

## Chapter LXV.

### FUNCTION OF THE SENATE IN IMPEACHMENT.

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

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

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

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

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

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

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<sup>1</sup> Senate asserts that it has the sole power to regulate the forms and procedure of the trial. Section 2324 of this volume.

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

<sup>2</sup> In England the judgment of the Lords is given in accordance with the law of the land. Section 2155.

<sup>3</sup> Does the Senate sit as a court? Sections 2079, 2082, 2126, 2270, 2307.

Objections of Senators to evidence. Section 2268.

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

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

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

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

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

**The Lords may not, under the parliamentary law, proceed by impeachment against a Commoner, except on complaint of the Commons.**

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

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

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

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

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

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

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

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

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

On February 29, 1868,<sup>1</sup> the Senate, in its legislative capacity and before its organization for impeachment proceedings, began the consideration of a series of

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<sup>1</sup>Second session Fortieth Congress, Senate Journal, p. 236; Globe, p. 1515.

rules reported<sup>1</sup> by a select committee composed of Messrs. Jacob M. Howard, of Michigan; Lyman Trumbull, of Illinois; Roscoe Conkling, of New York; George F. Edmunds, of Vermont; Oliver P. Morton, of Indiana; Stephen C. Pomeroy, of Kansas, and Reverdy Johnson, of Maryland. The caption of this report was "Rules of Procedure and Practice in the Senate when Sitting as a High Court of Impeachment." At the outset of the discussion<sup>2</sup> Mr. Thomas A. Hendricks, of Indiana, made the objection that the rules not only proposed the method for organizing the Senate into a court, but also proposed regulations for the court itself. He conceived that it was not proper for the Senate as such to adopt rules to control the action of the court upon any question whatever that might become material during the trial.

During the discussion of the rules themselves, Mr. Oliver P. Morton, of Indiana, acting upon suggestions received since he had concurred in the report, called attention<sup>3</sup> to the use of the words "high court of impeachment" in Rules III and IV as submitted:

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

Debate at once arose<sup>4</sup> and there was a citation of precedents to show that in former impeachment trials the words "high court of impeachment" had been used, although Mr. Conkling argued that these words had been used rather by the Secretary in recording the proceedings than by the Senate itself.

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

Mr. Ferry's motion was disagreed to,<sup>5</sup> yeas 16, nays 21.

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<sup>1</sup> Senate Report No. 59.

<sup>2</sup> Globe, pp. 1520, 1521.

<sup>3</sup> Globe, p. 1521.

<sup>4</sup> Globe, pp. 1521–1526.

<sup>5</sup> Senate Journal, p. 237; Globe, p. 1526.

The question was not settled by this vote, however, but recurred again and again. On March 2<sup>1</sup> Mr. Hendricks proposed an additional rule, as follows:

When the Senate sits as a high court of impeachment in a case in which the Chief Justice must preside, such of the foregoing rules as apply to the trial shall be considered and adopted by the court before they shall have force.

In support of his motion Mr. Hendricks argued:

I am not able to see that there ought to be a doubt on this question. If the Chief Justice must preside when the Senate shall try the case, he ought to preside when the Senate decides how it will try the case, what forms of proceeding shall be observed, what rights shall be secured to counsel, what rights shall be reserved to Senators. Many of these rules are exceedingly important.

\* \* \* If the Constitution provides that the Chief Justice must preside here, and that this must be a court with the Chief Justice as the presiding officer when the trial takes place, ought we not to decide how the case shall be tried when he is in his seat? In a case where the Chief Justice