A. Quitman, of Mississippi, said he was unwilling to assist in bringing on the expense and trouble of an impeachment trial without the strongest probable cause, and he was not willing to take as probable cause the strongest ex parte testimony where the opposite party had not been heard. Mr. John S. Caskie, of Virginia, cited the precedents in the cases of Judge Peck and Warren Hastings, and while not claiming that it was absolutely

[1] Third session Thirty-fourth Congress, Journal pp. 347, 381, 507; Globe, pp. 542, 627–630, 797, 798; Report No. 175.

[2] At that time such a report does not seem to have been held privileged.

incumbent for a committee charged with the consideration of a memorial praying an impeachment to give notice to the person against whom the charges were made and allow him to cross-examine witnesses before them, yet such was evidently the fair and judicious course.

Mr. George A. Simmons, of New York, speaking for the committee, said:

I am perfectly aware that in many such cases, in perhaps the majority of cases of impeachment, the party accused has been before the committee just as both parties are sometimes examined before magistrates. But there have been one or two cases in the House where the party accused has not been before the committee. It seems to me to be the opinion of the House—and probably well-founded on the Constitution—that a judge can not be displaced incidentally by remodeling his jurisdiction, or anything of that sort, although it was once done by Mr. Jefferson on a very large scale, to the satisfaction of the Democratic party. Notwithstanding that, the committee have come to the conclusion that it is the sense of the House, as it is undoubtedly the opinion of commentators, such as Judge Story, that there is no way to get rid of a judge, however unpopular he may be, however destitute he may be of the confidence of the people, unless by impeachment. The committee think that an impeachment ought to lie in all cues where there is a want of good behavior. It is not necessary to prove him guilty of high treason, or of highway robbery, or of some indelicate crime. It is enough that he has not fulfilled his duty as a judge in all respects so as to entitle himself to the confidence of the people. * * * It does not always follow that a man must be present when he is indicted by a grand jury. Neither does it always follow that because he is indicted he must be convicted. There undoubtedly should be prima facie evidence sufficient before the grand jury to satisfy them that the man whom they indict is guilty of the crime, just as there should be sufficient prima facie evidence in cases of impeachment—which are analogous—to show that the judge has failed in good official behavior.

Mr. Abram Wakeman, of New York, said:

The evidence is almost entirely of a documentary character, and if there is no other reason that alone would absolve the committee from the necessity of calling Judge Watrous before them. They are also of opinion that it was not within their province or their duty, in reference to the charge placed in their hands, to compel or require the attendance of Judge Watrous at this stage of the proceeding. They were called upon to inquire whether there was a prima facie case of corruption against him. If there was, they considered it their duty to present him before the Senate of the United States, where his case could be properly heard and tried. If * * * we were under an obligation to investigate and pronounce a decision upon this case, Judge Watrous would have two trials—first, before the Committee on the Judiciary, where he would be under the necessity of calling witnesses and counter witnesses, and the committee would stand in the capacity of judges, in the first instance, to try the guilt or innocence of Judge Watrous. * * * In one case of impeachment alone, where a judge was charged with high crimes or misdemeanors, was he summoned before the committee prior to the presentation of his case to the House.

Mr. Wakeman later stated this case specifically—that of Judge Pickering.

The House, without division, decided that the testimony should be printed, and that the consideration of the resolution should be postponed to Saturday, February 21.

On that day it was announced that a delay had occurred at the printing office and the testimony had not yet been printed. Mr. Caskie urged that the matter should be allowed to go over to the next Congress. A few days only remained of this Congress, and if they should agree to the resolution of impeachment new men would have to carry on the trial, as very few of this House were elected to the next, and not a single member of the Judiciary Committee had been returned.

Mr. Barbour, however, moved that the matter be postponed to Saturday, February 28, and this motion was agreed to.

But on February 28 only three legislative days remained to the Congress, and the resolution was not considered.

2497. The Watrous investigation continued.

In 1857 memorials before the House in a preceding Congress were reintroduced as a basis for investigation of the conduct of Judge Watrous.

The Watrous investigation of 1857 was limited in its scope by the withdrawal from the Judiciary Committee of a memorial containing certain charges.

In the Watrous investigation of 1857, the committee being equally divided, reported the evidence and two propositions, each supported by minority views.

In the investigation of 1857 the committee formally permitted Judge Watrous to file a written explanation and cross-examine witnesses in person or by counsel.

The committee investigating Judge Watrous, in 1857, appears to have informally permitted the accused to adduce testimony.

Discussion of the proper mode of examination in an investigation with a view to impeachment.

In the Watrous investigation of 1857 the written explanation of the accused was printed as part of the report.

An argument that judges may be impeached for any breach of good behavior.

After the report on his conduct by a committee, Judge Watrous presented to the House a memorial embodying his defense, and it was ordered printed and laid on the table.

At the beginning of the next Congress, on December 17, 1857,[1] Mr. Guy M. Bryan, of Texas, presented the memorial of Eliphas Spencer, praying for the impeachment of Judge Watrous; and on the next day[2] Mr. Miles Taylor, of Louisiana, reintroduced the memorial of Jacob Mussina, which had been presented in the preceding Congress.

On January 15, 1858,[3] Mr. George S. Houston, of Alabama, from the Committee on the Judiciary, presented this resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers and examine witnesses on oath in relation to the charges made against John C. Watrous, judge of the United States court for the western district of the State of Texas.

On February 18[4] Mr. Bryan presented resolutions of the legislature of Texas, which were referred to the Judiciary Committee; and on February 23[5] Mr. John H. Reagan, of Texas, presented the memorial of William Alexander on the same subject, and it was referred to the same committee.

On May 15[6] Mr. Horace F. Clark, of New York, from the Committee on the Judiciary, moved that that committee be discharged from the further consideration of the memorial of William Alexander. He said that in investigating the charges

[1] First session Thirty-fifth Congress, Journal, p. 81.

[2] Journal, p. 85.

[3] Journal, p. 175; Globe, p. 304.

[4] Journal, p. 404; Globe, p. 782.

[5] Journal, p. 412.

[6] Journal, pp. 826, 835, 836; Globe, pp. 2167–2169, 2195.

made in the memorials of Jacob Mussina and Eliphas Spencer the committee had taken up the matter de novo, as they were not satisfied with the methods of the committee in the preceding Congress. But they found that the allegations in the memorial of Alexander had been investigated by the committee in the Thirty-second Congress, and the committee had reported against impeachment proceedings. Therefore, with the great amount of labor involved in hearing the other charges, the committee did not wish to pursue the Alexander charges. It was urged also that the committee in the preceding Congress had taken no notice of the Alexander charges. Mr. John H. Reagan urged that the Alexander charges should be investigated, especially in the view that articles of impeachment might be prepared.

The House, on May 17, agreed to the motion of Mr. Clark that the committee be discharged.

On June [1] Mr. Houston presented the report of the committee, which was simply to the effect that they were equally divided, one portion recommending a resolution that Judge Watrous be impeached and the other portion a resolution that the testimony did not afford sufficient grounds for impeachment.

On June 7 [2] both portions of the committee, by permission of the House, presented minority views, which gave the respective opinions of the two portions.

The regular report, although giving no opinions, was accompanied by the record of the evidence and also by record of certain proceedings. It appears that on January 8 [3] Mr. Houston, chairman of the committee, addressed a letter to Judge Watrous informing him of the reference of the memorials, and notifying him that the subject-matter would be taken up on February 2, next. To this Judge Watrous replied:

> I most respectfully ask to be informed whether, at the approaching investigation by the committee, * * * I may be permitted to be present, together with my counsel. And I also desire to be informed whether the investigation will be confined to the testimony against me, or will be extended to all sources of information which are necessary to a proper understanding of the case. * * * Should a full and fair investigation of both sides of the case be determined on, I should take great pleasure (if permitted to do so) in furnishing a list of witnesses, whose testimony will put the whole case before the committee.

To this the committee replied by this resolution:

> *Resolved,* That Hon. John C. Watrous be informed that the Committee on the Judiciary will, on Tuesday, the 2d day of February, 1858, take up for investigation and action the memorials of Jacob Mussina and Eliphas Spencer, and that the committee will receive from the said John C. Watrous at any time previous to the said 2d day of February any explanation in writing relative to the charges contained in said memorials, and that after having made such communication in answer to said charges, the said John C. Watrous will be permitted by himself or counsel to cross-examine witnesses who may be examined before said committee.

Mr. Horace F. Clark, of New York, one of the four members of the committee who found against impeachment, while concurring with his three associates on the question of fact, filed supplemental views, in which he said: [4]

> I am not satisfied to vote an impeachment upon the ascertainment of what is commonly termed probable causes; nor do I regard the principles of common law relative to proceedings before grand juries applicable to cases of impeachment under the Constitution of the United States. The House of

[1] Journal, p. 1004; Globe, p. 2659; House Report No. 540.

[2] Journal, p. 1045; Globe, p. 2774; House Report No. 548.

[3] Report No. 540, p. 14.

[4] House Report No. 548, p. 30.

Representatives ought, in my judgment, to look beyond a prima facie case, and failing to discover in the evidence disclosed any fact inconsistent with judicial integrity on the part of Judge Watrous, and finding satisfactory explanations of the circumstances from which suspicions of such integrity may have arisen, should decline subjecting the accused to the expense and hazard of an impeachment.

Although the committee did not give in express terms permission for Judge Watrous to call witnesses on his own behalf, yet he did so. One witness, Robert Hughes, was called and examined in chief by Judge Watrous, and afterwards cross-examined by the committee.[1] And also Robert Hughes, apparently the same person, was on March 2[2] given leave by the committee to appear as counsel for Judge Watrous. With him as counsel was associated Mr. Caleb Cushing.[3]

In the course of a later debate, Mr. Mason W. Tappan, of New Hampshire, a member of the committee, said:[4]

Testimony was taken on both sides. A long and tedious examination was had. Judge Watrous was permitted to come in and defend his cause and to produce witnesses.

And Mr. Horace F. Clark, of New York, another member of the committee, said further:[5]

The committee determined that it was their province * * * to look into the facts of the case beyond the point necessary to ascertain whether there did or did not exist that technical probable cause which, under the well-settled principles of the common law, justifies a magistrate in holding a person for trial, or may, perhaps, justify a grand jury in finding a bill of indictment. * * * The committee applied, in its broadest sense, that generous maxim, audi alteram partem. * * * They determined to break down all the barriers which, it is admitted by professional men, the rigid rules of the common law sometimes throw in the way of the search after truth.

Judge Watrous's explanation, which treated only questions of fact, was printed as part of the report.

The minority views signed by the four members favoring impeachment, Messrs. Henry Chapman, of Pennsylvania; Charles Billinghurst, of Wisconsin; Miles Taylor, of Louisiana, and George S. Houston, of Alabama, found from the evidence[6]——

That while holding the office of district judge of the United States he engaged with other persons in speculating in immense tracts of land situated within his judicial district, the titles to which he knew were in dispute, and where litigation was inevitable.

That he allowed his court to be used as an agent to aid himself and partners in speculation in land and to secure an advantage over other persons with whom litigation was apprehended. That he sat as judge on the trial of cases where he was personally interested in questions involved, to which may be added a participation in the improper procurement of testimony to advance his own and partner's interests.

Also they concluded as to another charge urged against him:

Every irregular and wrongful decision of the judge [in the Cavazos case dealt with in the Mussina memorial] was in favor of the complainants and against the defendant, Mussina, and those occupying a similar position, and was to their particular injury. By maintaining the proceeding as one rightfully brought on the chancery side of the court, these defendants were illegally deprived of their right to a trial by jury, and were compelled to submit to an adjudication upon their rights to the property in such a manner that the decision would be final and conclusive as to the title of the property, instead of one upon the right of possession, which would at once have been pronounced, on the law side of the court, in an action of ejectment. By maintaining jurisdiction over the case, when a portion of the defendants

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[1] Report No. 540, pp. 38–76.

[2] Page 77 of Report.

[3] Pages 185, 230 of Report.

[4] Globe, second session Thirty-fifth Congress, p. 17.

[5] Globe, p. 39.

[6] Report No. 548, pp. 14, 23, 24.

as well as plaintiffs were aliens, these defendants were deprived of their rights to have the questions involved in it decided by the courts of Texas, to whose jurisdiction they were rightfully amenable, and whose laws were to govern in that decision. By admitting incompetent witnesses to testify, their rights were affected by evidence given by persons who had an interest in the litigation adverse to theirs. And, finally, they are prevented from having the decision against them reviewed in the appellate court by the failure of the judge to perform his full duty to them in facilitating the exercise of the right of appeal, given to them by law, from motives of public policy, for their own private advantage, and that, too, when there is some reason to believe that the decree by the court is not in conformity with the principles of law as recognized in Texas. Such a course of action continued through the whole progress of a cause, in favor of some of the parties and against others, is, to our minds conclusive evidence of the existence of a purpose on the part of the judge to favor one party or set of parties at the expense and to the injury of others, which is inconsistent with an upright, honest, and impartial discharge of the judicial functions. And this, we believe, constitutes a breach of the "good behavior" upon which, by the Constitution, the tenure of the judicial office is made to depend.

The Constitution of the United States declares that "the judges, both of the Supreme and inferior courts shall hold their offices during good behavior." Does not this necessarily imply that their offices are to determine, and they are to be removed when they are guilty of a breach of "good behavior?" Clearly so. But how are they to be removed? No power of removal is vested in the Executive, nor is there any provision in the Constitution of the United States like that to be found in many if not all the State constitutions, by which the Executive is authorized to remove on the address of two-thirds of the members of the two houses of the legislature. The only mode of removal of judges known to the Constitution is by impeachment, and it therefore necessarily follows that whenever a judge has, in the course of his official conduct, been guilty of actions which are inconsistent with an impartial discharge of the high duties intrusted to him, then it is both the right and duty of this House to proceed in the only way known to the Constitution to effect the removal of the magistrate who misuses or abuses the trust reposed in him for the public good.

The other minority views, concurred in by Messrs. Charles Ready, of Tennessee; Mason W. Tappan, of New Hampshire; Burton Craige, of North Carolina, and Horace F. Clark, of New York, concluded from an examination of the testimony that many of the charges were "utterly frivolous," that some of them were not proven or attempted to be proven, and "that none of them establish, import, or imply, upon the evidence, the commission of any act of malfeasance in office, nor any high crime or misdemeanor." The four members saw nothing in the case but the "resentfulness of two disappointed litigants."

One minority had recommended this resolution:

Resolved, That John C. Watrous, United States district judge for the district of Texas, be impeached of high crimes and misdemeanors.

The other minority recommended:

Resolved, That the testimony taken before the Committee on the Judiciary in the case of the Hon. John C. Watrous, judge of the district court of the United States for the eastern district of Texas, is insufficient to justify the preferment of articles of impeachment against him for high crimes and misdemeanors in office.

On June 10,[1] at the suggestion of the Judiciary Committee, the House postponed further consideration of the subject to the next session of Congress.

At the same time a memorial from Judge Watrous, which had already been placed on the desks of Members and appears to have embodied a defense of his conduct, was ordered to be laid on the table and printed.

[1] Journal, pp. 1075, 1076; Globe, pp. 2908–2910.

2498. The Watrous investigation continued.

In the Watrous case the House discussed whether or not ascertainment of probable cause justified proceeding in impeachment.

As to what are impeachable offenses was a subject of argument in the Watrous case.

After the investigation of 1857 the House decided that the evidence did not justify the impeachment of Judge Watrous.

At the next session the subject was debated at length from December 9 to 15.[1] The principal portion of the debate was on the strength of the evidence to sustain the facts alleged; but two other questions were touched on at some length:

1. Whether the ascertainment of probable cause was sufficient ground for the House to proceed in an impeachment.

Messrs. Chapman and Houston argued[2] at some length in opposition to the views advanced by Mr. Clark. Mr. Clark[3] had argued that the case could not be sent to the Senate on proof short of what would be sufficient to convict. Mr. Houston combated that view, referring to the argument of Mr. Wirt in the Peck trial as conclusive on the point that the action of the House was similar to that of a grand jury; that while the investigation of the House was not necessarily ex parte, the office of the House was not to ascertain whether the party was guilty or innocent of the charges preferred against him, but whether the proof was sufficient to make the case worthy of a further trial. Mr. Chapman called attention to the fact that the trial of the case belonged to the Senate under the Constitution and to the Senate alone. If the House advanced one step beyond the ascertainment of probable cause it was plunged into the trial. The House, in the exercise of its discretion, might examine witnesses on both sides, but there must be a boundary line marking the powers of the House and Senate, and there was no line to be observed, except the ascertainment of probable cause. "Such I understand to have been the views," he said, "entertained in the case of Judge Peck and the case of Judge Chase, of Macclesfield in 1705, in the case of Warren Hastings in 1778, and of Lord Melville in 1805. Probable cause is such a state of facts and circumstances as would induce a cautious man to believe that the party charged is guilty of the offense.[4]

2. As to what are impeachable offenses.

The point was argued at considerable length. In his memorial to the House Judge Watrous had made the point that impeachable acts were only such as were also punishable by the ordinary laws of the land. This view was sustained in argument by Messrs. James A. Stewart, of Maryland,[5] Clark B. Cochrane, of New York,[6] and Alexander H. Stephens, of Georgia .[7]

On the other hand, Messrs. John Cochrane, of New York,[8] Miles Taylor, of

[1] Second session Thirty-fifth Congress, Journal, pp. 56, 69; Globe, pp. 12, 21, 31, 56, 78, 95–102.

[2] Globe, pp. 16, 99.

[3] Mr. Clark's view was upheld by Mr. James A. Stewart, of Maryland, Globe, p. 38.

[4] Mr. Clement L. Vallandigham, of Ohio, held this view also, Globe, p. 85.

[5] Globe, pp. 37, 38.

[6] Globe, p. 84.

[7] Globe, pp. 95, 96.

[8] Globe, p. 56.

Louisiana,[1] Clement L. Vallandigham, of Ohio,[2] and John A. Bingham, of Ohio,[3] argued that the power of impeachment was broader, and went to an ascertainment of whether or not he had offended against the dignity of the people of the United States, transgressed the grave obligations of his office, or soiled the purity of the ermine. Mr. Bingham discussed especially the precedent of the Peck trial in this particular.

On December 15[4] a motion was made to strike out all after the word "resolved" in the resolution for impeachment, and insert the text of the second minority resolution, declaring the testimony insufficient to justify impeachment. This amendment was agreed to, yeas 111, nays 91. Then the resolution as amended was agreed to, yeas 112, nays 87.

So the House decided that the evidence did not justify impeachment proceedings.

2499. The Watrous investigation continued.

Memorials which had been before preceding Congresses were reintroduced as a basis of the Watrous investigation of 1860.

A minority of the Judiciary Committee were authorized to take testimony in the Watrous case.

In the Watrous investigation of 1860 the Judiciary Committee proceeded ex parte.

In the Watrous investigation of 1860 the Judiciary Committee, without special leave, considered the evidence and reports in preceding Congresses relating to this case.

The Judiciary Committee reported, in 1860, in favor of the impeachment of Judge Watrous.

On March 8, 1860,[5] during the next Congress, the memorial of Jacob Mussina was again introduced by Mr. Miles Taylor, of Louisiana, and that of Eliphas Spencer was presented by Mr. Andrew J. Hamilton, of Texas; and on March 12[6] the memorial of William Alexander, first presented in 1851, was again presented by Mr. Hamilton. All these papers were referred to the Committee on the Judiciary.

On March 28[7] the House gave the Judiciary Committee authority to send for persons and papers and to examine witnesses on oath or affirmation.

On May 18[8] Mr. John Hickman, of Pennsylvania, stated that the committee found itself obliged to sit during sessions of the House, and therefore it was very difficult to keep a quorum. Hence he proposed this resolution, which was agreed to by the House without objection:

Resolved, That a minority of the Committee on the Judiciary be, and are hereby, authorized to take the testimony of all witnesses in the matter of the petitions heretofore referred to said committee praying the impeachment of Hon. John C. Watrous, a judge of the United States for the eastern district of Texas.

On May 21[9] the House empowered the committee to print the memorial and testimony taken and to be taken in the case.

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[1] Globe, pp. 60, 61.

[2] Globe, p. 85.

[3] Globe, p. 90.

[4] Journal, pp. 69–71; Globe, p. 102.

[5] First session Thirty-sixth Congress, Journal, p. 476.

[6] Journal, p. 493.

[7] Journal, p. 607.

[8] Journal, p. 856; Globe, p. 2171.

[9] Journal, p. 877; Globe, p. 2215.

On December 17, 1860,[1] at the second session of the Congress, Mr. John H. Reynolds, of New York, asked unanimous consent to submit the report of the committee.[2] Mr. Horace Maynard, of Tennessee, reviewed the former proceedings in this case, intimated that the Committee on the Judiciary had been organized to further this impeachment, and declared that the time of the session was required for "the gravest and most important questions, going to the very existence and perpetuity of our Union." Therefore he objected.

On December 20[3] Mr. Reynolds submitted the report, which concluded:

Resolved, That John C. Watrous, United States district judge for the eastern district of Texas, be impeached for high crimes and misdemeanors.

The committee say in their report:

That in view of the previous proceedings touching the matters committed to them, they entered upon the investigation at the first session of the present Congress in the belief that it was of the highest importance to the public interest, as well as to the accused, that some definite result should be reached, and some action taken which should be regarded as final. In the Thirty-fifth Congress much time was expended by the Judiciary Committee in the investigation of the charges preferred, upon which Judge Watrous was heard by person and by counsel before the committee, a large amount of testimony was taken, and the committee were equally divided on the question of impeachment. The House, upon a consideration of the case, refused to adopt the resolution for an impeachment. Upon the present investigation the committee came to the conclusion to proceed ex parte, and they have accordingly taken additional evidence only in support of the charges against the accused. They have also considered the evidence before them taken during the Thirty-fifth Congress and the reports made to the House thereon, * * * and their proceedings are more properly to be regarded as a continuation of the former investigation than as an entirely original one. The additional evidence taken by the committee during the present Congress in respect to the charges upon which four members of the Judiciary Committee of the Thirty-fifth Congress recommended the adoption of a resolution of impeachment does not materially change the facts as they then appeared. But considerable evidence has been produced showing the connection of Judge Watrous with transactions of a character unfitting a judicial officer or an honest man, and which may not only present an independent ground of misbehavior deserving impeachment, but tends also to shed light upon the nature of his associations and private interests.

The committee adopt the conclusions of the four members who favored impeachment in the preceding Congress as to the charges in the Mussina and Spencer memorials, and then proceed to discuss the charges of the Alexander memorial, which they consider established and as justifying impeachment.

The report was postponed to December 27 but was not taken up on that day, and thereafter successive attempts to take it up on January 16, January 21, and January 28, 1861, failed,[4] through the objections of individual Members.

The Congress expired on March 3 and the report was not considered.

Amos Morrell was appointed judge on February 5, 1872, for the eastern district of Texas, and the records of the State Department show that this was the first appointment after the investigation of Judge Watrous.

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[1] Second session Thirty-sixth Congress, Globe, p. 105.

[2] In the later practice such reports are privileged.

[3] Journal, p. 106; Globe, p. 159; Report No. 2.

[4] Globe, pp. 411, 499, 599, 600.

2500. The investigation of the conduct of Judge Thomas Irwin in 1859.

Judge Irwin having resigned before the report of an investigation, the House discontinued proceedings.

On January 13, 1859,[1] the House authorized the Judiciary Committee to investigate charges made against Judge Thomas Irwin, of the United States district court of the western district of Pennsylvania. On January 28[2] Mr. George S. Houston, of Alabama, reported from that committee that pending the investigation, "they had satisfactory evidence before them that the said judge had this day resigned his said office, and that the committee now ask the further direction of the House."

There was some discussion as to the publication of the testimony already taken; but as it had been taken only on one side it was thought best not to print it. Then, on motion of Mr. John S. Phelps, of Missouri, it was—

Ordered, That the said committee be discharged from the further consideration of the subject, and that the same be laid on the table.

2501. The investigation into the conduct of Henry A. Smythe, collector of the port of New York.

The House declined to institute impeachment proceedings before a committee had examined specially whether or not there was ground for impeachment.

A question as to the expediency of impeaching an officer removable by the Executive.

It is for the House to say whether or not a person whose conduct is being investigated shall be allowed to appear before the committee by counsel.

The House declined to ask of the Executive the removal of an officer whom a committee had found delinquent.

On March 15, 1867,[3] the House had directed the Committee on Public Expenditures to inquire into the conduct of Henry A. Smythe, collector of the port of New York, and to report thereon to the House if in their opinion the said Smythe had been guilty of bribery or other crimes and misdemeanors.

On March 25, 1867,[4] the Speaker, by unanimous consent, laid before the House a letter from Mr. Smythe, requesting that he might be permitted to appear with counsel to produce and examine witnesses before the committee.

Thereupon, Mr. Samuel J. Randall, of Pennsylvania, proposed the following:

Resolved, That the request of Henry A. Smythe, now collector of the port of New York, asking the privilege and permission to appear by counsel before the Committee on Public Expenditures, in defense of his conduct as collector, now being examined into by said committee, be granted.

Considerable discussion was occasioned by this proposition. It was urged that it was not the custom of the House to allow persons implicated by investiga-

[1] Second session Thirty-fifth Congress, Journal, p. 178; Globe, p. 360.

[2] Journal, p. 278; Globe, p. 656.

[3] First session Fortieth Congress, Journal, pp. 51, 111; Globe, pp. 334–336.

[4] Journal, pp. 111, 112; Globe, pp. 334–336.

tions before a committee to appear, especially by counsel, and Mr. Hulburd, while saying that his committee had allowed any person to come before them and produce witnesses under such circumstances, yet they had not allowed counsel, and should not do so without the consent of the House. Mr. John Covode, speaking from experience as chairman of an important investigating committee, said that he never allowed parties to appear by counsel except in one case, when Judge Black, a member of Mr. Buchanan's cabinet, was allowed counsel in a case where he was indirectly interested. On the other hand, it was recalled that in the Thirty-ninth Congress both Mr. Conkling and General Fry had appeared before the investigating committee by counsel; that in the investigation of the infringement of the privileges of the House by General Houston, he was allowed to appear with counsel; in the Thirty-seventh Congress a Member against whom charges had been made was allowed to appear by counsel; in the Thirty-fifth Congress Judge Watrous had also appeared with counsel, and also in a former Congress Judge Irwin had done the same. Mr. John A. Bingham, of Ohio, argued that the House ought always to judge of the propriety of allowing the official under investigation to appear; but in this case, of a subordinate officer of the Government, incapable in the nature of things of influencing the House or its committee, he should be allowed to appear by counsel.

The House, by a vote of 80 yeas to 35 nays, voted to suspend the rules for the consideration of the resolution, and then agreed to it.

On March 21, 1867,[1] Mr. Calvin T. Hulburd, of New York, from the Committee on Public Expenditures, had reported this resolution:

Resolved, That it is the sense of this House that Henry A. Smythe should be immediately removed from the office of collector of the port of New York, and that the Clerk of the House cause a certified copy of this resolution to be laid before the President of the United States.

Objection was made by Mr. Benjamin F. Butler, of Massachusetts, that the House should not request from the Executive the removal of any officer, but should proceed by impeachment. On March 22[2] Mr. Thaddeus Stevens, of Pennsylvania, moved to amend by striking out all after the word "Resolved," and inserting—

That it is the sense of this House that Henry A. Smythe, collector of the port of New York, ought to be impeached; and that the Committee on Public Expenditures proceed forthwith to prepare articles of impeachment.

Objection was made to this amendment, especially by Mr. Samuel Shellabarger, of Ohio, that there was no precedent in the history of the Government for proceeding to an impeachment without investigation by a committee charged with finding whether or not there was ground for articles of impeachment. A question was also raised by Mr. Fernando Wood, of New York, as to whether the House ought to proceed to impeach an officer whom the President (or the President and Senate as provided under the tenure of office act) could remove. The right of the House to impeach such an officer was not disputed, but the expediency was questioned.

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[1] Journal, p. 80; Globe, pp. 255, 256.

[2] Globe, pp. 282–285.

In accordance with the suggestions made, Mr. Stevens modified his amendment to read as follows:

That the testimony taken by the Committee on Public Expenditures relating to the conduct of Henry A. Smythe, collector of the port of New York, be referred to the said committee, with a view to ascertain whether or not said Smythe has been guilty of high crimes and misdemeanors sufficient to justify his impeachment; and if said committee find from that and other evidence that he has been thus guilty, then to proceed and prepare articles of impeachment, and report the same to this House; and that they have leave to send for persons and papers.

On March 22 and 23 [1] this amendment was considered and agreed to. The resolution as amended was then agreed to also.

On February 20, 1868,[2] on motion of Mr. Hulburd, the House agreed to a resolution empowering the committee to inquire into the receipts of Mr. Smythe in his official capacity, with authority to send for persons and papers.

It does not appear that the committee reported.

2502. The proposition to inquire into the conduct of William B. West, consul at Dublin.

The House declined to order an investigation of Consul West on evidence presented by a Member and referred the subject to a committee.

Mr. Speaker Colfax held that in order to be received as privileged a resolution must positively propose impeachment.

On December 2, 1867,[3] Mr. William E. Robinson, of New York, proposed as a question of privilege this resolution:

Resolved, That the Committee on Foreign Affairs be instructed to inquire into the conduct of William B. West, American consul at Dublin, in Ireland, regarding American prisoners in that city, and to report thereon forthwith, to the end that if he has been guilty of conduct which would be liable to impeachment this House may take measures to have articles of impeachment presented to the Senate.

Mr. John F. Farnsworth, of Illinois, raised the question of order that no question of privilege was involved.

The Speaker [4] held that as the resolution did not positively propose impeachment, it did not present a question of privilege.

Thereupon Mr. Robinson modified the resolution to read as follows:

Resolved, That William B. West, consul of the United States at Dublin, Ireland, be impeached before the Senate.

Mr. Robinson presented copies of correspondence between Mr. West and one Patrick J. Condon, who had been held as a political prisoner in Ireland, and other documents, which he considered as showing that Mr. West had not been sufficiently aggressive in maintaining the rights of American citizens abroad.

After debate on the general question of the rights of citizenship, the resolution was, on motion of Mr. Nathaniel P. Banks, of Massachusetts, referred to the Committee on Foreign Affairs.

It does not appear that further action was taken.

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[1] Journal, pp. 89, 95; Globe, pp. 294, 289, 290.

[2] Second session Fortieth Congress, Journal, pp. 371, 372.

[3] Second session Fortieth Congress, Journal, p. 9; Globe, pp. 3–9.

[4] Schuyler Colfax, of Indiana, Speaker.

2503. The House, on the strength of a newspaper statement, ordered an investigation looking toward the impeachment of a justice of the Supreme Court.—On January 30, 1868,[1] Mr. Glenni W. Scofield, of Pennsylvania, by unanimous consent, presented the following:

Whereas it is editorially stated in the Evening Express, a newspaper published in this city, on the afternoon of Wednesday, January 29, as follows:

"At a private gathering of gentlemen of both political parties, one of the justices of the Supreme Court spoke very freely concerning the reconstruction measures of Congress, and declared in the most positive terms that all these laws were unconstitutional, and that the court would be sure to pronounce them so. Some of his friends near him suggested that it was quite indiscreet to speak so positively, when he at once repeated the views in a more emphatic manner."

And whereas several cases under said reconstruction measures are now pending in the Supreme Court: Therefore,

Resolved, That the Committee on the Judiciary be directed to inquire into the truth of the declarations therein contained, and to report whether the facts as ascertained constitute such a misdemeanor in office as to require this House to present to the Senate articles of impeachment against said "justice of the Supreme Court," and the committee may have power to send for persons and papers, and have leave to report at any time.

Objection was made that a newspaper charge was insufficient ground for action by the House. Mr. Scofield disclaimed any knowledge himself. The House agreed to the preamble and resolution, yeas 97, nays 57.

On June 18[2] Mr. George S. Boutwell, of Massachusetts, by instructions of the committee, moved that it be discharged from further consideration of the resolution, and that the same be laid on the table. This motion was agreed to without division or debate.

2504. The impeachment of Mark H. Delahay, United States district judge for Kansas.

The House voted to investigate the conduct of Judge Delahay after the Judiciary Committee had examined the charges in a memorial.

The Judiciary Committee was empowered in the Delahay ease to take testimony in Kansas through a subcommittee.

In the investigation into the conduct of Judge Delahay he was permitted to present testimony.

On March 19, 1872,[3] Mr. Benjamin F. Butler, of Massachusetts, from the Committee on the Judiciary, proposed a resolution, which was agreed to without debate:

Resolved, That the Committee on the Judiciary be, and they are hereby, authorized to send for persons and papers, to administer oaths, and to take testimony in the matter of the memorial and charges against Mark H. Delahay, district judge of the United States district for the State of Kansas.

On May 28[4] Mr. John A. Bingham, of Ohio, from the Judiciary Committee, reported the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be directed to further investigate the charges against the character and official conduct of M. H. Delahay, United States district judge for the district of Kansas, and for that purpose a subcommittee shall be authorized to sit during the recess of Congress,

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[1] Second session Fortieth Congress, Journal, p. 274; Globe, p. 862.

[2] Journal, pp. 881, 882; Globe, p. 3266.

[3] Second session Forty-second Congress, Journal, p. 538; Globe, p. 1808.

[4] Journal, pp. 989, 990; Globe, p. 3926.

and may proceed to Kansas, subpoena witnesses, send for persons and papers, administer oaths, take testimony, and employ a clerk and reporter, the expense of which shall be paid from the contingent fund of the House on the order of the chairman.

In another case, relating to Judge Charles T. Sherman, Mr. Butler, citing the case of Judge Delahay, said that this subcommittee heard in Kansas such witnesses as Judge Delahay chose to have summoned.[1]

2505. Delahay's impeachment continued.

The House, without division, voted to impeach Judge Delahay for improper personal habits.

The House voted the impeachment of Judge Delahay at the end of one Congress, intending to present articles in the next.

Forms and ceremonies for carrying of the impeachment of Judge Delahay to the Senate.

The Speaker gave the minority party representation on the committee to carry the impeachment of Judge Delahay to the Senate.

The impeachment of Judge Delahay was carried to the Senate by a committee of three.

On February 28, 1873,[2] Mr. Butler reported this resolution from the Judiciary Committee:

Resolved, That a committee of three be appointed to go to the Senate, and at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, to impeach Mark H. Delahay, judge of the United States district court for the district of Kansas, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate take order for the appearance of said Mark H. Delahay to answer to said impeachment.

Two questions arose from this report:

1. Mr. Henry L. Dawes, of Massachusetts, asked if the Judiciary Committee, in view of the fact that the Congress was about to expire, had settled the question whether or not the next House of Representatives could present the articles of impeachment, of which this House might notify them. Mr. Butler said:

The Committee on the Judiciary do not expect to prepare articles of impeachment against Judge Delahay and present them for trial at this session. In the earliest case of impeachment of a judge in this country, in 1803, the case of Judge Pickering, which was in all respects like this, this exact question arose and was settled. One House presented articles of impeachment to the Senate and another House at the next session prosecuted those articles, as will be done in this case. We do not expect any other action except the formal presentation of the articles of impeachment to the Senate. The Senate is a perpetual court of impeachment, and in presenting these articles we act only as a grand jury.

2. As to the offense for which the impeachment was to be the remedy, Mr. Butler stated that—

The most grievous charge, and that which is beyond all question, was that his personal habits unfitted him for the judicial office; that he was intoxicated off the bench as well as on the bench. This question has also been decided by precedent. That was the exact charge against Judge Pickering, of New Hampshire, who, with one exception, is the only judge who has been impeached.

Mr. Butler then had read testimony showing that the judge had sentenced prisoners when intoxicated, to the great detriment of judicial dignity.

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[1] Third session Forty-second Congress, Globe, p. 2123.

[2] Third session Forty-second Congress, Journal, p. 512; Globe, pp. 1899, 1900.

There was also a question as to certain alleged corrupt transactions, but Mr. Daniel W. Voorhees, of Indiana, said it was not proven to the satisfaction of several members of the committee that there was any malfeasance. Mr. Butler said:

The committee agree that there is enough in his personal habits to found a charge upon, and that is all there is in this resolution.

The resolution of impeachment was then agreed to without division.

On March 3 [1] the Speaker announced the appointment of Mr. Butler, Mr. John A. Peters, of Maine, and Mr. Clarkson N. Potter, of New York, members of the committee. Two of these were members of the majority party in the House, and the third represented the minority.

On the same day [2] the committee appeared at the bar of the Senate and, having been announced, advanced toward the area in front of the Secretary's desk, and Mr. Butler said:

Mr. President, in obedience to the order of the House of Representatives, this committee of the House appear at the bar of the Senate of the United States, and do impeach Mark H. Delahay, district judge of the United States district court for the district of Kansas, in the name of the House of Representatives and all the people of the United States, for high crimes and misdemeanors in office. And we do further acquaint the Senate, by the order of the House, that the House will in due time furnish particular articles against said Delahay and make good the same. And this committee is further charged by the House to demand of the Senate that they will take order for the appearance of Mark H. Delahay, as such judge, to answer the same.

The Presiding Officer [3] said:

The Senate will take order in the premises, of which due notice shall be given to the House of Representatives.

Later, on the same day, on motion of Mr. George F. Edmunds, of Vermont, it was

Ordered, That the Secretary inform the House of Representatives that the Senate will receive articles of impeachment against Mark H. Delahay, judge of the district court of the United States for the district of Kansas, this day impeached by the House of Representatives before it of high crimes and misdemeanors, whenever the House of Representatives shall be ready to receive the same.

Meanwhile the committee had returned to the House of Representatives, where Mr. Butler, the chairman, submitted the following written report: [4]

That, in obedience to the order of the House, the committee have been to the Senate, and, in the name of the House of Representatives and of all the people of the United States, have impeached Mark, H. Delahay, district judge of the United States for the district of Kansas, of high crimes and misdemeanors; and have acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him, and make good the same. And further, that the committee have demanded that the Senate take order for the appearance of the said Mark H. Delahay to answer to the said impeachment.

A message was also received [5] in the House from the Senate in these terms:

The Senate is ready to receive articles of impeachment against Mark H. Delahay, judge of the United States district court for the State of Kansas.

No further proceedings took place. On March 10, 1874, as shown by the records of the State Department, Cassius G. Foster was appointed judge to fill a vacancy in this district.

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[1] Journal, p. 551.

[2] Senate Journal, pp. 542, 543; Globe, pp. 2153, 2165.

[3] Henry A. Anthony, of Rhode Island, presiding officer.

[4] House Report No. 92.

[5] House Journal, p. 560.

2506. The investigation of the conduct of Edward H. Durell, United States district judge for Louisiana.

Instance wherein the House ordered an investigation of the conduct of a judge without a statement of charges, but in a case wherein common fame had made the facts known.

Instances wherein the House gave authority to prepare articles of impeachment at the time the investigation was ordered.

On January 13, 1873,[1] Mr. William D. Kelley, of Pennsylvania, moved that the rules be suspended so as to enable him to submit and the House to consider and agree to this resolution:

Resolved, That the Judiciary Committee be instructed to inquire into the conduct of Edward H. Durell, judge of the United States district court for the district of Louisiana, and ascertain and report whether, in the opinion of the committee, he has, for the purpose of overthrowing or controlling the government of the State of Louisiana, usurped jurisdiction not vested in the said district court by the Constitution or laws of the United States; and to report articles proposing the impeachment of the said Edward H. Durell if, in the judgment of the committee, he has abused his judicial functions by such usurpation of jurisdiction and unlawful interference with the constitutional privileges and rights of the people of said State; and that the committee have power to send for persons and papers.

The question being put, the rules were suspended, and the resolution was presented. And thereupon it was agreed to, without debate or division.

On January 21[2] Mr. Jeremiah M. Wilson, of Indiana, from the Committee on the Judiciary, stated that there was some uncertainty in the resolution first adopted, and asked for the adoption of the following:

Resolved, That in addition to the inquiries heretofore directed by the House to be made into the official conduct of Judge E. H. Durell, the Judiciary Committee be instructed further to inquire whether said Durell should be impeached for high crimes and misdemeanors in office, and that said committee have leave to report at any time.

The resolution was agreed to by the House without division.

2507. The Durell investigation continued.

Instance wherein a House committee charged with an investigation examined testimony taken before a Senate committee.

The Durell investigation was postponed in the Forty-second Congress because there was no time to permit Judge Durell to present testimony.

On March 3,[3] the last day of the Congress, Mr. John A. Bingham, of Ohio, submitted the report of the committee:

That they have examined to some extent the voluminous testimony taken before the Committee on Privileges and Elections of the Senate of the United States, and the bills, petitions, processes, and orders pending before said district court, and the action of said E. H. Durell thereon; and upon the legality and propriety of that action the most serious questions arise, and if the time at which this matter was brought before your committee by testimony permitted that proper investigation which ought to be had in a subject of so grave importance, your committee would proceed thereto.

It has been the practice of the Committee on the Judiciary to hear the accused in matters of impeachment whenever thereto requested, by witnesses or by counsel, or by both, as in their discretion would seem proper. Judge Durell has appeared before your committee and asked to be heard. At

[1] Third session Forty-second Congress, Journal, p. 164; Globe, p. 541.

[2] Journal, p. 225; Globe, p. 761.

[3] Journal, p. 583; Globe, p. 2133; House Report No. 96.

that hour in the session there was no time in which he could be heard, and for this reason only no further action has been taken by your committee.

We therefore report back the resolution with the recommendation that it be referred to the next House of Representatives for consideration, and that your committee be discharged from the further consideration thereof.

The report was laid on the table and ordered printed by the House.

2508. The Durell investigation continued.

A subcommittee, with power to send for persons and papers, was sent to Louisiana to investigate the conduct of Judge Durell.

A majority of the Judiciary Committee reported in favor of impeaching Judge Durell, principally for usurpation of power.

At the beginning of the next Congress, on December 17, 1873,[1] Mr. Jeremiah M. Wilson, of Indiana, submitted this resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be, and is hereby, authorized and directed to inquire and report to the House whether Judge E. H. Durell, judge of the district court of the United States for the southern district of Louisiana, shall be impeached for high crimes and misdemeanors; and that said committee shall have power to send for persons and papers.

On December 19[2] Mr. Benjamin F. Butler, of Massachusetts, from the Judiciary Committee, reported the following resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be, and is hereby, authorized to send a subcommittee of two members of said committee to New Orleans for the purpose of taking testimony in the matter of the impeachment of Judge E. H. Durell, heretofore referred to said committee, and that said subcommittee have power to send for persons and papers and to employ a stenographer.

Mr. Butler explained that the charges against Judge Durell related to bankruptcy proceedings, and that unless the committee, should be sent it might be necessary to have the bankruptcy records brought to Washington, or have copies of them made. Such a task would be long and expensive.

On June 17, 1874,[3] very near the end of the session, Mr. Wilson submitted the report of the majority of the committee, consisting of Messrs. Benjamin F. Butler, of Massachusetts; Jeremiah M. Wilson, of Indiana; Alexander White, of Alabama; Charles A. Eldredge, of Wisconsin; Clarkson N. Potter, of New York, and Hugh J. Jewett, of Ohio. The report begins:

Among the charges brought to the notice of your committee were those of drunkenness and the improper procurement of money by means of his judicial office. These charges are not sustained by the testimony, in the opinion of your committee, and therefore will not be further noticed.

The report finds more serious certain charges relating to the bankruptcy business of the court. Judge Durell had appointed E. E. Norton "official assignee in bankruptcy," and the latter had taken possession of the assets and estates of bankrupts in about 1,300 cases. "His charges were outrageously extortionate and seem to have been generally framed to absorb the estate," says the report; and it further cites an order by Judge Durell which prevented scrutiny into such charges. Norton also was found to have collusion with the auctioneers who made sales of bankrupt property, receiving more than $20,000 therefrom. The committee could not trace

[1] First session Forty-third Congress, Journal, p. 141; Record, p. 266.

[2] Journal, p. 165; Record, p. 337.

[3] Journal, p. 1218; Record, pp. 5124, 5125; House Report No. 732.

these facts directly to the knowledge of Judge Durell, although some testimony tended to show such knowledge. After citing evidence the report continues:

The manner in which Norton was managing these affairs and the extortionate charges he was making were the subject of severe criticism in the newspapers of the city of New Orleans.

The most intimate social relations existed between Judge Durell and Norton during all of this time. Judge Durell spent much of his time at Norton's house in the city of New Orleans. They traveled North together in the summer and spent much of their time together while North, returning South again together when the summer was over.

These facts so notorious in regard to the management of so important trusts as those of the bankrupt estates, when taken in connection with the order hereinbefore referred to, lead to the inevitable conclusion by your committee that Judge Durell must have been cognizant of them, and therefore a corrupt party thereto, or that he was grossly negligent in the discharge of his official duties, so that, quacumque via data, he comes under a like condemnation.

And, finally, the report discusses a charge growing out of the Louisiana election of November 4, 1872. William P. Kellogg, Republican candidate for governor at that election, filed a bill in the United States circuit court against the then Governor Warmouth, McEnery, the Democratic candidate for governor, and certain others, alleging frauds for the purpose of disfranchising colored voters, and such an illegal purging of the State registration board as would enable the destruction of the evidence of the frauds; and therefore Mr. Kellogg prayed that a writ of injunction should issue, enjoining Warmouth from canvassing the returns except in the presence of the unpurged returning board, called the Lynch board. Warmouth filed answer denying the allegations. The motion for an injunction was heard and submitted on December 4, and on December 6 Judge Durell granted the injunction restraining Warmouth as prayed for in the bill. The report, after setting forth these preliminary facts, continues:

In his opinion the judge speaks of Kellogg's bill as a bill "to preserve evidence." Assuming that this court had the power, by virtue of the acts of Congress, to preserve the evidence relating to the election of State officers, that end would have been answered and that power exercised by the injunction which prevented the destruction of the ballots, certificates, and evidences in question; and that was, as the Senate Committee on Privileges and Elections have said in their report of January, 1873, "the utmost that the court had authority upon this bill to do." The Constitution and acts of Congress gave no color of authority to a Federal court to determine what were the proper officers of the State or to restrain those who claimed to be so from action in respect of State matters.

On the 20th of November Warmouth signed an act passed by the last legislature which until that time he had delayed signing, which act appointed Wiltz, Deferiet, and others a returning board, and subsequently he submitted to them the votes and returns, which were compiled by that board, and they returned certifying the McEnery ticket as elected, and Warmouth, as governor, on the 4th of December, made proclamation thereof accordingly.

About these facts there is no dispute whatever.

The legislature thus declared to have been elected were about to assemble in the State house on the 6th of December. About 9 o'clock on the evening of the 5th of December Judge Durell sent for S. B. Packard, the United States marshal for the district. Packard went to his room. The judge told him to send for Mr. Billings and Mr. Beckwith, Kellogg's solicitors; that he proposed issuing an order for the occupation of the State house. The solicitors were sent for; they came, and the judge told them the same thing, and after some consultation the preparation of the order was set about. Judge Durell dictated it to Mr. Billings, who wrote it down, and the marshal's deputy, De Klyne, made a clean copy of the order thus dictated. The judge then signed it and delivered it to Packard, who thereupon set about executing it, which he did by calling on General Emory for a detachment of Federal troops, which occupied the State house that same night. This occupation resulted in securing the State gov-

ernment to Kellogg. This order declared that, whereas Warmouth had, in violation of the restraining order herein, issued the following proclamation and returns of certain persons claiming to be a board of returning officers, all in violation and contempt of the said restraining order, as follows, to wit [setting out the proclamation and returns], and proceeded:

Now, therefore, in order to prevent the further obstruction of the proceedings in this cause, and further to prevent a violation of the orders of this court, to the imminent danger of disturbing the public peace, it is hereby ordered that the marshal of the United States for the district of Louisiana shall forthwith take possession of the building known as the Mechanics' Institute, and occupied as the State house for the assembling of the legislature therein, in the city of New Orleans, and hold the same subject to the further order of this court; and meanwhile to prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretended returning officers, in contempt and violation of said restraining order; but the marshal is directed to allow the ingress and egress to and from the public offices in said building of persons entitled to the same.

E. H. DURELL, *Judge.*

NEW ORLEANS, LA., *December 5, 1872.*

And it contained no other pretenses, recitals, or reasons for its issue.

It will be observed that none of the persons who composed the Wiltz and Deferiet board were members of the Lynch board, or named or mentioned in Kellogg's bill or Judge Durell's injunction. The act under which the Wiltz board was appointed seems to have been wholly overlooked, and no effort was made to restrain or prevent action under it; and although the judge declared that his midnight order was intended to prevent the obstruction of the proceedings in the Kellogg suit, and the violation of the orders of the court, the fact was these orders had not been violated nor the proceedings obstructed, nor was it possible that the canvass and return by the Deferiet board could obstruct or defeat the proceedings in that case, unless the object of that case was not, as pretended, to preserve evidences of right, but really to determine the validity of State elections. But the law had conferred and could confer no such power on a Federal court, and any proceedings to that end were necessarily coram non judice and void.

The report discusses at length the alleged usurpation practiced by Judge Durell, concluding:

Such action, from whatever motive, is at variance with every principle of good government, is calculated to confound and subvert the distinctions between the State and Federal governments, and to overthrow the Constitution itself, without which neither Judge Durell nor any other judge has any rightful authority whatever.

Therefore the committee reported these resolutions:

Resolved, That Edward H. Durell, judge of the district court of the United States for the district of Louisiana, be impeached of high crimes and misdemeanors in office.

Resolved, That a committee of two be appointed to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Edward R. Durell, judge of the district court of the United States for the district of Louisiana, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment and make good the same; and that the committee do demand that the Senate take order for the appearance of said Edward H. Durell to answer to said impeachment.

Resolved, That a committee of seven be appointed to prepare and report articles of impeachment against Edward H. Durell, judge of the district court of the United States for the district of Louisiana, with power to send for persons, papers, and records, and to take testimony under oath.

Mr. Lyman Tremain, of New York, submitted minority views, which were concurred in by Messrs. William P. Frye, of Maine; John Cessna, of Pennsylvania, and Jasper D. Ward, of Illinois, dissenting, from the majority report and recommending the discontinuance of all proceedings.

Mr. Luke P. Poland, of Vermont, filed individual views, saying:

First. In relation to the midnight order, although he believes the judge had no proper legal jurisdiction to make it, still he is not able to find that the judge acted corruptly or with any belief that he was going beyond his jurisdiction in making it. The law under which he acted was new and no rules or precedents had been established under it. The whole people were excited, the times were violent and turbulent, and judicial calmness or correctness could hardly be expected.

Second. The evidence seems to establish that some of the officers of Judge Durell's court were guilty of very corrupt practices, and that he was not watchful to scrutinize their conduct, but there is no claim that he ever shared in any of the proceeds of their gains and no direct evidence that he knowingly sanctioned or approved their action.

Third. Where the evidence obtained by substantially an ex parte examination only secures a bare majority of the committee, it does not appear to me that the public interest will be furthered by presenting articles of impeachment to the Senate for trial.

A few days after this report was submitted this session of Congress adjourned without further action on it.

2509. The Durell investigation continued.

Judge Durell having resigned, the House discontinued impeachment proceedings.

Discussion of the effect of resignation of the officer upon impeachment proceedings.

Discussion of usurpation of power as a ground for impeachment.

At the next session, on January 7, 1875,[1] the resolutions came before the House, and it was then announced that Judge Durell had resigned his office, and that his resignation had been accepted.

A discussion arose as to two points:

1. As to the sentiments of the committee on the charges against Judge Durell.

Mr. Benjamin F. Butler said that he had favored impeachment solely because of the midnight order. He did not consider the other charges proven. As to the midnight order, he said:

That seemed to me not within the enforcement act. There was no bill under the enforcement act to put that order in action, but simply a proceeding to perpetuate testimony. It seemed to me so gross an exercise of power that if the judge did not know he was exceeding his powers he ought to have known it. And, in either case, if he did know, of course he was wrong; and if he did not know, he ought to have known, and therefore he did not conduct himself well in office. And upon that ground I voted as I did. * * * He acted upon his own motion, without any motion or argument before him, and that is what makes the gravamen of the offense charged against him; for without motion of the counsel for the complainant on this bill of equity, he, upon his own consideration and judgment, acted, and without any moving cause except in his own mind. * * * Now, while I will not hold a judge to be impeachable where he simply makes a mistake, yet if a judge, clearly outside of all possible jurisdiction, interferes with the liberty of a single citizen, I will hold him impeachable.

Mr. Lyman Tremain, of New York, who at the previous session had been one of the minority dissenting from impeachment, said that he had studied the case during the recess and had come to the conclusion that if the resolutions came to a vote he should vote for them, because of the midnight order. After reviewing the history of that order, Mr. Tremain said:

Instead of being a judicial order, it seems to me to be a military order, an order which it seems was afterwards upheld and supported by the troops of the United States, and which it may therefore be fairly assumed was contemplated and intended to be so used. I find also that the marshal testifies that

[1] Second session Forty-third Congress, Journal, p. 139; Record, pp. 319–324.

the judge gave him discretionary power by an oral direction to determine what persons should be admitted to the State-house and what persons should be excluded; thus deputing, not in writing, this vast discretionary power, and clothing the marshal with it. I can not believe that such an order as that can be justified by any consideration of charity.

Messrs. Storm and Poland, who had been of the dissenting minority, stated their belief that the order was wrong, but they did not consider that a wrongful intent was established. "Because this judge made an order he had no legal jurisdiction to make," said Mr. Poland, "it by no means follows he is amenable to impeachment, unless it can be established that that order was made corruptly or made with a knowledge on his part—with a belief that he was exceeding his legal jurisdiction."

Mr. Jeremiah M. Wilson stated that he believed the general opinion of those concurring in the majority report, was that Judge Durell was also impeachable for the irregularities in the bankruptcy proceedings.

2. As to the power to impeach a person who has resigned.

Mr. Butler stated that he had no doubt, as the Constitution imposed the punishment of disability for holding office thereafter, that the impeachment might proceed. But Judge Durell was an old man and there would be no practical benefit in going on with this case. Mr. Luke P. Poland stated that, while he had not examined the matter carefully, he had a very strong impression that the resignation would not avail as a legal obstacle to prevent the House from continuing the proceedings. It was a matter for the discretion of the House, according to the circumstances of the case.

Mr. Tremain said he had examined the question with considerable care, and he had very serious doubt "whether the House has any Constitutional power whatever to proceed by impeachment after the officer has resigned, his resignation has been accepted, and his successor has been appointed. The power to impeach rests entirely upon the Constitution of the United States. The whole system of English parliamentary impeachment, with the tremendous powers possessed by Parliament, has been superseded by our Constitution." Mr. Tremain said that the whole subject had been discussed by Judge Story, whose Commentaries he quoted in support of his view.

The question was taken on laying the resolutions on the table, and the motion was agreed to, yeas 129, nays 69. So the proceedings were discontinued.

2510. The inquiry as to the conduct of Schuyler Colfax, Vice-President of the United States.

In the Colfax case the majority of the Judiciary Committee concluded that the power of impeachment was rather remedial than punitive.

Discussion as to whether or not a civil officer may be impeached for an offense committed prior to his term of office.

A proposition to investigate the conduct of an officer and prepare articles of impeachment was held to be privileged.

On February 20, 1873,[1] Mr. Fernando Wood, of New York, proposed as a question of privilege, the following:

Resolved, That the testimony reported to this House by the special committee appointed under the resolution of the House of Representatives of December 2, 1872, for the investigation of charges of

[1] Third session Forty-second Congress, Journal, pp. 451, 452; Globe, pp. 1544, 1545.

bribery in influencing Members of the House of Representatives, be referred to the Committee on the Judiciary, with instructions to report articles of impeachment against Schuyler Colfax, Vice-President of the United States, if in its judgment there is evidence implicating that officer and warranting impeachment.

Mr. Horace Maynard, of Tennessee, asked if a question of privilege was presented.

The Speaker [1] stated that such a question had been presented.

Mr. James N. Tyner having raised the question of consideration, the House, by a vote of yeas 105, nays 109, voted not to consider it.

Thereupon Mr. Tyner presented this resolution, which was agreed to without debate or division:

Resolved, That the testimony taken by the Committee of this House, of which Mr. Poland, of Vermont, is chairman, be referred to the Committee on the Judiciary, with instructions to inquire whether anything in such testimony warrants articles of impeachment of any officer of the United States not a Member of this House, or makes it proper that further investigation should be ordered in this case.

This resolution was offered as involving a question of privilege, and its status as such was not questioned.

On February 24 Mr. Benjamin F. Butler, of Massachusetts, submitted the report [2] of the committee. This report, so far as it related to the subject of impeachment, was concurred in by Messrs. John A. Bingham, of Ohio, Benjamin F. Butler, of Massachusetts, Charles A. Eldredge, of Wisconsin, John A. Peters, of Maine, Lazarus D. Shoemaker, of Pennsylvania, Daniel W. Voorhees, of Indiana, and Jeremiah M. Wilson, of Indiana. Mr. Clarkson N. Potter, of New York, dissented.

For the purpose of applying the principles and precedents, the committee assumed all that could be inferred from the testimony in regard to the Vice-President, Schuyler Colfax, who was the official referred to. They assumed that in the winter of 1867–68 he purchased of Oakes Ames stock of the Credit Mobilier at par when it was known to be worth much more than par; and that, from 1867 to 1869, while holding such stock, and while the House was considering subjects affecting the value of that stock, he presided over the House as Speaker. They found it undisputed that Mr. Colfax became interested in the Credit Mobilier before he became Vice-President, and that the motives which impelled the transaction were expected to operate upon him only as a Member of the House. Continuing, the committee say:

But we are to consider, taking the harshest construction of the evidence, whether the receipt of a bribe by a person who afterwards becomes a civil officer of the United States, even while holding another official position, is an act upon which an impeachment can be grounded to subject him to removal from an office which he afterwards holds. To elucidate this we first turn to the precedents.

Your committee find that in all cases of impeachment or attempted impeachment under our Constitution there is no instance where the accusation was not in regard to an act done or omitted to be done while the officer was in office. In every case it has been heretofore considered material that the articles of impeachment should allege in substance that, being such officer, and while in the exercise of the duties of his office, the accused committed the acts of alleged inculpation.

The committee then cite briefly the impeachments of Judges Pickering, Chase, Peck, and Humphries, and President Johnson, in each of which the offense charged occurred during the term of office. Of impeachments under the State constitutions

[1] James G. Blaine, of Maine, Speaker.

[2] House Report No. 81, third session Forty-second Congress; Globe, p. 1651.

the rule seemed to be the same, unless the recent cases of Judges Barnard and McCunn, in New York, might present some exceptional features. In the Parliament of England, also, the committee found the same rule prevailing in all years since the rights of the subject and the principles of law and justice have become established.

From this so nearly "invariable current of precedent and authority" the committee turn to inquire:

What is the nature and what the objects of impeachments under our Constitution? Are they punitive or remedial? Or, in other words, is impeachment a constitutional remedy for removing obnoxious persons from office and preventing their again filling office, or a power given for punishing an officer, while he is an officer, for some crime alleged to have been committed by him before he was such officer?

The report answers these questions as follows:

Your committee are very strongly inclined to the opinion that impeachment was intended by the framers of the Constitution to be wholly remedial and not punitive, except as an incident to the judgment, because we find that the Constitution limits the judgment in impeachment by strongly restrictive words: "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States."

If such judgment is a punishment for an alleged high crime and misdemeanor, then why does the same article provide for the punishment of the accused a second time for the same offense? Because the words we have quoted are followed by the provision: "But the party convicted shall, nevertheless, be subject to indictment, trial, judgment, and punishment according to law."

This, therefore, would leave the party who had been removed from office and disqualified from holding office by the judgment of impeachment, if that is a punishment for his crime, to be the second time punished for the same offense, which is contrary to natural justice, against Magna Charta, and is most positively forbidden by the fifth article of amendment to the Constitution.

This article also throws some further light on this subject, because in its nervous language it enacts that "No person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

Nor does it appear that this view is affected by the exception in section 2, Article III, of the Constitution, that the trial of all crimes, except in cases of impeachment, shall be by jury; this exception being necessary only to make the instrument consistent in all its parts with itself, as it had already provided that the impeached could be tried by jury for his crime.

Again, we find impeachment to be remedial in this, that it only provides, as a further consequence, disqualification for office, by which the evil is cured; that thereafter the Government may not have an officer who has so far forgotten his obligations to his official oath and to his duty as a citizen as to have been removed from office for high crimes and misdemeanors; again, by vote of the electors or appointment by the Executive, put in place of honor or trust.

We are also inclined to believe that proceedings of impeachment were intended to be remedial and not punitive, because we have already seen that if punitive at all an entirely inadequate punishment has been provided by the judgment; because the very highest offenses are triable by impeachment, such as treason and bribery, and the sentence may be only removal from an office whose term extends for a few days only, as in the case under consideration.

Again, we are brought to the conclusion that proceedings of impeachment are remedial and not punitive, because, in the case of Judge Pickering, before referred to, impeached for habitual intoxication, the officer was condemned because he became incapacitated for the performance of the duties of his office, and we find that impeachment is the only means known to our Constitution by which a civil officer of the United States, elected by the people, or a judge appointed by the Executive, can be removed from office. And certainly habitual intoxication, while it may not be a crime at common law or by statute, in a private person, may readily enough seem to be a very high crime and misdemeanor in a high civil officer, wholly incapacitating him from performing all his duties; so much so as to be made by the Articles of War a ground for removing an officer from the military service.

Again, your committee are inclined to believe that impeachment is not punitive, because, although an officer may have been tried and convicted of a high crime, yet he may be impeached for that very crime as a remedy for public mischief, and thus, in the converse of the proposition above stated, be twice punished for the same offense.

If the conclusions to which your committee have arrived in this regard are correct, it will readily be seen that the remedial proceedings of impeachment should only be applied to high crimes and misdemeanors committed while in office, and which alone affect the officer in discharge of his duties as such, whatever may have been their effect upon him as a man, for impeachment touches the office only and qualifications for the office, and not the man himself.

The report was made in the House, February 24, and was briefly debated, after which it was postponed to February 26. But it was not considered that day, and does not appear to have been taken up thereafter.[1]

2511. The investigation into the conduct of Charles T. Sherman, district judge of the United States for the northern district of Ohio.

The House declined to vote the impeachment of a judge who had not been heard before the investigating committee.

Discussion of precedents in relation to ex parte investigations with a view to impeachment, including the case of President Johnson.

On February 22, 1873,[2] Mr. Ellis H. Roberts, of New York, presented as a question of privilege, and at the request of the Committee on Ways and Means, this resolution:

Resolved, That the evidence taken by the Committee on Ways and Means, under their authority to send for persons and papers in matters under examination pending before said committee, arising out of business referred to them by the House, be referred to the Committee on the Judiciary, with instructions to examine so much thereof as relates to Charles T. Sherman, judge of the district court of the United States for the northern district of Ohio, and determine whether further investigation of the conduct of said Sherman should not be had with a view of presenting articles of impeachment, if such investigation should, in their judgment, justify such action.

Without any question as to whether or not the resolution was privileged, and without division, the House agreed to it.

On March 3,[3] the last day of the Congress, Mr. Benjamin F. Butler, of Massachusetts, from the Committee on the Judiciary, reported that the testimony had come to the committee on the preceding day. There was therefore no time for the accused or his counsel to be heard, and as it had become the established practice of the Judiciary Committee to give such hearings in cases of impeachment, they reported the testimony back, to be placed on file for the consideration of the next House. Therefore Mr. Butler proposed this resolution:

Resolved, That the testimony be placed on file for the consideration of the next House of Representatives, and that the committee be discharged from the further consideration of the same.

Mr. Clarkson N. Potter, of New York, proposed the following as a substitute:

Whereas it appears by the letters of Charles T. Sherman, a judge of the district court of the United States for the northern district of Ohio, that he proposed to corruptly control legislation for money, to be paid to him by the stock exchange of New York, and subsequently insisted on such payment on the ground of such control, and threatened adverse legislation if the same was not paid; and whereas it

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[1] Globe, pp. 1655, 1656; Journal, pp. 472, 473.

[2] Third session Forty-second Congress, Journal, p. 461; Globe, p. 1628.

[3] Journal, pp. 571, 572; Globe, pp. 2122–2127.

further appears by the testimony of said Sherman before the Committee on Ways and Means of this House that his said pretenses of power to control legislation and his said assertions of services he had rendered in this respect were false: Therefore,

Resolved, That a committee of three Members of this House be appointed by the Speaker to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles T. Sherman, judge of the district court of the United States for the northern district of Ohio, of high misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that said committee do demand that the Senate take further order for the appearance of the said Charles T. Sherman to answer to said impeachment.[1]

The presentation of this proposed substitute caused an issue to be joined as to whether or not an officer ought to be impeached without an opportunity to be heard. It was explained that Judge Sherman had appeared before the Ways and Means Committee only as a witness, to answer such questions as were asked, and without power to explain or adduce evidence in his own behalf.

Those who favored delay to permit Judge Sherman to be heard seemed generally to consider that his conduct merited impeachment, Mr. Henry L. Dawes, of Massachusetts, saying that he did not see how he could make a satisfactory explanation, yet he believed that the opportunity should be given him.

Mr. Butler said that in the cases of Judges Pickering and Chase the opportunity to be heard was not given, but it had been conceded in "the case of Judge Watrous, in the case of Judge Peck, in the case even of Andrew Johnson." There was dissent at this statement as to President Johnson, and Mr. Butler qualified it by saying:

He was notified of what was going on, but never asked to appear.[2]

Mr. Butler went on to say that in the case of Judge Delahay they did not hear counsel, but sent a subcommittee to Kansas to hear such witnesses as Judge Delahay might choose to summon. Judge Busteed was heard by himself and by counsel. In this case Judge Sherman had made application to be heard, but the committee had no time to hear him.

Mr. Potter read letters of Judge Sherman which appeared to support the allegations of the preamble, and urged the adoption of the substitute.

After further debate the preamble and substitute were disagreed to by a vote of 32 ayes and noes not counted.

Then the resolution proposed by Mr. Butler was agreed to without division.

The records of the State Department show that Martin Walker was appointed judge of this district on November 25, 1873, and the vacancy was occasioned by the resignation and death of Judge Sherman.[3]

2512. The investigation into the conduct of Richard Busteed, United States district judge for Alabama.

The majority of the Judiciary Committee recommended the impeachment of Judge Busteed, principally for nonresidence.

A question as to the authority of Congress to make nonresidence of a judge an impeachable offense.

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[1] At this stage the simple resolution to impeach is usually presented. The above form is used after impeachment has been voted, to provide for taking the charge to the Senate.

[2] Globe, p. 2123.

[3] John Sherman's Recollections, Vol. II, p. 726.

Judge Busteed having resigned, the House discontinued impeachment proceedings.

On December 15, 1873,[1] Mr. E. Rockwood Hoar, of Massachusetts, by unanimous consent, submitted the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official conduct of the judge of the United States district court for the district of Alabama; and especially whether said judge has held terms of his court required by law; whether he has continuously and persistently absented himself from the said State; and whether his acts and omissions in his office of judge have been such as in any degree to deprive the people of that State of the benefit of a district court therein, and amount to a denial of justice.

On December 17,[2] Mr. Jeremiah M. Wilson, of Indiana, submitted the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary, to whom has been referred[3] the resolution requiring said committee to inquire into the conduct of the judge of the district court of the United States of the district of Alabama, shall have power to send for persons and papers.

On June 20, 1874,[4] Mr. Wilson presented the report of the committee for printing and recommitment.

The official referred to in these proceedings was Judge Richard Busteed.

It appears incidentally from the report that at least one witness was called at Judge Busteed's request, and was examined by "Mr. Busteed," which would suggest that the respondent acted in person or was represented by some attorney of the same name. Some of the testimony elicited shows pretty conclusively that Judge Busteed examined the witness personally.

Three charges appear in this case:

1. That Judge Busteed did not reside in the district as required by the acts of September 24, 1789, and December 18, 1812, the latter of which provided that "any person offending against the injunction or prohibition of this act shall be deemed guilty of a high misdemeanor."

The majority of the committee determined that the residence required by these laws was an actual residence. They say that Judge Busteed was appointed in 1865, being then a resident and large property owner in New York. Soon after his appointment he leased for three years a residence in Mobile, Ala., and removed his family there to reside. The report assumes that this removal was with the intent of becoming a permanent resident of the State. About two years afterwards, the house becoming untenantable, he abandoned his lease, his family came North, and have not since returned to Alabama. For the past seven years his family had not been in Alabama. The testimony showed that Judge Busteed had in New York real estate and personal property to a total value of about $300,000, including a house, but that he had no real estate in Alabama, and that his personal effects consisted of "a carpet, a music box, and a double-barreled gun." He lived with a relative in the New York house much of the year, going to Alabama in the fall to hold court,

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[1] First session Forty-third Congress, Journal, p. 127, Record, p. 209.

[2] Journal, p. 141; Record, p. 266.

[3] This is hardly accurate. The House agreed to the resolution, thereby instructing the committee.

[4] Journal, p. 1262; Record, p. 5316; House Report No. 773.

and returning in June, as soon as the courts were over. From this testimony the majority of the committee concluded that Judge Busteed was no resident of Alabama, "but only a sojourner from time to time for the purpose of holding terms of court."

2. The evidence showed much irregularity in holding courts—that in each division of the district he had frequently failed to hold the courts at the terms created by law. In one of them he had held no court since the spring of 1872, and in none of them had he held any court since the spring of 1873. Besides this, before those dates he held his courts irregularly, sometimes omitting altogether to hold them, being absent from the State. The committee concluded that the plea of ill health was not a sufficient excuse for these numerous and continued absences from duty.

3. It was also charged that Judge Busteed had used improperly the money of the United States and his official position to promote his personal interests. The committee found this charge sustained in respect to the remission of a fine by the judge in his court in order to relieve himself of a libel suit in the State courts.

Therefore the majority of the committee, Messrs. Benjamin F. Butler, of Massachusetts; Jeremiah M. Wilson, of Indiana; Luke P. Poland, of Vermont; Alexander White, of Alabama; Charles A. Eldredge, of Wisconsin; Clarkson N. Potter, of New York, and Hugh J. Jewett, of Ohio, concurred in recommending this resolution:

Resolved, That Richard Busteed, judge of the district court of the United States for the southern, middle, and northern districts of Alabama, be impeached for misdemeanors in office.[1]

Messrs. John Cessna, of Pennsylvania; William P. Frye, of Maine; Jasper D. Ward, of Illinois, and Lyman Tremain, of New York, dissented from the conclusion of the majority of the committee.

Soon after this report was printed the session of Congress ended.

At the next session, on January 7, 1875[2] the report was taken up. In the meantime Judge Busteed had resigned his office and the resignation had been accepted.

Mr. Tremain expressed a doubt as to whether or not nonresidence was an impeachable offense. "High crimes and misdemeanors" must be taken to mean such offenses as were high crimes and misdemeanors when the Constitution was framed. It might be doubted whether a subsequent law proposing to make a specific offense a high crime or high misdemeanor would be constitutional.

This report being taken up immediately after the disposition of the Durell case, Messrs. Butler and Wilson took occasion to emphasize their opposition to the theory that an officer might escape impeachment by resignation.

The question being taken on discharging the Committee on the Judiciary from the consideration of the subject and laying it on the table, the motion was agreed to without division. So the proceedings were discontinued.

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[1] Two other resolutions providing for carrying the impeachment to the Senate and for a committee to prepare articles accompanied this resolution. They were similar to the resolutions in the Durell Case

[2] Second session Forty-third Congress, Journal, pp. 140, 141; Record, pp. 324–326.

2513. The investigation into the conduct of William Story, United States judge for the western district of Arkansas.

Memorials containing charges against Judge Story were referred to the Judiciary Committee for examination before the House voted a formal investigation.

On February 26, 1874,[1] Mr. James G. Blaine, of Maine, presented to the House memorials of James S. Robinson, of Fort Smith, Ark., and of Ben. T. Du Vol, James S. Gage, and others, practicing attorneys of Fort Smith, containing charges and specifications against William Story, judge of the United States district court for the western district of Arkansas. These memorials were presented at the Clerk's desk under the rule, and under the rule were referred to the Committee on the Judiciary.

On April 28[2] Mr. Jeremiah M. Wilson, of Indiana, from the Committee on the Judiciary, stated that the memorials presented contained nineteen specifications. The committee had been examining the case for some time, but now needed further authority, and he proposed this resolution, which was agreed to by the House without division:

Resolved, That the Committee on the Judiciary be, and is hereby, instructed to inquire whether Judge William F. Story, judge of the district court of the United States for the western district of Arkansas, shall be impeached for high crimes and misdemeanors, and that said committee have power to send for persons and papers.

On June 20, 1874,[3] Mr. John Cessna, of Pennsylvania, from the Committee on the Judiciary, presented a resolution providing that the evidence taken in this matter by the Judiciary Committee be furnished by the Clerk of the House to the Attorney-General, Secretary of the Treasury, and Third Auditor and First Comptroller of the Treasury, "for their information and guidance, with the recommendation that such action be taken by the said Departments as will restore to the Treasury of the United States any moneys wrongfully paid to any of the officers of said court, and to prevent any such wrongful payments hereafter." This resolution was agreed to with an amendment including also a copy of testimony taken before the Committee on Expenditures in the Department of Justice.

2514. The investigation into the conduct of George F. Seward, late consul-general at Shanghai.

The Seward investigation was set in motion by a memorial.

In the Seward investigation the respondent was represented by counsel and in person before the committee.

An opinion of the Judiciary Committee that a person under investigation with a view to impeachment may not be compelled to testify.

An instance wherein a committee charged with the investigation reported articles with the resolution of impeachment.

On January 23, 1878,[4] the Speaker laid before the House a communication from John C. Myers, late consul-general at Shanghai, China, asking that an inves-

[1] First session Forty-third Congress, Journal, p. 511; Record, p. 1825.

[2] Journal, p. 869; Record, p. 3438.

[3] Journal, p. 1262; Record, p. 5316.

[4] Second session Forty-fifth Congress, Journal, pp. 268, 269, 273.

tigation might be had concerning the administration of the consulate-general at Shanghai, during the terms in office of Hon. George F. Seward, present minister to China; O.B. Bradford, vice-consul-general and consular clerk; and himself as consul-general.

The memorial was first referred to the Committee on Foreign Affairs, but later the reference was changed to the Committee on Expenditures in the State Department.

The Committee on Expenditures in the State Department, by a resolution of January 11, 1878,[1] had been empowered generally to investigate the affairs of the State Department, and under this authority they proceeded to take testimony on the subject of the memorial.

It appears[2] that counsel was permitted to represent Mr. Seward before the committee, and later the investigation was suspended in order that Mr. Seward might leave his post and appear before the committee to assist in cross-examination of witnesses. The committee, however, made the condition of this concession, that Mr. Seward should produce papers in his possession relating to the consul-generalship at Shanghai during his incumbency of the office. Mr. Seward did not produce the papers, did not obey a subpoena duces tecum, and declined the oath as a witness, urging that the fifth amendment to the Constitution provided that "no person shall be compelled, in any criminal case, to be a witness against himself."

The issue thus raised was referred to the Committee on the Judiciary, who reported on March 3, 1879,[3] Mr. Benjamin F. Butler, of Massachusetts, making the report. The general question of the production of papers was discussed,[4] and also the report said on the question of testimony:

> Investigations looking to the impeachment of public officers have always been finally examined before the Judiciary Committee of the House, so far as we are instructed; and it is believed that the case can not be found as a precedent where the party charged has ever been called upon and compelled to give evidence in such case. We distinguish this case from the case of an ordinary investigation for legislative purposes, where all parties are called upon to give such evidence (oral or written) as may tend to throw light upon the subject of investigation; but even in those cases it was early held that a person called as a witness, and not a party charged before the committee, was not bound to criminate himself; and a statute familiar to the House, for the protection of witnesses under such circumstances, from having the evidence given used against them, was passed.
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> In making an investigation of the facts charged against an officer of the United States looking to impeachment, the House acts as the grand inquest of the nation to present that officer for trial before the highest court known to our Constitution—the Senate of the United States—for such punishment as may be constitutionally imposed upon him, which is very severe in its penalties, and even then does not exonerate the party from further prosecution before the proper courts for offenses against the laws.

On March 1, 1879,[5] before the report of the Judiciary Committee had been submitted to the House, Mr. Springer presented the report of the majority of the Committee on Expenditures in the State Department.[6] The report consisted of seventeen articles of impeachment, charging that as judge of the consular court, while

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[1] Journal, pp. 158, 159.

[2] House Report No. 117, third session Forty-fifth Congress.

[3] Third session Forty-fifth Congress, Report No. 141.

[4] See sections 1699, 1700 of this volume for general aspects of the subject.

[5] Journal, pp. 621, 624, 625, 642, 649, 659, 664; Record, pp. 2374, 2378, 2384, 2778.

[6] For this report in full, see Journal, pp. 624–633.

consul-general, he had corruptly received money in the settlement of estates and in other judicial matters; that be had converted to his own use certain funds intrusted to him as consul-general; that he had used his official influence to promote the construction of a railway in violation of law and treaty; that he had converted to his own use fees belonging by law to the marshal of the consulate, by virtue of an unlawful agreement with the said marshal; that he had, by means of falsified accounts, converted to his own use certain premiums of exchange; that he unlawfully took the salary of his office as consul-general after he had become minister of the United States to China, and while receiving the salary of the latter office; that as minister to China he unlawfully suspended John C. Myers, then being consul-general at Shanghai, and procured the appointment of one Oliver B. Bradford to the place, for the purpose "to secrete and conceal the crimes committed as aforesaid;" and that he had neglected willfully to render true and just quarterly accounts of his office, and embezzled the public moneys of the United States; that as minister to China he unlawfully endeavored to procure and did procure the release of Oliver B. Bradford from the consular jail, whither he had been committed for embezzlement, and permitted him to go at liberty; and that he unlawfully took from the consulate-general at Shanghai certain account books, the property of the United States, and carried them away "with intent to conceal, destroy, or steal the same, and ever since has and still does conceal the same, and refuses to deliver the same up as required by law."

The committee therefore recommended this resolution:

Resolved, That George F. Seward, late consul-general of the United States of America at Shanghai, China, and now envoy extraordinary and minister plenipotentiary of the United States of America to China, be impeached of high crimes and misdemeanors while in office.

Two other resolutions accompanied, providing for presentation of the impeachment in the Senate and for the appointment of a committee to frame articles of impeachment.

Mr. Solomon Bundy, of New York, presented views of the minority, with this resolution:

Whereas, in view of the great importance of the subject and matters embraced in the report of the majority of the committee in the matter of the proposed impeachment of George F. Seward for alleged high crimes and misdemeanors, and the complicated questions of law involved therein: Therefore

Resolved, That the matters embraced in such report, together with the evidence in the case, be referred to the Committee on the Judiciary.

On March 3,[1] the last day of the Congress, the House, by a vote of yeas 132, nays 109, voted to consider the report; but thereafter dilatory proceedings prevented action on it.

2515. The investigation into the conduct of Oliver B. Bradford, late vice-consul-general at Shanghai.

A question as to whether a vice-consul-general is such an officer as is liable to impeachment.

The Bradford investigation was set in motion by a memorial in which charges were preferred.

[1] Journal, pp. 621, 622.

On March 22, 1878,[1] Mr. William M. Springer, of Illinois, from the Committee on Expenditures in the State Department, to whom had been referred a memorial of John C. Myers relating to the affairs of the consulate-general at Shanghai, China, reported a recommendation that Oliver B. Bradford, late vice-consul-general at Shanghai, China, and now holding the office of postal agent of the United States at Shanghai, and also the office of consular clerk of the United States assigned at Shanghai, be impeached at the bar of the Senate of high crimes and misdemeanors in office. The committee transmitted with their report the testimony taken, and also as part of their report, ten articles of impeachment, setting forth the charges against the said Bradford: (1) That in abuse of his official position he became interested in the construction of a railroad in China, violating treaties between the United States and China, and in violation of acts of Congress; (2) that in the construction of the said railroad he used his official position to further a fraudulent scheme; (3) that in five specified cases he has used his office to exercise oppressive, extortionate, and corrupt activity against American citizens; (4) that he embezzled a letter from the post-office at Shanghai; (5) that he unlawfully took from the post-office and opened another letter; (6) that he transmitted a false salary voucher to the United States Treasury to cover the withholding of a portion of the salary of an employee; (7) that as disbursing officer he defrauded the United States Government; (8) that he again was guilty of fraud as disbursing officer; (9) that he embezzled a sum of money belonging to the United States; (10) and that he unlawfully deposited to his own account a sum of money belonging to the United States.

In view of these specifications the committee recommended this resolution:

Resolved, That Oliver B. Bradford, now consular clerk of the United States, assigned to Shanghai, China, and postal agent of the United States at Shanghai, China, and late vice-consul-general of the United States at Shanghai, China, and late clerk of the consular court of the United States at Shanghai, China, be impeached by the House of Representatives at the bar of the Senate, for high crimes and misdemeanors while in office.

Mr. Springer announced in the report that two members of the committee, Messrs. Mark H. Dunnell, of Minnesota, and Solomon Bundy, of New York, entertained grave doubts whether Mr. Bradford was such an officer as was liable under the Constitution to impeachment. All of the committee agreed that the evidence sustained the charges. In view of the constitutional question involved, Mr. Springer moved that the whole subject be referred to the Judiciary Committee. This motion was agreed to without division.

2516. The investigation of the conduct of Henry W. Blodgett, United States judge for the northern district of Illinois.

In the case of Judge Blodgett the House ordered an investigation upon the presentation of a memorial specifying charges.

In the investigation of Judge Blodgett both the complainants and the respondent were represented by counsel and produced testimony before the committee.

The most liberal latitude was allowed in the examination of witnesses before the committee which investigated the conduct of Judge Blodgett.

[1] Second session Forty-fifth Congress, Journal, p. 1127; Record, p. 3667; House Report No. 818.

The committee and the House acted adversely on a proposition to impeach Judge Blodgett for an act in excess of his jurisdiction, bad faith not being shown.

On January 7, 1879,[1] Mr. Carter H. Harrison, of Illinois, presented the memorials of certain citizens of Chicago asking for the appointment of a special committee to visit that city and investigate certain charges, therein set forth, against Henry W. Blodgett, district judge of the northern district of Illinois. Mr. Harrison also presented a preamble and resolution, which, after amendment, was agreed to by the House, giving the Judiciary Committee authority to investigate the charges.

On March 3,[2] Mr. J. Proctor Knott, of Kentucky, presented the report of the committee.

As to the method of investigation the report says:

> That during the taking of the testimony herewith submitted, Judge Blodgett and Messrs. Cooper, Knickerbocker, and Sheldon, upon whose memorial the resolution recited above was introduced and adopted, were present in person and with counsel. Both parties were permitted to introduce evidence, and the most liberal latitude was allowed to each in the examination of witnesses to the end that every fact bearing directly or remotely upon the subject under consideration might be clearly ascertained. In order to facilitate the investigation as much as possible, however, and to enable the committee to confine the testimony within reasonable limits, and present it to the House in something like a systematic form, the memorialists were requested to present their charges and specifications in writing, which was accordingly done, and copies thereof delivered to Judge Blodgett with the request that he would file written answers thereto, if such answers should be deemed by him necessary or desirable.

The report then discusses the charges, which were:

1. That Judge Blodgett had entered into a dishonest conspiracy to defraud, by aid of his acts as judge, the creditors of a certain corporation.

2. That he had improperly attempted to prevent the grand jury from finding an indictment against one Homer N. Hibbard, for perjury.

3. That while holding the office of judge he had knowingly borrowed and converted to his own personal use money belonging to or deposited in the registry of his court.

4. That as judge he had willfully employed the power and authority of the court to perpetrate acts of gross judicial oppression upon the rights of a private citizen, and sanction and direct the commission of a flagrant trespass which constituted a criminal offense under the laws of the State of Illinois, punishable by fine and imprisonment.

5. That in administering the bankrupt law he had willfully violated the letter and spirit of the law by making an unlawful use of his power as judge to enrich his friends and favorites, to the reproach and scandal of the court.

6. That he had corruptly used his official position to aid a conspiracy to defraud the stockholders of a certain insurance company, by enabling certain persons to buy up the stock at a discount.

The committee found in general that the charges were not sustained by the evidence; but in discussing the fourth charge they say:

> It maybe conceded that Judge Blodgett acted in this instance in excess of his jurisdiction. * * * However justly, therefore, Judge Blodgett may be amenable to criticism or censure on account of his

[1] Third session Forty-fifth Congress, Journal, p. 138.

[2] Journal, p. 671; Record, pp. 2388, 2390–2395; House Report No. 142.

action in this matter * * * it is impossible to see how he can be held liable to impeachment therefor, unless it can be shown that he did not act in good faith for the best interests of those concerned, as he understood them, but with such malice and corruption as to render his act in the premises an official misdemeanor.

In view of all the evidence the committee, without dissent, recommended this resolution:

Resolved, That the charges against Henry W. Blodgett, United States district judge for the northern district of Illinois, be laid on the table, and the House take no further action thereon.

This resolution was agreed to by the House without division.

2517. The investigation into the conduct of Aleck Boarman, United States judge for the western district of Louisiana.

A Member of the House presented specific charges against Judge Boarman to the Judiciary Committee, which had been empowered to investigate the judiciary generally.

A subcommittee visited Louisiana and took testimony against and for Judge Boarman.

The Member who lodged charges against Judge Boarman conducted the case against him before the subcommittee.

Judge Boarman made a sworn statement or answer to the committee investigating his conduct in 1890, but did not testify.

The inquiry of 1890 into the conduct of Judge Boarman was conducted according to the established rules of evidence.

In 1890 the Judiciary Committee concluded that Judge Boarman should be impeached for an act in violation of the statute.

On March 1, 1890,[1] Mr. William C. Oates, of Alabama, from the Committee on the Judiciary, to whom had been referred, on February 18, 1890, a resolution providing for an investigation of "the practice of certain United States district courts and other officers in criminal cases," reported the resolution with an amendment in the nature of a substitute. To show the desirability of such investigation the report cites a letter from the Attorney-General to the chairman of the committee and letters from the Commissioner of Internal Revenue and one of the Auditors of the Treasury. In addition to these letters numerous complaints had been made by persons seeming to be well informed and reputable; and also there had been complaints in the newspapers. Therefore an investigation seemed to the committee desirable, and they recommended a substitute amendment providing for a general investigation, including "maladministration or corrupt official conduct of any of the officers connected with the judicial department of the Government."

On April 1[2] the House agreed to the resolution with the proposed amendment; and on September 16[3] the committee was given authority to continue its investigation through the recess of Congress.

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[1] First session Fifty-fifth Congress, Journal, p. 296; House Report No. 566.

[2] Journal, p. 416; Record, p. 2877.

[3] Journal, p. 1046.

On February 17, 1891,[1] Mr. Albert C. Thompson, of Ohio, submitted the report of the committee. This report dealt generally with the subject referred to the committee, and also presented an ascertainment of fact in relation to Aleck Boarman, district judge for the western district of Louisiana. The report states that while the committee were investigating the general subject a letter was, in May, 1890, addressed to the chairman of the committee by Mr. C. J. Boatner, Member of the House from the Fifth District of Louisiana, preferring seven specific charges against Judge Boarman, and asking that a date be fixed when the charges might be substantiated by witnesses. Thereupon a subcommittee of the Committee on the Judiciary visited Shreveport and New Orleans and took testimony relating to the charges. Both Judge Boarman and Mr. Boatner were present at Shreveport, but neither attended at New Orleans. Mr. Boatner conducted the examination of witnesses called to sustain the charges, and Mr. Albert H. Leonard appeared as counsel for Judge Boarman. The report further says:

> The subcommittee before whom the testimony was taken aimed to admit nothing inadmissible under the well established rules of evidence, but, notwithstanding the care exercised, much is found in the record that is not legal evidence. In reaching the conclusions, however, hereinafter stated, the committee endeavor to eliminate from their consideration those matters that are plainly hearsay and neighborhood gossip, and base their judgment, it is believed, upon substantial and trustworthy evidence.
>
> Judge Boarman did not testify before the subcommittee, nor did he introduce any oral testimony whatever, except that of Mr. Albert H. Leonard and a "statement" made by Mr. M. C. Elstner, the latter being entirely personal to Mr. Elstner himself and having no bearing upon any of the issues raised. The answer of Judge Boarman, hereinbefore referred to, is given its full legal effect, as an answer, and is taken to be true except in those particulars wherein its averments axe overcome by countervailing legal testimony.

The answer of Judge Boarman, filed at the first meeting of the committee, is printed in the report, and begins as follows:

> In the matter of certain charges and complaints made by C. J. Boatner against Aleck Boarman, judge, western district of Louisiana, to the subjudiciary committee of the House of Representatives, sitting at Shreveport, La., the Hon. A. C. Thompson, chairman.
>
> Respondent, in answer to said charges, respectfully makes the following answer and statements under oath:
>
> He denies each and every allegation made against him, except what is hereinafter admitted.
>
> First charge. Respondent denies, etc.
>
> * * * * * * *
>
> Respondent submits this answer to said charges, and respectfully asks now, as he has, to the knowledge of the committee, heretofore done, that such a thorough investigation Shall be made as will best subserve the public interest.
>
> ALECK BOARMAN.
>
> Sworn to and subscribed before me this November 17, 1890.
>
> [SEAL.]
>
> J. B. BEATTLE, *Clerk.*

Upon the filing of the answer Mr. Boatner asked and was granted leave to amend the charges against Judge Boarman by the addition of another specification.

The committee concluded as to all the charges except the fourth that while there was much in the testimony warranting severe criticism of his acts yet he

[1] Second session Fifty-first Congress, Journal, pp. 254, 270; Record, pp. 2797, 2937; House Report No. 3823.

should be acquitted; but on the fourth charge the committee were unanimous that he should be impeached. This charge was that he had "used for his own purposes the funds paid into the registry of his court, and has unlawfully and corruptly failed and refused to decide causes in which the funds in dispute were or should have been in the registry of his court, and also (additional charge) that the respondent repeatedly borrowed money from the marshal of this court, contrary to law." The report quotes sections 995, 996, and 5505 of the Revised Statutes, and rule 42 governing district courts in admiralty cases, and says:

> The committee profoundly regret that from the evidence taken and fully appearing in the record there appears to have been no attempt on the part of Judge Boarman to comply with the statute and the rules of court as to moneys paid to the clerk. His practice in this regard, if not criminal, is reprehensible in the extreme.

Therefore the committee, without dissent, reported this resolution:

> *Resolved,* That Aleck Boarman, judge of the United States district court for the western district of Louisiana, be impeached of high crimes and misdemeanors.

The House considered the resolution on February 28,[1] which was next to the last legislative day of the Congress, but the debate, which was entirely in favor of impeachment, was not concluded, and the resolution failed to be acted on.

2518. The Boarman investigation continued.

In 1892 the House referred to the Judiciary Committee the evidence taken in the Boarman investigation of 1890 as material in a new investigation.

At the investigation of 1892 Judge Boarman testified and was cross-examined before the committee.

The second investigation of Judge Boarman having revealed an absence of bad intent in his censurable acts, the committee and the House decided against impeachment.

A Member who had preferred charges against Judge Boarman declined, as a member of the Judiciary Committee, to vote on his case.

In the first session of the next Congress, on January 13, 1892,[2] Mr. Boatner submitted a resolution directing an investigation of the charges against Judge Boarman and it was referred to the Committee on the Judiciary.

On January 30[3] Mr. Oates reported from the committee, in lieu of that resolution, a preamble reciting the proceedings in the former Congress, especially citing the fact that the evidence taken was not ex parte, and that the respondent had been present in person or by counsel when it was taken, and a resolution referring the report made in the last Congress, the charges and the evidence, to the Committee on the Judiciary, with instructions to investigate the same thoroughly, and further providing: "And for the purpose of making the investigation hereby ordered the said Committee on the Judiciary may adopt and use as legal evidence the testimony taken as aforesaid," and "may take and consider any additional and explanatory evidence of a legal character which may be offered either for or against said judge."

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[1] Journal, p. 330; Record, pp. 3595–3597.

[2] First session Fifty-second Congress, Journal, p. 26.

[3] Journal, p. 49; Record, p. 689.

This resolution was agreed to, and the committee made the investigation

On June 1,[1] Mr. Oates submitted the report of the committee.

As to the manner of investigation the report shows that it was conducted by a subcommittee, and says:

> Your committee found it unnecessary to take any additional testimony after having adopted that taken by its predecessor in the Fifty-first Congress. Upon due inquiry it was found that there were no other witnesses to be examined in behalf of the Government touching the said charges, and therefore the said judge was notified that if he had any exculpatory or explanatory evidence which he wished to offer that he should have the opportunity of doing so. He then came to Washington, appeared before said special subcommittee, and gave his testimony.

A reference to the printed testimony[2] shows that Judge Boarman testified at length and was then cross-examined by members of the committee. He explained his conduct as to the various charges.

The committee investigated the seven former charges and one new one. The committee found in favor of the judge as to the new charge; and also found in his favor as to the old charges, including that numbered four, on which the committee had found against him in the preceding Congress. As to the fourth charge the report says:

> It will be seen in this testimony that the judge claims to have been entirely ignorant of the existence of this statute. (Sec. 5505 relating to receiving from the clerk money belonging to the registry.) He says that it looks like a humiliating confession for a judge to make, and the committee agree with him in that statement. Ignorantia legis non excusat is a maxim of the law, applicable alike to the ignorant and the learned. It can not, therefore, be taken as any excuse whatever for his conduct in this case. He is, by his own confession, technically guilty of embezzlement. There are, however, extenuating circumstances. Wheaton, the clerk, was upon his death bed when he gave the judge the orders * * * for this money. He told the judge that he was going to die, and that this money belonged in the registry of the court, and he did not wish it to go into his succession or estate. The judge swears that his motive in receiving the money was to preserve it unincumbered for the suitors who would be entitled to it when the distribution was decreed; and while he admits that he may have converted a part of it to his own use, if he did he replaced it with the new clerk, and thus those who were entitled to it received their money. While, therefore, the taking of the money by the judge was a statutory embezzlement, it can not be said from the evidence that he took it lucri causa, or with dishonest intent.

The committee find the second branch of the fourth charge—relating to corrupt failure to decide cases—not sustained.

The committee found that judge Boarman's conduct had not been such as to absolve him from censure, but they failed to find that he "had been influenced by corrupt or dishonest motives." Therefore they asked to be discharged from further consideration of the case.

The report also says:

> Hon. C. J. Boatner, now a member of this committee, having preferred the charges against Judge Boarman in the Fifty-first Congress, declined to vote on any of the propositions embraced in the foregoing report.

The report of the committee was concurred in by the House without division.

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[1] Journal, p. 207; Record, p. 4908; House Report, No. 1536.

[2] See pp. 57–72 of Report No. 1536.

2519. The inquiry into the conduct of J. G. Jenkins, United States circuit judge for the seventh circuit.

The investigation of the conduct of Judge Jenkins was suggested by a resolution offered by a Member and referred to the Judiciary Committee.

Form of resolution authorizing the investigation into the conduct of Judge Jenkins.

Instance wherein a majority of the Judiciary Committee reported a resolution censuring a judge for acts not shown to be with corrupt intent.

On February 5, 1894,[1] Mr. Lawrence E. McGann, of Illinois, proposed a resolution to investigate and report whether or not the Hon. J. G. Jenkins, judge of the United States circuit court for the seventh circuit, has abused the powers and process of said court or oppressively exercised the same to oppress the employees of the Northern Pacific Railroad Company. This resolution was referred to the Committee on the Judiciary.

On March 6, 1894,[2] Mr. Charles J. Boatner, of Louisiana, from the Committee on the Judiciary, reported the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary of the House be, and is hereby, authorized to speedily investigate and inquire into all the circumstances connected with the issuance of writs of injunction in the case of the Farmers' Loan and Trust Company, complainant, against the Northern Pacific Railroad Company, defendant, in the United States circuit court for the eastern district of Wisconsin, and the several matters and things referred to in the resolution introduced on the 5th day of February, instant, charging illegalities and abuse of the process of said court therein and report to this House whether in any of said matters or things the Hon. J. G. Jenkins, judge of said court, has exceeded his jurisdiction in granting said writs, abused the powers or process of said court, or oppressively exercised the same, or has used his office as judge to intimidate or wrongfully restrain the employees of the Northern Pacific Railway Company, or the officers of the labor organizations with which said employees or any of them were affiliated, in the exercise of their rights and privileges under the laws of the United States; and if so, what action should be taken by this House or by Congress.

On June 8[3] Mr. Boatner submitted the report of the committee. This report relates the history of the appointment of receivers for the Northern Pacific Railroad Company by Judge Jenkins, in conjunction with other judges in whose territory the property lay; of the successive reductions of the wages of employees made by the receivers; of great dissatisfaction which finally arose among the employees affected; and finally the issuance of a writ of injunction by Judge Jenkins, on application of the receivers, restraining the employees "from combining and conspiring to quit, with or without notice, the service of the said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of the said railroad, and from so quitting the service of the said receivers with or without notice as to cripple the property or prevent or hinder the operation of the said railroad." This writ was followed by a second writ prohibiting the representatives of labor organizations from "ordering, recommending, approving, or advising others to quit the service of the receivers."

Although witnesses and the judge himself in an opinion denied that there was an intention to coerce the services of the employees, yet the majority of the committee find this explanation inconsistent with the words used, and hold that

[1] Second session Fifty-third Congress, Journal, p. 137.

[2] Journal, p. 229; Record, pp. 2629, 2661.

[3] House Report No. 1049.

Judge Jenkins's writs were "not sustained either by reason or authority," were "in violation of a constitutional provision, an abuse of judicial power, and without authority of law." The report of the majority continues:

> The testimony adduced before us fails to show any corrupt intent on the part of the judge.

The majority, in conclusion, recommend the adoption of this resolution—

> *Resolved,* That the action of Judge James G. Jenkins in issuing said order of December 19, 1893, being an order and writ of injunction, at the instance of the receivers of the Northern Pacific Railroad Company, directed against the employees of said railroad company, and in effect forbidding the employees of said Northern Pacific Railroad Company from quitting its service under the limitations therein stated, and in issuing a similar order of December 22, 1893, in effect forbidding the officers of labor organizations with which said employees were affiliated from exercising the lawful functions of their office and position, was an oppressive exercise of the process of this court, an abuse of judicial power, and a wrongful restraint upon said employees and the officers of said labor organizations; and that said orders have no sanction in legal precedent, were an invasion of the rights of American citizens, and contrary to the genius and freedom of American institutions, and therefore deserving of the condemnation of the American people.

The minority views, signed by Messrs. William A. Stone, of Pennsylvania; George W. Ray, of New York; H. Henry Powers, of Vermont, and Thomas Updegraff, of Iowa, hold that if Judge Jenkins acted corruptly he should be impeached, while if he erred honestly the wrong would be righted by an appellate tribunal, and conclude:

> To propose that a judge, who, as the majority declare, had no "corrupt intent" and "who sincerely believes" in his conclusions, shall, without impeachment, be censured by the legislative branch of the Government, is to confound all distinctions between the legislative and judicial powers and create a side tribunal of appeal where justice would be for sale to the suitor who could poll the largest vote.

It does not appear that the resolution was acted on by the House.

2520. The investigation into the conduct of Augustus J. Ricks, United States judge for the northern district of Ohio.

The House ordered an investigation of the conduct of Judge Ricks on the strength of charges preferred in a memorial.

In the investigation of Judge Ricks the respondent made a statement before the committee and offered testimony in his behalf.

The majority of the Judiciary Committee reported a resolution censuring Judge Ricks.

On January 7, 1895,[1] Mr. Tom L. Johnson, of Ohio, presented the memorial of Samuel J. Ritchie, praying for the impeachment of Augustus J. Ricks, United States district judge for the northern district of Ohio. This memorial was referred under the rule.

On the same day Mr. Johnson, by unanimous consent, offered the following resolution, which was agreed to without debate and without the reading of the memorial or any statement of its contents beyond the mere announcement by Mr. Johnson that it was "the memorial of Samuel J. Ritchie, praying for the impeachment of Augustus J. Ricks," etc.:

> *Resolved.* That the Committee on the Judiciary be, and they are hereby, instructed to investigate the charges against the Hon. Augustus J. Ricks, United States district judge for the northern district of Ohio, contained in the memorial of Samuel J. Ritchie, presented to the House this day, and report what action in their judgment should be taken thereon.

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[1] Third session Fifty-third Congress, Journal, pp. 50, 51; Record, p. 709.

On January 25 [1] Mr. George P. Harrison, of Alabama, from the majority of the Committee on the Judiciary, submitted a report, accompanied by this resolution:

Resolved, That while the committee is not satisfied that Judge Augustus J. Ricks has been guilty of any wrong committed while judge that will justify it in reporting a resolution of impeachment, yet the committee can not too strongly censure the practice under which Judge Ricks made up his accounts.

Minority views were presented by Mr. Joseph W. Bailey, of Texas, accompanied by these resolutions:

Resolved, That Augustus J. Ricks, judge of the United States court of the northern district of Ohio, be impeached for high crimes and misdemeanors.

Resolved, That the Committee on the Judiciary is hereby instructed to prepare without unnecessary delay and report to this House suitable articles of impeachment against the said Augustus J. Ricks, judge of the United States court for the northern district of Ohio.

It appeared from the report and the minority views that at first the committee, by a vote of seven to six, had agreed to recommend impeachment, one member being present and not voting and three being absent. But before a report was made in accordance with this vote an order was agreed to inviting Judge Ricks to appear before the committee, and also providing for the testimony of such other witnesses as might be called. It was "after hearing the statement of Judge Ricks on his own behalf, and the testimony of Martin W. Sanders," that the committee, by a vote of nine to seven. one member being absent, agreed to the resolution reported by the majority.

It appears further from the report that the committee took testimony at Cleveland, Ohio, through a subcommittee, and in Washington before the whole committee. This testimony was such as was offered both against and in behalf of Judge Ricks.

The minority views were concurred in by Messrs. Joseph W. Bailey, of Texas; Edward Lane, of Illinois; Thomas R. Stockdale, of Mississippi; David A. De Armond, of Missouri; D. B. Culberson, of Texas; Thomas Updegraff, of Iowa, and C. J. Boatner, of Louisiana. The charges which they discussed were:

First. That as judge the said Augustus J. Ricks had defrauded the United States out of certain moneys, which he appropriated to his own use.

Second. That he corruptly persuaded Martin W. Sanders, his successor in the clerk's office, to omit from his emolument report fees which ought to have been included in it.

Third. That he approved the emolument report of said Martin W. Sanders, knowing it to be incorrect.

The minority found that the third charge was not reasonable, and that the second in the form made was not sustained by the evidence, although he had evidently taken fees to which he was not entitled. But on the first charge they concluded that the evidence sustained the guilt of the judge. The minority discuss at some length the evidence which led them to their conclusion.

The report was made near the close of the Congress, and it does not appear that any action was taken on it.

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[1] Journal, p. 84; Record, p. 1360; House Report No. 1670.

Chapter LXXX.

QUESTIONS OF PRIVILEGE AND THEIR PRECEDENCE.

2521. Definition and precedence of questions of privilege.

Questions of privilege have precedence of all motions except the motion to adjourn.

Form and history of Rule IX.

The House rules define questions of privilege in Rule IX:

> Questions of privilege shall be, fast, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; second, the rights, reputation, and conduct of Members individually in their representative capacity only; and shall have precedence of all other questions, except motions to adjourn.

This was a new rule framed in the revision of 1880,[2] and has not been changed essentially since that date. The object of the rule was to prevent the large consumption of time which resulted from Members getting the floor for all kinds of speeches under the pretext of raising a question of privilege.[3] As first framed, the motions for a recess and to fix the day to which the House shall adjourn were included with the motion to adjourn as having precedence of a question of privilege. These motions were dropped in the Fifty-first Congress, and, although restored in the Fifty-second and Fifty-third, were again dropped in the Fifty-fourth.

2522. A question of privilege supersedes consideration of the original question, and must first be disposed of.—Jefferson's Manual, in the latter portion of Section XXXIII, provides:

> A matter of privilege arising out of any question, or from a quarrel between two Members, or any other cause, supersedes the consideration of the original question, and must be first disposed of.

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[1] As to the duty of the Speaker in entertaining. Volume IV, section 2799. Precedence over questions merely privileged under the rules. Volume V, section 6451. The question of consideration may be demanded against. Volume V, sections 4941, 4942. Previous question applies to. Volume V, sections 5459, 5460.

[2] See Record, second session Forty-sixth Congress, pp. 205, 607, 608.

[3] See Record, second session Forty-sixth Congress, p. 482.

2523. It has long been the practice of the House to give a question of privilege precedence over all other business.—On February 6, 1836,[1] on motion of Mr. John M. Patton, of Virginia, the rules were suspended by a two-thirds vote in order to enable him to present for the consideration of the House a resolution returning to Mr. John Quincy Adams, of Massachusetts, the petition of Rachel Steers and eight other women of Fredericksburg, VA, presented by him on a preceding day, and received and laid on the table by the House.

Pending the question on this resolution, Mr. Waddy Thompson, of South Carolina, moved the following resolution:

Resolved, That the Hon. John Quincy Adams, by the attempt just made by him to introduce a petition purporting on its face to be from slaves, has been guilty of a gross disrespect to this House, and that he be instantly brought to the bar to receive the severe censure of the Speaker.

(Mr. Adams had informed the Speaker that he had such a petition immediately before Mr. Patton had moved suspension of the rules.)

During debate on the resolution moved by Mr. Thompson, Mr. Adams raised a question as to the propriety of the resolution displacing other business.

The Speaker[2] stated that the subject-matter of the resolution moved by Mr. Thompson, being a question of privilege, it would, until disposed of, take precedence over all other business.

2524. A question of privilege has precedence at a time set apart by a special order for other business.

An alleged attempt of a doorkeeper to detain and arrest a Member who was about to leave the Hall was held to involve a question of privilege, no authority having been given the doorkeeper so to act.

On August 9, 1890,[3] the House had just adopted a resolution from the Committee on Rules making the Indian appropriation bill a special order immediately and for two hours.

Thereupon Mr. Benjamin A. Enloe, of Tennessee, claimed the floor on a question of personal privilege.

Mr. Joseph G. Cannon, of Illinois, made the point of order that the adoption of the resolution created a special order, and that for two hours nothing was in order except to consider the Senate amendments to the Indian appropriation bill.

After debate on the said point of order and question of privilege, the Speaker 4 overruled the said point of order on the following grounds:

The rights and privileges of all the Members of the House, in the discharge of their functions, are sacred, and the House can undertake no higher duty than the conservation of all those rights and privileges intact. And even if the case arises under dubious circumstances, it is proper for the House to pause and give suitable heed to any question which any Member raises with regard to his rights and privileges as a Member. It is for the House alone to determine what they are.

In this case the gentleman from Tennessee [Mr. Enloe] has embodied his complaint and the remedy therefor in the shape of a resolution for the House to pass upon, if it be a question of privilege. The Chair thinks that the question ought to be passed upon by the House. The rules of the House

[1] Second session Twenty-fourth Congress, Journal, p. 352; Debates, p. 1594.

[2] James K. Polk, of Tennessee, Speaker.

[3] First session Fifty-first Congress, Journal, pp. 936, 937; Record, pp. 8373, 8375.

[4] Thomas B. Reed, of Maine, Speaker.

make provision for obtaining and for the retention of a quorum of its Members in cases provided for under the rules. In order to accomplish that the rules of the House require, whenever a call of the House is ordered, that the doors shall be closed. Such closing of the doors, in the opinion of the Chair, is to prevent any Member from going out. It is done for the purpose of keeping such Members as are already here, and retaining those who may be brought here after having been sent for by the order of the House. But that is the opinion which the Chair entertained as an individual Member of the House.

The Speaker of the House has issued no order with regard to the matter; but in response to a question of the Doorkeeper, or one of his assistants, as to the meaning of the rule, the Chair stated that to be his opinion, and the Doorkeeper has acted upon it, apparently, subject always and of course to the decision of the House upon an examination. As this resolution raises the question of privilege directly, which may be disposed of by the House, the Chair rules that it is admissible, and is before the House for consideration.

Mr. Enloe thereupon submitted, as a question of personal privilege, the following resolution, viz:

Resolved, That George E. Minot, assistant doorkeeper of the House of Representatives, be arrested and brought to the bar of the House to answer for a breach of the privileges of a Member of the House in laying hands upon and attempting to arrest Hon. B. A. Enloe, a Member of this House and a Representative from the Eighth district of Tennessee, without authority of law and in violation of the Constitution of the United States.

On motion of Mr. Witthorne, by unanimous consent the resolution was referred to the Committee on the Judiciary, with instructions to inquire into the facts and report thereon to the House.

On December 8, 1890,[1] the committee reported as follows:

The committee find that on the 9th day of August last, the House being in session, Mr. Minot, who is a messenger for the House, under the Doorkeeper, was stationed at the western extremity of the passageway leading by the wash room. This passageway leads into the corridor extending north and south on the west side of the Hall of the House of Representatives, and at the point of intersection there is no door.

On the occasion referred to in the resolution, while the House was under call, Mr. Enloe, a Member of the House, having answered to his name, passed out of the Hall of the House through the doorway next west of the Speaker's chair, all other doors being closed, and approached the place where Mr. Minot was stationed, with the purpose of passing into the corridor and thence to Statuary Hall.

Mr. Minot, having been instructed by Assistant Doorkeeper Houk to prevent Members passing out at that point during calls of the House, informed Mr. Enloe that he was instructed to not allow Members to pass. Mr. Enloe inquired who gave the order, and was told that it came from the Speaker. (In this, however, Mr. Minot was mistaken.) Mr. Enloe said he would go through, and did. During the conversation Mr. Minot undoubtedly placed his hand on Mr. Enloe's arm or shoulder, although he does not remember that he did so, and it is quite likely he was not conscious of the fact at the time it occurred. One of the witnesses, a Member of the House, who was standing by, describes Mr. Minot's touch as an appeal to Mr. Enloe or a means of arresting his attention.

Mr. Minot did not attempt or intend to arrest or to detain Mr. Enloe by force. He was not rude or uncivil, and only seems to have been desirous of doing his duty as he understood it.

Your committee, after due consideration of the subject, believe that Mr. Enloe was not, under the rules of the House, liable to arrest, under the circumstances, and had there been any attempt to arrest him a case of breach of privilege might have arisen which would call for action; but your committee do not think the facts in this case disclose any breach of privilege or call for any action on part of the House, and therefore recommend that said resolution lie on the table.

The House agreed to the report.

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[1] Second session Fifty-first Congress, Record, p. 218.

2525. On January 21, 1857,[1] Mr. James L. Orr, of South Carolina, arose to report from the select committee to investigate charges that Members of the House had entered into corrupt combinations for the purpose of passing and preventing the passage of certain measures during the present Congress, stating that he rose to a question affecting the privileges of the House. Thereupon Mr. Galusha A. Grow, of Pennsylvania, made the point of order that a question of privilege could not override a special order of the House, as the House was acting under a suspension of the rules.

The Speaker[2] ruled that the question of privilege overruled the special order.

2526. A question of privilege takes precedence of a motion merely privileged under the rules.—On January 10, 1846,[3] Mr. Hannibal Hamlin, of Maine, made the privileged motion that the House resolve itself into the Committee of the Whole House on the state of the Union.

Pending this motion Mr. Garrett Davis, of Kentucky, as a question of privilege, presented a resolution for the dismissal of the Printer of the House.

Mr. Hamlin having raised a question as to the precedence of the pending questions, the Speaker[4] said that the motion submitted by the gentleman from Maine was undoubtedly a privileged motion, which could at any time be made by the rule; but there was this difference between the two motions: That of the gentleman from Maine was a privileged question, and the other was a question of privilege, and must put everything else aside.

2527. On January 24, 1842,[5] Mr. Henry A. Wise, of Virginia, rose and submitted that—

> The House having allowed Mr. Adams, by its vote, to defend himself from a charge contained in a paper or petition in his possession, and to read a portion of a letter of Mr. Wise, to prove that he (Mr. Wise) had also made the same or a similar charge, and to comment upon that portion of the letter, Mr. Wise now asks the privilege and the permission of the House to reply to the remarks of Mr. Adam and to speak in his own defense and to the question of privilege raised by Mr. Adams.

Mr. Joseph R. Underwood, of Kentucky, submitted as a question of order the following:

> That his request can not be received or entertained without a suspension of the rules regulating the order of business.

The Speaker[6] decided that the motion submitted by Mr. Wise having been stated as a question of privilege, he considered it in order to submit the question to the House without a suspension of the rules, leaving it for the House to determine whether it was a question of privilege.

An appeal having been taken, the decision of the Chair was sustained.

The record of the debates quotes the Speaker as saying that questions of privilege were always questions for the House and riot the Chair to decide.

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[1] Second session Thirty-fourth Congress, Globe, p. 403.

[2] Nathaniel P. Banks, of Massachusetts, Speaker.

[3] First session Twenty-ninth Congress, Globe, p. 177.

[4] John W. Davis, of Indiana, Speaker.

[5] Second session Twenty-seventh Congress, Journal, p. 270; Globe, p. 167.

[6] John White, of Kentucky, Speaker.

2528. The latest decision does not admit the soundness of earlier rulings that a matter merely privileged by a rule relating to the order of business may supersede an actual question of privilege.—On January 8, 1894,[1] Mr. Thomas C. Catchings, of Mississippi, called up a report from the Committee on Rules proposing a resolution for the consideration of the tariff bill, on which the previous question had been ordered.

Mr. Charles A. Boutelle, of Maine, asked that a resolution relating to actions of the President in relation to Hawaii, which had already been decided to present a question of privilege, and which had been reported adversely from the Committee on Foreign Affairs, be first considered, and submitted the point that the resolution involved a question of privilege and therefore took precedence over the privileged report from the Committee on Rules.

The Speaker[2] held that the resolution reported from the Committee on Rules was already before the House for consideration; that under the rules it presented a privileged question of the highest degree, and that no other business was in order until it should be finally disposed of. The Speaker therefore declined to recognize Mr. Boutelle for the consideration of his resolution.

Mr. Boutelle stated that he appealed from the decision of the Chair.

The Speaker declined to entertain the appeal upon the ground mentioned in the foregoing decision.

2529.—On February 2, 1894,[3] Mr. Thomas C. Catchings, of Mississippi, submitted from the Committee on Rules a privileged report proposing a time for the consideration of a resolution of the House relative to Hawaiian affairs.

Mr. Charles A. Boutelle, of Maine, submitted the point of order that a resolution heretofore presented by him presented a question of privilege and therefore took precedence of the report of the Committee on Rules.

The Speaker[2] overruled the point of order upon the ground that the Committee on Rules, under the rules of the House, had the right to report on the order of business at any time, and on the further ground that the very report from that committee just submitted provided for the consideration of the privileged question submitted by Mr. Boutelle.

2530. On July 8, 1897,[4] Mr. John Dalzell, of Pennsylvania, being recognized, proposed to present a privileged report from the Committee on Rules.

Mr. James Hamilton Lewis, of Washington, demanded recognition for a question which he claimed to be of the highest privilege, and made the point of order that a question of privilege had precedence of a report from the Committee on Rules.

After debate the Speaker[5] said:

The Chair is very far from ruling that there may not be a question of privilege which may interfere with the right of the Committee on Rules to report, although subsequent to the Fifty-first Congress, and consequently subject to any decision which was made at that time, a rule was adopted providing that it shall always be in order to call up for consideration a report from the Committee on Rules. Although the Speaker occupying the chair at the time when this rule was adopted, and who made the first rulings

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[1] Second session Fifty-third Congress, Journal, pp. 71–72; Record, pp. 485, 527.

[2] Charles F. Crisp, of Georgia, Speaker.

[3] Second session Fifty-third Congress, Journal, p. 132; Record, p. 1809.

[4] First session Fifty-fifth Congress, Record, p. 2478.

[5] Thomas B. Reed, of Maine, Speaker.

under it, decided that no question of privilege could interfere with the operation of the rule, the present occupant of the chair was never entirely satisfied that that was so; but the gentleman from Washington [Mr. Lewis] having now stated his proposition, namely, that we are not a House, the Chair overrules the point as dilatory, and the Clerk will read the pending report from the Committee on Rules.

Mr. Lewis having appealed, the Speaker declined to entertain the appeal.

2531. A question of personal privilege has been given precedence over privileged Senate amendments remaining to be disposed of after the rejection of a conference report.—On February 26, 1901,[1] the House had disagreed to the conference report on the naval appropriation bill, and was considering motions relating to the several Senate amendments to the bill, when Mr. John J. Lentz, of Ohio, claimed the floor on a question of personal privilege relating to the Congressional Record.

Mr. Joseph G. Cannon, of Illinois, made the point of order that a question of privilege might not interfere with a conference report.

The Speaker[2] said that he would hear the gentlemen from Ohio, as it would readily be seen that matters might arise which would have to be considered at once.

Mr. Lentz then went on to say that the copy of a speech, which he had left with the Public Printer for insertion in the Record, had not appeared in the Record, but, as he had been informed, had been delivered to the Speaker, and by the Speaker delivered to the gentleman from Ohio, Mr. Charles H. Grosvenor. He asked upon what authority that could be done.

After discussion, the Speaker held that before further action could be taken a distinctive proposition must be presented to the House.

Thereupon Mr. James D. Richardson, of Tennessee, offered this resolution:

Resolved, That the Speaker has no right to withhold from the Record the speech of a Member made on a general leave to print.

Mr. Cannon renewed his point of order, urging that this was not a question of privilege, and that the privileged matter before the House could not be interrupted.

The ruling of the Speaker on the point of order made by Mr. Cannon was as follows:

* * * The Chair desires to say in regard to the point of order made by the gentleman from Illinois that there are privileged questions and questions of privilege. The gentleman submits a privileged question, but the gentleman from Ohio submits a question of privilege, and the Chair would be very loath to hold that the question of privilege should not be considered.

2532. Although the previous question had been ordered on a motion to reconsider, it was held that a question of privilege might be debated.—On July 10, 1840,[3] the previous question had been ordered on a motion to reconsider the vote of the previous day whereby the House, had rejected the resolution of the Senate (No. 16) authorizing the President of the United States to accept certain presents from the Imaum of Muscat and the Sultan of Morocco.

At this point Mr. John Quincy Adams, of Massachusetts, submitted the following resolution:

Resolved, That the Clerk of this House, by delivering, privately, a resolution from the Senate which had been acted upon by this House, to be returned to the Senate, to a Member of this House, thereby retaining it from the Senate, has violated his official duty as Clerk of this House.

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[1] Second session Fifty-sixth Congress, Journal, pp. 281, 282; Record, p. 3092.

[2] David B. Henderson, of Iowa, Speaker.

[3] First session Twenty-sixth Congress, Journal, p. 1242; Globe, p. 519.

An inquiry being made as to whether this resolution was open to debate, the previous question having been ordered on the motion to reconsider, the Speaker[1] stated that, this being a question of privilege, suspended the motion to reconsider, and was open to debate.

Mr. Hopkins L. Turney, of Tennessee, having taken an appeal, the decision of the Chair was sustained, yeas 86, nays 66.

2533. Only one question of privilege may be pending at a time.—On March 1, 1877,[2] during proceedings incident to the count of the electoral vote, Mr. Fernando Wood, of New York, submitted this resolution:

Resolved, That the vote of Henry N. Sollace, claiming to be an elector from the State of Vermont, be not counted.

Mr. Earley F. Poppleton, of Ohio, claimed the floor as the objector in the joint meeting to the vote of Henry N. Sollace as an elector from the State of Vermont.

Mr. Bernard G. Caulfield, of Illinois, claimed the floor upon a question of high privilege.

The Speaker[3] declined to entertain the motion of Mr. Caulfield at this time, on the ground that but one question of privilege could be pending at a time.

Mr. Poppleton was thereupon recognized.

2534. A question of privilege relating to the conduct of several Members being before the House, one of them may not claim the floor by asserting a question of personal privilege.—On March 9, 1904,[4] the House was considering a resolution of privilege relating to the conduct of certain Members in relation to transactions in the Post-Office Department. This resolution was being considered under the terms of a special order limiting the time of debate and giving control of the time to representatives of the majority and minority.

Mr. Henry A. Cooper, of Wisconsin, rising to a parliamentary inquiry, asked:

Would not each Member of the House of Representatives whose name appears in this report be entitled to address the House as a matter of personal privilege, in view of the heading of the pages of the report "Charges concerning Members of Congress?"

The Speaker[5] said:

The Chair will say, in answer to the parliamentary inquiry of the gentleman, that that matter will be ruled upon when it arises. In the opinion of the Chair it is not in order at this time.

Later, on the same day, Mr. Ebenezer J. Hill, of Connecticut, demanded time in his own right as a matter of personal privilege.

The Speaker[5] said:

One question of privilege is already before the House. The Chair is of opinion that there can not be but one question of privilege at a time. * * * The Chair can not recognize the gentleman on a question of privilege when there is a question of privilege already before the House.

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[1] Robert M. T. Hunter, of Virginia, Speaker.

[2] Second session Forty-fourth Congress, Journal, p. 587.

[3] Samuel J. Randall, of Pennsylvania, Speaker.

[4] Second session Fifty-eighth Congress, Record, pp. 3051, 3064.

[5] Joseph G. Cannon, of Illinois, Speaker.

On March 11,[1] the resolution being still before the House, Mr. James A. Tawney, of Minnesota, rising to a parliamentary inquiry, said:

I understand, Mr. Speaker, that every Member of the House who is named in this report can rise to a question of personal privilege, and occupy as much time as he wants. Is not that the fact? If so, the debate should be extended sufficiently to allow Members who desire to speak on the proposition to do so.

The Speaker[2] said:

The Chair ruled on that question on a former case. This is a question of the highest privilege and is entitled to consideration. Another question of privilege can not take this question from the floor of the House, or prevent the House from deciding this question when it desires to do so. The House has determined by special order when it will decide this question of privilege.

2535. Whenever a question of privilege is pending it may be called up by any Member, but may be postponed by a vote of the House.—On January 8, 1851,[3] Mr. William Strong, of Pennsylvania, called up the resolution reported from the Committee of Elections, to whom was referred the memorial of Jared Perkins, which resolution was read, and is as follows:

Resolved, That George W. Morrison is entitled to the seat which he now holds as a Representative from the Third Congressional district of New Hampshire.

Mr. George W. Jones, of Tennessee, made the point of order that it was not competent for any one Member to call up this question for the consideration of the House, but that it must be brought up on a motion made for that purpose.

The Speaker[4] stated that whenever a question of privilege is called for it must be taken up by the House,[5] although it may be postponed by a vote of the House. Such had been the practice of the House. He therefore overruled the point of order.

From this decision of the Chair Mr. Jones appealed. The decision of the Chair was sustained.

2536. While the Speaker should not entertain every motion which may be offered as a matter of privilege, he should submit to the House whatever relates to the privileges of the House or a Member.—On July 5, 1850,[6] the Journal of Wednesday having been read, Mr. Joshua R. Giddings, of Ohio, stated that he rose to a question of privilege, and submitted to the House a communication from a Washington correspondent in the Boston Atlas of the 2d instant, charging him with having abstracted from the files of the Post-Office, Department certain papers relating to the appointment of postmaster at Oberlin, Ohio.

The same having been read, Mr. Giddings was proceeding to make remarks thereon, when Mr. George W. Jones, of Tennessee, raised the question of order, that the said communication did not involve a question of privilege, and, consequently, that its consideration by the House was not in order.

The Speaker[4] decided that when a Member rises upon the floor, and brings

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[1] Record, p. 3103.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] Second session Thirty-first Congress, Journal, p. 119; Globe, p. 190.

[4] Howell Cobb, of Georgia, Speaker.

[5] Of course the question of consideration can be raised.

[6] First session Thirty-first Congress, Journal, p. 1079.

before the House a matter relating to the privileges either of the House or a Member, the question must be entertained by the Chair, so far as to submit to the House to determine whether it is a question of privilege or not. The Chair would not entertain every motion which a Member might think proper to say was a question of privilege; but it is the duty of the Chair to see that the matter relates to the privileges either of the House or a Member. When it does so, as in the present case, then, under the precedents in the Twenty-ninth and Thirtieth Congresses, the Speaker holds it to be his duty to entertain it as a privileged question to the extent of submitting it to the House to determine whether it is a question of privilege or not for its consideration.

From this decision of the Chair Mr. Robert Toombs,[1] of Georgia, appealed; and, after debate, Mr. Van Dyke moved that the appeal be laid upon the table, which was done.

So the decision of the Chair was sustained, and it was accordingly submitted to the House to determine whether the said subject did involve a question of privilege. After debate, the previous question was ordered and the main question put: Does the subject-matter brought before the House by the Member from Ohio involve a question of privilege for the consideration of the House? And it was decided in the negative, yeas 71, nays 89.[2]

2537. On January 21, 1842,[3] Mr. John Quincy Adams, of Massachusetts, presented a petition of thirty-eight citizens of the county of Habersham, in the State of Georgia, praying the House to adopt such measures as, in the wisdom of the House, it may seem fit and proper, for the removal of Hon. John Quincy Adams from the head of the Committee on Foreign Affairs, and the substitution of any other Member of the House in his place.

Mr. Adams claimed the right to be heard on the subject-matter of the petition, as it involved, in his opinion, his privilege as a Member of this House.

Mr. Henry A. Wise called on the Speaker to decide, as a question of order, whether the subject before the House involved a question of privilege.

The Speaker[4] answered that there was no question of order involved; and as to whether the question of privilege was involved, that was a matter for the House itself to decide.

This was acquiesced in by the House.

The House, without coming to a decision of the question of privilege, allowed Mr. Adams to be heard.

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[1] The Globe (p. 1334) shows that Mr. Toombs, in appealing from the decision, held that the rules of the House provided that when a question was made it should be decided by the Chair. The Speaker was the organ of the House. He was to decide in the first instance, and the House would overrule his decision if it was wrong. But the idea that the House were a tribunal, independent of the action of the Chair, to which any Member might submit a question which he might declare to be a question of privilege, and by means of which character precedence was to be given to it over all other business, was a doctrine to which he could not assent.

[2] See also section 2655 of this volume for other proceedings in relation to this matter.

[3] Second session Twenty-seventh Congress, Journal, p. 262; Globe, p. 158.

[4] John White, of Kentucky, Speaker.

2538. The statement by a Member that a certain thing "is rumored" is sufficient basis for raising a question of privilege.

An alleged corrupt combination between Members of the House and the Executive was investigated as a question of privilege.

On February 16, 1867,[1] Mr. John Wentworth, of Illinois, as a question of privilege, submitted the following preamble and resolution:

Whereas the President of the United States has been impeached by a Member of this House of high crimes and misdemeanors, and the Committee on the Judiciary have been instructed to inquire into the facts upon which said impeachment was based, with power to send for persons and papers, and report them to this House in order, if thought warrantable, that the President may be arraigned for trial thereon by the Senate; and

Whereas while the Committee on the Judiciary are examining witnesses with relation to said high crimes and misdemeanors of which the President has been impeached, with a view of making a report to this House for its disinterested aetion, it has for some time been rumored, and has at last been asserted in public newspapers, that certain Members of this House, who are bound to act impartially upon the report of said committee when presented, are now holding, and have been for some time holding, private meetings with a view to a corrupt bargain, whereby, in violation of their oaths, they have pledged and are pledging themselves in advance to act adversely to said report if unfavorable to the President, and also to act adversely to certain other measures pending before this House to which they have heretofore been favorable, provided the President himself will do certain things to which he has heretofore declared himself hostile, and refrain from doing certain things to which he has heretofore declared himself favorable: Therefore,

Resolved, That the Committee on the Judiciary be instructed to inquire, etc.

Mr. Charles A. Eldridge, of Wisconsin, having raised a point of order against the reception of the resolution, the Speaker[2] said:

The Chair rules that this is unquestionably a question of privilege. The resolution states that it is rumored that certain Members of this House have been guilty of corrupt bargaining, acting in violation of their oaths, and that they have changed their views for corrupt motives. Although the resolution states that "it is rumored," still when a Member rises in his seat and states that it is so rumored, and introduces a resolution for an inquiry into the facts introduced, he of course makes himself the responsible author of the charge. The Chair, therefore, decides that it is a question of privilege.

The preamble and resolution were then agreed to, yeas 80, nays 40.

On February 25 Mr. John Hill, of New Jersey, presented a preamble reciting that the integrity of Members in the discharge of their official duties was of the utmost importance to the public, that that integrity ought not to be assailed except upon the gravest reason, and quoting the preamble and resolution presented on the 16th instant by Mr. Wentworth. Accompanying this preamble were the following resolutions, which were agreed to by the House:

Resolved, That the select committee of three appointed under said resolution be instructed to report immediately after the reading of the Journal to-morrow any evidence that may be in possession of said committee or any Member thereof relating to the corrupt bargain referred to in the preamble to said resolution.

Resolved further, That Hon. John Wentworth be requested at the same time to furnish to this House the newspaper assertions and a statement of the rumors in relation to said corrupt bargain referred to in the preamble to said resolution.

Accordingly, on February 27, the select committee reported that they had not discovered any evidence and were discharged. Mr. Wentworth did not make a statement other than to submit the report.

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[1] Second session Thirty-ninth Congress, Journal, pp. 402 486, 487, 504; Globe, pp. 1280, 1536, 1580.

[2] Schuyler Colfax, of Indiana, Speaker.

2539. A question of privilege may be based on a communication received by telegraph.—On December 21, 1876,[1] the Speaker laid before the House a telegram from Mr. William R. Morrison, of Illinois, chairman of the special committee on Louisiana affairs, communicating the record of proceedings in the case of E. W. Barnes, a recusant witness.

Thereupon Mr. J. Proctor Knott, of Kentucky, submitted a resolution directing the Speaker to issue a warrant directing the Sergeant-at-Arms of the House, either by himself or deputy, to arrest and bring to the bar of the House without delay E. W. Barnes to answer for contempt.

Mr. John A. Kasson, of Iowa, made the point of order that there was no legal or proper parliamentary ground for adopting an order of arrest of an American citizen based upon a telegraphic copy of an alleged report of a committee of Congress, without any official certificate of its accuracy and without verification of the signatures to the alleged copy, all the signatures being made by an alleged telegraphic operator and without any other verification.

The Speaker[2] overruled the point of order, on the ground that the telegram came to him through the usual channel of telegraphic communication and presented every evidence of authenticity, and believing it to be genuine, and that it presented a question of high privilege, he had accordingly laid it before the House for its action.

The resolution was then agreed to.

2540. Under the later rulings a question of privilege may be raised in Committee of the Whole as to a matter then occurring in that committee.—On April 25, 1890,[3] the House being in Committee of the Whole House on the state of the Union, Mr. Charles Tracey, of New York, claimed the floor on a question of privilege.

Mr. Benjamin Butterworth, of Ohio, made the point of order that the question of privilege was not in place in Committee of the Whole.

The Chairman[4] said:

> The question of privilege can only be raised at this time on a matter that occurred in Committee of the Whole.

2541. On May 17, 1890,[5] the House was in Committee of the Whole House on the state of the Union, considering the bill (H. R. 9416) to reduce the revenue and equalize the duty on imports, and for other purposes.

Mr. Thomas M. Bayne, of Pennsylvania, having read a letter from a citizen, James Campbell, in which certain statements were made in regard to Mr. William D. Bynum, of Indiana, the latter rose to a question of personal privilege on account thereof.

Joseph G. Cannon, of Illinois, made the point of order that a question of privilege was not involved, and also that a question of personal privilege touching the right of a Member of the House of Representatives could only be made in the

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[1] Second session Forty-fourth Congress, Journal, p. 133; Record, p. 353.

[2] Samuel J. Randall, of Pennsylvania, Speaker.

[3] First session Fifty-first Congress, Record, p. 3826.

[4] Lewis E. Payson, of Illinois, Chairman.

[5] First session Fifty-first Congress, Record, pp. 4858–4860.

House of Representatives and not in the Committee of the Whole. There was no Journal in the Committee of the Whole; there was no record in the Committee of the Whole. There was no power in the Committee of the Whole to arrest, punish, censure, or expel; all that could only be done in the House of Representatives, where alone a question of personal privilege could be presented.

The Chairman [1] said:

> The rules of the House, so far as possible, are applicable to the Committee of the Whole. Now, can it possibly be that if a Member of the House is assailed here in Committee of the Whole House he must wait until to-morrow morning or until some subsequent day before he can be heard to defend himself? * * * The Chair is of opinion that a question of privilege extends very far beyond anything which requires the action of the House.
>
> A Member may rise and deny that he has made a certain statement without invoking any action of the House, simply permitting the denial to go into the Record. He would have the right to do that as a question of privilege. * * *
>
> The rule is that in order to constitute a question of personal privilege the attack must be made upon the Member in his representative capacity. Now, what are the facts before this committee? On one of the days of this session the gentleman from West Virginia, Mr. Wilson, and the gentleman from Indiana, Mr. Bynum, assailed (the Chair uses that term as expressive of the general generic nature of the remarks of the gentlemen) the character of a citizen of the country. That citizen now sends a letter which is intended to have some effect; whatever the ultimate effect may be, the intention is manifest:
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> "I see by the Associated Press report of the proceedings in Congress yesterday that Messrs. McMillin, Bynum, and Wilson made an attack on me personally. In relation to the statement of Mr. McMillin"—
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> Thereupon the statement proceeds with a view of furnishing a denial and refutation of the attack thus made in a representative capacity by gentlemen on the floor. The Chair is, therefore, of opinion that this is a reflection upon gentlemen in their representative capacity and is a question of privilege

2542. On April 8, 1892,[2] the House was in Committee of the Whole House on the state of the Union.

Mr. Seth L. Milliken, of Maine, rose to a question of privilege.

Mr. James D. Richardson, of Tennessee, made the point of order that the gentleman's matter of privilege should come up in the House and not in Committee of the Whole.

The Chairman [3] sustained the point of order.[4]

2543. On March 25, 1898,[5] the House was in Committee of the Whole House on the state of the Union, considering the naval appropriation bill under the five-minute rule.

Mr. Charles S. Hartman, of Montana, claimed the floor on a question of personal privilege.

Mr. Nelson Dingley, of Maine, made the point of order that no question of personal privilege could be raised in Committee of the Whole.

Mr. Charles H. Grosvenor, of Ohio, and Mr. Joseph W. Bailey, of Texas, called attention to the precedent of May 17, 1890.[6]

The Chairman [7] said:

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[1] Charles H. Grosvenor, of Ohio, Chairman.

[2] First session Fifty-second Congress, Record, p. 3116.

[3] James H. Blount, of Georgia, Chairman.

[4] Chairman Linn Boyd made a similar ruling. (Globe, 1st sess. 31st Cong., p. 1475.)

[5] Second session Fifty-fifth Congress, Record, p. 3233.

[6] See section 2541.

[7] James S. Sherman, of New York, Chairman.

The Chair will rule, complying with the precedent which the gentleman from Ohio and the gentleman from Texas state was made in the Fifty-first Congress. He will be governed by that ruling, and will hear the gentleman from Montana, provided he desires to speak upon the matter of personal privilege which has arisen now.

2544. On January 30, 1899,[1] the bill (H. R. 11022) for the reorganization of the Army of the United States was under consideration in the Committee of the Whole House on the state of the Union.

Mr. Jerry Simpson, of Kansas, demanded recognition on a question of personal privilege.

Mr. John A. T. Hull, of Iowa, rising to a parliamentary inquiry, said:

Can a Member rise to a question of personal privilege in Committee of the Whole?

The Chairman[2] said:

Only on a matter that arises at the time in the Committee of the Whole.

2545. During a call of the House, when a quorum is not present, a question of privilege may not be presented unless it be something connected immediately with the proceedings.—On February 21, 1893,[3] during a call of the House, Mr. John Lind, of Minnesota, claimed the floor on a question of privilege, and proceeded to read the declaration of a political convention relative to a certain bill (H. R. 9350) pending before the House.

Mr. James D. Richardson, of Tennessee, made the point of order that no question of privilege was presented.

The Speaker[4] sustained the point of order, holding that no question of privilege could be presented except such as might arise out of the call of the House, in which the House was then engaged, saying:

The Chair will state to the gentleman that when there is no quorum present, and when the House is acting under a call, no question of privilege, in the judgment of the Chair, can be called up unless it is something that is connected immediately with the proceedings, or arises out of the position of the body at the time. Any other question of privilege which the gentleman might desire to present could not now be brought before the House; for there are not present enough Members to constitute a House, although there are enough present under the Constitution to order a call of the House.

2546. In presenting a question of personal privilege the Member is not required in the first instance to make a motion or offer a resolution; but such is not the rule in presenting a case involving the privileges of the House.

A paper offered as involving a question of privilege should be read to the House rather than privately by the Speaker before a decision is made regarding its privilege.

A mere proposition to investigate, even though impeachment may be a possible consequence, does not involve a question of privilege.

On February 1, 1886,[5] Mr. Lewis Hanback, of Kansas, rising to a question of personal privilege, asked that a paper which he sent to the desk be read. The

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[1] Third session Fifty-fifth Congress, Record, p. 1279.

[2] James S. Sherman, of New York, Chairman.

[3] Second session Fifty-second Congress, Journal, p. 105; Record, p. 1964.

[4] Charles F. Crisp, of Georgia, Speaker.

[5] First session Forty-ninth Congress, Record, pp. 1027, 1028; Journal, pp. 514, 515.

reading having proceeded for a time, Mr. Clifton R. Breckinridge, of Arkansas, made the point of order that no question of privilege was raised.

The Speaker [1] said:

The Chair thinks the practice has been for a gentleman who rises to a question of privilege and asks to have a paper read to at least state that there is something in the paper which involves a question of that character. The Chair does not yet know what is contained in the paper which the gentleman from Kansas, Mr. Hanback, has sent to the desk. * * * The Chair desires the gentleman from Kansas to state whether or not there is anything in this paper which in his judgment involves a question of personal privilege on the part of that gentleman. Unless that were the rule, any gentleman might rise to a question of privilege and have anything that he might choose read at the Clerk's desk.

Mr. Hilary A. Herbert, of Alabama, having suggested that the Speaker might privately inspect the paper to ascertain whether or not a question of privilege was involved, the Speaker said:

The difficulty in regard to the suggestion made by the gentleman from Alabama, Mr. Herbert, is that if the Chair simply takes the paper and reads it privately for his own information and then decides whether there is or is not a question of privilege involved, no Member on the floor could know whether it was proper to take an appeal from the decision or not. The House must decide finally upon every question of order; so that the first thing to be done is to have the paper read, provided it is presented in a proper way. When a gentleman rises upon the floor and states that there is a question of personal privilege involved in a matter which he presents, it has not been the practice of the House to require him to make in the first instance any motion or offer any resolution. * * * But when a Member states that he rises to a question involving the privileges of the House, then there must be some question presented. The Chair thinks the gentleman must make a motion or offer a resolution, and upon that the question of privilege will arise. Thus far the gentleman from Kansas has offered no resolution nor made any motion which would constitute the foundation for a question of privilege before the House. * * * Although the Chair has constantly endeavored to confine these questions of privilege as strictly as possible under the rules, still it is very difficult for the Chair, in administering the rules, to prevent gentlemen from sometimes making upon the floor statements which are not strictly within the rules. But the Chair will endeavor to administer the rule as fairly as it can be done.

Mr. Hanback having presented the following resolution:

Resolved, That the Committee on Expenditures in the Department of Justice be, and is hereby, empowered to make full inquiry into any expenditure upon the part of the Government relative to the rights of the Bell and Pan-Electric Telephone companies; and for the purpose of this investigation, and to the end that the people may be fully advised, the committee is granted the right to send for persons and papers, all expenses to be audited and accounted for upon approved vouchers, and when so approved to be paid out of any moneys in the Treasury not otherwise appropriated—

Mr. Nathaniel J. Hammond, of Georgia, made the point of order that this resolution was not a matter of privilege.

The Speaker said:

The Chair will state that during the last session of Congress the gentleman from Illinois, Mr. Springer, offered a resolution of a similar character to this, to investigate the conduct of a judge with a view ultimately to his impeachment. That resolution, it was claimed by the gentleman from Illinois, involved a question of privilege, but the Chair decided that it did not. The Chair is unable to see any difference between that resolution and the one now presented. They are simply resolutions proposing an investigation of matters which may or may not be proper for the House to investigate, but which do not involve questions of privilege under the rule.

2547. On November 13, 1903,[2] Mr. Edward J. Livernash, of California, claiming the floor for a question of privilege, proceeded to discuss a question as to

[1] John G. Carlisle, of Kentucky, Speaker.

[2] First session Fifty-eighth Congress, Record, pp. 233, 234.

whether or not the President of the United States, in his dealings with the revolution on the Isthmus of Panama, had invaded a constitutional prerogative of the House; and to comment on the length of time which had elapsed since the House had called on the Executive for information relating thereto.

Mr. Sereno E. Payne, of New York, having raised a question of order, the Speaker [1] said:

The Clerk will read a passage from the Manual bearing upon this question.

The Clerk read as follows:

In presenting a question of personal privilege a Member is not required in the first instance to make a motion or offer a resolution; but such is not the rule in presenting a case involving the privileges of the House.

The Speaker then said:

If the gentleman will offer his resolution in writing under the rules, he will then conform to the rules; and then, for the first time, the Chair can make a ruling as to whether the gentleman is in order. The point of order being made, the rule is perfectly plain.

If the gentleman is so unfortunate as not to be able to embody in a resolution in writing, for the information of the House, his question of privilege, he is unable to conform to the rules of the House, as the Chair understands the matter.

2548. A resolution presented as a matter of privilege relating to the rights of a Member should show on its face an invasion of those rights.— On March 6, 1894,[2] Mr. Hernando D. Money, of Mississippi, from the Committee on Naval Affairs, reported for immediate consideration, as involving a question of privilege, a joint resolution (H.J. Res. 128) authorizing the Secretary of the Navy to appoint a cadet at the United States Naval Academy from the Fifth district of South Carolina.

It appeared from the debate and from the accompanying report that the Member representing the district having failed to receive the notice that there was a vacancy for his district, made no appointment, and so under the law the Secretary of the Navy had filled the vacancy from the country at large. None of these facts, however, were alleged in the resolution.

The Speaker [3] said:

In determining whether this resolution is privileged the Chair can not go beyond the resolution itself. * * * The Chair does not think the resolution on its face is privileged. It alleges no violation of any right of a Member.

2549. The House having devoted a time to debate only, the Speaker hesitated to recognize a Member for a question of personal privilege.—On Friday, February 7, 1896,[4] the House met at 10:30 a.m., in continuation of the session of the preceding day, the session being for debate only on the bill (H.R. 2904) to maintain and protect the coin redemption fund, etc.

Mr. W. Jasper Talbert, of South Carolina, arose to a question of personal privilege.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Second session Fifty-third Congress, Journal, p. 229; Record, p. 2629.

[3] Charles F. Crisp, of Georgia, Speaker.

[4] Record, first session Fifty-fourth Congress, p. 1457.

The Speaker[1] suggested that it would be better for the gentleman from South Carolina to wait until the regular session should open at noon, since this session was for debate only.

Mr. Talbert having asked if the Speaker would recognize him at 12 o'clock, the Speaker replied:

The Chair will be obliged to recognize the gentleman on "a question of personal privilege." The Chair thinks it would be better that the gentleman should not proceed now, because these understandings in regard to order of business ought never under any circumstances to be violated.

2550. A committee being intrusted with the examination of a question of high privilege, a broad construction was given in favor of the privileged character of its reports.—On January 16, 1877,[2] Mr. William A.J. Sparks, of Illinois, from the special committee on the privileges, powers, and duties of the House in reference to counting the electoral vote, reported this resolution:

Resolved, That with respect to any or all subjects to be considered by the special committee of the House on the privileges, powers, and duties of the House of Representatives in counting the electoral votes for President and Vice-President of the United States, said committee shall have power to send for persons and papers, and to sit during the sessions of the House.

Mr. James A. Garfield, of Ohio, made the point of order that the resolution was not privileged.

After debate the Speaker[3] said:

Under the Constitution of the United States, in a certain contingency this House of Representatives elects the President of the United States. That clearly is a question of the very highest privilege. The question of the powers, duties, and privileges of this House in connection with that provision of the Constitution has been referred to this committee, and by resolution of this House that committee was given the power to report at anytime. Therefore the Chair can reach no other conclusion than to overrule the point of order and to decide that the report at this time is in order as a question of privilege.

2551. A resolution relating to matters undoubtedly involving privilege, but also relating to other matters not of privilege, may not be entertained as of precedence over the ordinary business in regular order.—On January 4, 1904,[4] Mr. James Hay, of Virginia, claiming the floor for a question of privilege, offered the following:

Whereas Fourth Assistant Postmaster-General J.L. Bristow in his report to the Postmaster-General, dated October 24, 1903, and which report has been transmitted to a committee of this House, has charged that long-time leases for post-office premises were canceled and the rent increased upon the recommendation of influential Representatives;

And whereas it is charged in the same report that "if a Member of Congress requested an increase in the clerk hire allowed a postmaster, Beavers usually complied regardless of the merits of the case;"

And whereas certain cases of an aggravated character are cited on pages 133, 134, and 135 of said report to sustain the above charges;

And whereas on page 145 of said report it is charged that Members of Congress have violated section 3739 of the Revised Statutes, and that "in the face of this statute Beavers has made contracts with Members of Congress for the rental of premises, either in their own names, the names of their agents, or some member of their families;"

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[1] Thomas B. Reed, of Maine, Speaker.

[2] Second session Forty-fourth Congress, Journal, p. 240; Record, p. 666.

[3] Samuel J. Randall, of Pennsylvania, Speaker.

[4] Second session Fifty-eighth Congress, Journal, p. 89; Record, pp. 444–446.

And whereas these charges and others contained in said report reflect upon the integrity of the Membership of this House, and upon individual Members of this House whose names are not mentioned: Therefore,

Be it resolved, That the Speaker of this House appoint a committee consisting of five Members of this House to investigate said charges; and in connection therewith any frauds or irregularities in the conduct of the Post-Office Department; and that said committee have power to send for persons and papers, to enforce the production of the same; to examine witnesses under oath; to have the assistance of a stenographer, and to have power to sit during the sessions of the House, and to exercise all functions necessary to a complete investigation of said charges, and to report the result of said investigation as soon as practicable.

Mr. Frederick H. Gillett, of Massachusetts, made the point of order that the resolution contained a proposition not privileged.

After debate the Speaker [1] ruled:

Turning to page 583 of the Manual, the Chair reads as follows:

"The including of matter not privileged destroys the privileged character of a bill.

"A resolution of inquiry loses its privileged character if matter not privileged be contained therein.

"A privileged proposition may not be amended by adding thereto matter not privileged or germane to the original question"—

Citing the various decisions of the House.

The rulings of the House heretofore have been that you can not, under the guise of a privileged matter, couple therewith matters not privileged. It seems to the Chair that the House heretofore has decided wisely in that respect.

If a contrary ruling were adopted, there would be questions of privilege presented that might drag through many questions that were not privileged, and the House would be compelled to pass on the two together. In view of these rulings in the House from time to time, the Chair will call attention to this resolution.

The preamble seems by recitation to present a question of privilege. The resolution, however, is broader than the preamble. It is this:

"Be it resolved, That the Speaker of this House appoint a committee consisting of five Members of this House to investigate said charges"—

What follows?

"and in connection therewith any frauds or irregularities in the conduct of the Post-Office Department."

Again:

"And to have power to sit during the sessions of the House, and to exercise all functions necessary to a complete investigation of said charges, frauds, and irregularities."

The resolution on its face couples nonprivileged matters with privileged matters under sound rulings and determinations of the House heretofore; and for that reason, in its present shape, the Chair is compelled to sustain the point of order.

2552. In general a question of constitutional privilege may not be displaced by other privileged matters.—On March 3, 1879,[2] the House was considering the report of the Committee on Expenditures in the State Department proposing articles of impeachment against George F. Seward, late consul-general at Shanghai, China, and now minister plenipotentiary to China.

Mr. Benjamin F. Butler, of Massachusetts, as a question of privilege, proposed to submit a report from the Committee on the Judiciary, to which was referred the answer of George F. Seward in response to the order of the House, requiring him to show cause why he should not be declared in contempt of the House.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Third session Forty-fifth Congress. Journal, p. 642; Record, pp. 2362–2365.

The Speaker[1], held the report not in order at this time for the reason that a question of high constitutional privilege was pending, which the House by a yea and nay vote had determined to consider, and on which report and accompanying resolutions the main question had been ordered.

Mr. Butler having appealed, the appeal was laid on the table, yeas 125, nays 107.

2553. A proposition involving a question of constitutional privilege may supersede a pending motion to suspend the rules.—On March 2, 1877,[2] Mr. David Dudley Field, of New York, from the Select Committee on the Privileges, Powers, and Duties of the House of Representatives in counting the vote for President and Vice-President of the United States, reported a bill (H.R. 4698) to provide an effectual remedy for a wrongful intrusion into the office of President and Vice-President of the United States.

Mr. Omar D. Conger, of Michigan, made the point of order that the bill could not be reported or considered pending a motion to suspend the rules, which motion he claimed to have made before the bill was read.

The Speaker[1] held the report made by Mr. Field from the committee to be first in order, a question of high constitutional privilege being involved.

2554. A matter of constitutional privilege takes precedence of a special order.—On June 20, 1882,[3] the day was assigned to the consideration of the bill (H.R. 3843) to provide additional accommodations for the Library of Congress.

Mr. Thomas Updegraff, of Iowa, claiming the floor for a question of privilege, reported the bill (S. 613) to fix the day for the meeting of the electors of President and Vice-President, to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions rising thereon.

Mr. Selwyn Z. Bowman, of Massachusetts, made the point of order that the special order had precedence.

The Speaker[4] said:

> But questions of privilege or privileged questions, as has always been held, have a right to take precedence of any special or general order. It has been held, for instance, that the consideration of election cases are of a higher order of privilege and take precedence, although not mentioned in the exception to the special order. Now if the question which the gentleman from Iowa presents be one of constitutional privilege, it stands relatively in the same way toward all other matters and even matters of privilege.

2555. A question of privilege (as distinguished from a privileged question) does not lose its privilege through informality in the manner of reporting it.—On December 21, 1893,[5] Mr. James B. McCreary, of Kentucky, reported from the Committee on Foreign Affairs during the morning hour for the call of committees[6] a resolution relating to alleged intervention of the United States minister and naval forces in the affairs of the Government of Hawaii, and expressive of the sense of the House in relation thereto.

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[1] Samuel J. Randall, of Pennsylvania, Speaker.

[2] Second session Forty-fourth Congress, Journal, p. 628; Record, pp. 2126, 2127.

[3] First session Forty-seventh Congress, Record, p. 5142.

[4] J. Warren Keifer, of Ohio, Speaker.

[5] Second session Fifty-third Congress, Journal, pp. 50, 51; Record, p. 471.

[6] Under the present rule reports not privileged are filed with the Clerk.

Mr. Thomas B. Reed, of Maine, submitted the question of order, whether the effect of reporting of said resolution during the morning hour for reports and of the reference thereof to the Calendar would be to cause said resolution to lose its privileged character.

The Speaker[1] stated that that question might arise at a later period, but expressed the opinion that under the practice of the House the reporting of a privileged proposition during the morning hour for reports and the reference thereof to the Calendar caused such proposition to lose its privileged character.

Mr. Reed and Mr. Charles A. Boutelle, of Maine, made the point that the House could not be deprived of its right to consider the resolution by the action of one of its committees in thus reporting it.

Mr. Reed also objected that the resolution could not be referred to the Calendar in such manner as to destroy its privileged character, except after consideration and by the action of the House itself.

The Speaker stated that the question of the alleged privileged status of the resolution would arise when the resolution should be called up for consideration, and would be left open until that time.

On January 3, 1894,[2] the subject arising again, the Speaker said:

> The question is not entirely free from doubt. There have been previous rulings—and the Chair does not design or intend to overrule them at all—that when a committee has the privilege of reporting at any time, and the committee exercises the privilege by reporting during the call of committees for reports, that the privilege of calling up afterwards the resolution for consideration as a question of privilege is waived or lost.
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> But the Chair is inclined to think that the privilege that is thus lost is that privilege only which is given to the committee. In the case of a resolution which is itself privileged without any regard to what committee it might be referred, a case where the privilege attached not to the committee, nor even to the committee and the resolution together, but to the resolution itself, the Chair does not think it loses its privilege because reported during the call; because if it did, then a committee, by exercising its right to report a privileged resolution during the call of committees, could deprive the House of the right to consider it as a privileged matter.
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> A contested-election case is regarded as matter of the highest privilege, involving the right of a Member to his seat. Such a case is referred, under the rule, to the Committee on Elections, and that committee make a report upon it. They may make the report during the call of committees if they desire to do so—there is nothing to prevent it—or they may make the report at any other time. But whenever a contested-election case is put upon the Calendar it may be called up by any Member of the House.
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> It is not necessarily called up by the committee, for it has been repeatedly held that any Member of the House may at any time call it up as a privileged question, unless some question of higher privilege is pending, and that the House will then proceed to consider it unless the question of consideration is raised and the House determines that it will not consider it. Therefore, inasmuch as the resolution offered by the gentleman from Maine [Mr. Boutelle] has been decided to be privileged, has been referred to a committee, and has been reported back from that committee with the recommendation that it lie upon the table, and is now in the House and not in the committee, the Chair thinks the gentleman has a right to call it up as a question of privilege.

2556. To justify a question of privilege an invasion of the prerogatives of the House must be alleged to be actual, not prospective.—On

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[1] Charles F. Crisp, of Georgia, Speaker.

[2] Second session Fifty-third Congress, Journal, pp. 53, 54; Record, p. 485.

January 31, 1902,[1] Mr. James D. Richardson, of Tennessee, as a question of privilege, offered the following:

Whereas there are now pending before the Senate numerous treaties proposing commercial reciprocity with other nations, by which customs revenue duties will be changed from those established by acts of Congress duly approved by the President of the United States; and

Whereas there are bills originating in the Senate now pending before that body regulating the duties imposed on articles from Cuba and the Philippines imported into the United States; and

Whereas resolutions have been introduced in the Senate and are now pending in that body declaring that the doctrine of reciprocity as stated in the act of October 1, 1890, known as the McKinley bill, and the act of July 24, 1897, known as the Dingley bill, is the true doctrine, and that the various treaties pending in the Senate should receive consideration and action at the present session of Congress: Therefore,

Resolved, That it is the sense of this House that the negotiation by the executive department of the Government of a commercial treaty whereby the rates of duty to be imposed on foreign commodities entering the United States for consumption should be fixed would, in view of the provision of section 7. Article I, of the Constitution of the United States, be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives.

Mr. Sereno E. Payne, of New York, made the point of order that the resolution did not involve a question of privilege.

After debate the Speaker[2] said:

The Chair thinks that when he is once clear in his mind on a question like this it is better to rule on it and let the other business of the House go on.

The question first presented to the House for consideration is whether or not the resolutions offered by the gentleman from Tennessee are privileged resolutions. If so, it is because the prerogatives of the House are invaded. There is also presented the question whether we are entitled to go beyond the regular modes of procedure of the House in order to reach the desired result.

Now, there are three whereases in the resolution, each one of which shows that nothing has been done in this matter by the Senate. There is not a single averment in the resolution proposed by the gentleman from Tennessee showing a single specific legislative act on the part of the Senate. On the contrary, the averment in the resolution is simply to the effect that certain resolutions are pending in that body, but in no single case has action been taken upon it.

The Chair would state in this connection that this does not involve a discussion or a definition of the main question presented. It refers only to what has been done or is proposed to be done. The only thing, therefore for the Chair to determine is whether or not, under the resolution proposed by the gentleman from Tennessee, a question of privilege is presented, and whether such resolution is in order under the rule of the House.

Now, up to last night there were pending in the House 10,511 bills and resolutions, and up to the same hour there were pending in the Senate 3,380 bills and resolutions. We all know, as a matter of fact, that not every bill or resolution presented in either body becomes operative as a law, and it will not do to assume that all of this number of bills to which the Chair has called attention will be passed. Nor will it do to say that the House has not been vigilant in the consideration of matters relating to its rights and duties under the Constitution. This very morning, for instance, the House directed one of its committees to investigate and report upon a question which related to its functions under the Constitution. There can be no complaint of the want of consideration of such matters on the part of the House.

There has been no slumbering by the House in regard to its rights. But the House has not undertaken to fortify itself by the adoption of such a resolution as that presented by the gentleman from Tennessee, and the Chair, after a careful examination of his resolution—a dispassionate examination of it—fails to find anything specified in the resolution to indicate any positive action on the part of the Senate which would entitle the resolution to the consideration of the House. * * * The observa

[1] First session Fifty-seventh Congress, Journal, pp. 287, 288; Record, pp. 1181–1184.

[2] David B. Henderson, of Iowa, Speaker.

tion of the Chair was to the effect that there is no precedent cited by the gentleman wherein the House has felt that its prerogatives were being invaded. In the several cases presented by the gentleman, and where this question was considered by the House, there is nothing to show—not a single instance, as far as the Chair has been able to discover—where the House assumed to act before the Senate had taken such action as invaded the prerogatives of the House. It is true that there is a matter, as appears by the Record, which was once considered, where there was action taken as suggested by the gentleman, under a suspension of the rules.

Under individual suspension a gentleman, getting recognition, offered resolutions expressing his views, expressing his fears, calling the attention of the House to supposed dangers, supposed or proposed assaults upon its high privileges and rights; but that is not an authority in point; and if the gentleman can now cite to the Chair a single authority where action was taken by the House before the Senate acted or sent anything to the House, the Chair would be very glad indeed to have it. * * * The Chair, in view of the facts which he has stated, is very clearly of the opinion that this is not a privileged resolution. If the hand of the Senate is laid upon the prerogatives of this House, this House will act. There is no doubt about that, and it has already taken steps to be thoroughly qualified for doing it; but at this moment this great body is not justified, as it seems to the Chair, in taking such resolutions and passing upon them, and that the wise course for a great legislative body like the House of Representatives of the United States is to act with coolness and deliberation, and not strike back when not struck at.

The gentleman has his entire remedy, under the rules of the House, by bringing his resolution before the Committee on Ways and Means or any other committee.

The Chair therefore sustains the point of order made by the gentleman from New York.

Chapter LXXXI.

PRIVILEGE OF THE HOUSE.[1]

2557. Definition of questions of privilege affecting the House.—Rule IX defines questions of privilege affecting the House as "those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings."[9]

[1] For power of House to punish for contempts, see Volume II, Chapters LI to LIII, sections 1597–1724.

Propositions to impeach civil officers admitted as matters of privilege. Sections 2045, 2048, 2053, 2054, 2401, 2402, 2408, 2496, 2502, 2510 of this volume, and 7261 of Volume V. But propositions to investigate merely are not matters of privilege. Sections 2050, 2051 of this volume.

[2] House declined to define in 1795. Section 1603 of Volume II.

[3] Resolution relating to, a matter of privilege. Sections 1488, 1491, 1501 of Volume II.

Propositions relating to census and apportionment. Sections 305–308 of Volume I.

[4] Resolutions relating to prosecution of election cases matters of privilege. Sections 322, 328, 792, and 794 of Volume I, and 955, 1020, and 1062 of Volume II.

Admission of delegate from unorganized territory not matter of privilege. Section 411 of Volume I.

Presentation of credentials. Section 361 of Volume I.

Propositions to investigate conduct of members. Section 1838 of this volume.

[5] See also sections 3383, 3388 of Volume IV.

[6] Charge that a chairman of a committee had suppressed evidence. Section 1786 of this volume.

[7] Proposition to elect an officer of the House presents a question of privilege. Sections 189, 237, 263, 273, 290 of Volume I.

Correction of the Congressional Record. Sections 7013–7023 of Volume V.

[8] Proposition to remove an officer a question of privilege. Sections 284, 285 of Volume I.

[9] See section 2521 of this volume for history and full form of this rule.

2558. It being alleged that the Senate had invaded the constitutional prerogative of the House to originate appropriation bills, the Speaker entertained the matter as of privilege.—On January 23, 1885,[1] Mr. Frank H. Hurd, of Ohio, submitted the following resolution:

Whereas certain bills, appropriating money from the Treasury of the United States, originating in the Senate, have passed that body and have been sent to this House for its concurrence, which are now upon the Speaker's table, to wit, Senate bill No. 398, entitled "A bill to aid in the establishment and temporary support of common schools," and many others; and

Whereas it is asserted that these bills are in violation of the privilege of this House to exclusively originate bills for raising revenue: Therefore,

Be it resolved, That the Committee on the Judiciary be hereby directed to inquire into the power of the Senate to originate bills appropriating money from the Treasury of the United States and report to this House at as early a day as practicable. And said committee shall have leave to report at any time.

Mr. J. Frederick C. Talbott, of Maryland, made the point of order that this did not present a question of privilege.

The Speaker[2] ruled:

The Chair thinks whenever it is asserted on the floor of the House that the rights or privileges of the House have been invaded or violated by any other body, or by any individual, a question of privilege is presented, at least to the extent that the Chair is obliged to submit it to the House for its decision. Of course the Chair itself will decide all questions of order arising during legislative proceedings of the House; but when the allegation is made that the rights or privileges of the House collectively have been invaded, that is a question which does not come within the province of the Chair to decide. The House is the custodian and guardian of its own rights and privileges as a body, and must always possess the power and have the opportunity to determine what those rights and privileges are and whether or not they have been improperly interfered with.

After a long debate the motion to lay the resolution on the table was agreed to—128 yeas to 123 nays.

2559. An alleged invasion by the Senate of the House's constitutional prerogative of originating revenue legislation has been held in the later practice to present a question of privilege.—On January 29, 1842,[3] the House proceeded to the consideration of the amendments of the Senate to the bill No. 67, "An act to authorize the issue of Treasury notes."

Mr. James I. Roosevelt submitted for the decision of the Chair, as a question of privilege, the following:

Whereas the amendment made by the Senate to the bill for the issue of Treasury notes, rendering the same an addition to, instead of a partial substitution for, the twelve-million loan heretofore authorized by law, converts the said bill into a bill for raising revenue, which, by the Constitution, can only originate in the House of Representatives, and is a breach of the privileges of this House: Therefore

Resolved, That the said amendment can not be entertained by this House, and that the bill and amendments be returned to the Senate, with a respectful communication to that effect.

The Speaker[4] decided that the point raised was a question of constitutional power between the two Houses of Congress, and was not a question of privilege, which, in his opinion, it was his duty to submit to the House.

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[1] Second session Forty-eighth Congress, Journal, pp. 316, 317, 332, 333; Record, pp. 948, 962.

[2] John G. Carlisle, of Kentucky, Speaker.

[3] Second session Twenty-seventh Congress, Journal, p. 287; Globe. pp. 195, 196.

[4] John White, of Kentucky, Speaker.

From this decision Mr. Roosevelt took an appeal to the House; and the decision of the Chair was sustained—112 to 73.

The House then agreed to the first and second amendments, when the third amendment was read, which was to strike out the following proviso:

Provided, That the amount of Treasury notes which may be issued under the authority of this act shall be deemed and taken in lieu of so much of the loan authorized by the act of July 21, 1841.

Mr. Charles G. Atherton, of New Hampshire, here submitted for the decision of the Chair, as a question of order, the following:

In the seventh section, first article of the Constitution of the United States, it is provided that "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." The bill as it went from the House was not a bill for raising revenue, but to substitute one mode of raising revenue for another in regard to an amount of revenue already authorized by law to be raised. The amendment of the Senate does not increase or diminish an amount already authorized to be raised in the bill as passed by the House, but it entirely changes the nature of the House bill, and makes it a bill for raising an original and independent amount in addition to the sum authorized to be raised by former laws, and its adoption by the Senate is in effect originating a bill for raising revenue.

The Speaker overruled the question of order raised by Mr. Atherton; and on an appeal the decision was sustained—yeas 117, nays 76.[1]

2560. On March 3, 1859,[2] Mr. Galusha A. Grow, of Pennsylvania, raised a question as to the general post-office appropriation bill, which had been returned from the Senate with an amendment raising the rate of postage, and offered this resolution:

Resolved, That House bill No. 872, making appropriations to defray the expenses of the Post-Office Department for the year ending the 30th of June, 1860, with the Senate amendments thereto, be returned to the Senate, as section 13 of said amendment is in the nature of a revenue bill.

A question of order being raised, the Speaker[3] ruled that it was in order, as it involved a question of privilege.

2561. On January 27, 1871,[4] Mr. Samuel Hooper, of Massachusetts, raised a question as to a bill originating in the Senate and sent to the House, providing for the repeal of the law as to the income tax, and presented a resolution reciting that it was exclusively the privilege of the House to originate revenue bills.

A question of order being raised, the Speaker[5] held:

In the opinion of the Chair the question presented by the gentleman from Massachusetts is one of privilege. The Chair is not left to his own judgment merely in coming to this conclusion, but would call the attention of the House to a precedent established in the Thirty-fifth Congress. On that occasion the Senate amended the post-office appropriation bill by adding a clause increasing the rates of postage. On the return of the bill to the House, Mr. Grow, of Pennsylvania, made the motion, as one of privilege, that it be returned to the Senate because it contained a revenue measure. Speaker Orr sustained the motion as privileged, and the House by a decisive majority adopted it. The bill was lost in consequence of the disagreement resulting from this section, but was passed at the next session with the objectionable section left out.

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[1] For full text of the bill, after agreement to the Senate amendments, see Globe, p. 196.

[2] Second session Thirty-fifth Congress, Globe, pp. 1666, 1682, 1684.

[3] James E. Orr, of South Carolina, Speaker.

[4] Third session Forty-first Congress, Globe, p. 791.

[5] James G. Blaine, of Maine, Speaker.

In regard to the point raised by the gentleman from Pennsylvania [Mr. Randall], that this is not a bill to raise revenue, but to repeal a provision of law by which revenue is now raised, the Chair would remark that, in his judgment, that circumstance does not affect the question of privilege raised by the gentleman from Massachusetts [Mr. Hooper]. Under the practice of the House the rule requiring tax bills to be first discussed in Committee of the Whole has been always considered to apply with equal force to bills repealing taxes, and for this very obvious reason: that, as such bills are amendable, they might have their entire character changed in the House without the committee having proper opportunity for untrammeled discussion; and for an additional reason of much force, that the repeal of one tax may involve the necessity of levying another, and thus involve the whole question of raising revenue. It is for the House to decide upon the propriety of adopting the resolution offered by the gentleman from Massachusetts. The question submitted to the Chair is simply whether the resolution be one of privilege, and the Chair decides that it is, and it is now before the House.

2562. On June 14, 1878,[1] Mr. Joseph G. Cannon, of Illinois, as a question of privilege, submitted the following resolution:

That House bill No. 4286, to establish post routes in the several States therein named, with the Senate amendment thereto, be returned to the Senate, as a part of said amendments are in the nature of and constitute a revenue bill.

The Speaker[2] said:

The House must determine whether it is a question of constitutional privilege in the assertion of the rights of the House. It does not belong to the Chair. If it were a question in reference to the rules, the Chair would determine it.

The points wherein the amendments were in the nature of revenue legislation were specified by Mr. Cannon—the repeal of customs duties on certain books published abroad, extension of the franking privilege, reducing the rate on second-class mail matter, and providing for the collection of a tax from newspaper publishers. The resolution was adopted by the House by a vote of 169 to 68, after a long discussion.

2563. A resolution implying that the constitutional rights of the House may have been invaded by the Executive presents a question of privilege.— On December 8, 1903,[3] Mr. Edgar D. Crumpacker, of Indiana, claiming the floor for a question of privilege, offered the following:

Whereas it is commonly reported that a treaty negotiated between the President of the United States and the Republic of Cuba, granting and ceding the Isle of Pines to the Republic of Cuba, is pending in the Senate of the United States for ratification or rejection; and

Whereas by the terms of the treaty of Paris the Kingdom of Spain relinquished sovereignty over the Isle of Pines as part of the island of Cuba; and

Whereas by the action of this Government in establishing and recognizing the independence of the Republic of Cuba it was expressly provided that the Isle of Pines should not be within the constitutional boundary of that Republic; and

Whereas this Government has been administering the affairs of and exercising sovereignty over the Isle of Pines ever since the treaty of Paris was ratified; and

Whereas section 3 of Article IV of the Constitution of the United States provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States:" Therefore,

Resolved, That the Committee on the Judiciary be instructed to inquire into the facts hereinbefore recited and report to this House as soon as practicable:

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[1] Second session Forty-fifth Congress, Journal, p. 1303; Record, pp. 4605–4614.

[2] Samuel J. Randall, of Pennsylvania, Speaker.

[3] Second session Fifty-eighth Congress, Journal, p. 26; Record, pp. 55–58.

First. Whether the Isle of Pines is "territory or other property belonging to the United States" within the sense and meaning of the Constitution.

Second. Whether a treaty granting and ceding territory of or belonging to the United States to a foreign government without action on the part of the Congress is authorized by the Constitution.

Resolved, That the Committee on the Judiciary may report at any time under the foregoing resolution.

Mr. John S. Williams, of Mississippi, made a point of order that no question of privilege was involved.

The Speaker [1] said:

Of course the point of order goes to the standing of the resolution—the propriety of the introduction of the resolution. What the facts may be if the inquiry is made is no part of the duty of the Chair to inquire. The first whereas recites that—

"By the action of this Government in establishing and recognizing the independence of the Republic of Cuba it was expressly provided that the Isle of Pines should not be within the constitutional boundary of that Republic."

The next whereas recites that the government existing in the Isle of Pines is by the United States. The next whereas quotes section 3 of Article IV of the Constitution of the United States, that—

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States."

And then comes the resolution:

That the Committee on the Judiciary be instructed to inquire into the facts hereinbefore recited and report to this House as soon as practicable."

Then follow "first" and "second." I will read the second paragraph, which is all that is necessary to enable the Chair to rule:

"Second. Whether a treaty granting and ceding territory of or belonging to the United States to a foreign government without action on the part of Congress is authorized by the Constitution."

Now, it seems, upon the face of the resolution, that this presents a question, in the opinion of the Chair, of the highest privilege. What the House may do with the resolution, or, if it be agreed to, what that committee may find to be the facts, and after the finding what the House may do with the report, is no part of the business of the Chair in ruling upon the question of order. The Chair overrules the point of order.

2564. Alleged infringement by the treaty-making power on the constitutional right of the House to originate revenue measures presents a question of privilege.—On January 22, 1887,[2] Mr. D.N. Wallace, of Louisiana, presented, as a question of privilege, this resolution:

Whereas it has been stated in the public prints, and is no doubt true, that the President and Senate have agreed to and ratified a convention by which the terms of the treaty made between the United States and the Government of the Hawaiian Islands on the 30th day of January, 1875, have been extended for seven years longer, and beyond the period limited for its operation by the original treaty; and

Whereas by the original treaty it was agreed that certain articles therein mentioned were to be admitted to the United States free of duty; and

Whereas the original treaty was, by its terms, subject to the confirmation of an act of Congress, which provision is not inserted in the convention said to have been ratified: Therefore,

Resolved, That the Committee on the Judiciary be instructed to inquire into the facts hereinbefore recited, and to report to this House whether the treaty which involves the rate of duty to be imposed on any article or the admission of any article free of duty can be valid and binding without the concurrence of the House of Representatives and how far the power conferred on the House by the Constitution of the United States to originate measures to lay and collect duties can be controlled by the treaty-making power under said Constitution.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Second session Forty-ninth Congress, Journal, pp. 349, 350; Record, p. 917.

Resolved, That the President be requested to lay before the House, if consistent with the public welfare, a copy of the treaty or convention proposed to the Senate and ratified by that body between the United States and the Government of the Hawaiian Islands.

Resolved, That the Committee on the Judiciary may report at any time under the foregoing resolution.

Mr. Nelson Dingley, Jr., of Maine, made the point of order that the resolution was not privileged.

The Speaker [1] ruled:

The only question now before the House is the point of order. The resolution directs the Committee on the Judiciary to inquire and report how far the power conferred on the House by the Constitution of the United States to originate measures to lay and collect duties can be controlled by the treaty-making power under the Constitution. That is a question which involves the constitutional privileges and powers of the House to originate such measures, and the Chair thinks it has always been held to be a matter of privilege in the House.

2565. A resolution that the rights and dignity of the House have been invaded by the Executive presents a question of privilege.—On December 19, 1893,[2] Mr. Charles A. Boutelle, of Maine, submitted, as involving a question of privilege, the following preamble and resolution:

Whereas the Executive Communications [3] just read to the House clearly disclose that the rights and dignity of the House of Representatives as a coordinate branch of Congress of the United States have been invaded by the Executive Department in furnishing secret instructions to a minister plenipotentiary of the United States to conspire with the representatives of a deposed and discredited monarchy for the subversion and overthrow of the established republican government to which he was accredited and to which his public instructions pledged the good faith and sympathy of the President, the Government, and the people of the United States: Therefore,

Resolved, That it is the sense of this House that any intervention by the Executive of the United States, its civil or military representatives, without authority of Congress, in the internal affairs of a friendly, recognized government to disturb or overthrow it and to aid or abet the substitution or restoration of a monarchy therefor is contrary to the policy and traditions of the Republic and the letter and spirit of the Constitution, and can not be too promptly or emphatically reprobated.

Mr. James B. McCreary, of Kentucky, made the point of order that the resolution did not present a question of privilege.

Mr. W.C.P. Breckinridge, of Kentucky, made the farther point of order that in any event the resolution must first be referred to a committee of the House.

The Speaker [4] held that the resolution was privileged, but also held that under the rules it must be referred in the first instance to a committee.[5] Although the question is privileged, yet if the rules provide for its reference it must be referred. There is no question of higher privilege than the right of a Member to his seat, yet the rules provide that all matters touching the right of a Member to his seat shall be referred to the Committee on Elections.

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[1] John G. Carlisle, of Kentucky, Speaker.

[2] Second session Fifty-third Congress, Journal, pp. 43, 44; Record, pp. 397–400.

[3] A message relating to affairs in Hawaii.

[4] Charles F. Crisp, of Georgia, Speaker.

[5] This ruling as to reference of a matter of privilege is contrary to the past and present practice of the House, which is that a matter of privilege supersedes the regular order of business and the pending question and engages the attention of the House at once. (See sections 2521–2531, 2567 of this volume.)

Now, it has been held expressly that where a matter is called up in the House, not having been referred to the Committee on Elections, touching the right of a Member to his seat, that when the point is made it must be referred to the Committee on Elections. The Chair is aware of one decision in conflict with this, but the Chair thinks that a moment's reflection will satisfy gentlemen that it is within the power of the House to make rules for its own government, to make rules for the transaction of business, to make the rules which will cover privileged questions as well as questions not privileged.

The House has determined by its rules that as to certain matters they shall be referred to certain committees. Now, if a privileged matter should arise in the House or be presented to the House and there was nothing in the rules providing for its reference to any committee, then the Chair is of the opinion it would be in order to consider it, or be in order to move to refer it to some committee, thereby giving the committee jurisdiction of the subject-matter. Such questions frequently arise where there is no express direction in the rules as to the reference of the matter to a specific committee. The resolution, however, of the gentleman from Maine relates to our foreign relations, and there is a distinct provision in the rules that all matters referring to our foreign relations shall be referred to the Committee on Foreign Affairs; and the gentleman from Kentucky made the point that this matter should be so referred.

The Chair has decided that the recitals of this resolution constitute a question of privilege, and the point being made that, as the resolution pertains to our foreign relations, it should be referred under the rules to the Committee on Foreign Affairs, the Chair holds that it must be so referred.

Mr. Boutelle appealed from the decision of the Chair, to wit, that the resolution should be first referred to a committee. This appeal was, on motion of Mr. McCreary, laid on the table.

On the same day, Mr. W. Bourke Cockran, of New York, presented a resolution on the same subject, alleging that the Executive Department of the Government had recently attempted to enlarge the territorial limits of the United States without any consultation with the House of Representatives, and providing for a special committee to examine into the rights, powers, privileges, and duties of the House on this subject.

Mr. Breckinridge, of Kentucky, made the point of order that the resolution must first be considered by the Committee on Rules.

The Speaker sustained the point of order, holding as follows:

> This resolution is a resolution to raise a special committee, and under the rules of the House, when the point is made against its consideration, even though it be privileged, it must be referred to the Committee on Rules, because there is an express provision of the rules to that effect. The Chair holds. under the point made by the gentleman from Kentucky, that this resolution must be referred without a motion; and it will be referred to the Committee on Rules.

2566. A letter from an executive officer of the Government criticizing the Senate was condemned in debate as a breach of privilege and withdrawn.—On February 25, 1903,[1] a Senator read in the Senate a letter from the Civil Service Commission criticizing language used by a Senator in debate.

[1] Second session Fifty-seventh Congress, Record, pp. 2600–2604.

This letter, which was read during proceedings in relation to one Elmer E. Forshay, was criticized as a gross breach of privilege, and was withdrawn.

2567. A resolution relating to the recognition of a foreign state, no invasion of the House's prerogatives being alleged, does not present a question of privilege.

A definition of questions of privilege.

The ordinary rights and functions of the House under the Constitution are exercised in accordance with the rules, without precedence as matters of privilege.

On March 30, 1898,[1] Mr. Joseph W. Bailey, of Texas, presented, as a question of privilege, the following resolution:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the heroic struggle of the Cuban people against the force of arms and the horrors of famine has shown them worthy to be free. And, second, the United States hereby recognizes the Republic of Cuba as a free and independent state.

Mr. Charles A. Boutelle, of Maine, made the point of order that the resolution was not in order.

After debate the Speaker[2] ruled:

A question of privilege which concerns the House is one which concerns the exercise of its functions in accordance with the principles which govern parliamentary bodies. Every parliamentary body has to have rules for its government, otherwise it would have no government at all; and upon adherence to those rules depends its success as a parliamentary body. The rights of the House under the Constitution are in no way to be confounded with the privileges of the House and of every Member in it in the sense in which this matter is presented here to-day. Congress has certain powers conferred upon it, and in the exercise of those powers each House is governed by its rules. It is authorized expressly by the Constitution to make rules; and without the authorization of the Constitution it would be at liberty to make rules. These rules are the protection of the rights of the House. Now, it will be noticed in the Constitution—if any gentleman will turn to it—that there are certain powers conferred upon Congress—the power to declare war, the power to legislate for the general welfare, and a series of other enumerated powers. No man up to this date has for an instant pretended or suggested that, because the Congress has the right to pass laws upon certain topics, proposals for those laws become questions of privilege—never before except once, and the Chair will present that decision to the House.

The same language is used with reference to our relations with foreign nations that is used with reference to the creation of the courts of law, and all other power which is concerned. It is a legislative power, and it is exercised under the Constitution by rules adopted by each body. This is the first preliminary idea that we ought to have in regard to this matter. But those propositions in regard to war, or about recognition, or any of those subjects which may or may not be within our purview, do not become questions of privilege at all because we have a right to pass upon them, because that would make everything a question of privilege and end by making nothing a question of privilege.

Now, let us see what this call upon us is founded on. This is a matter that we should not have given any attention to except in times of interest, not to say excitement. The gentleman from Maine, Mr. Boutelle, some time ago presented to Speaker Crisp a proposition which had in it certain elements charging that the Executive was interfering with some of the rights and privileges of the legislative body. The Speaker ruled that it was a question of privilege; and you will perceive that it is entirely different from the present proposition, has no aspect like it at all, not the faintest resemblance to it; but the Speaker ruled that that was a privileged question. He also ruled that, being a privileged question, it should go to a committee.

Well, now, against that doctrine the Chair has always opposed himself; and the question, as Members will see by turning to the Record, that was put to the House was on that part of the Speaker's

[1] Second session Fifty-fifth Congress, Record, p. 3381.

[2] Thomas B. Reed, of Maine, Speaker.

decision as to whether it should go to a committee or not, and if it appears that, as the gentleman from Texas says, I voted on that subject, I voted according to my lights and voted against it. But he has omitted to state to you this other question, the same question almost, was put afterwards to Speaker Crisp, and by him promptly decided to be out of order at a later day, on the 30th of July, 1894:

"2. That the Republic of Hawaii is entitled to exercise and enjoy international comity and the benefits of all rights, privileges, and advantages under existing treaties that were concluded between the United States of America and the late Kingdom of Hawaii.

"3. That the Republic of Hawaii is hereby recognized by the United States of America as a free, sovereign, and independent republic, and the President of the United States shall give proper notice of the recognition to the President of the Republic of Hawaii."

The gentleman from Maine, Mr. Boutelle, demanded its immediate consideration as presenting a privileged question; and the gentleman from Missouri, an old and experienced Member, Mr. Dockery, made the point of order that the resolution was not privileged. Well, now, as a matter of course, the Speaker sustained the point—and that is precisely this question. There was no appeal. It was too clear for an appeal even.

Mr. Bailey having appealed from the decision of the Chair, the appeal was laid on the table, 180 yeas to 140 nays, and so the decision of the Chair was sustained.

2568. Subjects relating to the relations of the United States with other nations or peoples do not constitute questions of privilege.—On December 21, 1893,[1] Mr. Charles A. Boutelle, of Maine, submitted as a privileged proposition, and asked immediate consideration of, a preamble reciting that the naval forces of the United States at Hawaii had been made subject to the orders of one James H. Blount, who had no rank or authority whereby he might be entitled to assume such authority, and the following resolution:

Resolved, That the Secretary of the Navy be, and he is hereby, directed to inform the House of Representatives by what authority instructions were issued placing the armed naval forces of the United States and the use of its ensign under the orders and control of said Blount, and that the Secretary of the Navy is further directed to furnish the House of Representatives with copies of an orders, directions, instructions, or official suggestions issued by him or any officer of the Navy Department or of the Navy since the 4th day of March, 1893, concerning the use or movements of the armed naval forces of the United States at the Hawaiian Islands.

The Speaker[2] held that the resolution was not privileged.

2569. On July 30, 1894,[3] Mr. Charles A. Boutelle, of Maine, introduced the following joint resolution (H. Res. 210):

Resolved by the Senate and House of Representatives in Congress assembled:

1. That the United States of America congratulates the people of the Hawaiian Islands on their just and peaceful assumption of the powers, duties, and responsibilities of self-government, as indicated by their recent adoption of a republican form of government.

2. That the Republic of Hawaii is entitled to exercise and enjoy international comity and the benefits of all rights, privileges, and advantages under existing treaties that were concluded between the United States of America and the late Kingdom of Hawaii.

3. That the Republic of Hawaii is hereby recognized by the United States of America as a free, sovereign, and independent republic, and the President of the United States shall give proper notice of the recognition to the President of the Republic of Hawaii.

Mr. Boutelle demanded its immediate consideration as presenting a privileged question.

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[1] Second session Fifty-third Congress, Journal, pp. 50, 51; Record, p. 468.

[2] Charles F. Crisp, of Georgia, Speaker.

[3] Second session Fifty-third Congress, Journal, pp. 520, 521; Record, p. 8003.

Mr. Alexander M. Dockery, of Missouri, made the point that said resolution was not privileged.

The Speaker [1] sustained the point.

2570. On May 27, 1897 [2] Mr. James Hamilton Lewis, of Washington, presented, as a question of privilege, the following resolution:

Whereas the United States Senate assembled has duly by a proper form of resolution declared for a state of neutrality and the according to the island of Cuba all rights as a belligerent as against Spain; and

Whereas it is asserted that such right of recognition exists only with the Executive of the United States: Therefore,

Be it resolved by the House of Representatives of Congress, That as a foreign policy of the United States it is the right and authority of the Senate and House of Representatives in adopting a foreign policy of the United States to recognize as Congress the belligerency of and declare the attitude of neutrality of the United States to the island of Cuba or any other government or country when in the sense of the House such course is demanded by existing conditions.

Mr. Nelson Dingley, of Maine, made the point of order that the resolution did raise a privileged question.

The Speaker [3] said:

The Chair thinks this is not a question of privilege. Under the rules of the House such a resolution can be presented in the regular course and should have the report of a committee upon the subject.

Mr. Lewis having appealed from the decision of the Chair, the appeal was, on June 1, laid on the table.

2571. On June 3. 1897,[4] Mr. William L. Terry, of Arkansas, presented, as a question of privilege, this resolution:

Whereas the people of the United States are taking a deep interest in the Cuban question and the Senate has passed and sent to the House a resolution recognizing the belligerency of Cuba; and

Whereas for the due and orderly consideration of the same, and in accordance with immemorial usage and the rules and practices of the House, it is necessary that there should be a Committee on Foreign Affairs to which said resolution may be promptly referred for proper consideration and report; Therefore,

Resolved, That it is the sense of this House that the Committee on Foreign Affairs authorized by Rule X should be appointed as soon hereafter as practicable, so that said Senate resolution——

Mr. Sereno E. Payne, of New York, made a point of order against the resolution.

The Speaker [3] ruled:

The point is made that this resolution does not raise a question of privilege, and the Chair decides that it does not.

Mr. Terry having appealed, the appeal was laid on the table.

2572. A resolution recommending the recall of a foreign minister of the United States does not present a question of privilege.—On February 26, 1894,[5] Mr. Charles A. Boutelle, of Maine, presented, as involving a privileged

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[1] Charles F. Crisp, of Georgia, Speaker.

[2] I First session Fifty-fifth Congress, Record, pp. 1305, 1386.

[3] Thomas B. Reed, of Maine, Speaker.

[4] First session Fifty-fifth Congress, Record, p. 1459.

[5] Second session Fifty-third Congress, Journal, p. 203; Record, p. 2425.

question, a resolution recommending the recall of the United States minister to Hawaii.

The Speaker [1] held that the resolution was not privileged, saying:

It seems to the Chair that there can be no question of privilege involved in the resolution. Whilst the question of the relations of the United States to the Hawaiian Islands has been submitted to Congress, so are a great many other matters of much moment, and they do not constitute questions of privilege, but go to a committee, under our rules, to be considered first by the committee and then reported; and even then, unless expressly provided for, they are not what we know as privileged questions. So the Chair thinks it is not a privileged question.

2573. A proposition relating to the counting of the electoral vote presents a question of constitutional privilege.—On February 4, 1853,[2] the House received from the Senate a resolution providing a method of examining the votes for President and Vice-President of the United States.

Mr. George W. Jones, of Tennessee, rising to a parliamentary inquiry, asked if this was not a question of privilege, which took precedence of a mere privileged question.

The Speaker [3] said:

The Chair thinks it is a question of privilege.

2574. On February 2, 1861,[4] Mr. Elihu B. Washburne, of Illinois, called up a resolution from the Senate providing for the appointment of a committee to join such committee as might be appointed by the "House to ascertain and report a mode for examining the votes for President and Vice-President of the United States," etc.

Mr. Muscoe R.H. Garnett, of Virginia, objected to the consideration of the resolution on the ground that it was not then in order.

The Speaker [5] decided that inasmuch as the resolution provided for ascertaining a mode of executing a duty required by the Constitution of the United States to be executed on a particular day, and which might not, under the rules, be considered before that day, he was of the opinion that it presented a question of privilege, and might, therefore, be called up at any time.

Mr. Garnett having appealed, the appeal was laid on the table.

2575. On December 7, 1880,[6] Mr. George A. Bicknell, of Indiana, as a privileged question, moved that the House proceed to the consideration of the resolution of the Senate proposing a joint rule for counting the votes of electors of President and Vice-President.

Mr. J. Warren Keifer, of Ohio, made the point of order that the question was not one of privilege.

The Speaker, [7] after debate, overruled the point of order on the ground that the resolution of the Senate related to the execution of a high constitutional duty devolving on the two Houses of Congress by the Twelfth Article of the Constitu

[1] Charles F. Crisp, of Georgia, Speaker.

[2] Second session Thirty-second Congress, Globe, p. 511.

[3] Linn Boyd, of Kentucky, Speaker.

[4] Second session Thirty-sixth Congress, Journal, p. 261; Globe, p. 715.

[5] William Pennington, of New Jersey, Speaker.

[6] Third session Forty-sixth Congress, Journal, p. 38; Record, p. 24.

[7] Samuel J. Randall, of Pennsylvania, Speaker.

tion, which was also a duty imposed by section 142 of the Revised Statutes, and that as a particular day during the present session was the one fixed by law for counting the votes for President and Vice-President, any proposition looking to the performance of that duty was a question of privilege. The Speaker said:

If it (the counting) is done by the two Houses it is the highest duty they have to perform, one imposed directly by the Constitution, as the Chair thinks, relating to the election of a President and a Vice-President, and the very existence of our form of government might depend thereon. If done by any other authority it must be done in the presence of the two Houses, and without their presence it can not be done at all; so that all laws and all rules relating to the joint meeting, which in any event is indispensable to a count must be of the highest privilege, affecting as they do the exercise of a most important function of the two Houses, the ascertainment of the choice of electors for President and Vice-President. * * * The Chair desires to say that it is not competent for the House to make any rule which impairs in any degree the execution of the terms of the Constitution of the United States. The Chair therefore considers, for the reasons given and in view of past practice, that this is a question of privilege.

2576. A resolution declaring that the counting of the electoral vote of a certain State by the direction of the Presiding Officer of the Senate was an invasion of the privileges of the House, was held in order in the House.—On February 10, 1869,[1] after the electoral count had been concluded and the Senate had withdrawn, Mr. Benjamin F. Butler, of Massachusetts, offered this resolution as a question of privilege:

Resolved, That the House protest that the counting of the vote of Georgia by the order of the Vice-President pro tempore was a gross act of oppression and an invasion of the rights and privileges of the House.

Mr. Samuel J. Randall, of Pennsylvania, made the point of order that the House had no right to make reflections on the other House.

The Speaker[2] said:

The House has the right to adopt such resolutions as it may consider proper when it deems that its rights and privileges have been infringed upon.

2577. A resolution relating to alleged fraud in connection with the electoral count has been presented as a matter of privilege.—On May 13, 1878,[3] Mr. Clarkson N. Potter, of New York, as a question of privilege, presented a preamble and resolution, reciting the allegation of the legislature of Maryland that by reason of fraudulent returns from the States of Florida and Louisiana due effect had not been given to the electoral vote cast by Maryland on December 6, 1876, alleging fraud with the connivance of high officials of the Government, and providing for the appointment of a select committee to investigate the charges.

Mr. Omar D. Conger, of Michigan, made the point of order that the preamble and resolution did not present or involve a question of privilege, and were not in order at this time.

The Speaker[4] overruled the point of order on the ground that the preamble and resolution presented the question of the rightful occupation of the Executive

[1] Third session Fortieth Congress, Globe, p. 1064.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] Second session Forty-fifth Congress, Journal, pp. 1072, 1073; Record, p. 3440.

[4] Samuel J. Randall, of Pennsylvania, Speaker.

Chair and the connection of prominent officials with frauds alleged to have been committed in connection therewith, and, being presented on behalf of a sovereign States whose rights were alleged to be invaded, presented a question of high privilege.

Mr. Conger having appealed, the appeal was laid on the table, yeas 128, nays 108.

2578. A bill relating to the constitutional functions of the House in counting the electoral vote was held to be highly privileged.—On February 27, 1877,[1] Mr. David Dudley Field, of New York, from the Select Committee on the Privileges, Powers, and Duties of the House of Representatives in Counting the Vote for President and Vice President of the United States, reported a bill (H.R. 4693) to amend the Revised Statutes of the United States in respect to vacancies in the offices of President and Vice-President, and demanded the previous question thereon.

Mr. Horatio C. Burchard, of Illinois, made the point of order that the committee had no authority to report the said bill.[2]

The Speaker[3] overruled the point of order on the ground that the resolution creating the said committee authorized it "to ascertain and report what are the privileges, powers, and duties of the House of Representatives in counting the votes for President and Vice-President of the United States," and also gave the committee the right to report at any time. The Speaker further stated that he could not conceive of a question of higher constitutional and parliamentary privilege than was involved in the bill under consideration, and he therefore held the bill to be in order at this time.

The record of the debates[4] further shows the Speaker to have said:

> The Chair thinks there will be no dispute about one point, and that is this: That this committee possesses the power to report at any time. In the next place, the Chair is unable to conceive of a higher constitutional and parliamentary privilege than the introduction of a bill of this character. He will even go so far as to say that a Member might rise in his place and introduce a bill of this character, involving, as it does, the highest constitutional privilege he can conceive of, and ask for its consideration. This House has the right to determine when the contingency arises in reference to the election of President and Vice-President of the United States requiring further legislation in reference thereto.

2579. The right of a Member to his seat presents a question of privilege, and takes precedence of other business.

Previous to 1840 the principle that the order of business might be interrupted by a question of privilege was not fully recognized.

On June 16, 1840,[5] Mr. John Campbell, of South Carolina, moved that the rules in relation to the order of business be suspended to enable him to submit to the House two reports from the Committee on Elections. The motion was defeated, 114 yeas to 64 nays—not the required two-thirds vote. Mr. Campbell then arose and notified the House that he was instructed by the Committee on Elections to make two reports from that committee upon the rights of persons to seats as Members of this

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[1] Second session Forty-fourth Congress, Journal, pp. 555, 556; Record, p. 1980.

[2] Mr. Burchard based his point of order upon the usages of the House prevailing at that time in, regard to the introduction of bills. (See Congressional Record, second session Forty-fourth Congress p. 1980.)

[3] Samuel J. Randall, of Pennsylvania, Speaker.

[4] Record, second session Forty-fourth Congress, p. 1980.

[5] First session Twenty sixth Congress, Journal, pp. 1279, 1283, 1300.

House,[1] and he claimed the right to make the reports on the ground that the privileges of the House were involved in the questions discussed in the reports.

The Speaker[2] decided against the right claimed. He based his decision that a contested election case was not a question of privilege upon a case of contested election from Mississippi in a former Congress, from which it was to be seen that the House could not have considered it a privileged question, as it was determined that it required a vote of two-thirds to make that case a special order for a particular day.[3]

From this decision Mr. Campbell took an appeal to the House, and, after debate, the decision of the Chair was reversed, 95 nays to 86 yeas. And so it was decided that a contested election case was a privileged question.

The House having thus decided, Mr. Campbell, from the Committee of Elections, made a report on the New Jersey contested election, accompanied by the journal of the proceedings of the committee.

On July 17, 1840, Mr. Campbell, from the Committee of Elections, as a matter of privilege, under the decision of the previous day, reported the following resolution:

Resolved, That the Committee of Elections be discharged from the further consideration of the petitions of certain electors of the Sixth Congressional district of the State of Massachusetts, alleging that Osmyn Baker, the sitting Member from that district, was not duly elected a Member of the House of Representatives, etc.

This resolution was agreed to.

2580. On January 7, 1846,[4] as a question of privilege, Mr. Hannibal Hamlin, of Maine, from the Committee of Elections, to which was referred the memorial of W.H. Brockenbrough, representing that he was elected a Member of the House of Representatives in the Twenty-ninth Congress from the State of Florida by a majority of the legally qualified voters of that State, and that he was entitled to the return and commission at the time that Edward C. Cabell received the same, made a report thereon, accompanied by resolutions.

The record of debates does not show that any question was made against receiving the report as one of privilege. The Journal also indicates that it was received as a matter of course.

2581. It has been held that an election case may not supersede the consideration of a proposition of impeachment.—On March 3, 1879,[5] the regular order of business was the report of the Committee on Expenditures in the State Department, proposing articles of impeachment against George F. Seward, late consul-general at Shanghai, China, and now minister plenipotentiary to China, the pending question being the question of consideration raised by Mr. James A. Garfield, of Ohio, on which the yeas and nays had been ordered.

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[1] These were the New Jersey contested election cases, which delayed so long the organization of the House in the Twenty-sixth Congress.

[2] Robert M.T. Hunter, of Virginia, Speaker.

[3] This case was considered in 1837 (see section 518 of Vol. I). Also on March 4, 1836 (first session Twenty-fourth Congress, Journal, p. 464), the House took up the report in a contested election case by a two-thirds vote, Mr. Speaker Polk deciding that such a vote was necessary to set aside the regular order of business.

[4] First session Twenty-ninth Congress, Journal, p. 201; Globe, p. 158.

[5] Third session Forty-fifth Congress, Journal, p. 621; Record, p. 2347.

Mr. Hiram Price, of Iowa, proposed to submit the following resolution as a question of privilege:

Resolved, That the Committee of Elections be discharged from the further consideration of the contested election case of Nutting against Reilly, and that the same be now taken up for action in the House.

The Speaker [1] ruled the resolution out of order at this time, for the reason that a question of high privilege was already pending, involving the constitutional power of the House with reference to impeachment, on which question the yeas and nays had been ordered, thus precluding the presentation of another question of privilege until the pending question had been disposed of.

2582. The latest ruling establishes the principle that a proposition relating to the right of a Member to his seat may be acted on at once without reference to a committee.—On December 16, 1889,[2] Mr. John F. Lacey, of Iowa, as a privileged question, submitted the following preamble and resolution:

Whereas it is well known that a contest for a seat in this House was duly commenced by Hon. John M. Clayton, of Arkansas, against Hon. C.R. Breckinridge, a sitting Member; and

Whereas it is a matter of public notoriety that the said Clayton, while engaged in taking testimony in the said contest was assassinated and all further proceedings thereby suspended;

Resolved, therefore, That the Committee on Elections be, and is hereby, directed to inquire and report what further proceedings should be had in relation to the said case, and they are authorized to send for persons and papers if deemed necessary by them for the investigation of the said matter.

The same having been read, Mr. Charles F. Crisp, of Georgia, made the point of order that the said preamble and resolution, under the rule adopted, must be referred to the Committee on Elections.

After debate thereon, the Speaker [3] overruled the said point of order on the ground that the preamble and resolution touched the privileges of the House, and it therefore became the duty of the Chair to entertain and submit it to the House.

2583. On October 30, 1893,[4] Mr. Thomas A.E. Weadock, of Michigan, submitted as a privileged proposition, the following resolution, to wit:

Resolved, That the memorial of Henry M. Youmans, an elector residing in the Eighth Congressional district of the State of Michigan, touching the election of William S. Linton as a Member of the House of Representatives, to represent said district in this House, be referred to the Committee on Elections, which committee shall consider the allegation therein made, and, as speedily as possible, report to the House what action should be taken with reference thereto.

Mr. Albert J. Hopkins, of Illinois, made the point of order that the resolution should be first considered by the Committee on Elections.

The Speaker [5] sustained the point of order; and the resolution was accordingly committed to the Committee on Elections.

2584. The right of a Member to his seat may come up at any time as a question of privilege, even though the subject may have been referred to a committee.

A resolution directing the Elections Committee to report an election case may not have precedence as a question of privilege.

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[1] Samuel J. Randall, of Pennsylvania, Speaker.

[2] First session Fifty-first Congress, Journal, p. 22; Record, p. 196.

[3] Thomn B. Reed, of Maine, Speaker.

[4] First session Fifty-third Congress, Journal, p. 159.

[5] Charles F. Crisp, of Georgia, Speaker.

On June 18, 1884,[1] Mr. Samuel H. Miller, of Pennsylvania, proposed, as a question of privilege, a resolution reciting that the Committee on Elections had had the case from the Second Mississippi district before them over six months, and proposing that, therefore, it be

Resolved, That the Committee on Elections be ordered to report said case to the House at the earliest practicable time.[2]

The Speaker[3] decided that this resolution, as it did not propose to administer the oath to a Member but only to instruct a committee, was not one of privilege. But immediately the following was offered:

Resolved, That James R. Chalmers was duly elected a Representative to the Forty-eighth Congress from the Second Congressional district of Mississippi, and is entitled to his seat.

Mr. Nathaniel J. Hammond, of Georgia, made the point of order that the resolution was not in order, as this subject has been committed by the House to the Committee on Elections.

The Speaker, after referring to the fact that the resolution did not come before the House as the report from a committee, ruled:

It is a proposition to seat a Member, and is a question of privilege.

It being proposed by Mr. Philip B. Thompson, Jr., of Kentucky, to raise the question of consideration, the Speaker ruled: "The Chair decides it a matter of privilege, but of course the question of consideration may be raised against it."

2585. A motion to discharge a committee from the consideration of a contested election case presents a question of the highest privilege.—On July 23, 1886,[4] Mr. Henry G. Turner, of Georgia, as a privileged resolution, submitted the following:

Resolved, That the Committee on Elections be discharged from the further consideration of the contested election case of Charles H. Page v. William A. Pirce, from the Second Congressional district of Rhode Island, and that the House proceed to consider said case.

Resolved, That neither Charles H. Page nor William A. Pirce was duly elected a Member of this House from the Second Congressional district of Rhode Island, and that the seat now occupied by said William A. Pirce be declared vacant.

The Speaker[3] said, "This presents a question of the highest privilege."

2586. A resolution providing for an investigation of the election of a Member presents a question of privilege.—On October 27, 1893,[5] Mr. Thomas A.E. Weadock, of Michigan, as involving a question of privilege, submitted the following resolution:

Resolved, That the memorial of Henry M. Youmans, an elector residing in the Eighth Congressional district of the State of Michigan, touching the election of William S. Linton as a Member of the House of Representatives to represent said district in this House, be printed and, with the accompanying papers, be referred to a select committee of seven Members, with power to send for persons

[1] First session Forty-eighth Congress, Record, p. 5299; Journal, pp. 1477, 1478.

[2] On February 10, 1893 (second session, Fifty-second Congress, Journal, p. 87; Record, pp. 1489–1493).

[3] John G. Carlisle, of Kentucky, Speaker.

[4] First session Forty-ninth Congress. Record, p. 7403.

[5] First session Fifty-third Congress, Journal, p. 157.

and papers, administer oaths, and to employ a clerk and stenographer, and that said committee be authorized and directed to investigate the allegations of said memorial and report to this House; and the expenses necessarily incurred in the execution of this order shall be paid out of the contingent fund of the House.

Mr. Albert J. Hopkins, of Illinois, made the point of order that the resolution did not present a question of privilege.

The Speaker [1] overruled the point of order.

2587. A claimant to a seat, with papers indicating his election, is entitled to have them presented as a question of privilege.—On December 12, 1865,[2] Mr. Henry J. Raymond, of New York, presented, as a question of privilege, the certificates of certain gentlemen claiming to be representatives from the State of Tennessee.

Mr. Thaddeus Stevens, of Pennsylvania, raised the question that no question of privilege was involved, since the State of Tennessee was not known to the House or the Congress.

The Speaker [3] overruled the point of order, saying:

The Chair has examined the precedents of previous Congresses, especially since the rebellion commenced, and finds that the usage of the House has been uniform that claimants of seats have their credentials presented as a question of privilege. It is then for the House to determine what shall be done with them. The presentation of the credentials does not involve the question of their reference. It is for the House to determine whether they shall be laid on the table or referred. But a claimant to a seat, with papers prima facie indicating his election, is entitled, as a question of privilege, to have them presented.

2588. A question relating to the existence of a vacancy in the membership of the House was held to be of privilege.

Effect of negative votes by the House on affirmative propositions as to the titles of persons to seats, especially as related to the creation of vacancies. (Footnote.)

On June 29, 1850,[4] the House had defeated by a vote of 94 yeas to 102 nays this resolution:

Resolved, That William Thompson is entitled to the seat in this House which he now holds as the Representative from the First Congressional district of Iowa.

Thereupon Mr. Edward W. McGaughey, of Indiana, submitted the following resolution, viz:

Resolved, That there is now a vacancy in this House in the representation from the First Congressional district of the State of Iowa, and that the fact of vacancy be notified to the executive of the State of Iowa by the Speaker of this House.

Which having been read,

Mr. Armistead Burt, of South Carolina, made the point of order that the said resolution was not in order, as the result of the vote sufficiently declared the vacancy

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[1] Charles F. Crisp, of Georgia, Speaker.

[2] First session Thirty-ninth Congress, Journal, p. 51; Globe, p. 31.

[3] Schuyler Colfax, of Indiana, Speaker.

[4] First session Thirty-first Congress, Journal, p. 1065; Globe, pp. 1315, 1317.

without further action. Mr. Burt then referred to a recent New York case [1] as one in point. He held that as a proposition of the minority that the contestant was entitled to his seat, as well as the proposition of the majority, had both been voted down, a vacancy existed. No Member of the House could be concerned, therefore, by this resolution pending, and therefore no question of privilege was involved.

The Speaker [2] decided that, being a question of privilege, the resolution was in order.

Mr. Burt having appealed, the Chair was sustained.

The resolution was then agreed to by a vote of 109 to 84.

2589. A resolution notifying the governor of a State of a vacancy in the representation of a district is presented as a question of privilege.— On June 29, 1850,[3] the report of the Committee of Elections on the Iowa contested election case was under consideration, and the House had decided that neither Mr. Thompson, the sitting Member, nor Mr. Miller, the contestant, was entitled to the seat as Representative from the First Congressional district of Iowa.

Thereupon Mr. Edward W. McGaughey, of Indiana, submitted the following resolution:

Resolved, That there is now a vacancy in this House in the representation from the First Congressional district of the State of Iowa, and that the fact of vacancy be notified to the executive of the State of Iowa by the Speaker of this House.

Mr. Armistead Burt, of South Carolina, made the point of order that the resolution was not in order.

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[1] This case seems to have been the following, which occurred April 19, 1848. (1st sess. 30th Cong., Globe, p. 643; Journal, p. 709.)

These resolutions were voted on:

"Resolved, That David S. Jackson is not entitled to his seat in this House as a Representative from the Sixth Congressional district of the State of New York.

"Resolved, That James Monroe is entitled to the seat now occupied in this Home by David S. Jackson as a Representative from the Sixth Congressional district of the State of New York."

The first resolution was decided in the affirmative and the second in the negative.

Mr. Burt inquired of the Speaker if, under the recent decisions of the House, he should not consider it his duty to inform the proper authority of the State of New York that a vacancy existed in the representation from that State in the House of Representatives for the Thirtieth Congress.

The Speaker (Robert. C. Winthrop, of Massachusetts) said that he should do so after the time had elapsed in which a motion for the reconsideration of the votes last taken could be moved.

This case, it will be observed, is essentially different from the Iowa case.

On May 29, 1896 (1st sess. 54th Cong., Record, p. 5915), the House was considering these resolutions:

"*Resolved,* That Thomas B. Johnston was not elected a Representative in the Fifty-fourth Congress from the Seventh Congressional district of the State of South Carolina, and is not entitled to a seat therein.

"*Resolved,* That J. William Stokes was duly elected a Representative in the Fifty-fourth Congress from the Seventh Congressional district of South Carolina, and is entitled to a seat therein."

Mr. Stokes was the sitting Member.

Mr. Samuel W. McCall, of Massachusetts, having raised the question as to whether the defeat of both resolutions would in effect declare the seat vacant, the Speaker (Mr. Reed) informally expressed the opinion that it would.

[2] Howell Cobb, of Georgia, Speaker.

[3] First session Thirty-first Congress, Journal, p. 1065; Globe, pp. 1315, 1316.

The Speaker[1] decided that, being a question of privilege, the resolution was in order.

Mr. Burt having appealed, the appeal was laid on the table, thus sustaining the decision of the Chair.

2590. A Member having resigned, a question as to his right to his seat was not entertained as a question of privilege.

Although a Member had resigned, the House proceeded to inquire whether or not his acceptance of an incompatible office had vacated his title to the seat.

On January 5, 1847,[2] Mr. Robert C. Schenck, of Ohio, offered the following resolution as a question of privilege:

Resolved, That the Committee of Elections be instructed to inquire and report to this House whether the Hon. Edward D. Baker, a Representative from the State of Illinois, having accepted a commission as colonel of volunteers in the Army of the United States, and being in the service and receiving compensation from the Government of the United States as such army officer, has been entitled, since the acceptance and exercise of said military appointment, to a seat as a Member of this House.

Mr. Linn Boyd, of Kentucky, raised the question of order that the resolution did not involve a question of privilege to take precedence of all other business.

The Speaker[3] decided that the Member whose name was mentioned in the resolution, having resigned his seat as a Member of this House, the question, although an abstract question of privilege, was not such a question, involving the privileges of any Member of this House, as would take precedence of all other business.

This decision was acquiesced in by the House.

The question was then put on the resolution and it was agreed to.

2591. A paper in the nature of a memorial condemning the decision of the House in an election case was held not to involve a question of privilege.—On April 24, 1894,[4] Mr. Richard Bartholdt, of Missouri, claiming the floor for a question of privilege, offered the following resolution, which was read in part, as follows:

Whereas the principles of justice have been outraged in the unseating of the lawfully elected Member of Congress from the Eleventh district of Missouri, Mr. Charles F. Joy; and

Whereas this act is a direct assault upon the dearest possession of a citizen—the right to choose his representatives in the enactment of his country's laws—and is the first step in the direction of anarchy, as subverting a government of the people, for the people, and by the people: Be it therefore

Resolved, That this assemblage of voters of the district, irrespective of party, condemns this outrage against the integrity of the ballot and protests against the misrepresentation of the district by a man——

At this point of the reading Mr. Benton McMillin, of Tennessee, made the point of order that no question of privilege was presented.

After debate, during which reference was made to a precedent arising in connection with the Michigan case in the preceding session, the Speaker[5] held that no question of privilege was presented, saying:

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[1] Howell Cobb, of Georgia, Speaker.

[2] Second session Twenty-ninth Congress, Journal. p. 136; Globe, pp. 115, 116.

[3] John W. Davis, of Indiana, Speaker.

[4] Second session Fifty-third Congress, Record, pp. 4032, 4033.

[5] Charles F. Crisp, of Georgia, Speaker.

The Michigan case * * * was one where the memorial alleged that a gentleman who was on the roll and acting as a Member of the House had not been duly elected. That memorial was referred. But the case presented here is one in which there was a contest under the statute, notice given, evidence taken, a decision by the Committee on Elections, and a decision by the House after full debate; and the matter presented by the gentleman from Missouri is simply a resolution adopted by some individuals in St. Louis, declaring their opinion that there is no Representative of that district, although the gentleman from Missouri, Mr. O'Neill, was the duly and lawfully elected Member and entitled to his seat.

2592. No question of privilege is involved in the claim of a person to a seat in pursuance of the demand of a State for a representation greater than that allowed by law.—On March 9, 1869,[1] Mr. Roderick R. Butler, of Tennessee, offered as a question of privilege the following:

Whereas Hon. John B. Rodgers was on the first Tuesday of November, 1868, elected to the Forty-first Congress of the United States from the State of Tennessee as a delegate from the State at large; and

Whereas there is no existing law for the additional Member, but the loyal citizens of Tennessee believe that they are justly entitled to said additional Member: Therefore

Be it resolved, That the credentials of John B. Rodgers be referred to the Committee of Elections and that they be instructed to report, etc.

Mr. John F. Farnsworth, of Illinois, made the point of order that this was not a question of privilege.

The Speaker[2] said:

The Chair sustains the point of order. The resolution does not relate to the right of representation in any district of the United States, but refers to a law to confer additional representation.

2593. On March 28, 1879,[3] Mr. William M. Springer, of Illinois, presented the memorial of J.J. Wilson, claiming to have been elected a Representative from the State of Iowa for the Forty-sixth Congress and presented with the memorial a resolution providing for the reference of the subject to the Committee on Elections.

Mr. Omar D. Conger, of Michigan, and others made the point of order that no question of privilege was involved, since the petitioner claimed to have been elected at a pretended election at which a few votes only were cast, that the petition could not under the law be a basis for a contest, and that the petitioner had no credentials.

The Speaker[4] said:

The Chair desires to say that he can not see how the right of a person to be heard on this floor in reference to his right to a seat can be abridged or interfered with by any decision which the Clerk may have made in placing the names on the roll in pursuance of law. * * * The Constitution declares that this House "shall be the judge of the elections, returns, and qualifications of its own members." Now, for the Chair to deny a hearing to any person seeking a seat on this floor, claiming that he is entitled to it in preference to one who is already seated, would be an infringement upon the right which is guaranteed to every citizen in the Constitution itself. The Chair therefore considers that under the rules this is a question of privilege and entertains the resolution.

2594. A resolution proposing the exclusion of a Delegate from his seat presents a question of privilege.—On December 23, 1857,[5] Mr. Edward A.

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[1] First session Forty-first Congress, Globe, p. 38.

[2] James G. Blaine, of Maine, Speaker.

[3] First session Forty-sixth Congress, Record, pp. 93–95.

[4] Samuel J. Randall, of Pennsylvania, Speaker.

[5] First session Thirty-fifth Congress, Journal, pp. 112–115; Globe pp. 165–169.

Warren, of Arkansas, as a question of privilege, submitted the following preamble and resolution:

Whereas it appears from the proclamation of Brigham Young, late governor of the Territory of Utah, from the President's message, and from later developments, that the said Territory is now in open rebellion against the Government of the United States: Therefore

Be it resolved, That the Committee on Territories be instructed to report the facts and to inquire into the expediency of the immediate exclusion from this floor of the Delegate from said Territory.

Mr. Nathaniel P. Banks, of Massachusetts, raised a question of order as to the presentation of the resolution as a question of privilege.

The Speaker [1] overruled the point of order, on the ground that the resolution affected the right of a person who now occupied a seat on the floor.

A motion to lay the resolution on the table was decided in the negative, yeas 72, nays 118, and then the resolution and preamble were agreed to.

2595. A resolution embodying a general declaration as to the qualifications of Delegates was decided by the House not to involve a question. of privilege.—On January 10, 1882, the House had adopted a resolution referring to the Committee on Elections the subject of the representation of Utah, the principal question being as to the eligibility of Mr. George Q. Cannon, a Mormon and polygamist, to the seat to which he had been elected.

On the succeeding day, January 11,[2] Mr. Dudley C. Haskell, of Kansas, presented, as a question of privilege, a preamble and resolution reciting the facts as to the existence of polygamy in the United States, and as to Mr. Cannon's relations to the institution, and, concluding,

Resolved (as the fixed and final determination of this House of Representatives of the Forty-seventh Congress), That no person guilty of living in polygamous marital relations, or guilty of teaching or inciting others so to do, is entitled to be admitted to this House of Representatives as a Delegate from any Territory of the United States.

Mr. Samuel J. Randall, of Pennsylvania, made the point of order that the resolution did not involve a question of privilege under Rule IX, the subject-matter having been disposed of by the House.

During the debate it was urged that this subject involved the rights of the House collectively, its safety, dignity, and the integrity of its proceedings.[3] On the other hand it was urged that Mr. Cannon did not have a seat in the House, his claims to one being before a committee; therefore the question was not before the House, and the resolution amounted merely to a declaration as to qualifications.

The Speaker [4] said he regarded it his duty to submit the question to the House, whether or not the resolution involved a question of privilege.

After further debate the House decided—yeas 109, nays, 139—that the proposition did not present a question of privilege.

2596. A resolution providing compensation for a Territorial agent, not having a seat on the floor, does not present a question of privilege.

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[1] James L. Orr, of South Carolina, Speaker.

[2] First session Forty-seventh Congress, Journal, pp. 260, 261; Record, pp. 359–362.

[3] Under Rule IX, see section 2521 of this volume.

[4] J. Warren Keifer, of Ohio, Speaker.

In rare instances members of the minority party have been called to the Chair by the Speaker.

On March 2, 1861,[1] Speaker pro tempore Lawrence O'B. Branch,[2] of North Carolina, decided that a resolution providing compensation for a quasi-Delegate from the Territory of Colorado did not present a question of privilege, and on appeal the decision was sustained—yeas 79, nays 46. (The quasi-Delegate seems to have been one who attended to the business of the Territory as agent.)

2597. A protest against the method by which a bill had been passed, no error or infraction of the rules being alleged, was decided by the House not to present a question of privilege.

The Speaker held that a protest by Members should be read before any decision as to whether or not it might be offered as a question of privilege.

Instance in which the Speaker submitted to the House the decision as to whether or not a question involved privilege.

Summary of precedents relating to the placing of protests on the Journal.

On April 22, 1878,[3] the House having passed, under suspension of the rules, a bill making appropriations for the improvement of certain rivers and harbors, Mr. Samuel S. Cox, of New York, claimed the floor for a question of privilege and presented a protest, signed by several Members of the House, against the passage of the bill in this manner.

Mr. John H. Reagan, of Texas, made a point of order that the protest did not present a question of privilege and that it could not be admitted.

The Speaker[4] ruled that he could not decide whether a question of privilege was involved until he had heard the protest read.

From this decision Mr. Reagan appealed. On the following day Mr. Reagan withdrew his appeal, which was renewed by Mr. James A. Garfield, of Ohio.

The Speaker, in ruling, said:

Rule 141[5] provides that "when the reading of a paper is called for, and the same is objected to by any Member, it shall be determined by a vote of the House." In the Digest it is expressly stated in the same connection that the "rule above recited is not construed to apply to the single reading of a paper or proposition upon which the House may be called upon to give a vote or to the several regular readings of the bill, but to cases where a paper has been once read or a bill has received its regular reading and another is called for, and also where a Member desires the reading of a paper having relation to the subject before the House."

Further, in relation to questions of privilege, when a proposition is offered which relates to the privileges of the House, it is the duty of the Speaker to entertain it at least to the extent of submitting the question to the House as to whether or not it presents a question of privilege. Now, how could the Chair submit a question of privilege to the House, or a paper as to whether it involved a question of privilege or not, if the paper was not read so it could be seen whether it involved a question of privilege

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[1] Second session Thirty-sixth Congress, Journal, p. 474; Globe, p. 1426.

[2] It may be noted that Mr. Branch did not belong to the political party having control of the organization of the House.

[3] Second session Forty-fifth Congress, Record, pp. 2717, 2738, 2742, 2753; Journal, pp. 919–922, 925.

[4] Samuel J. Randall, of Pennsylvania, Speaker.

[5] Now Rule XXXI. (See sec. 5257 of Volume V of this work.)

or not? Under the rules it is the duty of the Chair to entertain it at least to the extent of submitting the question to the House as to whether or not it presents a question of privilege. The rule also provides that the gentleman has the right to call for the reading of a paper or proposition upon which the House may be called upon to give a vote.

The Chair did not know until this morning, when he read it in the daily paper, what was contained in the protest, but if he had known, under the rules of the House it was the duty of the Chair to entertain the question of privilege alleged by the gentleman from New York to the extent at least of submitting it to the House, and as it was a proposition upon which the House might be called upon to vote, the reading of the paper was a right which the gentleman from New York could demand. The only question decided by the Chair is that under the rules the reading of the paper is in order.

The appeal from the Speaker's decision was laid on the table by a vote of 131 yeas to 101 nays.

So the protest was read. It alleged that the rules of the House should not be suspended to facilitate the passage of a bill appropriating so large a sum of money; that it was an infraction of one of the rules of the House, and that certain provisions of the bill were infractions of the eighth section of the first article of the Constitution.

Mr. Eugene Hale, of Maine, made the point of order that it was not a question of privilege. After debate, the Speaker said:

In so far as this paper alludes to the rules of the House, the Chair on yesterday decided that point: That a suspension of the rules vacated them and for that occasion made them inoperative.

So far as the constitutional point alluded to in this paper is concerned, the Chair on yesterday stated it was not within his province to construe the Constitution, any more than it would be in the case of an amendment to cut off the House from determining whether such an amendment was contrary to law or not.

But in so far as this question of a protest is concerned and whether as a question of privilege it acquires the right to be read and the right to be placed upon the Journal, the Chair desires to refer to the proceedings of former Congresses. In the Third Congress, presided over by Mr. Muhlenberg, of Pennsylvania, Mr. Garnett, of Virginia, was allowed to spread upon the Journal the reasons of a vote given by him. In the Journal will be found the reasons in full.

"Mr. Swift, of Maryland, moved that the House do reconsider the vote taken on Saturday last on the question, Shall the declaration of Mr. Garnett then presented detailing the reasons for and motives of his vote on Thursday last on concurring with the Committee of the Whole on the state of the Union in their agreement to the first resolution subjoined to the report of the Committee on Foreign Affairs on the subject of a recognition of the independence of the late Spanish-American provinces be placed on the Journal? And on the question, Will the House reconsider the said vote? it passed in the affirmative.

"And on the question, Shall the said paper be placed on the Journal? it passed in the affirmative—yeas 89, nays 71."

The next precedent which the Chair has been able to consider was in the Twenty-eighth Congress, over which Mr. J.W. Jones, of Virginia, presided. New Hampshire, Georgia, Missouri, and Mississippi elected their Representatives by general ticket. Mr. Barnard, of New York, and forty-nine other Members signed a protest against the admission of Representatives from said States. The Journal of the House says Mr. Barnard so framed his protest as to embody it in a resolution. Subsequently, on motion, the Journal was corrected so as to make it appear that the protest had got upon the Journal surreptitiously. It will be observed that the latter suggestion was the ground given for refusing it to be on the Journal. In both these cases, however, the papers were read and considered.

The next case to which the Chair has had his attention directed is a case in the Thirty-first Congress, and is the one occurring in the Senate alluded to in the Manual. The decision quoted in the Manual, page 289, under the heading of "Protest," was a protest on the part of certain Senators against the passage of a bill admitting California into the Union as a State. After extended debate, the Senate decided, by yeas 22 to nays 19, to lay the whole subject upon the table. This protest was signed by Senators Hunter and Mason, of Virginia, Butler and Barnwell, of South Carolina; Soule, of Louisiana;

Jefferson Davis, of Mississippi, and other Senators. That paper appears of record, but did not go, the Chair presumes, on Senate Journal.[1]

The next is a case in the Thirty-sixth Congress, when John B. Clark, of Missouri (I believe the father of a respected Member of this House), claimed the right to submit a preamble and resolution, but the Clerk in that case declined to entertain it, on the ground he had not the power to do so pending the organization of the House. The same was read, however.

Again in the Thirty-ninth Congress, Mr. Brooks—it was the case alluded to yesterday—claimed the right to put upon the record a protest against the way in which the Clerk made up the roll of Members. The record shows that it was inserted in the proceedings, but the Clerk declined to recognize it, because he was then acting under the operation of law which instructed him as to the make up of the roll of Members.

It will thus be seen in every instance the Chair has mentioned the reading of the paper was allowed and that in one instance the Journal contains the protest.

The Chair, as an individual opinion, thinks that where a protest is respectful in terms no harm can come by allowing such courtesy as will place such respectful protest of record in the Journal, especially in a case where debate was not allowed and there was no possibility of amendment. Following, however, the rules which govern him in the administration of his duties as presiding officer, the Chair submits the question to the House itself to determine whether there is here presented or not a question of privilege. Those who think it involves a question of privilege will vote in the affirmative and those who are of a contrary opinion will vote in the negative.

The question being taken, the House decided, 52 yeas to 180 nays, that the paper presented by Mr. Cox did not involve a question of privilege.

2598. Alleged improper alteration of a bill presented as a question of privilege.

The enrolling clerks should make no change, however unimportant, in the text of a bill to which the House has agreed.

On July 24, 1854,[2] Mr. Elihu B. Washburne, of Illinois, submitted, as a question of privilege, the following resolution:

Resolved, That a special committee of five be appointed for the purpose of inquiring whether the text of House bill No. 342, to aid the construction of a railroad in the Territory of Minnesota, was altered or in any way changed in its language, subsequent to its engrossment or passage by this House, without the authority of the House; and if so, by whom, and under what circumstances, such change was made; and that said committee be empowered to send for persons and papers, and to examine witnesses on oath in the premises.

This resolution, having been amended by the addition of the words "and also in regard to all other cases of interpolations of bills or joint resolutions of the House during the present session," was adopted, and Mr. Washburne was appointed chairman of the committee.

The record[3] of the debate shows that no question was made about the privileged character of the resolution.

The report was made on August 2.[4] It shows that the change was made under direction of the Clerk of the House to make the enrolled bill conform to what he was assured was the intention of the Committee on Public Lands when they reported the bill to the House. The act was done as a correction of a clerical error made in

[1] First session Thirty-first Congress, Globe, p. 1578.

[2] First session Thirty-third Congress, Journal, p. 1194.

[3] Globe, pp. 1888, 1889.

[4] Globe, p. 2094.

reporting the bill from that committee. Such informal corrections in enrolled bills were made with considerable frequency, the committee found; and the report says:

In the opinion of your committee it is highly censurable in any Member or officer of the House to make any change, even the most unimportant, in any bill or resolution which has received the sanction of this body.

2599. The printing of an argument with the text of a bill was held to involve a question of privilege, and the House ordered the objectionable portions stricken out.—On January 12, 1900,[1] Mr. James D. Richardson, of Tennessee, rising to a question of privilege, said:

I think, Mr. Speaker, the matter I present is one of privilege—one which affects the integrity of the proceedings of the House. I hold in my hand what purports to be a bill. It is in the form of a bill—that is, the first portion of it—and it is indorsed "H.R. 64. A bill to promote the commerce and increase the foreign trade of the United States, and to provide auxiliary cruisers, transports, and seamen for Government use when necessary."

It purports to have been introduced on the 4th day of December, 1899, and to have been referred to the Committee on the Merchant Marine and Fisheries, and ordered to be printed.

The first few pages of this paper is in the form of a bill. The latter pages—four pages—are in different type, and an argument, a partisan argument, in support of the bill. After the conclusion of the bill there are four pages of partisan arguments and facts. It is made up in part of statements purporting to show the effect of the bill.

I submit, Mr. Speaker, that this bill should be taken from the files. I make the point of order, first, that the paper should be suppressed—it is not a bill—and, failing in that, I shall move to strike it from the files and have it destroyed.

After debate, the Speaker[2] said:

The Chair is of the opinion that that request should have coupled with it that the committee be discharged from the consideration of the bill, it not being before the House, and then have it reprinted. * * * The Chair is of the opinion that the point of order made by the gentleman from Tennessee is a good one. The bill is not before the House—it is before the committee, and it seems that it is improperly before the committee; and now the request should be that the committee be discharged from the consideration of the bill, this objectionable part eliminated, and the bill referred to the Committee on Merchant Marine and Fisheries with a new order to print. If there be no objection to such an order, it will be made. [After a pause.] The Chair hears none.

2600. A proposition to correct an enrolled bill that has become a law may not be presented as privileged.—On November 21, 1877,[3] Mr. Andrew H. Hamilton, of Indiana, from the Committee on Enrolled Bills, proposed to report as a matter of privilege a proposition for the correction of an enrolled bill of the last Congress.

The Speaker[4] said:

This is not a privileged matter; it involves a change of existing law.

2601. There having been no unreasonable delay in transmitting an enrolled bill to the President, a resolution relating thereto was decided not to present a question of privilege.

Enrolled bills are taken to the President by the chairman of the Committee on Enrolled Bills.

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[1] First session Fifty-sixth Congress, Record, pp. 788, 789; Journal, p. 152.

[2] David B. Henderson, of Iowa, Speaker.

[3] First session Forty-fifth Congress, Record, p. 582.

[4] Samuel J. Randall, of Pennsylvania, Speaker.

On September 20, 1888,[1] Mr. William W. Morrow, of California, presented, as a question of privilege, this preamble and resolution:

Whereas the House of Representatives did, on the 3d day of September, 1888, pass the bill H.R. 11336, entitled "A supplement to an act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved the 6th day of May, 1882," which said bill was on the same day reported to the Senate;

That it appears from the Record that said bill passed the Senate on the 17th day of September, 1888, and on the 18th day of September, 1888, was reported to this House by Mr. Kilgore, from the Committee on Enrolled Bills, as truly enrolled, whereupon the said bill was duly signed by the Speaker pro tempore of the House;

That thereafter and on the same day the said bill was reported to the Senate as having been so signed by the Speaker pro tempore of the House, whereupon it was duly signed by the President pro tempore of the Senate;

That the said bill having then passed both Houses, and having been duly enrolled and signed by the presiding officers of both Houses, was ready for transmittal to the President of the United States for his approval;

That it further appears that said bill was delivered to the Committee on Enrolled Bills of the House on the 19th of September, 1888, and is now in the possession of the acting chairman of said committee, Mr. Kilgore, for such transmittal to the President;

That it is reported in the Washington Post of this morning that said bill is being withheld from the President by said Committee on Enrolled Bills; that such action of the committee is without authority of law: Therefore,

Be it resolved by the House of Representatives of the United States, That said Committee on Enrolled Bills be directed to transmit said bill to the President of the United States forthwith and without further delay.

Mr. Benton McMillin, of Tennessee, having reserved a point of order, after debate, the Speaker[2] pro tempore decided:

In the opinion of the Chair this resolution does not present a question of privilege. If the resolution were properly before the House, being a resolution directing the Committee on Enrolled Bills to transmit a certain bill to the President of the United States forthwith, the House could no doubt adopt the resolution, but the point raised here is whether as this resolution now reaches the House it is a question of privilege. The point involved relates to the presentation of bills to the President after they are signed by the Speaker of the House and the President of the Senate. In the absence of any law on the subject or any rule governing the House in respect to this matter, reference has been made to the Constitution, which provides in section 7 of Article I that—

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States."

No time is fixed within which this presentation shall be made; there is no limit; the provision does not say "forthwith" or "immediately." The question presented therefore is not so much a question of law or Constitutional interpretation as a question of practice. The custom has grown up within the knowledge of the Chair—it is an old custom—for the Committee on Enrolled Bills to carry these bills to the President. We do not do as the Senate does. According to the practice of the House the chairman of the Committee on Enrolled Bills, by the direction of his committee or by reason of his function as chairman, takes these bills to the President. Within what time? There is no rule or law operating upon him in this respect.

In this resolution there is no reflection made upon this committee—none whatever. The only allegation in the resolution is based upon a statement taken from the Washington Post "that said bill is being withheld from the President by said Committee on Enrolled Bills; that such action of the committee is without authority of law." That is the statement of a newspaper; it is a part of the allegata; there is no proof of it. There is no statement of anything reflecting on the committee; no allegation of any impro-

[1] First session Fiftieth Congress, Record, p. 8787; Journal, p. 2809.

[2] Samuel S. Cox, of New York, Speaker pro tempore.

priety; nothing involving the integrity of the committee or the integrity of the House in any sense of the word "integrity."

Is this a question of privilege under those circumstances? What is a question of privilege? It is that which involves the safety, the dignity, or integrity of the House or its Members or of its proceedings. This does not in any way involve the safety or dignity of the House, and according to the statement of the gentleman submitting the proposition it does not involve the integrity of the gentleman from Texas or of the committee.

Has there been in this case unusual delay? The actual lapse of time appears to have been one day. The Chair has made inquiry into this matter, and finds, according to the report of the Clerk, that the time within which bills passed by the Senate and House and signed by their respective presiding officers reach the President varies from one to ten days, the average being three days. Non constat that the President may be out of town, or that there may be some other impediment. Possibly this Committee on Enrolled Bills is obliged to compare this bill in accordance with its function in these cases.

So that neither in the statement of the resolution nor the statement of Members on the floor is there any imputation upon the Committee on Enrolled Bills. Hence the Chair decides that this is not a question of privilege. If the resolution should properly come before the House it would no doubt be entertained; and the House could direct, according to its own judgment, the action which the Committee on Enrolled Bills should take in reference to this bill. If this matter should come up on a subsequent day, when there had been an unreasonable delay in transmitting the bill to the President, the Chair is not prepared to say what he might do in the premises, for lapse of time might raise some inference upon which to predicate a question of privilege.

The Chair sustains the point of order.[1]

2602. The correction of the reference of a public bill was held, at a time when the rules did not provide any other mode of correction, to present a question of privilege.—On March 22, 1880,[2] Mr. Richard W. Townshend, of Illinois, presented "A bill (H.R. 5265) to revise and amend sections 2503, 2504, and 2505 of title 33 of the Revised Statutes of the United States," and this bill was referred to the Committee on Revision of the Laws.[3] The text of this bill was as follows:

Be it enacted, etc., That sections 2503, 2504, and 2505 of title 33 of the Revised Statutes of the United States be revised and amended so that the duty on salt, printing type, printing paper, and the chemicals and materials used in the manufacture of printing paper, be repealed, and that said articles be placed on the free list.

When, on the succeeding day, the nature of the bill became known, there was an extended controversy over changing the reference to the proper committee, the Ways and Means.

Finally, Mr. Robert M. McLane, of Maryland, made the point that the improper reference of the bill involved the "integrity" of the proceedings of the House, and proposed as privileged the following:

Whereas the House, being of opinion that the reference of House bill 5265 to the Committee on the Revision of the Laws was incorrect under its rules, doth resolve that the said committee be discharged from its further consideration and the same be referred to the Committee on Ways and Means.

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[1] On February 13, 1884 (1st sess. 48th Cong, Record, pp. 1089, 1090), Mr. Speaker Carlisle made a similar decision as to a resolution proposing to investigate an alleged delay in transmitting to the President an enrolled joint resolution providing relief for sufferers from floods in the Ohio River.

[2] Second session Forty-sixth Congress, Record, pp. 1804, 1817, 1844, 1846; Journal, pp. 842–877.

[3] Public bills were then referred in open House. Now they are filed and referred under direction of the Speaker.

During the debate Mr. McLane explained his point of order:

I make the point to the House, the Journal of day before yesterday, on being read, having been approved by the Speaker and read to the House in pursuance of the first rule, reveals to me the reference of certain bills to the Committee on the Revision of the Laws which I think under the rules of this House ought to go to the Committee on Ways and Means. I believe it to be my privilege before I approve that Journal to see that a proper reference is made. It applies no more to this than to a multitude of cases which can occur. I do not choose to sit here and see a reference made which I know to be an improper reference under the rule, with no relief except what may come from the committee to which that bill has been improperly referred. I care not whether the reference results through the negligence of the officers of the House, through the design of the officers of the House, through the inadvertence of the officers of the House, it is my right and privilege to move the reference of the bill as the rules require; and, sir, that is the only point I make.

On the other hand it was urged by Mr. Carlisle:

I submit to my friend from Maryland that the phrase "integrity of its proceedings" means simply the unity, the completeness, and the truth of the proceedings of the House. When the proceedings of the House, as recorded by the Clerk under the direction of its presiding officer, do truthfully and correctly show what actually occurred, there can be no question of privilege about it.

The Speaker[1] submitted the question to the House, who decided, 135 yeas to 98 nays, to entertain the motion as a question of privilege.[2]

2603. The charge that the minority views of a committee had been abstracted from the Clerk's office by a Member was investigated as a question of privilege.—On March 3, 1863,[3] Mr. Elihu B. Washburne, of Illinois, rising to a question of privilege, charged that the minority views of the select committee on government contracts had been abstracted from the Clerk's office by a Member of the House with the connivance of a clerk in the office, and moved that a committee of three Members be appointed to investigate. This motion was agreed to and the committee were appointed; but the session and Congress ended so soon after that they did not report.

2604. The House authorized the clerk of a committee to disclose by deposition the proceedings of the committee.—On July 18, 1876,[4] Mr. Ansel T. Walling, of Ohio, from the Committee on the Public Lands, by unanimous consent, offered this resolution, which was agreed to:

Resolved, That the Clerk of the Committee on the Public Lands be authorized to attach to any deposition he may be required to give in the case of Hovey *v.* Valentine, now pending in the district court at San Francisco, Cal., a copy of the minutes of the proceedings of the Committee on the Public Lands on House bill 1024, (Forty-second Congress), for the relief of Thomas B. Valentine.

This action was taken to relieve the Clerk who had, in a court, declined to testify as to what took place in the committee, believing that he had no right to communicate what occurred in the committee.

2605. A charge of unfair and improper action on the part of a committee has been held to involve a question of privilege.—On May 24, 1882,[5]

[1] Samuel 1. Randall, of Pennsylvania, Speaker.

[2] The rules at present provide a privileged motion for the correction of errors of reference. (See Rule XXII, sec. 3. Sec. 3364 of Vol. IV of this work.)

[3] Third session Thirty-seventh Congress, Journal, p 617; Globe, p. 1551.

[4] First session Forty-fourth Congress, Journal, pp. 1284, 1285; Record, p. 4701.

[5] First session Forty-seventh Congress, Record, p. 4208.

Mr. William H. Calkins, of Indiana, claimed the floor for a question of personal privilege, and had read an article making a charge against a committee of which he was a member.

A point of order having been made that no question of privilege was involved, the Speaker [1] stated the case and his decision as follows:

The Chair always feels somewhat embarrassed in determining what constitutes a question of privilege. The matter which has been read by the Clerk, fairly analyzed, may be held to be equivalent to a statement that the case of Mackey against Dibble was not fairly heard by the committee, in this that the evidence of fraudulent transactions in the taking of the testimony in the case was unfairly or improperly rejected by the committee. Now, if that is to be considered as a reflection upon the conduct of members of the committee or of the majority of the committee, the Chair would feel bound to hold it was a question of privilege affecting the Member's rights in his representative capacity, which any member of the committee concurring with the majority might rise for the purpose of presenting to the House; and as it is a statement made by a Member of the House, the Chair feels it to be its duty to hold that this presents a question of privilege.

2606. A committee of the House having been charged with improper conduct, a member of that committee was recognized on a question of personal privilege.—On May 24, 1882,[2] Mr. William H. Calkins, of Indiana, rising to a question of personal privilege, sent to the Clerk's desk an extract from a newspaper relating to a contested election case. It was charged in this paper that the Committee on Elections had refused to hear any testimony as to the truth of a matter pending before that committee. Mr. Calkins asserted that this charge was made by a Member from New York, Mr. Abram S. Hewitt.

Mr. Samuel J. Randall, of Pennsylvania, made the point of order that no question of privilege was involved.

After debate, the Speaker [1] said:

The Chair does not feel bound to put an absolute construction on this language, because it may be open to a different construction from that suggested; but as it is a statement alleged to have been made by a Member of the House who is present, and as there is doubt about it, the Chair feels in the present case that it must hold this to be a question of privilege and one affecting the rights of a Member in his representative capacity.

Mr. Calkins thereupon proceeded with his explanation.

2607. An allegation that a committee had refused either to give hearings or to allow petitions to be read before it was held to involve no question of privilege.—On March 12, 1888,[3] Mr. Thomas M. Bayne, of Pennsylvania, claiming the floor on a question of privilege, presented the following preamble and resolution:

Whereas it is commonly stated in the newspapers throughout the country that the Committee on Ways and Mean by a majority has not only refused oral hearings to the producers, manufacturers, and workingmen of the country, but has denied to them also the right to have read before that committee their printed or written petitions in relation to the proposed changes of the tariff laws; and

Whereas the right of petition is a sacred constitutional right of the people; and

Whereas it has so long been the practice of the committees of the Senate and of the House of Representatives to freely grant opportunities to be heard by persons and interests affected by proposed legislation: Therefore, be it

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[1] J. Warren Keifer, of Ohio, Speaker.

[2] First session Forty-seventh Congress, Journal, p. 1318; Record, p. 4208.

[3] First session, Fiftieth Congress, Journal, pp. 1139–1140; Record, pp. 1978–1980.

Resolved, That the Committee on Rules be, and it is hereby, instructed to make thorough inquiry respecting the foregoing allegations and to report the facts, with such amendment of the rules of the House as may be necessary to assure to the people the full enjoyment of their constitutional right to be heard by petition or otherwise.

Mr. William C.P. Breckinridge, of Kentucky, made the point of order that the resolution did not present a question of privilege.

After debate, the Speaker pro tempore [1] said:

The Chair would state respectfully to the House that he has the privilege, under the rules, of selecting his own time for deciding points of order. He has now heard gentlemen on both sides; he has heard them sufficiently to make the point intelligible, to his own mind, at least. The resolution introduced by the gentleman from Pennsylvania refers, in the first place, to an alleged refusal on the part of the Committee on Ways and Means to allow oral hearings. That is not within the purview of a question of privilege here. It is a matter entirely within the province of the committee. Next, the resolution recites that certain persons have been denied the opportunity to have read before that committee their printed or written petitions in relation to proposed changes in the tariff laws. The gentleman from Pennsylvania [Mr. Bayne] takes the high constitutional ground that the right of petition has been thus invaded by this action of the Committee on Ways and Means. The right of petition is not abridged by the mode of reception of these petitions prescribed by our House rules, nor is it abridged by any denial of which the Chair is aware. That has already been decided. How, then, is the right of petition abridged? By the action of this Committee of Ways and Means in this alleged denial of the reading of the petitions? What has the committee done; and how can the House take control of this committee matter so as to regulate it either as to the mode of hearing, oral or written or otherwise? The committee has the right within itself to control it. It is not alleged that any member of the committee or of this House has been refused access to these petitions or that information in regard to their contents has been in any manner restricted. It is not a question of privilege to take that business from the committee. If it were done, the committee—in fact, all committees thus circumstanced—would be so crippled as to be practically useless.

Mr. Bayne having appealed, the appeal was laid on the table.

2608. The charge that a committee has reported a bill containing items of appropriation not in order under the rules does not present a question of privilege.—On February 22, 1897,[2] Mr. Joseph H. Walker, of Massachusetts, having claimed the floor on a question of privilege, offered the following resolution:

Resolved, That the Committee on Appropriations were not justified in bringing in ten items in their appropriation bill, under the laws or under the rules of the House, that were knowingly subject to the objection, under the point of order, that they were not justified by existing law.

The Speaker [3] decided that the resolution did not involve a question of privilege.

2609. A report having been ordered to be made by a committee, but not being made within a reasonable time, a resolution directing the report to be made was decided to be privileged.—On January 23, 1891,[4] Mr. George W. Cooper, of Indiana, submitted, as involving a question of privilege, this resolution:

Resolved, That the select committee having in charge the investigation of certain charges against the Commissioner of Pensions, to whom was referred, on the 4th day of September last, a preamble and resolution reciting additional misconduct and corruption in office on the part of said Commissioner, be directed to forthwith return said resolution to the House.

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[1] Samuel S. Cox, of New York, Speaker pro tempore.

[2] Second session Fifty-fourth Congress, Record, p. 2100.

[3] Thomas B. Reed, of Maine, Speaker.

[4] Second session Fifty-first Congress, Journal, p. 174; Record, p. 1789.

Mr. William McKinley, jr., of Ohio, having made the point of order that the resolution did not present a question of privilege, the Speaker [1] said:

The statement made by the gentleman from Indiana, Mr. Cooper, is that a committee of this House adopted a resolution to report, for reference by the House under the twenty-second rule, resolutions which had been referred to that committee in regular order. He states that a considerable length of time has elapsed since that action was taken by the committee to which the original resolution was referred, and he claims that this is a question of privilege involving the rights of the House and its method of doing business. The Chair think it plainly so; that the committee having ordered a report of that kind, it should have been made in a reasonable time, and that the House has a right to make inquiry into the matter and to decide what ought to be done under the circumstances.

2610. A charge that a committee had been inactive in regard to a subject committed to it was decided not to constitute a question of privilege.— On August 9, 1894,[2] Mr. James B. McCreary, of Kentucky, claimed the floor on a question of privilege to reply to remarks made by Mr. Charles A. Boutelle, of Maine, in which the latter was said to have attributed improper motives to the Committee on Foreign Affairs.

Mr. George W. Fithian, of Illinois, made the point of order that no question of privilege was involved.

The Speaker [3] said:

This is no question of privilege. There is no reflection on the gentleman. If there was, it would authorize him to rise to a question of privilege. But the mere inaction of the committee, if that is the charge of the gentleman from Maine, can not constitute a question of privilege. Of course the Chair would recognize the gentleman if the question, in the judgment of the Chair, involved one of privilege; but the mere question of the action of the Committee on Foreign Affairs, or the inaction of the committee, or any other committee, in relation to the measures brought before it, the Chair does not think constitutes a question of privilege. If that were so, why of course we might discuss everything that was discussed before any of the committees of the House.

2611. The premature publication of a paper as the report of a committee was, by permission of the House investigated by that committee.— On May 25, 1876,[4] Mr. George W. Hendee, of Vermont, from the Committee on the District of Columbia, as a question of privilege, although the Journal records it as by unanimous consent, stated that a paper presented before the committee, but not adopted as its report, had been made public as the report of the committee through the "fault, neglect, or improper act of some of the officers or employees of this House or of the Government Printing Office or of said committee," and therefore asked the House to authorize the committee to inquire into the matter. The House adopted a resolution giving the required order.

2612. A question affecting the integrity of the managers of an impeachment is a matter of privilege.—On May 1, 1868,[5] Mr. James Brooks, of New York, presented a resolution and preamble reciting that a charge had been made that some of the managers of the impeachment of the President had made to him, the accused, while thus accused, a proposition that he, by the exercise of the

[1] Thomas B. Reed, of Maine, Speaker.

[2] Second session Fifty-third Congress, Journal, p. 552; Record, p. 8339.

[3] Charles F. Crisp, of Georgia, Speaker.

[4] First session Forty-fourth Congress, Journal, pp. 1007, 1008; Record, pp. 3339, 3340.

[5] Second session Fortieth Congress, Globe, p. 2337.

war power, seize the island of Alta Vela, off the coast of Santo Domingo. The preamble further recited that it was important that the dignity and purity of the House be maintained through its managers, and therefore proposed a resolution to create a committee of investigation.

The Speaker [1] said:

The Chair thinks this is a question of privilege, as the rulings have been uniform that questions touching the official conduct of officers of the House are questions of privilege. The managers representing the House of course are subject to the orders of the House.

2613. A proposition to correct an error in a message to the Senate presents a question of privilege.—On August 3, 1854,[2] Mr. George S. Houston, of Alabama, called attention to the fact that in the message to the Senate concerning the action of the House on the Senate's amendments to the civil and diplomatic appropriation bill several errors had been made.

Objection being made to the consideration of the subject, Mr. Houston inquired if the matter did not constitute a question of privilege.

The Speaker [3] said:

The Chair holds that if an error has been committed by the Clerk, or in any other form, in any bill passed by the House, it is competent for the House to correct that error, and in that form it becomes a privileged question.

The Senate having acted on the bill before the House had determined as to the manner of making the corrections, they were left to the committee of conference.

2614. A motion to correct an error in referring a bill to the proper calendar presents a question of privilege.

A bill which applies to a class, and not to individuals as such, is a public bill.

On March 31, 1906,[4] Mr. Sereno E. Payne, of New York, claiming the floor for a privileged motion, said:

House bill 186, to authorize the readjustment of the accounts of army officers in certain cases, and for other purposes, relates to all the officers of the Army up to a certain date—about 1880. It is the second bill on the Private Calendar. It belongs evidently on the Union Calendar, and I move it be taken from the Private Calendar and placed upon the Union Calendar. I make that as a privileged motion.

The bill was reported as follows:

Be it enacted, etc., That the claims of officers of the United States Army, or of persons who may have served as such, and of the heirs at law or legal representatives of such as are deceased, for arrearages of longevity pay, are hereby referred to the United States Court of Claims, and jurisdiction is hereby conferred upon said court to render judgment in all such claims, without regard to lapse of time, for the amount, if any, found due; and in the adjustment of such claims credit shall be allowed for the full time of service as cadets in the Military Academy at West Point, and as officers or enlisted men in the Army or Navy of the United States, Regular or Volunteer, or both.

After debate the Speaker [5] said:

As the Chair understands, the gentleman from New York [Mr. Payne] moves to change this bill from the Private Calendar to the Union Calendar. The objection is made, as the Chair understands,

[1] Schuyler Colfax, of Indiana, Speaker.

[2] First session Thirty-third Congress, Globe, p. 2093.

[3] Linn Boyd, of Kentucky, Speaker.

[4] First session Fifty-ninth Congress, Record, pp. 4521–4524.

[5] Joseph G. Cannon, of Illinois, Speaker.

that the motion does not present a question of privilege, and therefore is not in order. Now, Mr. Speaker Randall held, and, as the Chair thinks, correctly, that such a motion does present a question of privilege. It seems to the Chair, however, that if the bill be a private bill it is on the right calendar. If it be a public bill, then it ought to go to the Union Calendar, under the rules. The Chair has followed the gentleman from Pennsylvania [Mr. Mahon] in his citation of precedents.

Under Rule XIII there are three calendars. There is a Calendar of the Committee of the Whole House on the state of the Union, which carries bills raising revenues, general appropriation bills, and bills of a public character directly or indirectly appropriating money or property. There is a House Calendar, to which are referred all bills of a public character not raising revenue or directly or indirectly appropriating money or property. And there is a Calendar of the Committee of the Whole House to which are referred all bills of a private character. The practice is that the Journal Clerk, under the direction of the Speaker, shall refer the bills to the respective calendars as they come from the committees. In point of practice the Journal Clerk, with the assistance of the clerk at the Speaker's table, makes these references unless the matter is specifically called to the attention of the Speaker. The same principle applies in the reference of bills that are introduced by Members and come through the basket. Now, this bill when it was introduced, as the Chair finds on consulting the Journal, was referred as a public bill; but when it was reported back from the committee the Clerk placed it, as it seems to the Chair if it be a public bill, inadvertently, upon the Private Calendar. So, that after all, it becomes a question of fact whether it is a public or a private bill within the rules and precedents. The gentleman from Ohio [Mr. Keifer] in his statement is probably correct from the standpoint of the rules as they were prior to the Fifty-fourth Congress; but, at that time, on the suggestion of Representative Dingley to the Committee on Rules, an amendment was made to Rule XXIII, section 3, so as to add to the words "all motions or propositions involving a tax or charge upon the people," etc., "or releasing any liability to the United States for money or property," the following: "or referring any claim to the Court of Claims." The effect of this is that such bills, under the rules, go to the Committee of the Whole.

Now, as to whether it be a public or a private bill, the Chair reads from Parliamentary Precedents of the House, as follows:

"The line of distinction between public and private bills is so difficult to be defined in many cases that it must rest on the opinion of the Speaker and the details of the bill. It has been the practice in Parliament, and also in Congress, to consider as private such as are 'for the interest of individuals, public companies, or corporations, a parish, city, or county, or other locality.' To be a private bill it must not be general in its enactments, but for the particular interest or benefit of a person or persons. A pension bill for the relief of a soldier's widow is a private bill, but a bill granting pensions to such persons as a class, instead of as individuals, is a public bill," etc.

Now, treating this bill by the test, if the House will give the Chair attention, let us read it. The gentleman from Pennsylvania, in his argument, assumes that this would cover about 800 people; assumes that it is under a certain law. After all that is an assumption. It may be correct or may not, and the Chair is not informed. The bill is as follows:

"That the claims of officers of the United States Army, or of any person who may have served as such"—

So it covers persons who have served as officers, although they may not have been officers regularly—

"And of the heirs at law or legal representatives of such as are deceased, for arrearages of longevity pay, are hereby referred to the United States Court of Claims and jurisdiction is hereby conferred upon said court to render judgment in all such claims, without regard to the lapse of time, for the amount, if any found due; and in the adjustment of such claims credit shall be allowed for the full time of service as cadets in the Military Academy at West Point, and as officers or enlisted men in the Army or Navy of the United States, Regular or Volunteer, or both."

Now, this bill not only refers the cases to the Court of Claims, but it legislates, removing the statute of limitations upon all claims, if such exist, from the organization of the Government to the present time. As a matter of fact, whether such claims are in existence in the hands of assignees or administrators the Chair is not informed. The Chair only knows of this bill upon its face. Nor does it apply in its terms to claims on file, if they be on file in the Treasury Department. It would cover claims, if such exist, although they may never have been filed or made under the provisions of the bill. It is

not like unto the case where legislation was had for the relief of a battalion, mentioning the battalion, because there was a roster, a specific number of people to be covered by the bill. This bill relates to a class; it legislates; it removes the statute of limitations; it counts services in the Militia, as well as in the Regular Army; it covers officers who were never mustered in, if they acted as officers. It seems to the Chair that if this is not a public bill, it would be difficult to conceive of one, and therefore the Chair thinks the motion of the gentleman from New York [Mr. Payne] is in order.

The question is on the motion of the gentleman from New York to change the reference from the Private Calendar to the Calendar of the Committee of the Whole House on the state of the Union.

The motion of Mr. Pavne was agreed to, ayes 62, noes 37.

2615. On February 18, 1889,[1] Mr. William H. Hatch, of Missouri, raised the question that the bill (H.R. 11027) defining "lard," etc., reported from the Committee on Agriculture, had been referred to the House Calendar, when it should have been sent to the Calendar of the Committee of the Whole House on the state of the Union.[2] Therefore, as a matter of privilege, he moved the correction of the reference, and that the bill take the same place on the proper Calendar that it would have had had it been correctly referred at first.

Mr. Samuel J. Randall, of Pennsylvania, made the point of order that such motion did not present a privileged question and was not in order for consideration at this time.

The Speaker[3] said:

The question arose in the Forty-sixth Congress as to whether it was a matter of privilege to correct an erroneous reference to a committee, and the then occupant of the chair decided that it was, and the House sustained the decision.[4] Since that time two or three questions of a similar character have arisen in the House, and have been decided in the same way. The Chair thinks that an erroneous reference of a bill to one of the Calendars of the House stands upon the same footing. It involves simply carrying out the rules of the House, and therefore the Chair thinks that the presentation of the question is a matter of privilege, but it is not the province of the Chair to correct the error by referring it to the Committee of the Whole House on the state of the Union. It is for the House to say whether it will or will not do so. The gentleman from Missouri moves that the bill be referred to the Committee of the Whole House on the state of the Union, as of the date July 28, 1888, when the House made the improper order, and the Chair puts that question to the House.

2616. A mere clerical error in the Calendar does not give rise to a question of privilege.—On April 13, 1876,[5] Mr. Thomas L. Jones, of Kentucky, claiming the floor for a question of privilege, stated that the calendar was in error in recording a certain bill as a special order for one date, when in fact it had been made a special order for another date.

The Speaker[6] said:

That is not a question of privilege. The Journal is correct, and as that and not the Calendar will guide the action of the House, the error in the Calendar will not cause any difficulty.

2617. A question as to the constitutionality and propriety of a continuing order of arrest was held not to supersede a motion to discharge the Sergeant-at-Arms from further execution of the order.—On April 17,

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[1] Second session Fiftieth Congress, Record, pp. 2020, 2021; Journal, p. 534.

[2] See sections 3115, 3116 of Volume IV of this work for rules relating to Calendars.

[3] John G. Carlisle, of Kentucky, Speaker.

[4] See sections 2602 of this volume. The Speaker submitted the question to the House.

[5] First session Forty-fourth Congress, Record, p. 2457.

[6] Michael C. Kerr, of Indiana, Speaker.

1894,[1] after the Journals of two preceding days had been approved, the Speaker stated that the question first in order would be on the motion of Mr. William M. Springer, of Illinois, to discharge the Sergeant-at-Arms from the further execution of the warrant of the 29th ultimo against absent Members, upon which motion the previous question had been demanded and the yeas and nays ordered on said demand.

Mr. Thomas B. Reed, of Maine, thereupon, as involving a question of privilege, submitted the following resolution:

Whereas the continuing order sought to be dispensed with is contrary to the Constitution and rules of the House, the same is hereby declared void.

After debate on the question of order, the Speaker [1] held as follows:

The Chair can not see that the question presented by the gentleman from Maine is one of superior privilege to the pending question, because it must be borne in mind that the pending question is to discharge a warrant for the arrest of certain Members. The question of the gentleman from Maine raises the question of the legality of the warrant. Now, the Chair can not see that that question ought to take precedence of the question of the discharge of a Member from custody or of a warrant for his arrest.

Therefore the Chair thinks the proposition presented by the gentleman from Maine does not in its present status take any priority of or supersede the pending proposition, and can not now be considered.

2618. The Sergeant-at-Arms having made no report of his execution of an order of arrest, and no excessive delay appearing, a motion summoning him to report was held not to be of privilege.—On February 8, 1894,[3] Mr. Thomas B. Reed, of Maine, as a matter of privilege, moved that the Sergeant-at-Arms be summoned to the bar of the House to make report of his action upon the order to take absent Members into custody, made by the House just before adjournment on the preceding day.

Mr. Richard P. Bland, of Missouri, made the point that the motion of Mr. Reed was not privileged and not in order.

The Speaker [2] sustained the point of order, saying, in the course of his ruling:

There has been no report from the Sergeant-at-Arms, and, so far as the Chair knows, no Member has been arrested, so that it seems to the Chair it certainly must be in the power of the House to get on with the transaction of its business until some report is made from the Sergeant-at-Arms. The Chair has no doubt that when that report is made the House will proceed at once to consider it, because it would present a question of high privilege, relating to the right of the House to punish its absent Members.

2619. An alleged error in the Congressional Directory relating to the representation of a district in the next Congress does not present a question of privilege.—On February 21, 1893,[4] Mr. J. Logan Chipman, of Michigan, submitted as a privileged proposition the following resolution:

Resolved, That the Committee on Printing be directed to ascertain by what authority the editor of the Congressional Directory, in the edition published February 10, instant, inserted the name of

[1] Second session Fifty-third Congress, Journal, pp. 337, 338; Record, p. 3795.

[2] Charles F. Crisp, of Georgia, Speaker.

[3] Second session Fifty-third Congress, Journal, p. 149; Record, p. 2034.

[4] Second session Fifty-second Congress, Journal, p. 101; Record, p. 1940.

Charles B. Belknap in the list of Members-elect to the Fifty-third Congress as a Representative-elect from the Fifth Congressional district of Michigan.

Mr. William J. Bryan, of Nebraska, made the point of order that the resolution did not present a privileged question.

The Speaker [1] sustained the point of order.

2620. The House having approved the Journal of the preceding day, a resolution to correct an alleged error in a vote of that day, which had been discussed before the vote of approval, was held not to be of privilege.

Instance wherein the House declined to permit a change in the Journal record of persons noted as present and not voting, on the statement of certain ones, not numerous enough to change the result, that they had been improperly noted.

On February 20, 1891,[2] the question was taken on ordering the previous question on a resolution reported from the Committee on Rules, when the Speaker announced yeas 150, nays 8, noted as present and not voting 35—in all 193, a quorum being 165.

Among those noted as present and not voting was Mr. Charles J. Boatner, of Louisiana. Mr. Benton McMillin, of Tennessee, raised the question that Mr. Boatner had not in fact been present; but another Member, Mr. Thomas M. Bayne, of Pennsylvania, stated that he had seen Mr. Boatner in the Hall.

On February 21,[3] when the Journal had been read for approval, four of those noted as present (Mr. Boatner not being one of the four) arose in yielded time and claimed that they had not been properly noted as present, since they had left the Hall before the time arrived when they might be noted properly.

But they were not permitted to move a correction of the Journal, the previous question being ordered by yeas 155, nays 113, on motion of the Member having the floor. Then the Journal was approved, yeas 150, nays 95.

Immediately after the approval of the Journal, Mr. William M. Springer, of Illinois, proposed to offer as a question of privilege a resolution as follows:

Whereas the Speaker of the House on yesterday directed the Clerk to announce and record as present Mr. Boatner, of Louisiana, on the statement of the Clerk that he passed between the tellers on the demand for yeas and nays;

Whereas Mr. Boatner was not in the, Hall of the House during the taking of the vote by yeas and nays on the pending proposition: Therefore,

Resolved, That the recording of Mr. Boatner as present and not voting at that time was contrary to the facts and in violation of the rules of the House.

Mr. William McKinley, jr., of Ohio, made the point of order that the preamble and resolution did not present a privileged question, and was therefore not in order.

The Speaker [4] pro tempore said:

In the judgment of the Chair, a question of privilege is not presented by this resolution because of the fact that, after the reading of the Journal by the Clerk, after debate had upon the motion made

[1] Charles F. Crisp, of Georgia, Speaker.

[2] Second session Fifty-first Congress, Journal, p. 275; Record, pp. 2997, 2998.

[3] Record, pp. 3080, 3081, 3083; Journal, p. 283.

[4] Lewis E. Payson, of Illinois, Speaker pro tempore.

by the gentleman from Ohio that the Journal be approved, and after the previous question had been ordered, the House by a vote of 150 to 95 approved the Journal, which involved the method in which a quorum was secured, and the evidence of the fact, the action of the House, concludes the question. The Chair is of opinion that no question of privilege is presented because of the action of the House upon the Journal itself; and therefore the point of order made by the gentleman from Ohio is sustained.

Mr. Springer having appealed, the appeal was laid on the table by a vote of 145 yeas to 98 nays.

2621. A rule giving the Speaker power to hold as dilatory certain motions, a resolution condemning his action thereunder was not admitted as a question of privilege.

Instance wherein the Speaker retained the Chair and ruled as to a resolution which in effect proposed a censure of a decision made by himself as Speaker.

On January 27, 1891,[1] Mr. William M. Springer, of Illinois, on the ground of its being a privileged question, submitted the following preamble and resolution:

Whereas during yesterday's session of the House, when a vote by yeas and nays had been ordered upon the previous question on the motion to approve the Journal, and the yeas and nays had been called, the recapitulation of said vote was dispensed with without the request for the consent of the House; and upon the request of the gentleman from Missouri [Mr. Bland] and the demand of the gentleman from New York [Mr. Tracey] for a recapitulation of the vote, the Speaker declined to order a recapitulation; and an appeal from this decision being made by the gentleman from Missouri [Mr. Bland], the Speaker declined to entertain the appeal: Therefore,

Resolved, That this action on the part of the Speaker was unlawful; that to permit it to go uncondemned by the House would be to permit a precedent to stand, with apparent approval, that impairs the right and dignity of the House and that is inconsistent with a proper evidence of the integrity of its proceedings.

Mr. William McKinley, jr., of Ohio, made the point of order that the resolution did not present a question of privilege, since the Speaker distinctly made the ruling upon the ground that the motion was dilatory, and also because there was no rule which required the recapitulation of the yeas and nays.

After debate the Speaker[2] said:

The Chair does not think that the action of the Chair under the rules of the House in deciding motions to be out of order, on the ground that they are dilatory, can be made a question of privilege. If they could be, the sole purpose of the rule in giving to the Chair the power to put an end to dilatory motions would be nugatory. The Chair thinks, therefore, that it is not a question of privilege.

Mr. Springer having appealed from the decision of the Chair, the appeal was laid on the table by a vote of 139 yeas to 105 nays, and so the Chair was sustained.

2622. A proposition that the House cooperate with the Senate in the conduct of the ceremonies of the President's inauguration was held not to present a question of privilege.—On February 28, 1885,[3] Mr. Roger Q. Mills, of Texas, offered, as a question of the highest privilege:

Resolved, That the Speaker appoint a committee of three Members of the House to cooperate with the committee appointed by the Senate to take charge of the arrangements for the inaugural ceremonies at the Capitol on the 4th of March.

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[1] Second session Fifty-first Congress, Journal, p. 187; Record, p. 1872.

[2] Thomas B. Reed, of Maine, Speaker.

[3] Second session Forty-eighth Congress, Record, p. 2301.

Mr. Richard W. Townsend, of Illinois, having made the point of order that the resolution was not a question of privilege, the Speaker [1] ruled:

The Chair does not see that the resolution involves any matter of privilege. It does not relate to the legislative proceedings of the House or its duties under the Constitution.

2623. A Member having announced his intention to publish in the Record certain extracts, but not having obtained leave of the House, the refusal of the proposed insertion violates no privilege.—On September 27, 1893,[2] Mr. Elijah A. Morse, of Massachusetts, stated, as involving a question of privilege, that on the 25th instant, in the course of his remarks, he had announced that he would incorporate in his remarks certain newspaper extracts; that objection was not made thereto at the time, but that no leave to insert the extracts had been granted by the House. The proposed insertions had been denied publication in the Record. He asked that they be printed with his remarks in the Record.

The Speaker [3] held that no question of privilege had been presented and that a Member had no right to have printed with or appended to his remarks any matter not actually delivered unless the express consent of the House thereto be given.

Mr. William M. Springer, of Illinois, submitted the question of order, whether the business first in order was not the resolution of inquiry reported as a privileged matter and pending when the House adjourned on the previous day.

The Speaker held that, inasmuch as the previous question had not been ordered on the resolution, it did not come up as the regular order of business until called up.

2624. An alleged violation of the rule relating to admission to the floor presents a question of privilege.—On March 1, 1886,[4] Mr. Lewis Beach, of New York, presented this resolution:

Whereas it is asserted in the public press that Rule XXXIV,[5] regulating admission to the floor of the House, is being violated: Therefore,

Resolved, That the Committee on Rules be instructed to inquire into the facts, and report as to the truth or falsity of the said charges and what remedy, if any, is necessary to secure a strict enforcement of the rule.

Mr. Richard P. Bland, of Missouri, made the point of order that the resolution was not in order.

The Speaker [1] said:

The Chair thinks this presents a question of privilege.

2625. A resolution relating to an alleged abuse of the privileges of the floor presents a question of privilege.—On March 1, 1886,[6] Mr. Lewis Beach, of New York, rising to a question of privilege, sent to the Clerk's desk to be read an article from a newspaper. During the reading, the point being made that a question of privilege had not been developed, the Speaker [1] said:

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[1] John G. Carlisle, of Kentucky, Speaker.

[2] First session Fifty-third Congress, Journal, p. 114.

[3] Charles F. Crisp, of Georgia, Speaker.

[4] First session Forty-ninth Congress, Record, p. 1905; Journal, p. 781.

[5] For this rule see section 7283 of Volume V of this work.

[6] First session Forty-ninth Congress, Journal, p. 781; Record, p. 1905.

The Chair thinks, under the rulings made heretofore, that a proposition must be presented to the House in a case when a gentleman rises to a question of privilege which he states involves the dignity of the House or the integrity of its proceedings, and then the gentleman can support his proposition by any argument, or having anything read which he chooses in his own time, provided it is pertinent.

Mr. Beach then presented the following:

Whereas it is asserted in the public press that Rule XXXIV, regulating admission to the floor of the House, is being violated: Therefore,

Resolved, That the Committee on Rules be instructed to inquire into the facts, and report as to the truth or falsity of the said charges, and what remedy, if any, is necessary to secure a strict enforcement of the rule.

Mr. Richard P. Bland, of Missouri, made the point of order that the preamble and resolution were not in order for present consideration.

The Speaker overruled the point of order and held that they presented a question of privilege.

2626. A resolution relating to an alleged abuse of the privileges of the floor does not present a question of higher privilege than an election case.—On May 22, 1884,[1] during the consideration of the contested election case of English *v.* Peelle, the previous question having been ordered on the resolution and pending substitute, Mr. Thomas M. Bayne, of Pennsylvania, presented the following resolution:

Resolved, That the Committee on Rules be, and it is hereby, instructed to inquire and report to this House whether or not Hon. William H. English, an ex-Member of this House, has violated the privileges thereof in the contested election case of English *v.* Peelle.

Mr. Richard P. Bland, of Missouri, made the point of order that the resolution was not in order while a contested election case was pending, which was of higher privilege

The Speaker[2] said:

While this resolution presents a matter of privilege, the Chair does not think it is a matter of higher privilege than the question of the right of a Member to a seat on the floor. The Chair thinks that except by consent it could not be introduced during the pendency of a contested election case.

2627. Alleged misconduct of an occupant of the press gallery, although occurring during a former Congress, brought before the House as a matter of privilege.—On January 29, 1884,[3] Mr. James H. Hopkins, of Pennsylvania, submitted the following as a privileged resolution:

Whereas Hon. J. Warren Keifer, a Member of this House, has charged H.V. Boynton, the Washington correspondent of the Cincinnati Commercial-Gazette, now holding a seat in the press gallery under the rules of the House, with having approached the Speaker of the House during the closing days of the last session of Congress with corrupt propositions intended to influence his official action; and

Whereas this alleged act is in the nature of a gross breach of the privileges of the House, and the charge if sustained would call for the exclusion of the said H.V. Boynton from the press gallery; therefore,

Be it resolved, That a special committee of five Members of this House be appointed by the Speaker with power to send for persons and papers and administer oaths, to investigate the said charge of attempted corruption, and to report the results of this investigation to the House.

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[1] First session Forty-eighth Congress, Record, p. 4406.

[2] John G. Carlisle, of Kentucky, Speaker.

[3] First session Forty-eighth Congress, Journal, p. 444; Record, p. 741.

Mr. William H. Calkins, of Indiana, made the point that it was a matter of privilege for the last and not for the present House.

The Speaker [1] ruled:

The Chair is called upon to determine whether this is or is not a question of privilege under the rules or under the general parliamentary law.[2] The preamble alleges that a person who is now occupying the gallery of the House by the permission of the House has made an improper proposition to a Member, not during the present session, but during the last session. Of course it is well known to the Chair and to every Member on the floor that no person can occupy a seat in that gallery without signing a statement or pledge that he is not interested in any legislation pending before the House. It does seem to the Chair that if there is any person occupying a seat in that gallery who has at any time, in violation of that pledge, made improper proposals to a Member of the House, it is not only the right but the duty of the House to investigate the matter, with a view of protecting the integrity of its own proceedings and denying to that person hereafter the privileges of the gallery. The Chair is therefore disposed to hold and does hold that this is a matter of privilege.

2628. A newspaper charge that an officer of the House had conspired to influence legislation was considered as a question of privilege.—On April 26, 1876,[3] Mr. John D. White, of Kentucky, submitted as a question of privilege a preamble and resolution reciting an allegation from a newspaper charging that the Clerk of the House and some of his subordinates had conspired to prevent retrenchment of expenditures, and directing the Committee on Rules to investigate the charges and make report thereon.

Mr. William M. Springer, of Illinois, made the point of order that the resolution did not involve a question of privilege.

The Speaker [4] overruled the point of order on the ground that the resolution, though going to the verge to which any matter of privilege of a Member of the House should go, involved enough of substance in its connection with the House and legislation to bring it within the rule and definition of a question of privilege.

2629. A resolution from the Committee on Ventilation and Acoustics relating to the comfort of Members in the Hall was received as a question of privilege.—On June 8, 1894,[5] Mr. George W. Shell, of South Carolina, from the Committee on Ventilation and Acoustics, presented for consideration as involving a question of privilege the resolution (Mis. Doc. 162) reported by him on the preceding day:

Resolved, That the Architect of the Capitol is hereby authorized to employ for the balance of this session an assistant engineer at the rate of $100 per month, and three additional laborers at $60 per month each, to be paid out of the contingent fund of the House; and the Clerk of the House is hereby directed to pay out of the contingent fund of the House the sum of $20 for incidental expenses of the Architect's office, and the sum of $400 for additional coal for the use of the same.

Mr. William S. Holman, of Indiana, made the point of order that the resolution should receive its first consideration in the Committee of the Whole.

The Speaker sustained the point of order.

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[1] John G. Carlisle, of Kentucky, Speaker.

[2] The House had not yet adopted permanent rules.

[3] First session Forty-fourth Congress, Journal, pp. 867, 868; Record, p. 2771.

[4] Michael C. Kerr, of Indiana, Speaker.

[5] Second session Fifty-third Congress, Journal, p. 421; Record, pp. 5924, 5989.

The record of the debate shows that the resolution was called up as a question of privilege, the subject relating to the health of Members, and was admitted to consideration as such.

2630. A proposition relating to the comfort or convenience of Members is presented as a question of privilege.—On December 10, 1880,[1] Mr. Speaker Randall intimated that he considered a proposition relating to the construction of a proposed elevator for the House to be a question of privilege, since it related to the convenience of the House.

2631. On December 14, 1883,[2] Mr. Richard W. Townshend, of Illinois, proposed a resolution providing for the removal of the desks from the hall.

A point of order being made against the resolution by Mr. William H. Calkins, of Indiana, the Speaker[3] said:

> It was decided by Mr. Speaker Blaine in the Forty-second Congress that all matters relating to the arrangement of the hall and the convenience of Members were to be considered and treated as matters of privilege, and a similar ruling was made by Mr. Speaker Keifer in the last Congress.

Accordingly the resolution was admitted.

2632. A subject relating to the convenience of Members and comfort of employees presents a question of privilege.—On June 13, 1882[4] Mr. John H. Brewer of New Jersey, called up a report of the Select Committee on Ventilation and Acoustics[5] in relation to the unhealthfulness of the folding room of the House of Representatives.

Mr. Joseph G. Cannon, of Illinois, objected to its consideration.

The Speaker[6] held the report to be of a privileged character on the ground that the committee had been specially directed to consider the subject-matter of the resolution submitted, and report their conclusions thereon to the House, and although authority had not been specially given to that committee to report at any time, it was still the duty of the committee to report at as early a day as practicable, and having so reported, their report was properly before the House; and also on the further ground that the pending resolution related to the convenience of Members and comfort of the employees of the House.

2633. A resolution reported from the Committee on Ventilation and Acoustics and relating to the sanitary conditions surrounding certain employees, was held to be privileged.—On June 13, 1882,[7] Mr. John H. Brewer, of New Jersey, called up the report[8] of the Select Committee on Ventilation and Acoustics, which had come over from the preceding day with a question as to whether or not it involved a question of privilege.

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[1] Third session Forty-sixth Congress, Record, p. 75.

[2] First session Forty-eighth Congress, Record, p. 145.

[3] John G. Carlisle, of Kentucky, Speaker.

[4] First session Forty-seventh Congress, Journal, p. 1469; Record, p. 4846.

[5] This committee is now one of the standing committees.

[6] J. Warren Keifer, of Ohio, Speaker.

[7] First session Forty-seventh Congress, Record, pp. 4846, 4852.

[8] The report was in response to a resolution directing an investigation of the sanitary condition of the House folding room.

Mr. Samuel J. Randall, of Pennsylvania, having renewed the question of order, the Speaker [1] said:

The Chair wishes to state that under the resolution which passed the House ordering this committee to investigate this subject it was required by the terms of that resolution that the committee report to the House; and while it does not specify it should report at any time, yet in view of the fact that it relates to the convenience of the employees of the House and is necessarily connected with the business of the House, the Chair is inclined to hold to-day that it is a privileged matter.

2634. A resolution relating to the dismissal of an employee was held not to involve a question of privilege.—On February 11, 1884,[2] Mr. John D. White, of Kentucky, claiming the floor for a question of privilege, presented a resolution instructing the Committee on Reform in the Civil Service to inquire into the cause of the removal of William H. Smith, librarian of the House of Representatives, and directing it to report on what changes might be necessary to protect employees of the House from dismissal.

Mr. Philip B. Thompson, jr., of Kentucky, made the point of order that no question of privilege was involved.

The Speaker [3] said:

The Chair does not think this resolution comes within any definition of a privileged matter given in the rules or the general parliamentary law of the country.

2635. Subjects relating to the convenience of Members are not necessarily entertained as matters of privilege.—On November 19, 1903,[4] Mr. Charles Q. Hildebrandt, of Ohio, offered as a question of privilege the following resolution:

Resolved, That the Clerk of the House is hereby authorized and directed to employ an additional laborer in the bathroom during the remainder of the present fiscal year, to be paid out of the contingent fund of the House at the rate of $60 per month.

The Speaker [5] declining to entertain it as a question of privilege, it was submitted by unanimous consent.

2636. A resolution from the Committee on Accounts relating to the management of the House restaurant was not received as a matter of privilege.—On April 25, 1904,[6] Mr. Joseph V. Graff, of Illinois, claiming the floor for a privileged matter, offered the following resolution:

Resolved, That the superintendent of the Capitol building and grounds shall, under the direction of the Speaker of the House, make such alterations of the rooms now used as a restaurant as to provide facilities for luncheon rooms for the Members, Delegates, and officers of the House, and for the employees of the House and the public. And the privilege of conducting said luncheon rooms shall be granted by the Speaker of the House to such person or persons as he shall select, who shall be subject to removal by him and who shall be governed by such rules for the conduct of said luncheon rooms as he may prescribe: *Provided,* That in no sense shall it be understood that the practical management of the House luncheon rooms is hereby assumed by the House.

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[1] J. Warren Keifer, of Ohio, Speaker.

[2] First session Forty-eighth Congress, Journal, p. 560; Record, p. 1031.

[3] John G. Carlisle, of Kentucky, Speaker.

[4] First session Fifty-eighth Congress, Journal, p. 82; Record, p. 389.

[5] Joseph G. Cannon, of Illinois, Speaker.

[6] Second session Fifty-eighth Congress, Record, p. 5581; Journal, p. 680.

The Speaker[1] did not entertain the resolution as one involving the privileges of the House, but admitted it after asking the unanimous consent of the House.

The resolution was agreed to.

2637. The publication by a Member of alleged false and scandalous charges against the House and its Members, which he also reiterated in debate, was held to involve a question of privilege.

The House took action as to a Member who reiterated on the floor certain published charges against the House, although other business had intervened.

Instance wherein testimony taken before a Committee and relating to the conduct of a Member was not reported to the House at once.

On July 29, 1892,[2] Mr. Charles J. Boatner, of Louisiana, as a matter of privilege, submitted the following resolution, and demanded immediate consideration thereof, to wit:

Whereas on page 216 of a book purporting to have been written by Thomas E. Watson, of Georgia, a Member of the House of Representatives, the following charge appears:

"Drunken Members have reeled about the aisles, a disgrace to the Republic. Drunken speakers have debated grave issues on the floor, and in the midst of maudlin ramblings have been heard to ask: 'Mr. Speaker, where was I at?'" and

Whereas the publication of such charges, if untrue, is a grave wrong to this body, and if true the responsibility should be placed where it belongs; and

Whereas the said Watson has reiterated the same on the floor of the House: Therefore, be it

Resolved by the House, That a committee of five Members be appointed by the Speaker to investigate and report to the House whether such charges are true, and, if untrue, whether the said Watson has violated the privileges of the House and their recommendations relative to the same. That said committee have leave to sit during the sessions of the House, to send for persons and papers, to swear witnesses, and to compel their attendance.

Mr. Thomas B. Reed, of Maine, submitted the question of order, whether, the House having failed to take action respecting the remarks of Mr. Watson at the time he reiterated the charges on the floor of the House, and having passed to other business, it was not now too late to hold him to account therefore.

Mr. Louis E. Atkinson, of Pennsylvania, made the further point of order that the pending business before the House was a conference report, which was itself a matter of the highest privilege.

The Speaker[3] held that the resolution submitted by Mr. Boatner presented a question of privilege, and that whenever the Speaker is of opinion that a question of privilege is involved in a proposition, he must entertain it in preference to any other business.

The Speaker also held that the pending business was the amendments of the Senate to the bill H.R. 752, and that no conference report was pending. Both points of order were therefore overruled.

On August 8, 1892,[4] Mr. Boatner submitted the report[5] of the select committee authorized by the adoption of the resolution, and of which he had been made chairman.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] First session Fifty-second Congress, Journal, p. 345; Record, p. 6943.

[3] Charles F. Crisp, of Georgia, Speaker.

[4] Journal, p. 357; Record p. 7105.

[5] Report No. 2132.

This report stated that the committee summoned Mr. Watson and such witnesses as he indicated, and very soon the fact was developed that the charge as to drunken speakers referred to Mr. J. E. Cobb, of Alabama. The committee thereupon went on and examined testimony as to Mr. Cobb, no point of order being made that the testimony implicating a Member should first be reported to the House.

The committee concluded that the charge was a libel upon the membership, and recommended the adoption of the following resolution:

Resolved, That the charges made by Thomas E. Watson in his book against the House of Representatives, viz, "that drunken Members have reeled about the aisles, a disgrace to the Republic," and "drunken Members have debated grave issues on the floor," etc., are not true, and constitute an unwarranted assault upon the honor and dignity of the House, and that such publication has the unqualified disapproval of the House.

This report was made in the last hours of the session and does not appear to have been acted on.

2638. General charges that attempts are being made through public sentiment to influence the House do not give rise to a question of privilege.—On March 11, 1902,[1] Mr. John R. Thayer, of Massachusetts, claimed the floor to offer, as involving a question of privilege, the following:

Whereas it has been currently reported in many reputable newspapers, and by many Republican Members of this House, that in the event of a reduction of the duty on sugar imported from Cuba the American Sugar Refinery, commonly known as the "sugar trust," will be the chief beneficiary; and

Whereas it has been currently reported from reliable sources that the entire crop of Cuban sugar has already been purchased from the Cubans at ruinously low prices by the said sugar trust, and is only awaiting shipment until a reduction of the duty on the same can be secured through the action of Congress, and that any concessions intended to be for the alleviation of the deplorable condition of the Cubans by admitting their sugar this year at reduced rates of duty will serve only to benefit the sugar trust, and that the Cubans will receive no benefit whatever from it, and

Whereas it has been currently alleged by many reputable newspapers that the American Sugar Refinery Company (commonly known as the "sugar trust") has, by subsidizing the press, establishing literary bureaus, and by spending large sums of money, and in other ways attempted to create a public sentiment in favor of a radical reduction of the tariff on sugar imported from Cuba; and

Whereas it is due to the dignity of this House that the truth or falsity of these charges should be clearly established before the House proceeds to a consideration of the question of reducing the duty on sugar imported from Cuba, as recommended by the President of the United States in his annual message to Congress: Therefore, be it

Resolved, That a special committee of seven Members of this House be appointed by the Speaker to investigate the subject-matter of this resolution.

Mr. Eugene F. Loud, of California, raised the question of order that no question of privilege was presented.

The Speaker[2] sustained the point of order.

Mr. Thayer having appealed, the House, on motion of Mr. Sereno E. Payne, of New York, laid the appeal on the table by a vote of yeas 125, nays 87.

2639. A newspaper article making general charges concerning the proceedings of the House was held not to involve a question of privilege.—

[1] First session Fifty-seventh Congress, Record, p. 2639.

[2] David B. Henderson, of Iowa, Speaker.

On April 21, 1868,[1] Mr. Charles E. Phelps, of Maryland, offered, as a question of privilege, the following:

Whereas there appeared in the Baltimore American newspaper of the 15th of April, 1868, the following paragraph:

"GENERAL SHERMAN BEFORE THE MANAGERS.

"Lieutenant-General Sherman was before the impeachment managers for a consider-able time and was very minutely examined in relation to his interviews with the President at the time of the proffer of the War Department to him. It is understood that the declination of General Butler to proceed with the cross-examination of General Sherman yesterday was in view of this preliminary examination of General Sherman this morning."

And whereas "false and scandalous reports of proceedings in this House," "charges affecting the official character of its Members," and "alleged combinations on the part of certain Members," as questions of high privilege, demand that such indecent imputations as are contained in the above-recited paragraph upon the official conduct of the honorable managers appointed by the House of Representatives to conduct the trial of the impeachment of the President at the bar of the Senate of the United States should not be promulgated without proper action on the part of this House to vindicate the reputation of its officers and its own dignity:

Resolved, That a committee of three be appointed to inquire into the truth or falsity of the imputations conveyed in the above-recited paragraph, with power to send for persons and papers and to report what action, if any, should further be taken in the premises.

Mr. Elihu B. Washburne, of Illinois, made the point of order that this did not involve a question of privilege.

The Speaker[2] said:

The Chair will rule that this is not a question of privilege, and will state his reasons. Although the gentleman from Maryland has noted upon his resolution references to the Digest, which relate to questions of privilege, if he will examine the authorities there quoted he will find that the charges are not to be general charges. If a charge is made by a newspaper affecting the official character of a Member of this House, that would be a question of privilege. If an attack should be made by the Public Printer, and, the Chair would add, by the publisher of any paper, in an article alleged to be for the purpose of inciting unlawful violence among Members, that would be a privileged question, because relating to the privileges of the House. If alleged corrupt combinations on the part of certain Members were presented, those would be questions of privilege. But the corrupt combinations must be charged, and the statement of the corrupt combination must be incorporated in the resolution. In the extract which the gentleman has quoted in his resolution * * * the Chair is unable to see how, even by the utmost stretching of the rule that could be construed into a question of privilege. * * * If this proposition could be entertained as a question of privilege, the House of Representatives would or could have resolutions upon questions of privilege before them every day, because probably not a day elapses without some newspaper in the country making a general charge against the Congress of the United States or some of its Members. These charges must be specific charges. A general charge that some conduct has been scandalous and unjust, the Chair will rule is not a question of privilege, unless the gentleman from Maryland desires to have that question submitted to the House.

Mr. Phelps having asked the decision of the House, the question was put, will the House entertain the same as a question of privilege? and decided in the negative.

2640. The House ordered the investigation, as a question of privilege, of a newspaper report of certain proceedings of the House.—On February 8, 1847,[3] Mr. Stephen A. Douglas, of Illinois, offered the following resolution as a question of privilege, and it was entertained as such without question:

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[1] Second session Fortieth Congress, Journal, p. 632; Globe, p. 2320.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] Second session Twenty-ninth Congress, Journal, pp. 311–313, 353; Globe, pp. 349–352, 426.

Resolved, That a committee of five Members be appointed to examine into the truth of the report of the Union of the 6th instant, in regard to the proceedings of the House and of the Committee of the Whole, on Saturday last, on the bill for the relief of Thomas Wishart, and to ascertain who the reporter was and what Members were engaged in creating disorder in the House and in the committee, and report thereon, with the names of such reporter and Members; and for the purposes of such examination said committee shall have power to send for persons and papers.

This resolution having been agreed to, yeas 128, nays 64, the Speaker appointed Messrs. Douglas; Andrew Kennedy, of Indiana; Thomas H. Bayly, of Virginia; David Wilmot, of Pennsylvania; and Andrew Trumbo, of Kentucky, the committee.

On February 15 Mr. Douglas reported from the committee that they had found the investigation would require more time than could be obtained so near the end of the session, and asking that they be discharged from further consideration of the subject. Such a motion was made and agreed to.[1]

2641. The publication by the Public Printer of an article alleged to be for the purpose of exciting unlawful violence among Members has been considered a matter of privilege.

The Speaker may pass on a question presented as of privilege instead of submitting it directly to the House.

On June 8, 1854,[2] Mr. Joshua R. Giddings, of Ohio, submitted, as a question of privilege, the following preamble and resolution:

Whereas A.O.P. Nicholson, esq., printer to this body,[3] *editor and proprietor of the Washington Union, in his paper of this morning has published an article most evidently designed to excite unlawful violence upon Members of this body: Therefore,*

Resolved, That said A.O.P. Nicholson, and all other persons connected with the Washington Union, be expelled from this House.

Upon the presentation of these resolutions a suggestion was at first made that questions of privilege had heretofore been referred to the judgment of the House.

The Speaker[4] at first acquiesced in this view, but afterwards determined that there was involved in the resolution a question of privilege, and that the gentleman from Ohio, Mr. Giddings, had a right to move to expel from the Hall any officer of the House. * * * The editor or editors of the Union had the privilege of the Hall, but they had not the privilege of the floor. That paper had a number of reporters here, and they were here by law of the House and under the direction of the Speaker. The gentleman proposed to expel them all, editors and reporters. The Chair was of the opinion that the question was a privileged one, and so decided. * * * Mr. A. O. P. Nicholson was entitled, under an express law of the House, to the privilege of the Hall as an ex-Senator of the United States. He was named in the resolution.

The resolution proposed by Mr. Giddings was not agreed to by the House.

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[1] At about this time a similar resolution in the Senate caused a long debate on the freedom of the press. The resolution excluded the editors of the Union from the floor for "uttering a public libel upon the character of this body." (Globe, pp. 392, 406–417.)

[2] First session Thirty-third Congress, Journal, p. 965; Globe, p. 1361.

[3] The Public Printer was at that time elected by the two Houses. At present he is, under the terms of law, appointed by the President.

[4] Linn Boyd, of Kentucky, Speaker.

2642. An alleged offense against the dignity of the House and the participation of a Member therein was held to constitute a question of privilege.

Early instance wherein the Speaker and not the House decided whether or not a question was one of privilege.

On April 27, 1846,[1] Mr. Robert C. Schenck, of Ohio, offered as a question of privilege a preamble and resolution reciting that the President, in response to a resolution of the House, had declined to disclose in regard to the use of the secret service fund of the State Department during the Oregon boundary negotiations, and that Charles Jared Ingersoll, a Member from Pennsylvania, had averred that he had procured such information from the Department of State, and therefore resolving that a committee of five be appointed to ascertain how Mr. Ingersoll got his information, whether by his own act or by the act of "any officer of any Department of this Government."

The Speaker[2] decided that the resolution did not involve a question touching the privileges of this House or any of its Members.

Mr. Schenck modified his resolution by inserting after the word "Government," where it last occurs, the following:

> And if by a Member, then whether he does not deserve by such conduct punishment by the House, and whether, in such transaction, there has been an offense committed against the dignity and privileges of the House.

The Speaker decided that the resolution, as modified, involved a question touching the privileges of this House and must be entertained in preference to any other business.

2643. A proposition to investigate alleged unnecessary violence of policemen toward citizens on the Capitol grounds was ruled not to present a question of privilege.—On May 2, 1894,[3] Mr. Tom L. Johnson, of Ohio, submitted, as presenting a question of privilege, the following preamble and resolution:

> Whereas it is well known that the Capitol grounds were, on May 1, overrun by a large assemblage of people, including a considerable number of the regular and special police of this District; and
>
> Whereas it is publicly stated that the safety of the Members of this House has been endangered, thereby making it necessary for the House to rely upon the clubs of policemen for their protection:
>
> *Resolved,* That the Committee on Public Buildings and Grounds be instructed to inquire into the question as to whether unnecessary force was used, whether unoffending citizens were cruelly beaten, and whether the dignity of this House has been violated; that the said committee have the power to send for persons and papers, and report the facts in connection with the subject, with their recommendations as to whether any legislation is necessary in the premises.

Mr. Joseph H. Outhwaite, of Ohio, made the point of order that no question of privilege was presented in said resolution.

After debate the Speaker[4] sustained the point of order, holding that the resolution did not present a question of privilege.

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[1] First session Twenty-ninth Congress, Journal, p. 724; Globe, p. 734.

[2] John W. Davis, of Indiana, Speaker.

[3] Second session Fifty-third Congress, Journal, p. 369; Record, p. 4335.

[4] Charles F. Crisp, of Georgia, Speaker.

2644. A charge affecting the character of an elected officer of the House was held to involve a question of privilege.

The office of Journal Clerk and its requirements. (Footnote.)

On May 13, 1876,[1] Mr. John D. White, of Kentucky, as a question of privilege, submitted the following preamble and resolution:

Whereas the following articles which affect the character of an officer of this House have appeared in the public print [the articles were not read]: Therefore,

Resolved, That the Committee on Rules be, and they are hereby, directed to inquire into the charges publicly made against L.H. Fitzhugh, Doorkeeper of the House, and report, by resolution or otherwise, whether there is anything in said charges that would render him an improper person to be an officer of this House; and that they be further directed to inquire into the propriety of abolishing the office of Doorkeeper and requiring the duties of said office to be performed by the Sergeant-at-Arms.

Mr. Samuel J. Randall, of Pennsylvania, raised the point of order that as the articles read did not affect or relate to the privileges of a Member it was not a question of privilege.

The Speaker pro tempore[2] overruled the point of order, holding that any matter affecting the character of an officer of the House was a question of privilege.

In this decision the House acquiesced.[3]

2645. The request of an officer of the House for an investigation of newspaper charges against his administration is presented as a question of privilege.—On December 10, 1867,[4] Mr. William B. Allison, of Iowa, presented a communication from the Sergeant-at-Arms of the House asking for an investigation of his administration of his office, certain charges reflecting on his official integrity having been made in certain newspapers.

Mr. Lewis W. Ross, of Illinois, raised a question as to whether or not the communication was privileged.

The Speaker[5] said:

The Chair thinks that this is a question of privilege, as it involves a question concerning the fidelity of one of the officers of the House.

2646. A resolution for the investigation of the conduct of an employee of the House may be presented as a matter of privilege.—On January 8, 1883,[6] Mr. Thompson H. Murch, of Maine, submitted the following as a question of privilege:

Whereas it has been asserted on the floor of this House that John Bailey, chief clerk, is an officer and large stockholder of the Washington Gaslight Company, and has been retained in the Clerk's office of the House for many years past through the influence of said company in order to advise it of what was going on in Congress affecting its interests and to assist in procuring favorable legislation for said company; and

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[1] First session Forty-fourth Congress, Journal, p. 948; Record, pp. 3065, 3066.

[2] Samuel S. Cox, of New York, Speaker pro tempore.

[3] On April 15, 1876 (First session Forty-fourth Congress, Journal, p. 806; Record, pp. 2480, 2655), a question as to the conduct of the Journal Clerk of the House was presented as a question of privilege apparently, although Record and Journal do not agree on this point. On April 20 the Committee on Rules, after investigating the charges, made a report which dwells at length upon the necessity of competency and integrity on the part of that officer.

[4] Second session Fortieth Congress, Globe, p. 105.

[5] Schuyler Colfax, of Indiana, Speaker.

[6] Second session Forty-seventh Congress, Journal, pp. 190, 235; Record, pp. 967–970, 1165.

Whereas the same charge has been heretofore made in the public press: Therefore,

Resolved, That a select committee of five Members be appointed, whose duty it shall be to thoroughly investigate said charges; and said committee shall have power to send for persons and papers, and shall have leave to report at any time.

Mr. George M. Robeson, of New Jersey, made the point of order that the preamble and resolution did not involve a question of privilege.

After debate the point of order was withdrawn, and the resolution was agreed to.

On January 13, Mr. Murch, also as a question of privilege, introduced and the House agreed to a resolution instructing the committee to inquire "whether said Bailey has at any time attempted to influence legislation in this House for the benefit of the Washington Gaslight Company." [1]

2647. A proposition to investigate the conduct of certain officers of the House while they were officers of the preceding House was presented as a matter of privilege.—On March 16, 1886,[2] Mr. Thomas M. Browne, of Indiana, presented a preamble reciting that the charge had been made that certain officers of the preceding House had in that Congress exacted a sum of money on pretense of influencing the action of Congress, and further reciting that these persons so exacting money were officers of the present House. Therefore he proposed a resolution instructing the Committee on Reform of the Civil Service to make an investigation of the charges.

The preamble and resolution were presented as a question of privilege, and agreed to without question.

2648. A proposition relating to the expulsion of a Member presents a question of privilege which supersedes the regular order of business.

Instance wherein the Speaker left to the House to decide whether or not a proposition involved a question of privilege.

On February 19, 1857,[3] Mr. Henry Winter Davis, of Maryland, from the select committee on certain alleged corrupt combinations, proposed to submit a special report from the said committee, having reference to William A. Gilbert, a Member of the House from the State of New York, accompanied by a resolution reciting the alleged corrupt acts of Mr. Gilbert and providing for his expulsion from the House forthwith.

The report and resolution having been read, the Speaker [4] stated the question to be, Shall the said committee have leave to report in part at this time, and win the House receive the said resolution as a question of privilege?

After debate, and a motion to adjourn, Mr. Davis modified the motion originally submitted by him, as follows: That the said special report, together with the other special reports of the said committee, the views of a minority, the general report, and the evidence, be received and printed.

This motion was agreed to, 168 yeas to 5 nays.

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[1] Mr. Murch, who proposed the resolution, was not made a member of the committee. Record, p. 1088.

[2] First session Forty-eighth Congress, Journal, p. 933; Record, p. 2404.

[3] Third session Thirty-fourth Congress, Journal, pp. 475, 476; Globe, pp. 764, 766.

[4] Nathaniel P. Banks, of Massachusetts, Speaker.

2649. A proposition to censure a Member presents a question of privilege.

Early instances wherein the Speaker passed on questions presented as of privilege instead of submitting them directly to the House.

On January 24, 1842,[1] Mr. Thomas W. Gilmer, of Virginia, presented the following resolution:

Resolved, That in presenting for the consideration of the House a petition for the dissolution of the Union the Member from Massachussets [Mr. Adams] has justly incurred the censure of this House.

Mr. Joseph R. Underwood, of Kentucky, objected to the reception of the resolution at this time, as not within the established order of business, and consequently not now in order.

The Speaker[2] said that he considered this a matter of privilege, and referred to a precedent that occurred in 1836, in which the gentleman from Massachusetts offered a petition from certain slaves near Fredericksburg, Va., and on which occasion a resolution was offered by a gentleman from Virginia that the gentleman be brought to the bar and censured. Under this precedent the Chair did not feel at liberty to arrest the proceeding.

2650. On April 27, 1858,[3] Mr. James Hughes, of Indiana, submitted as a question of privilege a preamble reciting that Air. Francis E. Spinner, of New York, by proposing to the House an investigation of mere newspaper insinuations against a certain Senator and certain Members of the House, had reflected upon their characters without presenting any matter or charge proper for action, and concluding with this resolution:

Resolved, That the offer to introduce said preamble and resolution was a breach of the privilege, order, and decorum of the House, and that the said Francis E. Spinner is hereby censured for the same.

Mr. Lewis D. Campbell, of Ohio, raised the question of order that no question of privilege was involved.

The Speaker[4] held that as the resolution proposed to censure a member it involved a question of privilege.

After debate the resolution was laid on the table.

2651. A proposition to censure a Member for violating the rules of the House involves a question of privilege.—On February 10, 1865,[5] Mr. James A. Garfield, of Ohio, submitted as a question of privilege the following:

Resolved, That Hon. E. B. Washburne, in leaving the Hall without permission, pending a call of the House at its session Tuesday evening, February 9, was guilty of disorderly conduct, and deserves the censure of the House.

Mr. John F. Farnsworth, of Illinois, raised a question of order as to the privilege of the resolution.

The Speaker[6] said:

The Chair is of the opinion that it is a question of privilege, as a charge is made by one member against another for violating the rules of the House.

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[1] Second session Twenty-seventh Congress, Journal, pp. 273, 274; Globe, p. 168.

[2] John White, of Kentucky, Speaker.

[3] First session Thirty-fifth Congress, Journal, p. 703; Globe, p. 1829.

[4] James L. Orr, of South Carolina, Speaker.

[5] Second session Thirty-eighth Congress, Journal, pp. 239, 242; Globe, p. 741.

[6] Schuyler Colfax, of Indiana, Speaker.

Mr. Garfield's resolution was later withdrawn.

2652. A charge that a Member had been holding intercourse with the foes of the Government was investigated as a question of privilege.—On July 15, 1861,[1] Mr. John F. Potter, of Wisconsin, offered the following resolution:

Resolved, That the Committee on the Judiciary be directed to inquire whether the Hon. Henry May, a Representative in Congress from the Fourth district of the State of Maryland, has not been found holding criminal intercourse and correspondence with persons in armed rebellion against the Government of the United States, and to make report to the House as to what action should be taken in the premises, and that said committee have power to send for persons and papers and to examine witnesses on oath or affirmation, and that said Hon. Henry May be notified of the passage of this resolution (if practicable) before action thereon by said committee.

Mr. Henry C. Burnett, of Kentucky, made the point of order that the resolution was not in order as a question of privilege.

The Speaker[2] submitted the question to the House, and the House decided that the resolution was in order as involving a question of privilege.

By a vote of 56 yeas to 82 nays the House refused to lay the resolution on the table. It was then agreed to.[3]

2653. A resolution directing an inquiry into alleged treasonable conduct on the part of a Member was admitted as a question of privilege.—On December 19, 1865,[4] Mr. John F. Farnsworth, of Illinois, as a question of privilege, submitted the following:

Whereas it is alleged that Benjamin G. Harris, a Representative in this House from the Fifth district of the State of Maryland, was, in the month of May last, before a very respectable and intelligent court-martial tried, and by said court convicted, upon charge and specifications, to wit: "Violative of the sixth article of war," by giving aid and comfort to the public enemy and inciting them to continue to make war against the United States, declaring his sympathy with the enemy and his opposition to the Government of the United States in its efforts to suppress the rebellion; and

Whereas it was proved at such trial (as is alleged) that the said Harris expressed his regret that the assassination of President Lincoln came too late to be of any use to the rebels, and at the same time declared that Jeff. Davis was a great and good man, all of which acts on the part of said Harris axe inconsistent with the oath which he has taken as a Member of this House; and

Whereas the said court-martial sentenced the said Harris (among other things) to be forever disqualified to hold any office of honor, trust, or profit under the United States, which sentence was approved by the President: Therefore

Resolved, That the Committee of Elections be directed to inquire into the facts of the case and that they report the same to the House, together with such action as said committee shall recommend; and in making their investigations said committee to have power to send for persons and papers.

Mr. Charles A. Eldridge, of Wisconsin, raised the question of order that no question of privilege was involved.

The Speaker[5] held that the question raised was a question of privilege, and of the very highest kind, since it involved the right of a Member to his seat.

The resolution was then agreed to, yeas 138, nays 21.

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[1] First session Thirty-seventh Congress, Journal, p. 88; Globe, p. 131.

[2] Galusha A. Grow, of Pennsylvania, Speaker.

[3] On July 18 the committee reported that they found no evidence against Mr. May. Journal, p. 105; Globe, p. 196.

[4] First session Thirty-ninth Congress, Journal, p. 89; Globe, p. 81.

[5] Schuyler Colfax, of Indiana, Speaker.

2654. The House declined to entertain as a question of privilege a resolution to investigate a charge made by a Cabinet officer that Members of Congress, not named, had made a corrupt proposition to the Executive.

There is a distinction between a question of privilege and a privileged question.

In 1842 the Speaker could find no precedent for deciding as to a question offered as of privilege.

On December 13, 1842,[1] Mr. John M. Botts, of Virginia, moved, as involving the privileges of this House, a resolution in the words following:

Resolved, That a committee of ——— be appointed to inquire into the truth of the charges contained in the letter of the Hon. John C. Spencer,[2] dated October 25, addressed to Lewis K. Faulkner and others, against Members of Congress, of having submitted a proposition to the President of the United States, at the extra session of Congress, to postpone the consideration of a great national measure, intimately connected with the best interests of the country, on condition of a pledge from him that he would not disturb the then members of his cabinet in office.

Mr. Henry A. Wise, of Virginia, submitted that it was not in order to entertain the proposition without a vote of two-thirds (i. e., by suspension of rules) unless it be a privileged question; and he submitted that the paragraphs read by Mr. Botts from a letter purporting to be written by John C. Spencer, Secretary of War, did not involve any question of the privileges of this House.

The Speaker[3] stated that there was a difference between a question of privilege and a privileged question, and it was the duty of the Chair to decide such questions. A question of privilege was one which involved the character and the rights of Members of the House, and the Chair would inform the gentleman from Virginia, Mr. Wise, that his question of order did not reach the point. It was for the House to determine whether it should be entertained, and if no gentleman made a motion for that purpose it was the duty of the Speaker to test the sense of the House. He should therefore propound the question, "Shall the resolution be considered?" because for the Chair to decide in such a case would be a usurpation on its part. What the Chair might deem a breach of privilege the House might not deem so, and vice versa, and therefore he should propound the question which he had stated; to do which he had the authority of the fifth rule,[4] which said: "When any motion or proposition is made the question, 'Will the House now consider it?' shall not be put unless it is demanded by some Member or is deemed necessary by the Speaker."

Mr. Wise insisted that the resolution could not be considered except by a two-thirds vote suspending the rules, unless it could be shown that a question of privilege was involved. This was simply a resolution to raise a committee of inquiry. The House was not charged by the Secretary of War with malfeasance. He had simply made charges against a party in the House, and that could not be a question of privilege.

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[1] Third session Twenty-seventh Congress, Journal, p. 46; Globe, pp. 47 and 48.

[2] At that time Secretary of War in President Tyler's cabinet.

[3] John White, of Kentucky, Speaker.

[4] Now section 3 of Rule XVI.

The Speaker said that he could find no instance on record where the Chair had entertained of himself, and settled, what was a question of privilege; on the contrary, he found numerous instances where the House had settled it.

The question being put by the Speaker, the House decided, 86 yeas to 106 nays, that the resolution did not present a question of privilege.

2655. A resolution to investigate the charge that a Member had improperly abstracted papers from the files of an Executive Department was entertained as privileged. (Speaker overruled.)—On July 5, 1850,[1] the House voted that a charge in a newspaper that the Hon. Joshua R. Giddings, of Ohio, had abstracted from the files of the Post-Office Department certain papers relating to the post-office at Oberlin, Ohio, did not involve a question of privilege. On July 6 Mr. Orsamus B. Matteson, of New York, having made an explanation in behalf of the Second Assistant Postmaster-General, stating that the newspaper article was unauthorized by that official, but that Mr. Giddings did ask to see the papers referred to and examined them at the Department, Mr. Edward D. Baker, of Illinois, submitted the following resolution:

Resolved, That a committee of five be appointed by the Speaker to investigate the charges against the Hon. Joshua R. Giddings of having improperly abstracted papers from the files of the Post-Office Department, and that they have power to send for persons and papers.

The Speaker[2] decided that the whole subject was disposed of by the action of the House on the preceding day, the House having decided that it did not involve a question of privilege. He therefore ruled the resolution out of order.

Mr. William A. Richardson, of Illinois, appealed from the decision on the ground that the state of facts on this day was different from what it had been on the preceding day.[3]

Mr. Harman S. Conger, of New York, moved that the appeal be laid on the table, and on this question there appeared, yeas 54, nays 86.

The question being then taken on the appeal, the decision of the Chair was overruled, and the House decided that the resolution of Mr. Baker might be considered.

2656. One House should not take notice of bills or other matters depending in the other, or votes or speeches until they be communicated.—Section III of Jefferson's Manual, on the subject of privilege, provides:

It is highly expedient, says Hatsel, for the due preservation of the privileges of the separate branches of the legislature that neither should encroach on the other, or interfere in any matter depending before them, so as to preclude, or even influence, that freedom of debate which is essential to a free council. They are, therefore, not to take notice of any bills or other matters depending, or of votes that have been given, or of speeches which have been held, by the members of either of the other branches of the legislature, until the same have been communicated to them in the usual parliamentary manner. (2 Hats., 252; 4 Inst., 15; Seld. Jud., 53.) Thus the King's taking notice of the bill for suppressing soldiers, depending before the House; his proposing a provisional clause for a bill before it was presented to him by the two Houses; his expressing displeasure against some persons for matters moved in Parliament during the debate and preparation of a bill, where breaches of privilege (2 Nalson, 743); and in 1783, December 17, it was declared a breach of fundamental privileges, etc., to report any

[1] First session Thirty-first Congress, Journal, pp. 1085, 1086; Globe, p. 1343.

[2] Howell Cobb, of Georgia, Speaker.

[3] See section 2536 of this volume for decision of preceding day.

opinion or pretended opinion of the King on any bill or proceeding depending in either House of Parliament with a view to influence the votes of the members. (2 Hats., 251, 6.)

2657. Certain Members of the House having, in a published letter, sought to influence the vote of a Senator from their State in an impeachment case, it was held that no question of privilege arose thereby in the House.—On May 15, 1868,[1] Mr. George W. Woodward, of Pennsylvania, as a question of privilege, offered the following:

Whereas a letter has been published purporting to be addressed by Members of this House to a Senator from the State of Missouri, with a view of influencing his vote upon articles of impeachment preferred by this House against the President of the United States, and now pending in the Senate of the United States, sitting as a court of impeachment, which letter, as published, is as follows:

"WASHINGTON, *May 12, 1868.*

"SIR: On a consultation of the Republican Members of the House of Representatives from Missouri, in view of your position on the impeachment articles, we ask you to withhold your vote on any article upon which you can not vote affirmatively. This request is made because we believe the safety of the loyal people of the United States demands the immediate removal of Andrew Johnson from the office of President of the United States.

Respectfully,

"GEORGE W. ANDERSON.
"WILLIAM A. PILE.
"C. A. NEWCOMB.
"JOSEPH W. MCCLURG.
"BENJAMIN F. LOAN.
"JOHN F. BENJAMIN.
"JOSEPH J. GRAVELY.

"Hon. JOHN B. HENDERSON, *United States Senate."*

And whereas such a communication, if addressed to a Senator sitting in judgment upon a President of the United States, is a gross breach of the privileges of the Senate, calculated to degrade the House of Representatives and to obstruct the course of public justice; therefore—

Resolved, That a select committee of seven be appointed, etc.

The Speaker[2] said:

In the opinion of the Chair it is not a question of privilege. The wording of the resolution expressly shows that it is not. The charge is that this was an infringement of the privileges of the Senate. It has not yet occurred, in the recollection of the Chair, that the House of Representatives has been recognized by the Senate as the protector of its privileges. If the privileges of the Senate are assailed, that body is competent to protect its own privileges; nor would the House consent that the Senate of the United States should assume to protect its privileges. The Chair, therefore, does not think that it is a question of privilege.

Mr. Woodward thereupon struck out the reference to the Senate, whereupon the Speaker said:

The Chair is still of the opinion that it is not a question of privilege. From a hurried examination of the precedents to be found in the Digest, the Chair can not see on what ground it could be held to be a question of privilege, unless it were "an alleged corrupt combination." But it does not appear that any corruption is charged in this case upon Members of the House. As to intercourse between Members of the House and Senators, whether oral or written, the Chair can not see that that properly involves a question of privilege, unless corrupt influences were used.[3]

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[1] Second session Fortieth Congress, Journal, pp. 695, 704; Globe, pp. 2471, 2497, 2527.

[2] Schuyler Colfax, of Indiana, Speaker.

[3] The Journal of May 15 contains no reference to this action, no vote being taken on appeal. (Journal, pp. 690–694.)

On May 16 Mr. Charles A. Eldridge, of Wisconsin, introduced the subject again, reciting in the preamble "that an indecent and corrupt combination of the Representatives aforesaid has been entered into to improperly influence the Senator aforesaid in his judgment and decision."

The Speaker said:

The evident object of the language of this resolution is to charge that the letter written by the Representatives from Missouri to their Senator appears to be an indecent and corrupt combination of the Representatives aforesaid, but without a direct charge to that effect. In the opinion of the Chair it is not a corrupt combination and the Chair will state the reasons for his opinion. If the conversations and the interviews between Members of the House and those representing the same State in the Senate in writing are corrupt, then the same conversations in regard to matters pending before the Senate sitting as a court orally are corrupt. If the gentleman from Wisconsin had charged directly that there was a corrupt combination, the Chair would be disposed to submit the question to the House for them to decide whether it is or is not a question of privilege, as the rules allow him to do in doubtful cases, and as he intends to do, even as the resolution reads. In the opinion of the Chair it is not a corrupt combination. There does not appear on the face of it anything corrupt in its character.

The Chair thereupon submitted the question to the House, and it was decided, yeas 28, nays 82, that the preamble and resolution did not present a question of privilege.

2658. A charge of general corruption in the Government, made in the Senate, does not so reflect on the House as to raise a question of privilege.—On February 15, 1847,[1] Mr. William H. Brockenbrough, of Florida, offered a preamble and resolution setting forth that a Senator, in the Senate, had charged general corruption in the Government, and as the silence of the House might be construed as acquiescence in this charge, providing a committee to go to the Senate and ask for such specifications in regard to the charges as would enable the House to act in the matter. Mr. Brockenbrough offered this as a question of privilege, but Mr. Joseph R. Ingersoll, of Pennsylvania, objected to the introduction thereof on the ground that it did not present a question of privilege.

The Speaker[2] sustained the point of order.

2659. A resolution relating to the protection of the records of the House presents a question of privilege.—On January 26, 1885,[3] Mr. Strother M. Stockslager, of Indiana, claiming the floor for a question of privilege, presented a resolution instructing a committee to investigate the causes of a fire which occurred on the roof of the House that morning, and ascertain what action might be necessary in future to protect the records of the House from a recurrence of such an accident.

The Speaker[4] said:

The Chair thinks it is properly a matter of privilege.

2660. The House, after discussion, declined to make a general rule permitting Members to waive their privilege in attending court as witnesses, but gave the permission asked on behalf of a single Member.—

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[1] Second session Twenty-ninth Congress, Journal, p. 351; Globe, p. 426.

[2] John W. Davis, of Indiana, Speaker.

[3] Second session Forty-eighth Congress, Record, p. 1004.

[4] John G. Carlisle, of Kentucky, Speaker.

On May 6,1846,[1] Mr. George C. Dromgoole, of Virginia, rising to a question of privilege, stated that his colleague, Mr. George W. Hopkins, of Virginia, had been summoned to attend as a witness before the circuit court of the United States for the District of Columbia. The rule of the Manual forbade a Member to waive his privilege without leave of the House. Therefore Mr. Dronigoole offered this resolution:

Resolved, That any member of this House who has been, or may be, summoned to attend as a witness before the circuit court of the United States for the District of Columbia, now sitting in the City of Washington, has the leave of this House, during the present session, to attend as a witness in said court, if he shall think proper to do so.

The words "if he shall think proper to do so," were added at the suggestion of Mr. Robert C. Winthrop, of Massachusetts, who favored the assertion of the House's privileges to the fullest extent.

Considerable discussion arose over the resolution. Reference was made to the case of Thomas Cooper, tried while Congress was in session in Philadelphia. Members of Congress were summoned, but the court decided that Mr. Cooper was not entitled to compulsory process against them. Mr. John Quincy Adams, of Massachusetts, criticized the resolution as far more extensive than was necessary to meet the case. This was an exceedingly delicate matter for the House to decide. On the one hand were privileges which were a departure from the common law of the country in favor of Members of the House—not for their own advantage, but for the advantage of the country whose interests they represented. On the other hand the sacred powers of the courts of justice to summon witnesses before them was equally important to the liberties of the country, and to all its rights and interests. For his own part he should object to any general resolution. He should wish to recur to the practice heretofore of the British Parliament, from which our institutions, in this respect, had their origin, not for the purpose of considering any of these privileges, in relation to the British Parliament, as having any application here, but because the practice as there established, was a good source to consult as to the mode of proceeding in such cases.

Finally, after considerable debate, and the suggestion of several propositions, the House adopted the following substitute resolution, offered by Mr. Armistead Burt, of South Carolina:

This House having been informed that Mr. Hopkins, one of its Members, has been served with a process of the circuit court of the United States, now sitting in this city, to attend as a witness in a criminal proceeding pending in that court:

Resolved, That Mr. Hopkins have the leave of this House to attend said court.

2661. The House decided that the summons of a court to Members to attend and testify constituted a breach of privilege, and directed them to disregard the mandate.—On March 7, 1876,[2] certain Members of the Committee on Expenditures in the War Department, who had examined the charges against William W. Belknap, late Secretary of War, and had reported in favor of his impeachment, informed the House that they had been commanded by the supreme court of the District of Columbia "to bring all papers, documents, records, checks,

[1] First session Twenty-ninth Congress, Journal, pp. 757–759; Globe, pp. 767–769.

[2] First session Forty-fourth Congress, Journal, p. 528; Record, pp. 1522, 1538.

and contracts in your possession, or in possession of the committee of the House of Representatives on Expenditures in the War Department, in relation to the charge against said defendant of accepting a bribe or bribes while Secretary of War of the United States, and to attend the said court immediately to testify on behalf of the United States, and not depart from the court without leave of the court or district attorneys," and that they had attended.

A long debate arose over this statement. It was urged [1] that had the Members belonged to the British House of Commons they would, on their own statements, be punished for breach of privilege in attending without the permission of their House, the privilege being the privilege of the House and the individual Member having no right to waive it.

The House adopted a resolution the preamble of which gave a statement of the facts and declared that—

Whereas the mandate of said court is a breach of the privileges of this House:

Resolved, That the said committee and the members thereof are hereby directed to disregard said mandate until the further order of this House.

2662. Members having informed the House, as a matter of privilege, that they had been summoned before the grand jury of the District of Columbia, the House authorized them to respond to the summons.—On March 21, 1876,[2] Mr. Jeptha D. New, of Indiana, rising to a question of privilege, stated that he and two of his colleagues had been subpoenaed to appear before the grand jury of the District of Columbia. Inasmuch as it seemed to be well settled that the privilege of the Member was the privilege of the House and that privilege could not be waived except with the consent of the House, they had thought it their duty to submit the matter to the House.

Mr. J. Randolph Tucker, of Virginia, offered this resolution:

Whereas John M. Glover, Jeptha D. New, and A. Herr Smith, Members of this House and of the committee of this House for investigating the affairs of the real-estate pool of the District of Columbia, have been summoned to appear as witnesses before the grand jury of the district court of said District to testify; and whereas this House sees no reason why the said Members should not appear and testify: Therefore,

Resolved, That they be, and are hereby, authorized to appear and testify under the said summons.

After brief debate this resolution was agreed to without division.

2663. No officer or employee of the House may produce any paper belonging to the files of the House before a court without permission of the House.

No officer or employee of the House should furnish, except by authority of the House or a statute, any copy of any paper belonging to the files of the House.

No officer or employee should furnish any copy of any testimony given or paper filed on any investigation before the House or any of its committees.

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[1] By Mr. George F. Hoar, of Massachusetts.

[2] First session Forty-fourth Congress, Record, p. 1847.

On April 22, 1879,[1] Mr. J. Proctor Knott, of Kentucky, from the Committee on the Judiciary, made a report on a question which had arisen as follows:

The Adjutant-General of the Army had transmitted to the Speaker a subpoena addressed to Mr. Ferris Finch, file clerk of the House. This subpoena was given under the hand of D.G. Swaim, judge-advocate of a general court martial convened in the city of New York, and commanded Mr. Finch to appear there as a witness, and commanded him to bring with him manuscript of certain testimony given before the Military Affairs Committee of the House in 1872.

This letter of transmittal, with the accompanying subpoena, were referred to the Committee on the Judiciary.

The committee concluded that under the law the judge-advocate of a court martial was not authorized to compel the attendance of witnesses from beyond the limits of the State, Territory, or district in which the court-martial was ordered to sit. As to the further and more important question, whether or not any officer of the House had the right or could be lawfully compelled without the consent of the House to produce, in obedience to a subpoena duces tecum, any paper belonging to its files, the committee concluded, after examining the decisions of the courts, that the file clerk could not lawfully be compelled by a subpoena duces tecum to remove any paper or document whatever from the files of the House. He was not even mentioned or recognized in the rules as an officer or employee of the House. He was merely an assistant, employed by the Clerk to enable him to discharge one of the functions which, from the necessity of the case or the unbroken practice and usage of the House, pertained to his office, namely, that of preserving and arranging the archives of the House so that they might be produced immediately whenever the business of the House should require. He had no property in nor authority to remove a solitary paper from the files for any other purpose than those just specified. Were he to attempt to do so, the Clerk could forbid it, remove the papers beyond his reach, or remove him from his position, as he might choose. It was scarcely necessary to add that if he could not be compelled by legal process to take a paper from the files he had no authority to do so voluntarily, unless by the permission or under the direction of the House. The report continues:

Nor has the Clerk of the House himself any such authority, either of his own volition or in obedience to a subpoena duces tecum. It is simply his duty, as one of the incidents of his office, to keep the files of the House, preserve the papers belonging to its archives, and see that they are arranged in convenient and proper order. He has no such property in, possession of, or control over them as to impose any obligation upon him to produce them before a court, or to authorize him to do so of his own accord. They belong to the House, and are under its absolute and unqualified control. It can at any time take them from the custody of the Clerk refuse to allow them to be inspected by anyone, order them to be destroyed, or dismiss the Clerk for permitting any of them to be removed from the files without its expressed consent.

The committee discuss the inconvenience that might result from allowing papers from the files to be taken to places where they might not be accessible when needed, and also to the fact that good faith and public policy, especially in the case of witnesses, who might give testimony compromising to themselves, often required that certain documents be kept in the custody of the House. In this regard it had long been the settled and invariable practice of the English Parliament to refuse to permit

[1] First session Forty-sixth Congress, House Report No. 1; Journal, p. 94; Record, p. 535.

the testimony taken before any of its committees to be used in any criminal proceeding involving the party who testified, provided he testified truly.

It was a principle well understood that the President, the governor of a State, or the head of a department was not bound to produce papers or disclose information communicated to him when, in his own judgment, the disclosure would, on considerations of public policy, be improper or inexpedient.[1] And by parity of reasoning the House of Representatives, having the exclusive custody and absolute control of its own archives, should judge for itself whether the production or inspection of these papers would be injurious to the public interests or not, and refuse or permit such production or inspection accordingly as its own judgment might dictate.

The committee therefore recommended the adoption of the following resolution:

Resolved. 1. That no officer or employee of the House of Representatives has the right, either voluntarily or in obedience to a subpoena duces tecum, to produce any document, paper, or book belonging to the files of the House before any court or officer, nor to furnish any copy of any testimony given or paper filed on any investigation before the House or any of its committees, or of any other paper belonging to the files of the House, except such as may be authorized by statute to be copied, and such as the House itself may have made public, to be taken without the consent of the House first obtained.

2. That the consent of the House is hereby given to either party in the case of the United States against Col. D.S. Stanley, now pending before the general court-martial sitting in the city of New York, to have made and properly proven such copies of the papers mentioned in the subpoena duces tecum issued by the judge-advocate of said court and directed to Ferris Finch, esq., file clerk of the House of Representatives, on the 16th instant as may be desired, but that the originals thereof shall not be removed from the files of the House.

On April 22, as soon as made to the House, this report was adopted under operation of the previous question.[2]

2664. The House, in maintenance of its privilege, has refused to permit the Clerk to produce in court, in obedience to a summons, an original paper from the files, but has given the court facilities for making certified copies.

Instance wherein a report was ordered printed in the Journal.

On February 9, 1886, Mr. J. Randolph Tucker, of Virginia, from the Committee on the Judiciary, made a report[3] on the subject of a subpoena duces tecum issued by the Chief Justice of the Supreme Court of the District of Columbia and addressed to Hon. John B. Clark, Clerk of the House of Representatives, directing him to appear as a witness at a certain place within the District of Columbia and to bring with him a certain volume from the files of the House.[4]

The report states that the committee deemed it important to protect with strict care the privileges of the House in respect of its officers and its records, and papers upon file in its various offices, and under charge and in custody of its officers. Subject to this supreme duty the committee thought that all proper access to records and papers should be allowed in furtherance of the ends of justice, in the courts, but so as not to endanger the safety nor surrender the custody of the papers. It did not

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[1] The committee here cite 1 Greenl., E., section 251.

[2] First session Forty-sixth Congress, Journal, pp. 181–186; Record, p. 690.

[3] First session Forty-ninth Congress, House Report No. 385.

[4] This subpoena had been laid before the House by the Speaker on the preceding day. (Journal, p. 594.)

appear in this case that the production of the book was necessary. The precedents of the Forty-fourth and Forty-sixth Congresses [1] were cited, and the following resolution was recommended to the House:

Resolved, 1. That by the privilege of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate or process of the ordinary courts of justice, be taken from such control or possession but by its permission.

2. That when it appears by the order of a court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice or before any judge or such legal officer for the promotion of justice, this House will take such order thereon as will promote the ends of justice consistently with the privileges and rights of this House.

3. That the Hon. John B. Clark, Clerk of the House, be authorized to appear at the place and before the officer named in the subpoena duces tecum before mentioned, but shall not take with him the books named therein, nor any document or paper on file in his office, or under his control or in his possession as Clerk of the House.

4. That the said court, through any of its officers or agents, have full permission to attend with all witnesses and proper parties to the proceeding, and then always at any place under the orders and control of this House, and take copies of any documents or papers in possession or control of said Clerk, and any evidence of witnesses in respect thereto which the court or other proper officer thereof shall desire, so as, however, the possession of said documents and papers by the said Clerk shall not be disturbed, or the same shall not be removed from their place of file or custody under said Clerk.

5. That a copy of this report and these resolutions be transmitted to the said court as a respectful answer to the subpoena aforementioned.

On February 9 these resolutions were agreed to by the House without debate.[2]

2665. The Secretary of the Senate being subpoenaed to appear before a committee of the House with certain papers from the files, the Senate, after a discussion as to privilege, empowered him to attend with the papers in his custody.—On June 7, 1878,[3] a letter was laid before the Senate from the Secretary of the Senate stating that on the 3d instant he was served with a subpoena to appear before a special committee of the House of Representatives, of which Hon. Clarkson N. Potter was chairman, and to bring with him all books, returns, and papers in his custody as secretary of the Senate in any manner relating to the election of Presidential electors of the State of Louisiana in the year 1876. The Secretary stated that he had obeyed the subpoena, and the papers had been from day to day before the committee, in the custody, however, of one of the clerks of his office. The Secretary requested instructions as to his duty.

Mr. George F. Edmunds, of Vermont, offered the following:

Ordered, That the Secretary of the Senate attend before the committee of the House of Representatives mentioned in the letter of the Secretary with the papers desired by said committee, and submit said papers to the examination of said committee from time to time according to its convenience.

The objection was made that the House had commanded the papers as a legal and superior authority. It was an attempt of the House to visit the archives of the Senate, or at least to command documents in the custody of the Senate. The House should have asked leave of the Senate for its officer to attend. The question was

[1] See sections 2661–2663 of this chapter.

[2] First session Forty-ninth Congress, Record, p. 1295; Journal, p. 602. The report was ordered printed in the Journal.

[3] Second session Forty-fifth Congress, Record, pp. 4228–4232.

raised that the electoral certificates were not especially the archives of the Senate, as no constitution or law made them such, but it was replied that they never had been in any other custody since the foundation of the Government, and they were actually among the papers of the Secretary's office.

Finally the Senate agreed to the order, modified as follows:

Ordered, Reserving all questions touching the regularity of the action of the committee of the House of Representatives in calling for the papers, that the Secretary of the Senate attend before the committee of the House of Representatives mentioned in the letter of the Secretary, with the papers desired by said committee, and submit said papers to the examination of said committee from time to time, according to its convenience, retaining, however, the custody of said papers.

2666. The Secretary of the Senate being subpoenaed to produce a paper from the files of the Senate, permission was given him to do so after a discussion as to whether or not he was exempted by privilege from the process.—In the Senate, on December 28, 1842,[1] the Chair laid before the Senate a subpoena issued from the circuit court of the United States for the District of Columbia, which had been served upon the Secretary of the Senate, with a view to compel his attendance in court with a certain antibank memorial, on the files of the Senate. The Chair stated that the Secretary was in doubt as to what to do, having no authority to take from the files any portion of the public archives.

Considerable discussion arose as to the character of the office of the Secretary, whether, being a ministerial officer, he was entitled to the privilege which attached to Senators and exempted them from the processes of the courts. The question was also raised as to whether a transcript would not be sufficient to carry into court.

Finally, on motion of Senator J. M. Berrien, of Georgia, the following was agreed to:

Resolved, That the Secretary of the Senate have leave to take from the files of the Senate the antibank memorial specified in the subpoena duces tecum issued from the circuit court of the United States for the District of Columbia, in the case of Henry Addison *v.* Robert White, this day served upon him for the purpose of being exhibited as evidence in the said case.

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[1] Third session Twenty-seventh Congress, Globe, pp. 88, 89 .

Chapter LXXXII.

PRIVILEGE OF THE MEMBER.

1. Definition. Section 2667.
2. Jefferson's summary. Sections 2668, 2669.
3. Provisions of Constitution and parliamentary law as to debate and arrest. Sections 2670–2672.
4. Arrest in going to or returning from sessions. Sections 2673, 2674.
5. Immunity as to acts done in representative capacity. Section 2675.
6. House liberates an arrested Member. Section 2676.
7. Challenge or menace of Member. Sections 2677–2687.[1]
8. Personal privilege as related to Members' duties. Sections 2688–2690.[2]
9. Charges against Members in newspapers, etc. Sections 2691–2722.
10. Charges as to conduct of a Member at a time prior to election. Sections 2723–2725.

2667. Definition of questions of privilege affecting the Member individually.—Rule IX defines questions of privilege affecting the Member as those affecting "the rights, reputation, and conduct of Members individually, in their representative capacity only." [3]

2668. Jefferson's summary of the privileges of members of Parliament.—Thomas Jefferson, in his manual written for the use of the Senate and in 1837 adopted as a guide for the House in all cases not provided for by its rules and orders, has the following in his discussion of the subject of privilege:

The privileges of members of Parliament, from small and obscure beginnings, have been advancing for centuries with a firm and never-yielding pace. Claims seem to have been brought forward from time to time and repeated till some example of their admission enabled them to build law on that example. We can only, therefore, state the points of progression at which they now are. It is now acknowledged, first, that they are at all times exempted from question elsewhere for anything said in their own House; second, that during the time of privilege, neither a member himself, his [4] wife, nor his servants (familiares sui), for any matter of their own, may be [5] arrested on mesne process in any civil suit, third, nor be detained under execution, though levied before time of privilege; fourth, nor impleaded, cited, or subpoenaed in any court; fifth, nor summoned as a witness or juror; sixth, nor may their lands or goods be distrained; seventh, nor their persons assaulted or characters traduced. And the period of time covered by privilege, before and after the session, with the practice of short prorogations under the connivance of the Crown, amounts in fact to a perpetual protection against the courts of justice. In one instance, indeed, it has been relaxed by the 10 G., 3, c. 50, which permits judiciary proceedings to go

[1] See also case of Houston, section 1616 of Volume II.

[2] See section 7012 of Volume V.

[3] See section 2521 of this volume for the full form and history of this rule.

[4] Order of the House of Commons, 1663, July 16.

[5] Elsynge, 217; 1 Hats., 21; 1 Grey's Deb., 133.

on against them. That these privileges must be continually progressive seems to result from their rejecting all definition of them, the doctrine being that "their dignity and independence are preserved by keeping their privileges indefinite, and that 'the maxims upon which they proceed, together with the method of proceeding, rest entirely in their own breast and are not defined and ascertained by any particular stated laws.'" (1 Blackst., 163, 164.)

2669. Privilege of Parliament takes place by force of election and may not be waived by the Member without leave.—Thomas Jefferson, in his Manual written for the use of the Senate and in 1837 adopted as a guide for the House in all cases not provided for by its rules and orders, has the following in his discussion of the subject of privilege:

Privilege from arrest takes place by force of the election; and before a return be made a Member elected may be named of a committee, and is to every extent a Member except that he can not vote until he is sworn. (Memor., 107, 108. D'Ewes, 642, col. 2; 643, col. 1. Pet. Miscel. Parl., 119. Lex. Parl., c. 23. Hats., 22, 62.)

Every man must, at his peril, take notice who are Members of either House returned of record (Lex. Parl., 23; 4 Inst., 24.)

On complaint of a breach of privilege, the party may either be summoned or sent for in custody of the sergeant. (1 Grey, 88, 95.)

The privilege of a Member is the privilege of the House. If the Member waive it without leave, it is a ground for punishing him, but can not in effect waive the privilege of the House. (3 Grey, 140, 222.)

2670. The Constitution grants to Members privilege from arrest under certain conditions.

The Constitution guards Members from being questioned outside of the House for speech or debate in the House.

The Constitution provides for the punishment or expulsion of Members.

The Constitution of the United States, in article 1, section 6, provides:

They [the Senators and Representatives] shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

Also, in section 5 of article 1:

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

2671. Privilege as to speech or debate in Parliament is limited by certain conditions.—Section III of Jefferson's Manual, on the subject of privilege, provides:

For any speech or debate in either House they shall not be questioned in any other place (Const. U.S., 1, 6; S.P. protest of the Commons to James 1, 1621; 2 Rapin, No. 54, pp. 211, 212); but this is restrained to things done in the House in a parliamentary course (1 Rush., 663.), for he is not to have privilege contra, morem parliamentarium, to exceed the bounds and limits of his place and duty. (Com. P.)

2672. Jefferson's discussion of the privilege conferred on Members by the Constitution, especially as to arrest, summons, etc.—Thomas Jefferson, in his Manual, written for the use of the Senate and in 1837 adopted as a guide for the House in all cases not provided for by its rules and orders, has the following in his discussion of the subject of privilege:

It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged "Senators and Representatives" themselves from the single act of "arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective Houses and in going to and returning from the same, and from being questioned in any other place for any speech or debate in either House." (Const. U.S., art. 1, sec. 6.) Under the general authority "to make all laws necessary and proper for carrying into execution the powers given them" (Const. U.S., art. 2, sec. 8), they may provide by law the details which may be necessary for giving full effect to the enjoyment of this privilege. No such law being as yet made, it seems to stand at present on the following ground: 1. The act of arrest is void, ab initio. (2 Stra., 989.) 2. The Member arrested may be discharged on motion (1 Bl., 166; 2 Stra., 990), or by habeas corpus under the Federal or State authority, as the case may be, or by a writ of privilege out of the chancery (2 Stra., 989), in those States which have adopted that part of the laws of England. (Orders of the House of Commons, 1550, February 20.) 3. The arrest being unlawful, is a trespass for which the officer and others concerned are liable to action or indictment in the ordinary courts of justice, as in other cases of unauthorized arrest. 4. The court before which the process is returnable is bound to act as in other cases of unauthorized proceeding, and liable, also, as in other similar cases, to have their proceedings stayed or corrected by the superior courts.

The time necessary for going to and returning from Congress not being defined, it will, of course, be judged of in every particular case by those who will have to decide the case. While privilege was understood in England to extend, as it does here, only to exemption from arrest, eundo, morando, et redeundo, the House of Commons themselves decided that "a convenient time was to be understood." (1580, 1 Hats., 99, 100.) Nor is the law so strict in point of time as to require the party to set out immediately on his return, but allows him time to settle his private affairs and to prepare for his journey; and does not even scan his road very nicely, nor forfeit his protection for a little deviation from that which is most direct, some necessity perhaps constraining him to it. (2 Stra., 986, 987.)

This privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person, as a subpoena ad respondendum, or testificandum, or a summons on a jury; and with reason, because a Member has superior duties to perform in another place. When a Representative is withdrawn from his seat by summons, the 40,000 people whom he represents lose their voice in debate and vote, as they do on his voluntary absence; when a Senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does on his voluntary absence. The enormous disparity of evil admits no comparison.

2673. The words "treason, felony, and breach of the peace" in the constitutional guarantee of privilege have been construed to mean all indictable crimes.—On November 14, 1877,[1] the House, on motion of Mr. Benjamin F. Butler, of Massachusetts, agreed to a preamble and resolution instructing the Committee on the Judiciary to investigate the arrest and confinement of Robert Smalls, of South Carolina, a Member of the House, and report whether the arrest was in violation of the privileges of the House.

On January 25, 1878,[2] Mr. J. Proctor Knott, of Kentucky, from the Committee on the Judiciary, submitted a report,[2] which, after reciting the statutes of South Carolina on the subject of bribery, presented the following statement of facts:

It appears that after his credentials as a Member-elect to the Forty-fifth Congress of the United States had been formally issued and forwarded to the Clerk of the House of Representatives Mr. Smalls was arrested, under a regular warrant issued by a duly authorized magistrate, on a charge of having accepted a bribe in violation of the statute just recited, and on the 9th day of October, 1877, entered into a recognizance to appear at the next ensuing term of the court of general sessions in and for the county of Richland, in said State, and answer such bill of indictment as might be preferred against him therefor.

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[1] First session Forty-fifth Congress, Journal, p. 212; Record, p. 399.

[1] Second session Forty-fifth Congress, H. Report No. 100; Journal, p. 287.

Whether he was actually on his way to attend the session of Congress called to meet on the 15th of October when arrested your committee are not advised, but on that day he appeared at the bar of the House with his credentials as a Member thereof, was admitted to his seat as such, and took the oath prescribed by law. On the 25th day of the same month he was granted a leave of absence at his own request and returned to Columbia, S. C., where, in discharge of his recognizance, he appeared in the court of general sessions, the tribunal having jurisdiction of the offense charged against him, to answer an indictment preferred against him on the 22d of October for having accepted from one Josephus Woodruff a bribe of $5,000 on the 18th day of December, 1872, etc.

On the 8th of November Mr. Smalls presented his petition to the court in which the indictment was pending for a removal of the cause to the circuit court of the United States for the district of South Carolina, which having been overruled, he moved the court to discharge him from custody on the ground that his arrest and detention were in violation of his privilege as a Member of Congress, which motion was overruled and a trial had by jury, which resulted in his conviction and sentence to imprisonment in the penitentiary for five years. The accused having before sentence filed his motions for a new trial and in arrest of judgment, which were respectively overruled, appealed from the judgment of the court and was admitted to bail in the sum of $10,000 and discharged from custody pending the appeal, since which time he has been in attendance upon the sessions of the House.

The committee proceed to say that it is worthy of note that the question to what extent, if any, a Member of Congress enjoys immunity from arrest under criminal process, State or Federal, was now presented for the first time since the organization of the Government. The Constitution had limited privilege from arrest by the clause declaring that Senators and Representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses and in going to and returning from the same." It was evident, therefore, that the question at issue turned on the consideration whether or not the offense of bribery fell within the exception embraced by the terms "treason, felony, and breach of the peace." At the time the Constitution was formed bribery, like perjury and forgery, did not, by either the common law or any statute then in force in any of the States, come within the technical definition of either treason, felony, or breach of the peace. Indeed, at the present time the offense of bribery was only a misdemeanor in South Carolina, although in some of the States it was a felony. The committee comment upon the fact that if the words of the Constitution were to be taken literally a Member might plead his privilege in one State, while in another a Member might be held for the same offense. A President might be impeached for bribery, yet if bribery were not included in the phrase "treason, felony, or breach of the peace" a Senator held for bribery might be taken from court by the Senate to sit in judgment on the President accused of the same offense. Furthermore, it was never expected that Congress would be given a wider range of privilege than had been claimed for Parliament. And the committee show by abundant English precedents that the provision of our Constitution was intended to embrace the entire range of indictable crimes. The fact also was commented on that any other than a broad construction of the Constitution would deny the Member privilege for a mere assault or brawl in a tavern and allow him the benefits of privilege in a case where he had defrauded his neighbor by perjury. After quoting May and Cushing, the committee proceed to consider the contention that the Constitution refers only to treasons, felonies, and breaches of the peace against the laws of the United States. If that were so, a Member was not privileged at all from arrest upon processes issued by State authority, even in civil suits,

because the language used in the exception is as general as that employed in the rule. The report concludes:

Upon principle therefore, as well as in view of the precedents, your committee are clearly of the opinion that the arrest of Mr. Smalls upon the charge and under the circumstances hereinbefore set forth, was in no sense an invasion of any of the rights or privileges of the House of Representatives; and that, so fax as any supposed breach of privilege is concerned, his detention by the authorities of South Carolina for an alleged violation of the criminal law of that State was legal and justifiable; and having arrived at that conclusion they have deemed it not only unnecessary but improper for them to make any suggestion here as to what course the House should have pursued had the arrest been a violation of its privileges.

Your committee, therefore, submit the following resolution, and recommend its adoption:

Resolved, That the arrest of Robert Smalls, a Member of this House, by the authorities of South Carolina, for an alleged crime against the laws of that State, was no violation of any right or privilege of this House; and that the detention of said Smalls for trial in the courts of said State, so far as any supposed breach of the privilege of this House is concerned, was legal and justifiable.

This report was printed and recommitted, and there does not appear to have been any further action by the House on the matter. The printing and recommitting was undoubtedly a matter of form, and not a decision on the merits of the question involved.

2674. Instance wherein the courts discussed and sustained the privilege of the Member in going to and returning from the sessions of the House.—On August 9, 1886, Judge Dyer, United States district judge for the eastern division of Wisconsin, made a decision in the cases of Miner *v.* Markham, which involved the construction of that clause of the Constitution relating to the privileges of the Member in going to and returning from the sessions of the House.[1]

These were two suits begun in the State court and removed to this court. The summons in each case was served on the defendant personally at Milwaukee, on the 28th day of October, 1885. Before the removal of the cases to this court the defendant appeared specially therein, and moved to set aside the service of the summons in each action on the ground that he was a Member of Congress, and at the time of such service was on his way from his residence in California to Washington for the purpose of attending the next ensuing session of Congress. The motion was overruled by the State court, but without prejudice to the right of the defendant to renew the motion in that or any other court in which the cases should be thereafter pending. Thereupon the defendant, thereafter appearing in the cases for the purpose only of removing the same to this court, filed petitions in each suit for the removal of the same under the act of 1875, and the cases were duly removed. A new motion was then made in behalf of the defendant to quash the service of the summons in each action upon the same ground as that upon which a similar motion was made in the State court, which motion was opposed and argued.

Affidavits filed in the cases in support of the motion showed that at the time of the service of process, and for a considerable time prior thereto, the defendant was a Member of the Congress of the United States, having been duly elected thereto as a Representative from the Sixth Congressional district of the State of California, and that he is a resident of the county of Los Angeles in that State. He alleged that at the time of the service of process upon him he was on his way to the city of Washington for the purpose of attending a session of the House of Representatives as a Member thereof from the Sixth Congressional district of California, and was at the time of such service temporarily in the city of Milwaukee. He further stated in his affidavit that he left Los Angeles, accompanied by his wife and four children, intending to proceed to Washington and there secure a suitable place of residence for himself and family during the session and in time to arrange for and settle his family and household affairs there prior to the date of the commencement of the session; that during his journey several of his children were ill, and by reason thereof he was obliged to stop at several places on his

[1] From Manual and Digest, second session Fifty-first Congress, pp. 460–464. (See also 24 Fed. Law Rep., p. 387.)

way to Washington; and further, that by reason of such illness he was being detained in Milwaukee at the residence of his brother at the time of the service of summons in said actions. He further states in his affidavit that he started from his residence in Los Angeles County to attend the session of Congress only a reasonable length of time before the commencement of the session, and such as he considered proper and necessary under all the circumstances connected with the proper discharge of his duties as a Representative in Congress, and was proceeding on his way to attend the session without any unreasonable or unnecessary delay.

* * * * * * *

Thus it will be seen that the decisions are not entirely harmonious upon the question of the extent of the privilege in question; but it has been the law in this jurisdiction from Territorial times that the privilege in such a case as that at bar extends to exemption from civil process, with or without actual arrest; and in the absence of more authoritative exposition of the constitutional provision from the Supreme Court of the United States, I shall hold that under that provision the defendant, as a Member of the Congress of the United States, was entitled to exemption from service of process upon him, although it was not accompanied with an arrest of his person, provided the privilege was in force at the time of such service.

2. This brings us to the second proposition involved, namely: Was the defendant, when served with process, "going to" the capital to attend a session of the House of which he was a Member, within the meaning of the constitutional provision? No fixed time is prescribed by the Constitution during which, before and after the close of the session, the privilege in question shall extend. The clause is: "During their attendance at the session of their respective Houses, and in going to and returning from the same." It would be a superfluous task to go into all the old law on this subject as it once existed in England, when members of Parliament were allowed prescribed periods of exemption from arrest before and after sessions of Parliament. An exhaustive review of the law and of the English authorities may be found in the case of Hoppin *v.* Jenckes (8 R. I. 453), and nothing can be profitably added to what is there said on the subject. In Cushing's Law and Practice of Legislative Assemblies, at section 582, it is said:

"In the Federal Government, and in many States, Members are privileged while going and returning merely, without other limitation of time. Where the duration of the privilege is thus stated, Members are entitled to a reasonable or, as it was expressed by the House of Commons on occasion, a convenient time for going and returning. Thus they are not obliged at the close of the session to set out immediately on their return home, but may take a reasonable time to settle their private affairs and prepare for the journey; nor will the privilege be forfeited by reason of some slight deviation from the most direct road."

The Manual of Parliamentary Practice, published by authority of the House of Representatives in 1860, states the rule thus:

"The time necessary for going to and returning from Congress not being defined, it will, of course, be judged of in every particular case by those who will have to decide the case. While privilege was understood in England to extend, as it does here, only to exemption from arrest, eundo morando et redeundo, the House of Commons themselves decided that a convenient time was to be understood. (1 Hats., 99, 100.) Nor is the law so strict in point of time as to require the party to set out immediately on his return, but allows him time to settle his private affairs and to prepare for his journey, and does not even scan his road very nicely nor forfeit his protection for a little deviation from that which is most direct, some necessity, perhaps, constraining him to do it. (Str., 986, 987.)"

Such, also, is, in substance, the language of Judge Story, in his work on the Constitution, section 864. As a result of the authorities that bear on the question, it is held, in Hoppin *v.* Jenckes, supra, that the privilege from arrest of a Member of Congress is limited to the continuance of the session and to a reasonable time for going and returning; and this is now the law of this country. What is a reasonable time for "going to and returning," from the seat of government must depend upon circumstances and may be difficult to determine. The observations of Judge Story, that the law does not scan the road which the Member may take in his journey very nicely, nor forfeit his protection for a slight deviation from the route which is most direct, nor, it may be added, measure with precision the time absolutely necessary for going to or returning from the capital, furnish a just and sensible test in considering the question. To entitle the defendant to the privilege here invoked he must have been in good faith on his way to the seat of government to enter upon the discharge of his public duties;

that must have been the primary object of his journey. He must have left his residence in California with the intent of then going to Washington to take his seat in the Congress to which he was elected, and the time taken for the journey must have been reasonable. He had a right, without forfeiture of his privilege, to set out from his residence at such time before the session should open as would enable him conveniently to establish his quarters and settle his family and household affairs at the capital, and also, I think, to enable him to inform himself as a new Member regarding pending legislation, so that he might enter advisedly upon the discharge of his duties. A slight deviation from the usual route, for rest, convenience, or because of family sickness, ought not to cause a loss of his privilege, if such deviation was but an incident to the principal journey. Nor ought the duration of the privilege to be strictly measured by the exact number of days, with the present facilities for travel, required for a journey from his residence in California to Washington. At the same time his privilege could not and ought not to avail him if the deviation was equivalent to an abandonment of the original journey for purposes of pleasure or family visiting. If, when he left his home in California, his intention was to make a journey, not to Washington, but to Milwaukee, there to spend an indefinite time visiting relatives, and then to go from Milwaukee to Washington after such prearranged delay at the former place as would still enable him to arrive at the capital in reasonable time to enter upon his public duties, so that it might be fairly said that the object of his journey at the time he set out upon it was not then to go to the capital, but elsewhere, it is clear that while in Milwaukee he could not assert the constitutional privilege of exemption from arrest or service of process.

Applying these principles to the facts as here presented, I am of the opinion that the defendant was privileged from the service of process upon him in these cases. It is evident that when he set out with his family from Pasadena his intended destination was Washington. The primary object of the journey was to go to the capital to prepare for and enter upon his duties as a Member of Congress. He had a right to exercise a reasonable judgment in connection with the settlement of his family in Washington, as to the time required for the accomplishment of his primary purpose, with its necessary incidents. It can not be said from the facts shown that his destination was Milwaukee. It is evident that the health of his family to a large extent controlled his movements. Under the circumstances, his deviation from the direct route was not such as to justify an inference of abandonment of the original journey or its primary object. His privilege, in view of all the facts shown, ought not, I think, to be adjudged forfeited by such deviation, nor ought the court to measure with mathematical accuracy the days and hours required by the most rapid course of transit to travel from Pasadena to Washington. In short, the defendant was in good faith on his way to the seat of government to enter upon his public duties as a Member-elect of the Forty-ninth Congress when the process in these cases was served upon him. His deviation to Milwaukee was but an incident in the journey and seems to have been occasioned by circumstances which made the deviation justifiable, if not absolutely necessary. He was therefore entitled to the protection of his privilege.

The defendant having appeared specially in the State court both in his motion to set aside the service of the summons in these cases and in his application for the removal of the cases to this court, and the motion made in the State court having been denied without prejudice to a renewal of the same, the defendant has not waived his privilege and can assert it here with the same force and effect as if the suits had been brought and the motion made in this court in the first instance. (Atchinson *v.* Morris, supra; Harkness *v.* Hyde, 98 U.S., 476.; Sanderson *v.* Ohio Cent. R. and C. Co., 61 Wis., 609; S. C., 21 N. W. Rep., 818.)

Motion to set aside the service of summons granted.

2675. In the case of Kilbourn v. Thompson the court affirmed the immunity of Members of the House from prosecution on account of their action in a case of alleged contempt.

The constitutional privilege as to "any speech or debate" applies generally to "things done in a session of the House by one of its Members in relation to the business before it."

At the October term of 1880 the Supreme Court of the United States rendered an opinion in the case in error of Hallet Kilbourn against John G. Thompson,

Michael C. Kerr, John M. Glover, Jeptha D. New, Burwell P. Lewis, and A. Herr Smith. This was an action for false imprisonment, the plaintiff having been imprisoned by the defendant, Thompson, who was Sergeant-at-Arms of the House of Representatives, on a warrant given under the hand of Michael C. Kerr, who was Speaker, and authorized by action of the House, taken on report of an investigating committee, of which the remaining defendants were members.[1] The defendant, Kerr, died before process was served on him. The other Members of the House[2] who were defendants pleaded their constitutional privilege, which protected them against being "questioned in any other place."[3]

The opinion[4] of the court, delivered by Mr. Justice Miller, proceeds:

As these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him, they can only be held liable on the charge made against them as persons who had ordered or directed in the matter, so as to become responsible for the acts which they directed.

The general doctrine that the person who procures the arrest of another by judicial process, by instituting and conducting the proceedings, is liable to an action for false imprisonment, where he acts without probable cause, is not to be controverted. Nor can it be denied that he who assumes the authority to order the imprisonment of another is responsible for the act of the person to whom such order is given, when the arrest is without justification. The plea of these defendants shows that it was they who initiated the proceedings under which the plaintiff was arrested. It was they who reported to the House his refusal to answer the questions which they had put to him, and to produce the books and papers which they had demanded of him. They expressed the opinion in that report that plaintiff was guilty of a contempt of the authority of the House in so acting. It is a fair inference from this plea that they were the active parties in setting on foot the proceeding by which he was adjudged guilty of a contempt, and in procuring the passage of that resolution.

If they had done this in any ordinary tribunal, without probable cause, they would have been liable for the action which they had thus promoted.

The House of Representatives is not an ordinary tribunal. The defendants set up the protection of the Constitution, under which they do business as a part of the Congress of the United States. That Constitution declares that the Senators and Representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place."

Is what the defendants did in the matter in hand covered by this provision? Is a resolution offered by a Member a speech or debate within the meaning of the clause? Does its protection extend to the report which they made to the House of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the House? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative they can not be brought in question for their action in a court of justice or in any other place. And yet if a report, or a resolution, or a vote is not a speech or debate, of what value is the constitutional protection?

We may perhaps find some aid in ascertaining the meaning of this provision if we can find out its source, and fortunately in this there is no difficulty. For while the framers of the Constitution did not adopt the lex et consuetudo of the English Parliament as a whole, they did incorporate such parts of it, and with it such privileges of Parliament as they thought proper to be applied to the two Houses of Congress. Some of these we have already referred to, as the right to make rules of procedure, to determine the election and qualification of its Members, to preserve order, etc. In the sentence we have just cited another part of the privileges of Parliament are made privileges of Congress. The

[1] See sections 1608–1611 of Volume II of this work for proceedings in full.

[2] The House authorized employment of counsel for defendants. Second session Forty-fourth Congress, Journal, p. 678; Record, p. 2241. Also first session Forty-fourth Congress, Journal, p.1413; Record, p. 5387.

[3] The case against the defendant, Thompson, gave rise to other questions.[4] 103 U.S., pp. 200–205.

freedom from arrest and freedom of speech in the two Houses of Parliament were long subjects of contest between the Tudor and Stuart kings and the House of Commons. When, however, the revolution of 1688 expelled the last of the Stuarts and introduced a new dynasty many of these questions were settled by a bill of rights, formally declared by the Parliament and assented to by the Crown. (I W. & M., st. 2, c. 2.) One of these declarations is "that the freedom of speech and debates and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

In Stockdale *v.* Hansard, Lord Denman, speaking on this subject, says: "The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the Speaker [1] by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker can not be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published the law will attach responsibility on the publisher. So if the Speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship money could justify his revenue officer."

Taking this to be a sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England, it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source.

The court refers to similar provisions in the fundamental laws of the colonies, which afterwards became States. The Massachusetts constitution of 1780 had a provision which received judicial construction in 1808, in a decision from which quotation is made. The opinion of Mr. Justice Story is also quoted in support of the conclusion that—

It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its Members in relation to the business before it.

Therefore the plea set up by the Members is held good.

2676. A Member having been arrested and detained under mesne process in a civil suit, the House liberated him and restored him to his seat by the hands of its own officer.

On suggestion based on a newspaper report the House investigated the arrest and detention of a Member by authority of a court.

Interpretation of word "felony" as related to the privilege of a Member from arrest.

The House has decided that a Member arrested during vacation was entitled to discharge from arrest and imprisonment on the assembling of Congress.

On December 20, 1866,[2] Mr. Thomas Williams, of Pennsylvania, as a question of privilege, from the Committee on the Judiciary, to whom it was referred to inquire into the circumstances of the detention from his seat in this House, under arrest, of

[1] The Speaker was originally one of the defendants, but died before this question came in issue.

[2] Second session Thirty-ninth Congress, Journal, pp. 103, 105.

the Hon. Charles V. Culver,[1] submitted a report in writing, accompanied by the following resolution; which was read, considered, and agreed to:

Resolved, That the Speaker be directed to issue his warrant to the Sergeant-at-Arms, commanding him to deliver forthwith the Hon. Charles V. Culver, a Member of this House, detained, as it appears under mesne process issuing out of the court of common pleas of Venango County, in the State of Pennsylvania, in a civil suit instituted therein at the instance of a certain James S. Myers, from the custody of the sheriff and jailer of said county, or any other person or persons presuming to hold and detain the said Culver by virtue of such process, wherever he may be found, a copy of the said warrant, duly authenticated by the Clerk of this House, being first delivered to the party or parties in whose custody he may be, and to make return to this House of the said warrant, along with the manner in which he may have executed the same.

On the same day the Speaker laid before the House the following return made by the Sergeant-at-Arms to the warrant this day issued by order of the House, viz:

OFFICE OF THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES,
Washington, D. C., December 20, 1866.

Pursuant to this warrant, I have taken the Hon. C. V. Culver from the custody of Philander R. Gray, esq., sheriff of Venango County, in the State of Pennsylvania, and have delivered to the said Gray a certified copy of the within warrant, as within commanded, and now have the Hon. Charles V. Culver unrestrained in his seat as a Member of the Thirty-ninth Congress.

N. G. ORDWAY,
Sergeant-at-Arms of the House of Representatives.

The Committee on the Judiciary were instructed to examine into the case by a resolution[2] passed December 10, Mr. Robert S. Hale, of New York, who introduced the resolution, basing his action upon a newspaper report that Mr. Culver was held in custody, and that on a writ of habeas corpus a United States judge had decided that a Member of Congress arrested under such conditions was not entitled to his privilege. The report of the Judiciary Committee[3] shows that Mr. Culver was arrested in the preceding month of June, during the actual session of Congress, at his home, by virtue of a warrant issuing out of the court of common pleas of the county, under an act of the general assembly of Pennsylvania passed on the 12th day of July, 1842, upon an affidavit filed by a certain James S. Myers, as the plaintiff in an action of assumpsit instituted against the said Culver upon a contract for the return of certain bonds and notes alleged to have been lent to him, charging that the debt incurred thereby was fraudulently contracted by said Culver; and that upon a hearing before the then acting judge of said county he was committed, in default of the required security to the jail, where he had been imprisoned until the 18th instant.

The committee found that under the sixth section of the first article of the Constitution, which provides that Senators and Representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same," there had been a violation of the privilege of the House,

[1] The case of Mr. Culver had been brought to the attention of the House on December 10 by a resolution instructing the committee to make the inquiry. The resolution was based on a newspaper paragraph, and was entertained as a question of privilege. Journal, p. 54; Globe, p. 51.

[2] Cong. Globe, second session Thirty-ninth Congress, p. 51.

[3] Globe, p. 225.

and that the arrest did not fall within any of the specified exemptions. The process issued was but a warrant, authorized by an act of assembly abolishing imprisonment for debt in cases where fraud was charged as an ingredient in the contract, and its effect was only to require the defendant to pay or secure the debt, or give security not to remove or dispose of his property in fraud of his creditor, or that he would apply within thirty days for the benefit of the insolvent laws of the State. It was therefore but a mesne or interlocutory process, and the action which authorized it was no wise penal nor the proceeding itself a criminal one.

It was conceded that Mr. Culver was neither in actual attendance on the House nor going to or returning from the seat of government at the time when he was arrested. But a liberal construction has always been given in such cases. The arrest was made during the last session of Congress, and the detention continues during the present one. It was his duty to be present, and a Member arrested during vacation, or at any other time when not entitled to assert his privilege, was entitled to his discharge from such arrest and imprisonment on the assembling of the body to which he belonged.

As to the method of proceeding, the report reviews the precedents of Parliament, and the suggestion of Cushing, that the proper course is in conformity with the modern English practice, where liberation is effected by an order of discharge, properly authenticated by the Clerk. But the committee could see no reason for the issue of an order to which no answer could be received but absolute obedience, and where, in case of contumacy, an attachment for contempt would only result in the punishment of the delinquent without effecting the object aimed at. Therefore the committee advised the more summary, simple, and complete remedy of actual deliverance by the hands of the House's own officer.

2677. Challenge of a Member by a Senator in 1796 was determined to be a breach of the privileges of the House.—March 14, 1796,[1] Mr. Abraham Baldwin, one of the Members from the State of Georgia, presented to the House certain papers relative to a correspondence between James Gunn, a United States Senator from Georgia, and himself, including a challenge addressed to him by Gunn. These were received, read, and ordered to lie on the table.

On March 15 the Speaker laid before the House two letters, one from James Gunn and the other from Frederick Frelinghuysen, United States Senator from New Jersey, on the subject referred to in the papers presented to the House on the previous day. These papers, with those submitted the day before, were referred to the Committee on Privileges, to which committee Mr. James Madison, of Virginia, was added, in the place of Mr. Baldwin, who had withdrawn at his own request.

On March 17 Mr. Madison made a report from that committee, which was, on the next day, agreed to. The report held:

> That it appears to the committee, from a view of all the circumstances attending the transaction referred to them, that the same was a breach of the privileges of this House on the part of James Gunn, a Senator from the State of Georgia, and Frederick Frelinghuysen, a Senator from the State of New Jersey.
>
> That the several letters addressed to the House by the said James Gunn and the said Frederick Frelinghuysen, together with that addressed by the latter to the committee and herewith reported, contain apologies and acknowledgments on the occasion, which ought to be admitted as satisfactory to the House, and therefore that any further proceeding thereon is unnecessary.

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[1] First session Fourth Congress, Journal, pp. 470–474; Annals, pp. 786–795.

2678. A Member having stated, upon the authority of 11 common rumor," that another Member had been menaced, there was held to be ground for action.

Question as to the right of the House to interfere for the protection of Members who, without the Hall, get into difficulties disconnected with their official duties. (Footnote.)

The Speakers have been accustomed for many years to give a preliminary determination as to questions presented as involving privilege.

On April 20, 1848,[1] Mr. John G. Palfrey, of Massachusetts, saying that he rose to a question of privilege, stated that common report had represented to Members of this House that a lawless mob had assembled for two nights past and committed acts of violence, setting the laws at defiance and menacing individuals of this body and other persons residing in this city, and that he proposed to submit to the House a preamble and resolution thereon.

Mr. Thomas H. Bayley, of Virginia, raised the question of order, and inquired whether the recital of a fact, upon rumor, that a Member of this House had been menaced could make it a question of privilege.

The Speaker[2] decided that the allegation of the gentleman from Massachusetts raised a question relating to the privilege of Members, and that it would be for the House, and not for the Chair, to decide whether any breach of privilege was involved, or whether any steps were necessary for the protection of any of its Members. The House might call for specifications, and if such specifications were not made it might be sufficient ground for the House, in their own judgment, to refuse the inquiry, but it was not sufficient reason for the Chair to rule it out of order, the House alone having the power to determine a question of privilege.

The record of debates[3] shows that the Speaker said that the question was entirely new, but that the parliamentary law laid down expressly that "common rumor" was sufficient ground for action. Moreover, it was well understood that where the life, or person, or liberty of a Member was menaced in any way it was a proper subject to be acted upon by the House. The case was on record where a Member had been challenged by a person out of doors, and the House had considered that he was menaced and that it constituted a question of privilege. The Chair therefore held, upon the best consideration he could give the question, that where an allegation was made that the life, liberty, or person of a Member of this House was menaced, it was a question of privilege in regard to which any Member ought to be heard. The Speaker then quoted Jefferson's Manual in its reference to the Randall and Whitney case, and the case of a challenge to a Member of the House.[4]

The Chair therefore ruled that it was a privileged question, and that it was for the House to determine whether any steps were necessary to be taken for the protection of any of its Members.

This decision was sustained on appeal; and thereupon Mr. Palfrey offered the following preamble and resolution:

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[1] First session Thirtieth Congress, Journal, pp. 712, 720.

[2] Robert C. Winthrop, of Massachusetts, Speaker.

[3] See Globe, p. 649.

[4] See section 1597 of Volume II and section 2677 of this volume.

Whereas common report has represented to Members of this House that a lawless mob has assembled within the District of Columbia on each of the two nights last past and has committed acts of violence, setting at defiance the laws and constituted authorities of the United States and menacing individuals of this body and other persons residing in this city: Therefore,

Resolved, That a select committee of five Members be appointed to inquire into the facts above referred to; that said committee have power to send for persons and papers and to report facts, with their opinion whether any legislation is necessary or expedient in the premises; and that they further have leave to sit during the sessions of the House.

After an amendment had been offered and the subject had been debated, the whole subject was, on April 25, laid on the table.[1]

2679. A proposition to investigate as to duels occurring on account of words spoken in debate was admitted as a question of privilege.—On January 16, 1845,[2] Mr. Preston King, of New York, rising to a question of privilege, submitted the following resolutions:

Resolved, That a select committee be appointed by the Speaker, whose duty it shall be to inquire and report to this House whether any (and, if any, what) Members of this House have been engaged in fighting a duel on account of words spoken in debate on this floor; and that the said committee have power to send for persons and papers.

Resolved, That if it shall appear to the said committee that any Members of this House have been engaged in fighting a duel on account of words spoken in debate on this floor, then the said committee are instructed to report the facts, with a resolution to expel from this House any Member or Members guilty of such crime.

Mr. William W. Payne, of Alabama, having proposed to object to the resolutions, the Speaker[3] said that they involved a question of privilege, and were therefore in order.

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[1] The Globe (1st sess. 30th Cong., pp. 664, 649, 650, 672) shows that the resolution gave rise to an extended debate. The riotous proceedings seem to have arisen over an effort to enable certain slaves in the District of Columbia to escape from their masters. The Member who had been menaced was Mr. Joshua R. Giddings, of Ohio, who furnished a statement in writing which Mr. Palfrey read. Mr. Giddings in this statement said that he had been menaced by a mob, and gave particular places and times.

In the debate Mr. Robert Toombs, of Georgia, took the ground that the preamble of the resolution did not aver that any Member of the House had been called in question by a mob or anybody else for anything uttered or done in this House, and he held that the Chair erred if he supposed that this House had the right or authority to interfere generally for the protection of Members in any strait they might get into out of doors, disconnected with their official duties. If the Member had been called in question by anyone for the discharge of his official duty, that would be a question of privilege which would demand the intervention of the House.

Mr. Joseph R. Ingersoll, of Pennsylvania, contended that such a view was too narrow. A far wider extent of jurisdiction was embraced in the character of the assembly, in the fundamental rules of its existence, and in the sovereign necessity and duty of self-preservation which every constituent principle of continued organization implies. Why should a speech delivered be the subject of protection rather than a speech prevented? If you could notice by the power of the House an unlawful attempt to rebuke or assault a Member for the just performance of his duty, why should you not with equal rigor restrain and prevent disorderly attempts to overawe and restrain him from performing it at all? The power to make laws carried with it the power of self-protection while engaged in the act.

The question was debated until August 25, the subject of slavery being often brought in, and on that day was laid on the table.

[2] Second session Twenty-eighth Congress, Journal, pp. 217, 218; Globe, pp. 144–147.

[3] John W. Jones, of Virginia, Speaker.

The resolutions were debated at some length, the power of the House to expel for such an offense being disputed, and the argument being made that a law against dueling made the offense punishable in the District of Columbia.

Finally the resolutions, with a pending amendment, were laid on the table—yeas 106, days 82.

2680. An appeal of a Member to the President for protection was considered derogatory to the privileges of the House.

It not being clear that a Member had been insulted by officers of the military establishment for words spoken in debate, the House declined to act on his complaint.

On January 14, 1800,[1] a message was received from the President of the United States transmitting a letter which had been addressed to him by a Member of the House, Mr. John Randolph, of Virginia. In this letter Mr. Randolph complained that he had been grossly and publicly insulted by two officers of the Army or Navy for words of a general nature uttered on the floor of the House, with a view to effect the reduction of the military establishment.

President Adams, in his message of transmittal, said that he had directed the Secretaries of War and Navy to investigate the circumstances, but the case relating to the privileges of the House, it ought, in his opinion, to be inquired into by the House.

The message, with the accompanying letter, was referred to a committee composed of Messrs. Chauncey Goodrich, of Connecticut; Nathaniel Macon, of North Carolina; John W. Kittera, of Pennsylvania; James Jones, of Georgia; Samuel Sewall, of Massachusetts; Robert Williams, of North Carolina, and James A. Bayard, of Delaware.

The evidence showed that at the theater some incidents had occurred which caused suspicion of an attempt to insult Mr. Randolph; but these incidents had been found capable of explanation or so doubtful as not to render it certain that a breach of privilege had been committed. The committee say:[2]

> Your committee, being of opinion that the matter of complaint respects the privileges of the House, inherent in its own body and there exclusively cognizable, can not but consider the appeal in this instance to the Executive authority, however otherwise intended, as derogating from those rights of the House with which are intimately connected both its honor and independence, and the inviolability of its Members.

The committee recommended the adoption of the following resolutions:

> *Resolved,* That this House entertain a respectful sense of the regard which the President of the United States has shown to its rights and privileges in his message of the 14th instant, accompanied by a letter addressed to him by John Randolph, Jr., a Member of this House.
>
> *Resolved,* That in respect to the charge alleged by John Randolph, Jr., a Member of the House, in his letter addressed to the President of the United States on the 11th instant, and by him submitted to the consideration of the House, that sufficient cause does not appear for the interposition of this House on the ground of a breach of its privileges.

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[1] First session Sixth Congress, Annals, pp. 374, 378, 387, 426, 506; also American State Papers, Miscel., Vol. I, p. 196.

[2] For this report in full see Journal, first session Sixth Congress, pp. 572, 573.

The House, after long debate, adopted the first resolution on June 29, but after amending the second resolution by words condemning the conduct of the officers, the House defeated it by a vote of 49 yeas, to 51 nays.

2681. An explanation having been demanded of a Member by a person not a member for a question asked of the latter when a witness before the House, the matter was considered but not pressed as a breach of privilege.—On May 14, 1832,[1] Mr. Eleutheros Cooke, of Ohio, presented to the House a paper accompanied by the following resolution:

Resolved, That the letter of E. S. Davis, and a statement of facts accompanying it, which has been sent to the Chair, containing, as is believed, a breach of the privileges of the House, be read.

This resolution being agreed to, the letter of Mr. Davis to Mr. Cooke was read:

SIR: During my examination before the House of Representatives in the case of General Houston you very impertinently asked, among other questions, my business in this city. Whilst the trial of General Houston was pending I deferred calling on you for the explanation which I now demand through my friend General Demitry.

In connection with this note Mr. Cooke submitted a statement explaining the circumstances, giving a statement of a threat made by Davis on the floor, and claiming that it was an attempt by menace and violence to overawe the Members and curb the freedom of debate.

Mr. Joseph H. Crane, of Ohio, moved a resolution that the communication be referred to a select committee consisting of seven Members, to report the facts, and their opinion whether the same established a contempt and a breach of the privileges of this House or not, the said committee to have power to send for persons and papers.

The House declined to agree to the resolution—87 nays to 85 yeas.

The House seems to have felt not quite sure that a breach of privilege was involved, and not disposed to enter upon another inquiry so soon after the Houston case and while much party feeling was existing.

2682. A letter from a person supposed to have been assailed by a Member in debate asking properly and without menace if the speech was correctly reported was held to involve no question of personal privilege.—On January 23, 1865,[2] Mr. James Brooks, of New York, rose and presented the following letter, addressed to him by Maj. Gen. B. F. Butler, claiming that the said letter presented a question of privilege:

WASHINGTON, *January 20, 1865.*

SIR: I find in the daily Globe of the 7th instant a report of your remarks in the House of Representatives on the 6th instant, an extract of which, personal to myself, is appended.

I have the honor to inquire whether your remarks are here correctly reported, except, perhaps, the misprint of "bold" for "gold," as the remarks were quoted in other papers; and also whether there were any modifications, explanations, or limitations made by you other thin appear in this report.

The gentleman who hands you this will await or call for an answer at any time or place you may designate.

Very respectfully,

BENJAMIN F. BUTLER, *Major-General.*

JAMES BROOKS, *Member of the House of Representatives.*

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[1] First session Twenty-second Congress, Journal, p. 740; Debates, pp. 3023–3036.

[2] Second session Thirty-eighth Congress, Journal, p. 137; Globe, p. 376.

Appended to the letter was the extract from the Globe in which Mr. Brooks was quoted as saying that—

an effort was made by the Federal Government during the pendency of the late Presidential election to control the city of New York by sending there a bold robber, in the person of a major-general of the United States.

Mr. George S. Boutwell, of Massachusetts, raised a question of order that the letter did not involve a question of privilege.

The Speaker [1] sustained the point of order, saying:

It appears from the letter just read that the gentleman from New York stigmatized, in a speech which he made on this floor, a certain gentleman as a "gold robber," and that that language having been reported in the public papers a gentleman who supposes himself to be meant wrote the letter just read. It appears to the Chair that there is nothing in the language used in this letter which involves a breach of the privilege of this House. If he ruled that there were, then he would be compelled to rule that letters addressed by constituents to Members of Congress as to how they had voted or spoken on pending propositions were also infringements upon their rights.

We know that language, differing in some degree but still somewhat of the same character, has been used as preliminary to further correspondence under what is called the "code of honor," but which the Chair regards as a code of murder. If the Chair thought this language could be brought within the language of what is called the "code of honor," the Chair would have decided that the gentleman's question of privilege was well taken. But it appears most natural, and not improper, that when a person has been stigmatized here as a "gold robber," he should inquire whether the speech which contained the report had been correctly reported, and whether there had not been some qualifications of such a charge made by the gentleman from New York other than in this report. There is no menace in this inquiry that the Chair can see. The Chair thinks the inquiry a natural one, and not couched in improper language, and therefore rules that it is not a question of privilege.

Mr. Brooks appealed from the decision, but on the succeeding day withdrew the appeal.

2683. The House has declared that a communication from a person not a member, criticising words spoken in debate by a Member, should not be received.—On December 30, 1842,[2] Mr. James A. Meriwether, of Georgia, presented the following resolution:

Resolved, That the communication addressed to the Speaker of this House by Stephen Pleasanton, Fifth Auditor of the Treasury, on the 14th instant, in relation to some remarks made in the House before that time by Mr. Sprigg, a Member from Kentucky, which was received by the Speaker and laid before the House, without a knowledge of its contents, was not such a communication as ought to have been received and printed by the House; and that the same be withheld from the Journal and files of this House, and the original returned to the writer.

The letter was in relation to a statement in debate by Mr. James C. Sprigg, of Kentucky. Mr. Sprigg had criticised the light-house service, and the Fifth Auditor in his letter criticised the statement as "wholly erroneous." Considerable debate was occasioned by the resolution, the ground being taken that Members debating on the floor should not be subjected to replies from persons outside presented and made a part of the records of the House in this way.

The Speaker [3] stated that he was not aware of the nature of the communication, or he would not have presented it.

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[1] Schuyler Colfax, of Indiana, Speaker.

[2] Third session Twenty-seventh Congress, Journal, p. 116; Globe, pp. 101, 102.

[3] John White, of Kentucky, Speaker.

Mr. Meriwether's resolution was agreed to without division.

2684. A communication addressed to the House by an official in an Executive Department calling in question words uttered by a Member in debate, was criticised as disrespectful and a breach of privilege, and was withdrawn.—On August 12, 1848,[1] Mr. George Fries, of Ohio, by leave, presented a communication from the Commissioner of Indian Affairs, which was read to the House.

This communication was in response to a speech in which Mr. Thomas L. Clingman, of North Carolina, had denounced the Indian Bureau as thoroughly corrupt. The letter of the Commissioner was addressed "To the honorable the House of Representatives of the United States," and besides entering into a defense of the Indian Bureau charged the Member of the House making the charges with improper conduct in his representative capacity.

A motion was made by Mr. John A. Rockwell, of Connecticut, that the communication, being disrespectful in its language, be not received.

Considerable discussion arose, it being urged that the letter invaded the privileges of the House, a member being privileged as to his remarks on the floor from being questioned in any other place.

Mr. Fries withdrew the communication.

2685. A menace to the personal safety of Members involves a question of the highest privilege.—On June 10, 1876,[2] during debate some confusion occurred in the Hall in consequence of some glass falling from one of the escutcheons in the ceiling.

Mr. Nathaniel P. Banks, of Massachusetts, after calling attention to the danger to the lives of Members from such possible occurrences offered the following:

Ordered, That the Clerk be directed to inquire into the cause of the disturbance which has just occurred and report the facts found to the House.

The Speaker pro tempore [3] said:

This is a question of the personal safety of Members and is one of the highest privilege. The Chair understands that the Hall is under the control of the Clerk, and that the Clerk has already sent a messenger to ascertain how this has occurred, and he will report to the House what it means.

The order was agreed to.

2686. An officer of the Army having written a letter, which was read in the House, falsely impugning the honor of a Member, the House condemned the action as a gross violation of privilege.

It is an invasion of privilege for a Member in debate to read a letter from a person not a Member calling in question the acts of another Member.

On April 30, 1866,[4] Mr. James G. Blaine, of Maine, offered in the House a letter from James B. Fry, Provost-Marshal-General, impugning the official conduct

[1] First session Thirtieth Congress, Journal, p. 1265; Globe, pp. 1068–1070.

[2] First session Forty-fourth Congress, Journal, p. 1090; Record, p. 3752.

[3] S. S. Cox, of New York, Speaker pro tempore.

[4] First session Thirty-ninth Congress, Journal, pp. 639, 1056, 1057; Globe, pp. 2292, 2293–2299, 3935–3948.

of Mr. Roscoe Conkling, a member of the House from New York. The letter having been read, a resolution was adopted for a select committee of five to investigate the statements made, respectively, by Mr. Conkling and General Fry, and as to alleged frauds in the recruiting service. The Speaker appointed on this committee Messrs. Samuel Shellabarger, of Ohio, William Windom, of Minnesota, Benjamin M. Boyer, of Pennsylvania, Burton C. Cook, of Illinois, and Samuel L. Warner, of Connecticut.

On July 19, 1866, the committee reported. As part of their report they say:

> Your committee deem it proper most earnestly to protest against the practice which has obtained to some extent of causing letters from persons not Members of the House to be read as a part of personal explanation, in which the motives of Members are criticised, their conduct censured, and they are called to answer for words spoken in debate. Such attacks upon Members, made in the House itself and published in its proceedings, and scattered broadcast to the world at the expense of the Government, are, in the opinion of your committee, an improper check upon the freedom of debate, a violation of the privileges, and an infraction of the dignity of the House.

The committee presented the following resolutions, which were agreed to by the House—yeas 96, nays 4:

> *Resolved,* That all the statements contained in the letter of Gen. James B. Fry to Hon. James G. Blaine, a Member of this House, bearing date the 27th of April, A. D. 1866, and which was read in this House on the 30th of April, A. D. 1866, in so fox as such statements impute to the Hon. Roscoe Conkling, a Member of this House, any criminal, illegal, unpatriotic, or otherwise improper conduct or motives, either as to the matter of his procuring himself to be employed by the Government of the United States in the prosecution of military offenses in the State of New York, in the management of such prosecutions, in taking compensation therefor, or in any other charge, are wholly without foundation in truth; and for their publication there were, in the judgment of this House, no facts connected with said prosecutions furnishing either a palliation or an excuse.
>
> *Resolved,* That General Fry, an officer of the Government of the United States, and head of one of its military bureaus, in writing and publishing these accusations named in the preceding resolution, and which, owing to the crimes and wrongs which they impute to a Member of this body, are of a nature deeply injurious to the official and personal character, influence, and privileges of such Member, and their publication originating, as in the judgment of the House they did, in no misapprehension of facts, but in the resentment and passion of their author, was guilty of a gross violation of the privileges of such Member and of this House, and his conduct in that regard merits and receives its unqualified disapprobation.

2687. A controversy between a Member and the o1ficials of one of the Executive Departments as to a question of the administration of the duties of that Department was held to involve no question of personal privilege.— On December 19, 1901,[1] Mr. David A. De Armond, of Missouri, claiming the floor for a question of personal privilege, proceeded to have read papers and to make statements concerning transactions which he had had, as a Representative, with the Post-Office Department concerning the appointment of carriers in the rural free-delivery service, and wherein his recommendations to the Department had been disregarded.

Mr. Sereno E. Payne, of New York, made the point of order that no question of personal privilege was presented.

The Speaker[2] said in relation to the question presented by the point of order:

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[1] First session Fifty-seventh Congress, Record, pp. 443–445; Journal, p. 165.

[2] David B. Henderson, of Iowa, Speaker.

If a Representative has a controversy with one of the Departments about patronage, the gentleman from Missouri will readily see that it does not constitute a question of personal privilege, which a Member of the House may at any time make the pretext for taking the floor and occupying the time of the House. If the gentleman thinks that attacks have been made upon him in regard to the administration of his office in his representative capacity—if something of that kind were brought before the House—the view of the Chair might be entirely different; but up to this time nothing has been submitted to the House to be read that comes within the rules as a question of personal privilege. * * * There should be some tangible matter laid before the House, the Chair thinks. * * * The gentleman knows well the difference between conclusions and facts. It seems to the Chair that the House should have specific facts before it in order that it may pass upon the question whether the facts thus presented constitute a violation of the privileges of a Member of the House. That is the opinion of the Chair. * * * The gentleman from Missouri will see that there is no tangible thing in the nature of a question of personal privilege before the House. The point of order has been made to that effect, and the Chair has ruled that that does not constitute a question of personal privilege. * * * The point of order was made against the gentleman's claim that he had a question of personal privilege when the document that he sent up was read. The Chair is well aware that a Member might be attacked physically; that there might be no document at all. * * * The Chair desires to state that it is a question for the House to decide whether a matter is a question of privilege or not. Many Speakers, for the purpose of saving the time of the House, have passed preliminarily upon questions of this kind. As to the points of order which are pending, the Chair believes that both are well taken. Such matters as that which the gentleman from Missouri is now trying to bring before the House have usually been made matters of "personal explanation" by unanimous consent. The Chair can not see that anything thus far developed by the gentleman constitutes a question of privilege, and thinks that the points of order are well taken. * * * If the Chair is to admit discussion of every disturbance that a Representative has within his district over rural free-delivery or post-office appointments the transaction of the business of this country will soon be prevented by the consideration of such questions. Therefore the Chair must hold that nothing has been presented by the gentleman that comes within the rule as a question of personal privilege. The remedy of the gentleman is in an appeal from the decision of the Chair, or to ask unanimous consent to make a personal explanation, which the Chair will be glad to submit to the House.

2688. A resolution to investigate the failure of the Post-Office Department to remove a postmaster charged with an attempt to influence a Member corruptly was held not to present a question of privilege.—On September 23, 1893,[1] Mr. John L. Bretz, of Indiana, presented, as involving a question of privilege, and caused to be read, letters from a postmaster containing a corrupt proposition intended to influence the action of a Member of Congress with a view to securing a retention of said postmaster in office.

Mr. Bretz thereupon submitted the following as a privileged resolution:

Whereas on the 16th day of September, 1893, charges of an attempt to bribe a public officer and incompetency to perform the official duties of the office were filed with the Hon. Robert A. Maxwell, Fourth Assistant Postmaster General, against the present Republican postmaster at Celestine, Ind., and the said Maxwell's attention specially called to the nature and character of said charges, and a request was made for the immediate removal of said postmaster; and

Whereas the said Fourth Assistant Postmaster-General has failed and refused to make said removal: Now, therefore,

Be it resolved, That a committee of three Members of this House be appointed by the Speaker, whose duty it shall be to investigate and inquire into the reasons, if any exist, why said removal is not made, and report to this House at an early day the result of said investigation.

The Speaker[2] held that said resolution was not privileged.

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[1] First session Fifty-third Congress, Journal, p. 109.

[2] Charles F. Crisp, of Georgia, Speaker.

2689. A Member is not entitled to the floor on a question of personal privilege unless the subject which he proposes to present relates to himself in his representative capacity.—On February 11, 1901,[1] during the consideration of the diplomatic and consular appropriation bill in Committee of the Whole House on the state of the Union, and while general debate was in progress, Mr. Thaddeus M. Mahon, of Pennsylvania, called attention to a meeting of Boer sympathizers over which another Member, Mr. William Sulzer, of New York, had presided, and whereof the expenses had absorbed almost all the funds raised for the cause.

Mr. Sulzer, after occupying the floor a limited time in reply, again claimed the floor for a question of personal privilege.

The Chairman[2] said:

Without attempting to pass upon the application of any language made by the gentleman from Pennsylvania to the gentleman from New York personally, it is the duty of the Chair to rule that any language used must have reflected upon the gentleman in his representative capacity.

Mr. Sulzer insisted that it had been intimated that he had collected funds for widows and orphans of the Boers and that these funds had not been turned over to those for whom they had been collected, and urged that this affected his position as a Representative.

After debate the Chairman held:

The Chair is ready to rule. The rule under which this question is invoked is Rule IX:

"Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; second, the rights, reputation, and conduct of Members individually in their representative capacity only."

Now, unless the question of personal privilege capable of being invoked here relates to conduct of gentlemen in their representative capacity, it is a restriction on the rule. The Chair is bound to say he understood nothing from the gentleman from Pennsylvania as reflecting upon the gentleman from New York individually or in his representative character. * * * The Chair holds that the gentleman has not presented a question of personal privilege.

2690. It was held in 1894 that the act of the Sergeant-at-Arms in pursuance of the law for deductions of Members' salaries for absence might not be reviewed on the floor as a question of privilege.—On April 26, 1894,[3] Mr. Thaddeus M. Mahon, of Pennsylvania, presented, as involving a question of privilege, that he had received from the Sergeant-at-Arms a circular note requesting him to certify the number of days he had been absent during the current fiscal month, for which deduction should be made pursuant to section 40 of the Revised Statutes.

Mr. Mahon insisted that said section of the Revised Statutes (sec. 40) had been in effect repealed. He therefore submitted the following resolution:

Resolved, That the Sergeant-at-Arms is hereby directed to pay to Members and Delegates their salary on the 4th day of each and every month, as provided by law, and that he shall not deduct any part of a Member's salary on account of absence under the act of August 16, 1856, until the absence of a Member has been duly certified to him under a rule or some action of this House by the officer authorized to certify the same.

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[1] Second session Fifty-sixth Congress, Record, pp. 2276–2278,

[2] William H. Moody, of Massachusetts, Chairman.

[3] Second session Fifty-third Congress, Journal, pp. 358, 359.

Mr. Joseph H. Outhwaite, of Ohio, made the point that no question of privilege was presented.

The Speaker [1] sustained the point of order, holding as follows:

The gentleman from Pennsylvania [Mr. Mahon] submits a resolution which he claims raises a privileged question; and in order to determine whether this resolution does raise a privileged question it is necessary to look to the rules of the House and to the resolution itself. The rules of the House provide that the Sergeant-at-Arms shall keep the accounts of Members and pay them their salaries according to law. This House separately and alone has no control of the salary of its Members. The Constitution provides that Representatives shall receive a salary to be fixed by law. Congress has passed a law fixing the salary of Representatives, and all that this House has ever undertaken to do under its rules in dealing with the question of salaries is to provide that the Sergeant-at-Arms shall keep the accounts for the pay and mileage of Members and Delegates and pay them as provided by law. When you turn to the law you find that the Sergeant-at-Arms is required to deduct from the monthly payments of each Member or Delegate the amount of his salary for each day that he has been absent from the House, unless the reason for such absence was the sickness of himself or some other member of his family. Gentlemen state that this is not the law. It is not the purpose or province of the House of Representatives to determine that question. This House can make law, but the construction of law is for the courts and not for the House. The Sergeant-at-Arms is a bonded officer, a disbursing officer of the Government. He is charged with the duty of executing public law. If the Sergeant-at-Arms should plead the opinion of this House as to whether a law existed or was repealed, such opinion would have no effect in relieving him from any liability on his bond if such opinion were wrong. This House can not construe the law.

Now, let us see what the resolution is. First, "The Sergeant-at-Arms is hereby directed to pay to Members and Delegates their salaries on the 4th day of each and every mouth, as provided by law." That is the rule of the House now. If it be the purpose to change the rule, it is not a privileged question unless reported from the Committee on Rules. So that the first part of this resolution can not, certainly, be considered as privileged. What is the second?

"That he shall not deduct any part of a Member's salary on account of absence under the act of August 18, 1856, until the absence of a Member has been duly certified to him under a rule or some action of this House by the officer authorized to certify the same."

That is a proposition, not that the law for the deduction from salaries of Members is repealed by implication, not that the law does not exist, but that the Sergeant-at-Arms shall not enforce the law until the absence of Member has been certified to him under a rule or some action of the House by an officer authorized to certify the same.

Now, how does that constitute a question of privilege? That is a change of the rules. What allegation is there in this resolution that any right of a Member of this House or Members collectively has been infringed or invaded? The Chair can not see any. The Chair desires to say, in justice to the Sergeant-at-Arms, that the form of the certificate which has been read was suggested by the Chair, upon the request of the Sergeant-at-Arms. That form of certificate was intended to put it wholly within the power of the Member himself to say whether or not any deduction should be made under section 40 of the Revised Statutes.

The Chair believed then and believes now that every disbursing officer of the United States who is charged by law with the performance of a duty in paying out money has a right to make all reasonable regulations, which must be complied with by those to whom the money is to be disbursed before they can demand its payment. The regulation which the Sergeant-at-Arms has made is simply to require the Member himself to certify whether or not under that law any deduction should be made. The Chair desires to say further, so that the House may fully understand it, that as he now understands the law the Chair would not certify the pay of any Member as to the amount that might be due him for a month's salary unless the Member first furnished information as to how long he had been absent, for which deductions should be made. The Chair holds that there is no question of privilege in this resolution.

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[1] Charles F. Crisp, of Georgia, Speaker.

Mr. Mahon thereupon submitted, as involving a question of privilege, the following resolution:

Resolved, That it is the sense of the House that the Sergeant-at-Arms of the House of Representatives has no authority to require each Member of the House to report to him whether he has been absent from the sessions of the House, and the reasons for such absence, in the absence of any rule of the House giving him such authority, and that the notice of such requirement given by the Sergeant-at-Arms is in derogation of the rights of Members of this House.

Mr. Richard P. Bland, of Missouri, and Mr. William M. Springer, of Illinois, made the point that the resolution did not present a question of privilege.

The Speaker sustained the point, for the reasons indicated in the preceding decision of the Chair.

Mr. Mahon appealed from the decision of the Chair. Mr. Outhwaite moved to lay the appeal on the table; and the question being put, Shall the appeal lie on the table? it was decided in the affirmative, yeas 167, nays 76.

2691. One Member having, in a newspaper article, made charges against another Member in the latter's individual and not his representative capacity, a committee of the House found no question of privilege involved.

A distinction has been drawn between charges made by one Member against another in a newspaper and the same made in debate on the floor.

A charge made outside the House of disreputable conduct on the part of a Member before he became a Member has been held not to involve a question of privilege.

On May 4, 1868,[1] Mr. William Windom, of Minnesota, as a question of privilege, submitted the following:

Whereas Elihu B. Washburne, a Member of this House from the State of Illinois, did, on the 19th day of April, 1868, in the column of a newspaper published in the city of St. Paul, Minn., styled the St. Paul Press, make a violent attack upon the character of Ignatius Donnelly, a Member of this House from the State of Minnesota, in which he charged him, among other things, with bribery and corruption, and with being a fugitive from justice, in the following words: [Here follows the letter in full.]

And whereas the said Elihu B. Washburne did, on the 2d day of May, 1868, in his place on the floor of the House of Representatives, repeat said charges against the said Ignatius Donnelly, in the following words: [Here follows the words in full.]

Resolved, That a select committee of seven be appointed by the Chair to investigate the truth or falsehood of the charges so made, with power to send for persons and papers, and with leave to report to this House at any time

The Speaker[2] said:

The Chair is of the opinion that this is a question of privilege upon the ground that "charges affecting the character of a Member of Congress, "when made distinctly, even by a person not a fellow Member, are regarded as questions of privilege. General charges and denunciations, vague and not specific in their character, are not usually regarded as questions of privilege. But when charges have been made in newspapers by persons not holding the relations to a Member of Congress that a fellow Member does, imputing distinctly that affecting the honor and reputation of a Member, they are regarded as questions of privilege. This, however, is subject to the rules of the House; and if objection is made to the consideration of this resolution the Chair will submit to the House the question: Shall the resolution be considered at this time for its decision?

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[1] Second session Fortieth Congress, Journal pp. 650–653; Globe p. 2355.

[2] Schuyler Colfax, of Indiana, Speaker.

No objection was made and the resolution was considered and agreed to.

On June 1, 1868,[1] Mr. Luke P. Poland, of Vermont, from the select committee appointed to investigate certain charges made by Mr. Elihu B. Washburne, of Illinois, against Mr. Ignatius Donnelly, of Minnesota, submitted a report. The investigation had arisen over a letter written by Mr. Washburne, and published in a newspaper, charging, among other things, that Mr. Donnelly, before he was a Member of the House, had left Philadelphia under suspicious circumstances between two days. The committee say in regard to this charge:

> The committee have endeavored to give the subject such careful and considerate attention as it deserves, and while anxious to do exact and equal justice to both the gentlemen interested in it, they have been equally anxious not to establish a precedent that should go beyond the proper legal and parliamentary jurisdiction and authority of this House, in sustaining and protecting its own privileges and that of its Members. And especially have your committee desired not to go beyond the true line of privilege in a case where a precedent, once established, would necessarily furnish occasion for frequent and perplexing appeals for the exercise of the power of the House for the defense and protection of the reputations of its Members from attacks having no reference to their official character.
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> Upon such consideration and examination as your committee have been able to give this question, they are unanimously of the opinion that the charges of disreputable conduct (or of criminal conduct, if the language will bear that interpretation), made by Mr. Washburne against Mr. Donnelly anterior to his becoming a Member of the House, are not a breach of privileges of the House, or of Mr. Donnelly as a Member, and therefore furnish no proper ground for an investigation with a view to protect and defend the privileges of the House or its Members by punishing the person violating them.
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> Libelous publications in reference to that parliamentary body itself are a breach of its privileges which may be punished, and so a libelous publication against a single Member of such body, in his capacity as a Member, or affecting his conduct or character as such, is equally so, as casting discredit upon the body. But a libelous publication concerning a Member in his private character and capacity only has never been regarded as a breach of privilege, either of the body of which he is a Member or of the Member himself, and he must seek redress for such private injury in the same manner other citizens do, by vindication through the public press, or by resort to the legal tribunals. The principle is much the same as that applicable to the person of a Member. If an assault be made, or other personal injury be done, to a Member while in attendance upon the House, or while going to or returning from such attendance, it is a breach of privilege; but an assault upon the person of a Member not in attendance, and in no way affecting his attendance as a Member, is not.
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> As has been already stated, if the words of this letter had been used by Mr. Washburne upon the floor of the House, they would have been disorderly, a breach of the privileges of the House and of Mr. Donnelly as a Member, and he could have properly been punished therefor. This is upon the ground that the use of any language upon the floor derogatory to the personal character of a Member is calculated to provoke disturbance and disorder in the proceedings, and bring the body itself into contempt and disgrace. These reasons do not apply to the publication of the same words in a newspaper a thousand miles distant.

The committee therefore asked to be discharged from the consideration of the subject.

2692. In order to afford a basis for a question of personal privilege a newspaper charge against a Member should present a specific and serious attack upon his representative character.—On January 30, 1882,[1] Mr. William E. Robinson, of New York, claiming the floor for a question of privilege, had read at the Clerk's desk extracts from newspapers criticising his conduct in championing the cause of Irish suspects imprisoned in Great Britain and reminding him that

[1] Second session Fortieth Congress, House Report No. 48.

[2] First session Forty-seventh Congress, Record, p. 723.

he was elected to Congress to represent a district of New York, and not an "imaginary Irish republic."

Mr. Thomas M. Browne, of Indiana, made the point of order that no question of privilege was involved.

The Speaker [1] said:

The Chair is inclined to hold that unless a Member is criticised in his representative or official capacity in such way as to affect his standing as Representative comments by newspapers on matters that can not be brought before the House for its action are not questions of personal privilege.

The Chair then went on to speak of the difficulty in determining in such cases a rule to follow, but ended by sustaining the point of order.

2693. On May 18, 1892,[2] Mr. William W. Bowers, of California, claiming the floor for a question of personal privilege, stated that a Member had sent to the Clerk's desk a paper reflecting on himself in that the matter referred to the complaint of certain settlers in a county of his district who claimed that the Government and Congress had been unconsciously used as a part of a conspiracy to defraud them. Mr. Bowers stated that he had been threatened by lobbyists in the matter, and that the presentation of the article was part of a plan, and that the article was intended as a reflection on him as Representative of the district.

The article nowhere charged Mr. Bowers by name or directly, although it might be construed as making insinuations against him.

The article having been read, Mr. William D. Bynum, of Indiana, made the point of order that there was nothing in the article giving rise to a question of personal privilege.

The Speaker [3] sustained the point of order, saying:

The Chair does not see that it presents a question of privilege.

2694. A newspaper charge that a Member had been influenced in his action as a Representative by the Speaker was held to involve a question of privilege.—On March 17, 1902,[4] Mr. Frank C. Wachter, of Maryland, rising to a question of personal privilege, had read the following from a newspaper:

While the Cuban reciprocity fight was at its warmest and the "insurgents" were making daily assaults against the Ways and Means Committee, Speaker Henderson sent for Representative Wachter, of Maryland, of the Baltimore district.

"Why are you so much interested in this sugar-beet question?" demanded the Speaker, angrily."You have no sugarbeet interests."

"Well, it seems fair enough to me," replied the Baltimore man. "Furthermore, I have some constituents who own sugar-beet factories."

"How many?"

"Oh, two or three."

"How many have you got interested in the Sparrows Point improvement, for which $300,000 or $400,000 are asked?"

"My whole district is virtually interested in that."

"Well, then, it is up to you, if you are a good Congressman, to choose between sugar beet and your item in the river and harbor bill."

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[1] J. Warren Keifer, of Ohio, Speaker.

[2] First session Fifty-second Congress, Record, p. 4374.

[3] Charles F. Crisp, of Georgia, Speaker.

[4] First session Fifty-seventh Congress, Record, p. 2927.

Mr. Wachter having proceeded with remarks, Mr. James D. Richardson, rising to a point of order, stated that no question of personal privilege was involved.

The Speaker[1] overruled the point of order, stating that the Member had been attacked in his representative capacity.

2695. A Member may not present as involving a question of personal privilege a newspaper criticism of his relations with other Members or the Speaker.—On December 16, 1903,[2] Mr. John Lind, of Minnesota, claimed the floor for a question of personal privilege and proceeded to discuss an editorial in a newspaper, saying:

> It comments upon my committee assignments and in that connection insinuates that the relations between the minority leader and myself are not cordial. Such is not the fact, Mr. Speaker, so far as I am advised and know. Our personal and political relations are cordial. Besides that, the minority leader recommended my assignment to two other committees regarded by this House as more prominent than the assignments which I received.

Mr. Sereno E. Payne, of New York, made the point of order that no question of privilege was presented.

The Speaker[3] took the view that no question of privilege was presented.

2696. The House has entertained as a question of privilege and ordered the investigation of newspaper charges against a Member in his representative capacity.—On January 30, 1880,[4] Mr. Joseph H. Acklen, of Louisiana, as a question of privilege, called the attention of the House to a newspaper publication charging him with making to the House from the Committee on Foreign Affairs an unauthorized report. Mr. Acklen having explained, offered a resolution directing the Committee on Foreign Affairs to investigate the truth or falsity of the statements in the paragraph to which he had called the attention of the House. The resolution was agreed to by the House.

2697. On May 12, 1882,[5] Mr. Fetter S. Hoblitzell, of Maryland, as a question of privilege, submitted the following, which was considered and agreed to:

> Whereas a letter appeared in the Baltimore Herald of the 4th instant reflecting on Mr. Hoblitzell, a Representative from the State of Maryland: Therefore,
>
> *Resolved,* That the Committee on Claims are hereby directed to make immediate investigation into the conduct of the clerk of that committee in connection with the letter referred to and to report its action to the House at as early a day as possible.

Mr. Hoblitzell had charged that the clerk of the committee had placed a letter on the files of the committee not referred to the committee by the House, the said letter reflecting upon the conduct of Mr. Hoblitzell in connection with a certain claim.

2698. On February 25, 1884,[6] Mr. E. John Ellis, of Louisiana, rising to a question of personal privilege, had read at the Clerk's desk an extract from a newspaper, wherein it was stated that he had received a sum of money for assisting in

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[1] David B Henderson, of Iowa, Speaker.

[2] Second session Fifty-eighth Congress, Record, p. 287.

[3] Joseph G. Cannon, of Illinois, Speaker.

[4] Second session Forty-sixth Congress, Journal, p. 354; Record, p. 616.

[5] First session Forty-seventh Congress, Journal, p. 1231; Record, pp. 3879, 3880.

[6] First session Forty-eighth Congress, Journal, p. 658; Record, p. 1349.

getting a contract under the Government in the Post-Office Department. After remarks he submitted the following resolution, which was agreed to:

Resolved, That the Committee on the Post-Office and Post-Roads be instructed to investigate the charges reflecting upon Mr. Ellis, a Representative from Louisiana, in connection with star-route frauds recently published, and for this purpose are authorized to send for persons and papers.

2699. On December 4, 1862,[1] Mr. J. M. Ashley, of Ohio, claimed the floor on a question of personal privilege, and the Speaker, after learning that charges had been made in a newspaper against Mr. Ashley, said:

It has been decided that publications in a newspaper are not questions of privilege unless it is proposed to make them the basis of some action on the part of the House.

Mr. Ashley having stated that he proposed to ask an investigation, the Speaker[2] recognized him for a question of privilege, and he presented the following, which were agreed to by the House:

Whereas charges derogatory to the character and standing of a Representative are made in the Toledo Daily Blade and other newspapers published in the Tenth Congressional district of Ohio, in connection with certain letters written by Hon. J. M. Ashley to Hon. F. M. Case, touching his application and appointment as surveyor-general of the Territory of Colorado, of the date of February 2, 1861, March 12, March 18, and March 19, 1862, and published in said papers of September last: Therefore, be it

Resolved, That a committee of five be appointed for the purpose of investigating the truth of the charges above referred to, and instructed to inquire into the whole subject-matter, with power to send for persons and papers, to examine witnesses on oath or affirmation, and to employ a stenographer at the usual rate of compensation, with leave to report at any time.

2700. Language which may be replied to as a matter of personal privilege must reflect on the Member in his representative capacity.—On February 21, 1893,[3] Mr. Joseph E. Washington, of Tennessee, submitted as a question of privilege that during the proceedings under the call he had been charged with representing corporations instead of his constituents in his opposition to the bill H. R. 9350, and proceeded to reply to said charge.

Mr. William H. Cate, of Arkansas, made the point of order that no question of privilege was presented by Mr. Washington.

The Speaker[4] sustained the point of order, saying that the language complained of appeared to be very general and did not seem to charge any gentleman with representing railroads. The Chair would ask the gentleman from Tennessee and the House to bear in mind that a mere desire to reply to something that some gentleman had said on the floor did not constitute a question of privilege. The language complained of must be something that reflected upon the Representative in his capacity as a Representative.

2701. A newspaper charge that a Member of the House had been influenced by Executive patronage was submitted as privileged, but the House declined to investigate.

A contention that common fame was sufficient basis for the House to entertain a proposition relating to its privileges.

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[1] Third session Thirty-seventh Congress, Journal, p. 36; Globe, p. 10.

[2] Galusha A. Grow, of Pennsylvania, Speaker.

[3] Second session Fifty-second Congress, Journal, p. 106, Record, p. 1979.

[4] Charles F. Crisp, of Georgia, Speaker.

On February 12, 1858,[1] Mr. Charles B. Hoard, of New York, arose and proposed to submit the following resolution as a question of privilege:

Resolved, That a committee of five be appointed by the Speaker to inquire and investigate whether any improper attempts have been or are being made by any persons connected with the executive department of this Government, or by any persons acting under their advice or consent, to influence the action of this House, or any of its Members, upon any question or measure upon which the House has acted, or which it has under consideration, directly or indirectly, by any promise, offer, or intimation of employment, patronage, office, or favor under the Government, or under any department, officer, or servant thereof, to be conferred or withheld in consideration of any vote given or to be given, withheld or to be withheld, with power to send for persons and papers, and leave to report at any time, by bill or otherwise.

The same having been read, Mr. Edward A. Warren, of Arkansas, made the point of order that the proposed resolution did not present a question of privilege.

After debate, the Speaker[2] stated that, following the precedents in former Congresses, he would entertain the proposition so far as to submit the question to the House as to whether it did or did not involve a question of privilege.

The Speaker held that the resolution on its face presented a question of privilege, and while he doubted whether the newspaper articles which were introduced to support its allegations were such as justified the predicate of the resolution, he would submit the question to the House as to whether a question of privilege was involved. The Speaker quoted as a precedent the action of Speaker Cobb in the Thirty-first Congress.

Pending the question submitted by the Speaker, the House voted, on motion of Mr. Alexander H. Stephens, of Georgia, that it be laid upon the table.

On March 4[3] Mr. Hoard modified the resolution heretofore submitted to read as follows:

Whereas the Member from New York, the Hon. Mr. Hoard, read from the Clerk's stand, in this House, the following paragraph from the New York Tribune of the 11th February, to wit:

"WASHINGTON, *Wednesday, February 10, 1858.*

"I learn that, until Monday morning, it was expected that Burns, of Ohio, would vote against the Lecomptonites. On the morning of that day, however, he came to another perception of his duty on the understanding with the President that his son-in-law should retain the valuable place of postmaster at Keokuk, Iowa, and that he himself should be gratified with the office of marshal of the northern district of Ohio when his present term in the House is completed."

Resolved, That a committee of five persons be appointed by the Speaker to inquire if there was any collusion or bargain made between the said Mr. Burns and the President that if he, Burns, would vote to refer the President's Kansas message to the standing committee on the Territories, that the said Burn's son-in-law should retain the position of postmaster at Keokuk. Iowa, and also that he, the said Burns, should be gratified or appointed marshal of the northern district of Ohio after his present term in the House expired; and to further investigate whether any improper attempts have been made or are being made, directly or indirectly, by any person connected with the executive department of this Government, or by any other person with their advice and consent, to influence the action of any Member of this House upon any question or measure upon which the House has acted or which it has under consideration; with power to send for persons and papers, and with leave to report at any time, by bill or otherwise.

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[1] First session Thirty-fifth Congress, Journal, pp. 376, 410; Globe, pp. 693, 694, 967, 968.

[2] James L. Orr, of South Carolina, Speaker.

[3] Journal, pp. 410, 413, 428; Globe, pp. 966–969.

The Speaker having stated the question to be, Shall the said preamble and resolution, as modified, be received and entertained on the ground that the privileges of the House are involved? A debate arose, Mr. Hoard contending that common fame was sufficient basis for the House to entertain the proposition, and quoted parliamentary authorities in support of his contention. It was urged in opposition that the investigation would be inexpedient and useless and that the report emanated from irresponsible sources.

The whole subject was laid on the table, on motion of Mr. Mathias H. Nichols, of Ohio, by a vote of yeas 92, nays 80.

2702. An "absurd and purposeless" anonymous letter proposing a corrupt bargain to a Member of the House was held by a committee of the House to create no breach of privilege.—On April 17, 1880,[1] Mr. Van H. Manning, of Mississippi, as a question of privilege, submitted the following:

Whereas a certain anonymous letter, dated House of Representatives, Washington, District of Columbia, March 4, 1880, addressed to Hon. William M. Springer, offering a bribe of $5,000 if he would prevent the unseating of William D. Washburn, of Minnesota, the contestee in the pending election case of Donnelly *v.* Washburn, was mailed on the 8th day of March, 1880, in the post-office of the House of Representatives, and delivered to the Hon. William M. Springer, then and now the chairman of the Committee on Elections, before which said election case at that time was pending; and

Whereas said letter purports to be an attempt to corruptly influence the action of said Hon. William M. Springer as a, member of said committee and of the House of Representatives; and

Whereas another private letter was sent to and received by the said Springer, in reference to the said contest, signed by H. H. Finley; and

Whereas the language by the said Springer, published in the Congressional Record of the 6th instant, in his speech on the subject before the House, is construed by many Members as a charge against said Donnelly of having inspired the writing of the said letter; and

Whereas said Donnelly has requested an investigation of said matter: Now, therefore,

Resolved, That a committee of seven Members of this House be appointed by the Speaker to inquire and report to this House as to the authorship of said anonymous letter, who sent it, and the purpose for which said letters were sent, and all other matters in connection with the same, and that said committee be authorized to inquire and report to the House thereon whether, in either or all of the letters in controversy and written to Ron. William M. Springer, there has been any breach of the privileges of the House or of any Member thereof, and said committee shall have power to send for persons and papers, etc.

This resolution was agreed to by the House.

On March 3, 1881, the committee reported,[2] and both majority and minority concurred in the view that there was no breach of the privileges of the House or of any Member, since the anonymous letter could not be traced to any source, and was of itself absurd and purposeless.[3]

2703. A newspaper article charging certain Members by name with conspiracy to defraud the Government was presented as a matter of privilege.—On December 12, 1889,[4] Mr. Benjamin Butterworth, of Ohio, as a question of privilege, presented a preamble and resolution, providing for the appoint-

[1] Second session Forty-sixth Congress, Journal, pp. 1047, 1048; Record, p. 2501.

[2] House Report No. 395. The committee consisted of Messrs. John G. Carlisle, of Kentucky; George A. Bicknell, of Indiana; David B. Culberson, of Texas; William Lounsbery, of New York; William Claflin, of Massachusetts; Thomas Updegraff, of Iowa; and Benjamin Butterworth, of Ohio.

[3] This report, being made in the last hours of the Congress, was laid on the table. journal, pp. 615, 616.

[4] First session Fifty-first Congress, Journal, p. 18: Record, p. 161.

ment of a committee to investigate a charge made in a certain newspaper that certain persons, including several Members of the House and Senate, himself included, had entered into a corrupt contract to defraud the United States through the sale of ballot boxes. No objection was made to the receipt of the resolution as a question of privilege, and it was agreed to by the House.

2704. An accusation in a newspaper that certain Members had received an excess of mileage pay was held to involve a question of privilege.—On December 27, 1848,[1] Mr. William Sawyer, of Ohio, claimed the floor for a question of privilege, and stated that he, with most of the Members of the House, was accused, in the New York Tribune of Friday last, of having charged and received an excess of mileage, and, as a consequence, with having been guilty of fraud on the Treasury.

Mr. Sawyer thereupon demanded the right to be heard on the question as a question of privilege.

The Speaker[2] stated that it was for the House to decide upon the extent of its own privileges, and he therefore propounded it to the House, whether they would entertain the case submitted by the gentleman from Ohio as a question of privilege.

And the question being taken, the House decided in the affirmative, and thereupon Mr. Sawyer proceeded with his remarks.

Having concluded without moving any specific proposition on the subject, Mr. Thomas J. Turner, of Illinois, said that he rose also to a question of privilege, and stated that he, with other Members of the House, was charged in the same paper to which the gentleman from Ohio had alluded with fraud and peculation on the Treasury.

Mr. Turner proceeded to speak on the question as a question of privilege, when Mr. Robert M. McLane, of Maryland, rose to a question of order, and insisted that the gentleman from Illinois was out of order, because the decision of the House upon the case presented by the gentleman from Ohio, by which it was declared a question of privilege, was not a decision of the same effect on the case of the gentleman from Illinois. This was no question of privilege in itself; the gentleman from Illinois was therefore out of order.

The Speaker decided that the question was the same as that raised by the gentleman from Ohio, but that, on the demand of the gentleman from Maryland, he would again call upon the House to say whether the question should be again entertained as a question of privilege.

The House thereupon decided, yeas 85, nays 76, that it was a question of privilege.

2705. A newspaper article charging Members of the House generally with abuse of the franking privilege was held to involve a question of privilege.—On January 4, 1906,[3] Mr. Thetus W. Sims, of Tennessee, claiming the floor for a question of privilege, asked for the reading of the following newspaper article:

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[1] Second session Thirtieth Congress, Journal, pp. 152, 153; Globe, pp. 108, 109.

[2] Robert C. Winthrop, of Massachusetts, Speaker.

[3] First session Fifty-ninth Congress, Record, pp. 692, 693.

ABOLISH THE FRANKING PRIVILEGE?

We quite agree that something ought to be done for the relief of the Post-Office Department. Its work is simply tremendous, and, by an interesting coincidence, its usefulness is quite as great. There is no section of the governmental machinery more important or more accurately and satisfactorily conducted. But the burden put upon Mr. Cortelyou and his coadjutors can be materially lightened without imparing its efficiency. It is our opinion, indeed, that the people and the Government both would be better off if the franking privilege were abolished utterly.

That this privilege has been outrageously abused is a fact of universal knowledge. Congressmen load the postal cars with all sorts of freight—furniture, libraries, kitchen utensils, the family wash, pianos, poultry, barnyard animals, etc., without limit. They frank a cow, a washtub, or a churn as glibly as they do a letter or a speech that no one ever heard. They go further—they lend their franks in large, uncounted bunches to societies and propagandas that would flourish on the public Treasury as they already thrive upon the people's discontent. The whole system has been converted to the most abominable ends. It presents the perfected spectacle of graft. But its worst expression is to be found in the lumbering up of the mail cars, the preposterous demands upon the Department's resources of transportation, and the corresponding and concurrent crippling of the postal service in all its proper and legitimate activities.

We note the presentation of an alternative arrangement—an arrangement under the operation of which Members of Congress will receive a direct allowance for the purpose of conducting their official correspondence without cost to themselves. The expedient is most commendable. We quite agree that Members of Congress, who are but ill-paid public servants, should be spared the constant drain upon their resources involved in postage and the like. They should at least be left entirely free of artificial taxes and protected in the complete enjoyment of what small emolument has been assigned them. But this franking concession, which has grown to the proportions of insolvent and predaceous graft, this should be contracted within the limits of common decency and transformed into an explicit allowance, no matter how generous and liberal it may be.

We think there are very few Congressmen who would care to oppose this adjustment in full view of the public gaze. Why not try it, gentlemen?

Mr. Sims later proposed this resolution:

Resolved, That the Committee on the Post-Office and Post-Roads be, and hereby is, instructed to investigate whether or not there are or have been abuses of the franking privilege by Members of Congress or in the name of Members of Congress.

Question being made as to the matter, the Speaker [1] said:

The Chair hardly thinks that the article presents a question of personal privilege. * * *. The Chair will state to the House that the resolution is privileged. The Chair will read from the Digest:

"In presenting a question of personal privilege a Member is not required in the first instance to make a motion or offer a resolution; but such is not the rule in presenting a case involving the privileges of the House."

Now, the gentleman from Tennessee [Mr. Sims] has had read an editorial, as he states, and having had read the editorial it seems to the Chair to involve the privileges of the House. He now sends up the resolution which had just been reported. In the opinion of the Chair, the privileges of the House are involved.

2706. It was held that a newspaper report of a Member's speech might not be examined as a matter of privilege.—On January 22, 1867,[2] Mr. Lawrence S. Trimble, of Kentucky, rose and proposed as a question of privilege to call attention to a report of the Associated Press of remarks made by him in the House.

[1] Joseph G. Cannon, of Illinois, Speaker.

[2] Second session Thirty-ninth Congress, Journal, pp. 228, 229; Globe, p. 659.

The Speaker[1] decided that the gentleman from Kentucky was out of order, on the ground that no question of privilege was involved in such a report.

Mr. William E. Finck, of Ohio, having appealed, the appeal was laid on the table, yeas 113, nays 1.

2707. A newspaper publication stating that a certain Member would unite with others in a certain legitimate course of action was held not to involve a question of personal privilege.—On April 17, 1897,[2] Mr. Robert E. Burke, of Texas, rising to a question of privilege, stated that he held in his hand a newspaper in which were printed the names of a number of Members, among them his own, who were credited with the intention of forming an opposition to the policy of the House of adjourning for three days at a time. Mr. Burke proceeded to state that he should vote upon the question according to the dictates of his own judgment, without reference to the opinions or purposes of other men.

The Speaker[3] said:

The Chair hardly thinks this can be regarded as a question of personal privilege.

2708. No question of privilege arises from the fact that a newspaper has attributed to a Member certain remarks which he denies having used.—On July 13, 1894,[4] Mr. Allan C. Durborow, of Illinois, as involving a question of privilege, sent to the Clerk's desk and had read an article published in a newspaper in which were attributed to him certain expressions which he denied having used.

Mr. Charles H. Grosvenor, of Ohio, made the point that the article just read did not present a question of privilege.

The Speaker[5] pro tempore sustained the point of order.

Mr. Durborow then, by unanimous consent, made a personal explanation denying that he had in any manner expressed the sentiments attributed to him in said paper.

2709. A newspaper allegation that a certain number of Representatives, whose names were not given, had entered into a corrupt speculation was held to involve a question of privilege.

Instance wherein the Speaker submitted to the decision of the House the question as to whether or not a matter involved privilege.

It is in order to move to discharge a committee from the consideration of a proposition involving a question of privilege.

On January 12, 1891,[6] Mr. Alexander M. Dockery, of Missouri, having claimed the floor on a question of personal privilege, submitted the following preamble and resolution, viz:

Whereas on the 1st day of December last the following preamble and resolution were introduced and referred to the Committee on Rules:

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[1] Schuyler Colfax, of Indiana, Speaker.

[2] First session Fifty-fifth Congress, Record, p. 747.

[3] Thomas B. Reed, of Maine, Speaker.

[4] Second session Fifty-third Congress, Journal, p. 480.

[5] James D. Richardson, of Tennessee, Speaker pro tempore.

[6] Second session Fifty-first Congress, Journal, p. 120; Record, pp. 1196–1200.

Whereas it is alleged in the Washington correspondence of the St. Louis Globe-Democrat, under date of September 20 last, that 12 Senators and 15 Representatives, pending the passage of an act entitled "An act directing the purchase of silver bullion and the issue of Treasury notes thereon, and for other purposes," approved July 14, 1890, were admitted to partnership in various silver "pools" by which they realized $1,000,000 profits in the advance of the price of silver after the passage of the said act: Therefore, be it

Resolved, That the Committee on Coinage, Weights, and Measures is hereby instructed to inquire into all the facts and circumstances connected with the said alleged purchase and sale of silver, and for that purpose it shall have power to send for persons and papers and administer oaths, and shall also have the right to report at any time. The expenses of said inquiry shall be paid out of the contingent fund of the House upon vouchers approved by the chairman of said committee; and

Whereas the said Committee on Rules has failed to report the resolution to the House for its action, notwithstanding the allegations of the St. Louis Globe-Democrat involves the integrity of the proceedings of the House: Therefore,

Resolved, That the Committee on Rules be discharged from the further consideration of said resolution and that it be now considered by the House.

After debate [1] on the question of order raised against the said preamble and resolution by Mr. Nelson Dingley jr., of Maine,

The Speaker [2] stated that, in accordance with the practice in respect to questions of this character, he would submit the same to the House, and thereupon the Speaker stated the question to be: Does the said preamble and resolution present a question of privilege? And it was decided in the affirmative, yeas 149, nays 80.

2710. A general charge of violation of law by Members, although not specifying the offense as within the existing term of service, was held to present a question of privilege.—On January 4, 1904,[3] Mr. James Hay, of Virginia, claiming the floor for a question of privilege, offered the following:

Whereas Fourth Assistant Postmaster-General J. L. Bristow, in his report to the Postmaster-General, dated October 24, 1903, and which report has been transmitted to a committee of this House, has charged that long-time leases for post-office premises were canceled and the rent increased upon the recommendation of influential Representatives;

And whereas it is charged in the same report that "if a Member of Congress requested an increase in the clerk hire allowed a postmaster, Beavers usually complied, regardless of the merits of the case;"

And whereas certain cases of an aggravated character are cited on pages 133, 134, and 135 of said report to sustain the above charges;

And whereas on page 145 of said report it is charged that Members of Congress have violated section 3739 of the Revised Statutes, and that "in the face of this statute Beavers has made contracts with Members of Congress for the rental of premises, either in their own names, the names of their agents, or some member of their families;"

And whereas these charges and others contained in said report reflect upon the integrity of the membership of this House, and upon individual Members of this House whose names are not mentioned: Therefore,

Be it resolved, That the Speaker of this House appoint a committee consisting of five members of this House to investigate said charges; that said committee have power to send for persons and papers, to enforce the production of the same; to examine witnesses under oath; to have the assistance of a stenographer, and to have power to sit during the sessions of the House, and to exercise all functions necessary to a complete investigation of said charges, and to report the result of said investigation as soon as practicable.

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[1] In the debate a precedent of the Forty-ninth Congress, when a motion to discharge a committee from the consideration of a vetoed bill was held in order, was cited. (Record, p. 1196.)

[2] Thomas B. Reed, of Maine, Speaker.

[3] Second session Fifty-eighth Congress, Journal, p. 89; Record, pp, 446, 447.

Mr. John J. Gardner, of New Jersey, made the point of order that the resolution did not show particularly that Members of the present House were involved, or, if they were, that they were involved as Members of this House.

After debate, the Speaker [1] said:

The gentleman from New Jersey [Mr. Gardner] makes the point of order that the resolution does not present a question of privilege. I read from the preamble of the resolution:

"And whereas on page 145 of said report it is charged that Members of Congress have violated section 3739 of the Revised Statutes and that 'in the face of this statute Beavers' has made contracts with Members of Congress for the rental of premises, either in their own names, the names of their agents, or some member of their families.'"

The gentleman from New Jersey says that for anything which appears in that branch of the preamble a Member of some former Congress, who way not be a Member of this Congress, may be the one referred to as having made the contract. The gentleman also cites from the report to which the resolution refers that matters therein referred to are stated to have occurred in 1899, some in 1896, and some in 1901, if my recollection of the gentleman's remarks is correct.

The Chair is frank to say that if this were an indictment and the Chair were acting as a court that part of the indictment if separated from other portions of the instrument would, in the opinion of the Chair, be not sufficient; that the allegation ought to be made with particularity and refer to Members of this Congress. But the next clause of the resolution is as follows:

"And whereas these charges and others contained in said report reflect upon the integrity of the membership of this House, and upon individual Members of this House whose names are not mentioned: Therefore, etc."

It does not appear from the allegation or from anything so far as the Chair is informed in the report, that these alleged improprieties or offenses were committed since the 4th day of March last.

Waiving, however, the want of particularity in the resolution—and the Chair refers to the same in stating the position of the gentleman from New Jersey—this resolution is presented by a Member of this House, and, while its allegations are general, perchance they may include a Member of the House touching an act committed since the 4th day of March last, when the term of office began. The Chair therefore would be slow to hold that it does not present a question of privilege. It is the duty of the Chair to rule and say, subject, of course, to the subsequent action of the House, whether or not this resolution does present a question of privilege. If in doubt, the Chair would let the House pass upon that question. The Chair, however, is not in doubt, and overrules the point of order made by the gentleman from New Jersey.

2711. A newspaper article vaguely charging Members of Congress generally with corruption may not be brought before the House as involving a question of privilege.—On July 31, 1890,[2] Mr. William C. Oates, of Alabama, as a question of personal privilege, submitted the following preamble and resolution:

Whereas in the National Economist of July 26, 1890, a newspaper publication known as the official organ of the National Farmers' Alliance and Industrial Union, and which has a wide circulation, the following editorial appears on page 305, to wit: "The bond owners are now happy; they have won the fight and the bonds they now hold are payable, principal, interest, and premium, in gold only. It would be interesting to know just how many millions it took to force this bill through Congress. Men in these days of corruption and trickery do not change their avowed beliefs and betray their constituencies without a consideration. It will now be in order to placate those whom they have so wickedly betrayed;" and

Whereas the said editorial charges that a measure has been passed through Congress by bribery and the corruption of its Members the integrity of this House and the rights of the people alike demand that the truth or falsehood of the charge shall be known and dealt with as it deserves: Therefore,

Resolved, That a committee composed of seven Members of this House be appointed to investigate the said charge, and that said committee shall have power to send for persons and papers, administer

[1] Joseph G. Cannon, of Illinois, Speaker.

[2] First session Fifty-first Congress, Journal, p. 908; Record, p. 7976.

oaths, may employ a clerk and stenographer if necessary, may sit during the sessions of the House, and report to the House by resolution or otherwise.

Mr. Joseph G. Cannon, of Illinois, made the point of order that the said preamble and resolution did not present a question of privilege.

After debate, the Speaker[1] sustained the point of order on the following grounds:

Whether this is or is not a question of privilege does not in the slightest degree prevent its being brought before the House at the proper time; for, even if it is not a question of privilege, any Member has a right to present a resolution and have it referred to the proper committee for examination. But the question whether this is a, matter of privilege or not is one which concerns the transactions of business in the House.

It is not always easy to determine the line of demarcation between matters which are questions of privilege and matters which are not. Still, there are questions which are very very plainly on the one side of the line, and the Chair thinks this is one of them. Here is a newspaper paragraph of the very vaguest character, which makes no assertion except by implication, which makes no statement upon which anybody can be expected to predicate a belief or a conviction. That paragraph is brought before the House, and it is proposed to stop the business of the House until a committee of investigation is ordered. No gentleman on the floor, notwithstanding the number that have spoken, has in any way made himself responsible for the paragraph by expressing the slightest confidence or belief in its statements or by giving any indication that there can be any testimony produced which would have a tendency to prove either the truth or the falsity of the insinuation there made.

Now, it is within the knowledge of every Member of this House that there must be floating about at this time, as there probably have been at any time within the last ten or twenty years. paragraphs of the same kind and character almost without number; but the House will at once see the inconvenience that would result to the transaction of its business if any Member had the right, at any time, upon the production of a newspaper paragraph like this, to demand that we should proceed to investigate it to the exclusion of other business. It seems very clear to the Chair that this is not a question of privilege; and therefore, if the House thinks as the Chair does, the gentleman from Alabama, Mr. Oates, will be remitted to his right to present a resolution on this subject and have it referred to a committee in the proper form.

From the decision of the Chair Mr. Oates appealed, and the question being put, Shall the decision of the Chair stand as the judgment of the House? it was decided in the affirmative, yeas 95, nays 71.

2712. A newspaper article in the nature of criticism of a Member's acts in the House does not present a question of personal privilege.—On February 1, 1904,[2] Mr. Robert Baker, of New York, claiming the floor for a question of personal privilege, asked to have read the following extract from the columns of the Washington Post:

Republican Members of the House will now be able to sleep o'nights. Representative Baker, of New York, no longer will haunt their dreams. His anger has been placated and his ferocity has subsided. He has withdrawn his threat that no Republican Member shall have unanimous consent to extend in the Record remarks begun on the floor of the House.

A week or so ago Mr. Baker wanted to make a speech, but the man in charge of the Democratic time could not give him as many minutes as he required. When the allotted minutes were exhausted, he asked unanimous consent to extend his remark in the Record. Some one on the Republican side objected. This aroused Mr. Baker's ire, and he served public notice that henceforth he would object whenever a Member on the Republican side asked unanimous consent to extend remarks.

But Saturday Mr. Baker made another speech, and again found himself short of time. He asked unanimous consent to extend his remarks, and no objection was offered. The embargo on extended Republican speeches, therefore, is lifted.

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[1] Thomas B. Reed, of Maine, Speaker.

[2] Second session Fifty-eighth Congress, Record, p. 1469.

The extract having been read, Mr. Sereno E. Payne, of New York, made the point of order that no question of privilege was involved.

The Speaker [1] sustained the point of order, saying:

The Chair thinks it is hardly a question of personal privilege.

2713. On May 1, 1906,[2] Mr. John W. Gaines, of Tennessee, claiming the floor for a question of privilege, proceeded to read the following article from the Washington Post:

Mr. Gaines, of Tennessee, endeavored to be heard above the noise and confusion, Mr. Wadsworth objecting to any further discussion of seeds under the paragraph relating to "animal industry." This angered the Tennesseean, and as he sat down, by command of the Chair, he managed to say that the bill was loaded with all kinds of appropriations to take care of and suppress the "mouth and foot disease, hollow horn, and hollow tail," but took away from the farmer the few seeds that he every year looked forward to receiving.

This new outburst of eloquence on the part of Mr. Gaines threw the House into convulsive laughter. When the Members had partially recovered their composure Mr. Gaines rushed down the aisle, carrying a mass of manuscript in both hands, holding it aloft, shouting that he had hundreds of letters from farmers favoring free seeds.

As Chairman Wadsworth reached out his hand for them Mr. Gaines laid them on a desk and began pulling from the bunch various documents. It developed that among these "hundreds" of letters there were an unusually large proportion of bills of various sorts and other "pub. docs." that had no relevancy to the seed question.

Mr. John Dalzell, of Pennsylvania, made the point of order that no question of privilege was involved.

The Speaker [1] ruled:

The Chair reads from the Manual:

"A newspaper article in the nature of criticism of a Member's acts in the House does not present a question of personal privilege."

The Chair has listened to the reading of the article which the gentleman furnished him. In the opinion of the Chair it does not present a question of personal privilege.

2714. A newspaper article criticising Members generally involves no question of privilege.—On April 23, 1902,[3] Mr. Thomas J. Creamer, of New York, claiming the floor for a question of privilege, asked to have read an article from a New York newspaper criticising New York Members for their course in relation to a proposed public building in New York City, saying:

It is not at all surprising to learn from our special Washington dispatch this morning that "the New York Members of the House were not consulted." If New York had real Representatives instead of more than a dozen dummies in the House they would not wait to be invited by the committee. They would have to be consulted.

Unless a strenuous effort is made to have the Senate bill taken up and passed our "Representatives" are liable to learn something to their disadvantage.

The Speaker [4] said:

This presents no question of personal privilege. * * * If the gentleman wants to ask unanimous consent for a personal explanation, the Chair will be glad to submit the request.

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[1] Joseph G. Cannon, of Illinois, Speaker.

[2] First session Fifty-ninth Congress, Record, pp. 6199, 6200.

[3] First session Fifty-seventh Congress, Record, p. 4578.

[4] David B. Henderson, of Iowa, Speaker.

2715. A declaration in a newspaper interview by one Member that another Member had broken a party agreement was held to involve no question of personal privilege.—On December 11, 1905,[1] Mr. William B. Lamar, of Florida, claiming the floor for a question of privilege, submitted a newspaper paragraph, claiming that it reflected on him in his representative capacity:

Much of the trouble comes from the fact that he has removed from the Committee on Interstate and Foreign Commerce Dorsey W. Shackleford, of Missouri, and William B. Lamar, of Florida, the two Democrats who last year submitted to the House a subsidiary report on the Hearst railroad-rate bill.

In addition to this action, which it is claimed was taken by Mr. Williams without notice to the two men concerned, he yesterday made a statement that Shackleford and Lamar had broken faith with the caucus agreement on the Davie rate bill last session.

"There is nothing personal in this," said Mr. Williams. "Shackleford and Lamar simply broke the party agreement reached in the caucus."

This paragraph, as is not expressed but as was well understood in the House, referred to Mr. John Sharp Williams, of Mississippi, leader of the minority and, under an arrangement with the Speaker, the one selecting the members to be named on the minority portions of the committees.

The Speaker[2] held that no question of personal privilege was involved.

2716. Charges alleged to have been made against Members in the report of an agent of a foreign power and presented by a Member were held to involve a question of privilege.—On March 27, 1902,[3] Mr. James D. Richardson, of Tennessee, as a question of privilege, presented a preamble and resolution, reciting that a certain secret report made to the Government of Denmark had set forth that a certain sum of money, from the amount to be paid by the United States to Denmark for the purchase of the West Indian Islands, was to be used for bribing certain Members of the United States Congress and American newspapers; and providing for a select committee to investigate the charges.

Mr. Sereno E. Payne, of New York, made the point of order that as the preamble showed the report to be secret no facts could be known to the gentleman presenting the resolution, and therefore there could be no facts on which to base a question of privilege.

In the course of the debate the Speaker[4] said:

The Chair would like to call the gentleman's attention to the fact that the allegations are that the Members of Congress have been corrupted and bribed; also the newspapers. With regard to the newspapers, the Chair thinks that is a matter which alone would be hardly within the jurisdiction of the House. * * * And the term "Congress" includes both House and Senate. The allegations are not so specific as to show whether any Member of the House is included in the charge. In respect to this the Chair is very strongly of the opinion that that body must be the custodian of its own morals, and no specification is made here which directly affects the House, as the Chair remembers the resolution when read, although the general term would include both Houses.

Thereupon Mr. Richardson modified his amendment so as to insert the words "including Members of the House of Representatives."

Mr. Richardson also stated upon his responsibility as a Member that he believed such charges had been made.

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[1] First session Fifty-ninth Congress, Record, pp. 305, 306.

[2] Joseph G. Cannon, of Illinois, Speaker.

[3] First session Fifty-seventh Congress, Journal, pp. 530; Record, pp. 3330–3332.

[4] David B. Henderson, of Iowa, Speaker.

Thereupon the Speaker said:

The Chair desires to say, on the point of order made by the gentleman from New York [Mr. Payne], that it is clear, especially as the matter has been amended at the suggestion of the Chair, that this is a matter of high privilege. It has troubled the Chair somewhat to decide how much we should be governed by the statements made by a member of a foreign government.

But the Speaker concluded that, as the gentleman from Tennessee had stated that he believed the charges had been made, he was clearly of opinion that the point of order was not well taken. Therefore he overruled it, and the resolution was admitted.

2717. A declaration upon the floor of the House, that a statement made by a Member on his own responsibility is false, presents a question of privilege.—On June 10, 1886,[1] Mr. Leonidas C. Houk, of Tennessee, rising to a question of privilege, recalled a certain statement which he made on the 30th of March preceding, regarding events happening in Tennessee during the war, and the following declaration made in reply thereto by Mr. James D. Richardson, of Tennessee: "As a Representative from the State of Tennessee I denounce the statement as false."

Mr. Nathaniel J. Hammond, of Georgia, made the point of order that no question of privilege was involved, as it was merely a controversy between two gentlemen as to a matter of history.

The Speaker[2] ruled—

The Chair is in some doubt about this question. A few days ago the Chair had occasion to make a ruling upon a somewhat similar question; in fact, very similar in some respects although quite different, the Chair thinks, in others. In this case it appears a statement of the gentleman from Tennessee, not a quotation or the repetition of some statement made by somebody else, adduced as evidence, but a personal statement of his own, was denounced as false upon the floor of the House.

In the case which was before the House a few mornings since a gentleman had cited certain evidence in support of a charge he had made, and the gentleman from Pennsylvania, Mr. Kelley, denounced that as a slander, but without imputing to the gentleman who had cited the evidence any personal misstatement. Here, as the Chair has already stated, it appears from what the gentleman from Tennessee, Mr. Houk, has just stated, that the statement made by him on his own responsibility as a Representative on the floor was denounced as false, which the Chair is inclined to think * * * a question of privilege.

2718. An employee of the House having in a newspaper charged a Member with falsehood in debate, a resolution relating thereto was entertained as a question of privilege.

Priority of a question of privilege over a merely privileged question.

Early custom of the Speakers to leave to the House to decide whether or not a proposition involved privilege.

On January 10, 1846,[3] Mr. Garrett Davis, of Kentucky, moved the following resolution:

Whereas John P. Heiss, a person in the employment of this House, having in a newspaper charged Charles Hudson, a Member of this House, with falsehood in debate:

Resolved, therefore, That the said John P. Heiss be dismissed from the employment of the House as one of its printers.

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[1] First session Forty-ninth Congress, Record, p. 5516; Journal, p. 1850.

[2] John G. Carlisle, of Kentucky, Speaker.

[3] First session Twenty-ninth Congress, Journal, p. 223.

Mr. Reuben Chapman, of Alabama, objected to the reception of the resolution as not in order pending the motion of Mr. Hannibal Hamlin, of Maine, that the rules be suspended and that the House resolve itself into Committee of the Whole House on the state of the Union.

The Speaker[1] stated that the resolution was only in order as a question of privilege, and that it was for the House, and not the Speaker, to decide whether the resolution did or did not involve the privileges of a Member of this House.

The House decided, 116 to 57, that the resolution did involve a question of privilege.

The record of the debates[2] shows that the Speaker declared the motion of Mr. Hamlin undoubtedly a privileged motion, which could at any time be made by the rule, but that there was this difference between the two motions—that the motion of the gentleman from Maine was a privileged question and the other was a question of privilege, and must put everything else aside. There followed some argument as to whether it was really a question of privilege. It was urged in support of the contention that the letter aimed a blow at the freedom of debate on the floor.

2719. One Member having charged another with perverting facts in a debate, the Speaker allowed the latter to raise a question of personal privilege.—On February 18, 1886,[3] Mr. Byron M. Cutcheon, of Michigan, claiming the floor for a question of personal privilege, alleged that Mr. Edward S. Bragg, of Wisconsin, had in debate this day charged him with perverting facts in a certain table of statistics published by him in the Record of the previous day's debate.

Mr. Nathaniel J. Hammond, of Georgia, having raised a question of order that no question of personal privilege was involved, after debate the Speaker[4] said:

> The gentleman from Michigan rises to a question of personal privilege, and says that the gentleman from Wisconsin, in his remarks, has questioned his motives; or, in other words, attributed improper motives in the use of the table in question. This is not a question affecting the dignity of the House itself or the integrity of its proceedings, but it is a question of personal privilege made by the gentleman from Michigan. Now, of course, the Chair can not determine whether any question of personal privilege is involved unless he can ascertain exactly what was said.

The remarks of the gentleman from Wisconsin being read, showed that he had charged the gentleman from Michigan with printing as the losses of one day's battle at Bull Run, the losses occurring during about two weeks of time.

The Speaker thereupon allowed the gentleman from Michigan to have the floor on a question of personal privilege, saying that "the remark made by the gentleman from Wisconsin might, without any strained construction, be understood as attributing to the gentleman from Michigan a disposition not to be ingenuous in the discussion of the bill."

2720. A mere difference between two Members in debate as to matters of fact involves no question of privilege.—On March 13, 1894,[5] Mr. Elijah A. Morse, of Massachusetts, claimed the floor to present a question of privi-

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[1] John W. Davis, of Indiana, Speaker.

[2] Globe, p. 177.

[3] First session Forty-ninth Congress, Record, p. 1624.

[4] John G. Carlisle, of Kentucky, Speaker.

[5] Second session Fifty-third Congress, Journal, p. 244.

lege, and proceeded to discuss certain matters of fact concerning which he differed from the opinion which had been expressed by other Members of the House.

Mr. Benjamin A. Enloe, of Tennessee, made the point that no question of privilege was presented.

The Speaker[1] held that a mere issue between two Members as to matters of fact does not present a question of privilege, and therefore sustained the point of order.

2721. A difference of opinion as to historical facts, a Member not having made a false statement knowingly with intent to deceive the House, does not give rise to a question of personal privilege.—On January 27, 1886,[2] Mr. Charles A. Boutelle, of Maine, claiming the floor upon a question of personal privilege, referred to some resolutions recently presented by him in regard to the removal of a tablet or inscription from the engine room of the dry dock at Norfolk, Va., and announced his intention to file certain historical data in answer to the statement of Mr. George D. Wise, of Virginia, concerning the dry dock.

Mr. Hilary A. Herbert, of Alabama, made the point of order that no question of personal privilege was raised.

The Speaker[3] ruled:

> It happens almost every day in the discussions on the floor that Members differ in their statements respecting facts, especially historical facts, such as the one involved in this case, and unless there is some improper motive attributed, some purpose to deceive or impose upon the House, or some reflection upon the representative character of a Member, the Chair can not see that any question of privilege is involved. It frequently happens that gentlemen rise for the purpose of making "personal explanations" with the consent of the House, but those are not, technically speaking, under the rules of the House, matters of privilege. The Chair has not been able to see, from what has been read by the gentleman from Maine, that the gentleman from Virginia in his remarks imputed to him any improper motive or purpose whatever; but the two gentlemen differed simply upon a question of fact. The Chair sustains the point of order made by the gentleman from Alabama.

Again, on June 8, 1886,[4] a question arose concerning remarks published in the Congressional Record as a speech delivered by Mr. Joseph Wheeler, of Alabama, wherein certain statements were made concerning the late Secretary of War Edwin M. Stanton.

Mr. William D. Kelley, of Pennsylvania, having replied to these statements,

Mr. Wheeler, on the ground of its being a question of privilege, claimed the floor to reply to Mr. Kelley, who, he asserted, had charged him with perverting a session of the House, with having slandered the dead, and with having stated to the House that which might be regarded as an infringement of the truth.

Mr. William W. Brown, of Pennsylvania, made the point of order that no question of privilege was presented.

The Speaker[3] held that unless some statement in the speech of Mr. Kelley imputed improper or corrupt motives to Mr. Wheeler, or that he had made a false statement knowingly, with intent to deceive the House, no question of privilege was presented by Mr. Wheeler. The Speaker also held that in a discussion of a proposi-

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[1] Charles F. Crisp, of Georgia, Speaker.

[2] First session Forty-ninth Congress, Journal, p. 490; Record, p. 925.

[3] John G. Carlisle, of Kentucky, Speaker.

[4] First session Forty-ninth Congress, Journal, p. 1835; Record, pp. 5419, 5420.

tion which implies in any degree the censure of a Member of the House there must necessarily be allowed more latitude of expression in reference to that matter than in the ordinary discussion of a matter of legislation pending before the House.

2722. Reference in debate to a Member as a source of information, gives the Member no claim to the floor for a question of personal privilege.—On May 16, 1902,[1] Mr. Thetus W. Sims, of Tennessee, was recognized for a question of privilege; and having addressed the House and resumed his seat without making any motion, Mr. John W. Gaines, of Tennessee, claimed the floor for a question of privilege, saying, "my very honorable colleague states that he based his vote and action in this Methodist Church matter upon information received from me and from a letter that was directed to me by the book agent of that concern," and further proceeding in explanation of his action on that claim. Mr. Sims had criticised the management of that claim, but had not called in question the actions of Mr. Gaines further than to refer to him as a source of information.

Mr. Sereno E. Payne, of New York, made the point of order that Mr. Gaines had stated no question of personal privilege.

The Speaker[2] sustained the point of order.

2723. A Member may not bring before the House as a question of privilege charges of disreputable conduct on his part before he became a Member.—On April 15, 1879,[3] Mr. J. R. Chalmers, of Mississippi, in the course of a personal explanation, presented a resolution providing for a committee to investigate the charges made that he, while an officer in the Confederate army, was a participant in the "Fort Pillow massacre."

Questions were raised as to whether or not a Member might bring such a question forward as a question of privilege.

The Speaker[4] said:

> The Chair thinks that this is hardly a question of privilege. It is in the nature of a personal explanation. The Chair is inclined to believe the point of order which was intended to be made by the gentleman from Ohio [Mr. Garfield] is a correct one; that this does not embrace a question of privilege; that it does not relate to any stricture upon the gentleman from Mississippi in reference to anything done by him during his occupancy of a seat upon this floor. The Chair has listened to it as a personal explanation with the apparent consent of the House.

The House, on May 7, laid the resolution on the table.

2724. A Member is not entitled to raise a question of personal privilege on account of a newspaper charge relating to his conduct while a Member, but not as a Member.—On February 27, 1860,[5] Mr. John Cochrane, of New York, claiming the floor for a question of personal privilege, read an extract from the New York Tribune reflecting upon his course in relation to the recent visit of the New York Seventh Regiment to the city of Washington, and claimed that, inasmuch as the said article charged him with having been chairman of the committee of arrangements, when he was not even a member of the committee, a question of privilege was thereby presented.[6]

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[1] First session Fifty-seventh Congress, Record, pp. 5365, 5366.

[2] David B. Henderson, of Iowa, Speaker.

[3] First session Forty-sixth Congress, Journal, pp. 81, 263, 265; Record, pp. 455, 1125.

[4] Samuel J. Randall, of Pennsylvania, Speaker.

[5] First session Thirty-sixth Congress, Journal, p. 382; Globe, p. 896.

[6] The Journal does not give the newspaper extract in full, but only as printed here.

The Speaker [1] decided that no question of privilege was involved in the matter as presented by Mr. Cochrane.

Mr. Cochrane having appealed, the appeal was laid on the table.

2725. A proposition to investigate the propriety merely of a citizen's conduct at a time before he became a Member, may not be presented as a question of privilege.

Review of precedents relating to investigations of charges in regard to conduct of a Member at a time preceding the existing term of service.

The Speaker may, on a difficult question of order, decline to rule until he has taken time for examination of the question.

On April 26, 1904,[2] during debate on the bill (S. 2163) entitled "An act to require the employment of vessels of the United States for public purposes," Mr. William Bourke Cockran, of New York, in the course of his remarks, proposed as a matter of privilege a resolution, which he read.

Mr. Sereno E. Payne, of New York, made the point of order that the resolution did not present a question of privilege.

Debate having arisen, and Mr. Cockran having asked for the present consideration of the resolution, the Speaker [3] said:

The resolution having been presented and a point of order made upon it, the Chair declines to rule upon the point of order until he has had an opportunity to examine the precedents.

On April 27 [4] the Speaker submitted to the House his decision, as follows:

Yesterday, during consideration of the bill relating to the use of certain vessels belonging to the United States, the gentleman from New York [Mr. Cockran], claiming recognition for a question of privilege, proposed a resolution, which the Clerk will read.

The Clerk read as follows:

"Whereas the Hon. John Dalzell, a Member of this House and of its Committee on Ways and Means, has charged on the floor that the Hon. William Bourke Cockran, a Representative from New York and a member of the same committee, had been paid money by a political party to support a candidate for the Presidency nominated in opposition to the party with which the said William Bourke Cockran had theretofore been affiliated; and

"Whereas the said charge, though denied specifically on this floor by the said William Bourke Cockran, has not been withdrawn by the said John Dalzell; and

"Whereas said charge if true establishes such conduct as should unfit any man for membership in this House, and if false should be so declared and its author censured severely: Therefore, be it

"Resolved, That a select committee of five Members be appointed by the Chair to inquire into the truth of said charge, and to report the testimony with their conclusions thereon to this House at its session beginning the first Monday of December next; and be it further

"Resolved, That said committee be, and it is hereby, given full power to compel the attendance of such witnesses and the production of such papers as the Members thereof may deem necessary to the full and proper discharge of the duty hereby imposed on them."

Rule IX of the House is as follows:

"Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; second, the rights, reputation, and conduct of Members individually in their representative capacity only; and shall have precedence of all other questions, except motions to adjourn."

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[1] William Pennington, of New Jersey, Speaker.

[2] Second session Fifty-eighth Congress, Record, pp. 5655, 5657.

[3] Joseph G. Cannon, of Illinois, Speaker.

[4] Journal, pp. 693, 694; Record, pp. 5750, 5751.

Now, it is manifest that under the rules of the House the gentleman from New York may not interrupt the orderly course of business to present an extraneous matter unless that matter involves a question relating to the integrity of the House itself, or, what is the same thing, the integrity of one of its Members in his representative capacity.

A preliminary question presents itself first: Does the allegation presented in the preamble of the resolution recite accurately the charges alleged to be made by the gentleman from Pennsylvania?

As the language referred to was uttered on the floor, within the hearing of all the House, and is a part of the Record, it is possible for the Chair to form an opinion; but while that is so, the question is one of fact, relating to the interpretation of language, and more properly belongs to the House itself to decide, should the decision of the question of law bring the matter within the field of the House's jurisdiction. Therefore the Chair dismisses this branch of the inquiry.

Assuming the declarations of the preamble to establish prima facie what they assume to establish, is a question of privilege presented?

The Chair is warranted in taking judicial knowledge of the fact so abundantly established in the debate that the offense set forth as charged against the gentleman from New York, if committed at all, was committed while the gentleman from New York was neither a Member nor a Member-elect of this House.

May the House punish a Member for that which he did in his capacity as a citizen, before his election as a Member?

In view of the high constitutional importance of this question, the Chair on yesterday declined to rule until he had examined the precedents thoroughly. He finds that the question has often arisen, and that while there has been some diversity of opinion, there is in the main a well-defined line of decisions indicating that the House may not take such action.

As early as 1796 the charge was made against Humphrey Marshall, of Kentucky, a Member of the United States Senate, that he had committed the crime of perjury in Kentucky eighteen months before his election to the Senate. After careful examination the Senate found that it did not have jurisdiction under the Constitution to take cognizance of the alleged offense. It should perhaps be said in this connection that the case of William Blount, who was expelled from the Senate in 1797 for treasonable designs against the United States, has sometimes been cited as a precedent the other way; but the Chair does not find that this particular question was discussed in that case. And the case of John Smith, charged with complicity in the alleged conspiracy of Aaron Burr, and whose proposed expulsion failed in the Senate in 1807, can hardly be drawn into precedent.

In 1799 the House declined to expel Matthew Lyon for a violation of the alien and sedition law, committed while a Member but before his reelection to the then existing House, the point being especially urged that his constituents had reelected him with a full knowledge of his actual prosecution and conviction.

In 1858 it was proposed to expel from the House Mr. O. B. Matteson, who had resigned from the preceding House to escape expulsion for corruption in his legislative acts; but the House, after careful examination by a committee, declined to punish him, it being urged that he was amenable only to the people of his district.

Later, in 1875, in a case referred to in section 31 of the Parliamentary Precedents, the majority of the Judiciary Committee, citing the case of Humphrey Marshall, concluded that the Constitution did not vest in the House jurisdiction to try a Member for an offense committed before his election. In that case the offense charged was the bribery of Members of the preceding Congress.

It should be stated that this decision was rendered in the full knowledge of the famous Credit Mobilier case in the preceding Congress, in 1872, when the House censured two Members for bribery of fellow-Members, committed before their election to the existing House, but while they were Members of the preceding Congress. It should be noted that the Members in this case were censured on the report of a select committee, and that the Judiciary Committee of the House, in an elaborate report presented by Mr. Benjamin F. Butler, of Massachusetts, combated strongly those conclusions as to the right to punish. The report of 1875 was made in the Congress of which Mr. Randall was Speaker.

In the case of Brigham H. Roberts, which was referred to yesterday, it was alleged, if the recollection of the Chair is correct, that Roberts was actually engaged in the practice of polygamous cohabitation not only before his election, but up to the time his case was decided.

The Chair might also refer to the case of William N. Roach in the Senate in 1893, wherein the Senate, after debate, neglected to investigate a charge that Mr. Roach had been an embezzler at a time previous to his election to the Senate.

It will be observed that in only one of the cases cited has the House assumed to punish a Member for an act committed prior to his election to the then existing House, and that case dates to a period of great popular excitement.

As to acts committed outside the House, and having no relation to the legislative capacity of the Member, the Chair finds even less grounds for proceeding.

In 1879 a Member from Louisiana, Mr. Acklen, claiming the floor for a question of personal privilege, asked an investigation of a charge that he had committed the crime of seduction in Louisiana at a time prior to his election. Mr. John H. Reagan, of Texas, having objected that no question of privilege was presented, Mr. James A. Garfield, of Ohio, sustained Mr. Reagan's position, holding that the House had no jurisdiction. Mr. Speaker Randall expressed his concurrence in Mr. Garfield's opinion, but submitted the case to the House. And the House, without division, decided that no question of privilege was involved.

Again, in 1884, Mr. William Pitt Kellogg, of Louisiana, asked, as a question of privilege, that the House investigate his alleged connection with the star-route frauds, certain testimony reflecting on his conduct having just been given before a committee of the House itself. Mr. William R. Morrison, of Illinois, made the point of order that no question of privilege was involved. Mr. Speaker Carlisle said:

"The House has no right to punish a Member for an offense alleged to have been committed previous to the time when he was elected a Member of the House. That has been so frequently decided in the House that it is no longer a matter of dispute."

Mr. Nathaniel J. Hammond, of Georgia, urged that the House should not investigate the conduct of a Member at a time prior to his election, and on his motion resolutions proposed by Mr. Kellogg were referred to the Committee on the Judiciary. It does not appear that that committee ever reported on the matter.

So it seems to the Chair that even if it had been alleged on the floor that the gentleman from New York had committed an actual crime in 1896, and even if it were an ascertained fact that he had committed a crime at that time, it would be very doubtful under the precedents cited whether or not he would be punishable by this House, and hence, as a necessary consequence, whether or not a resolution of investigation would involve a question of privilege.

But the Chair feels justified in taking cognizance of the fact that what is alleged to be charged constitutes no crime. At most the only question is one as to the propriety of the conduct of a private citizen. The House could not rightfully punish him if it desired so to do. The Chair thinks that a reading of the decision of the United States Supreme Court in the case of Kilbourne *v.* Thompson will raise a serious doubt as to whether the House could compel a syllable of testimony under this resolution.

Therefore the Chair holds that the resolution may not be entertained as a question of privilege.

Mr. John S. Williams, of Mississippi, having appealed, the appeal, on motion of Mr. Payne, was laid on the table by a vote of yeas 170, nays 126.

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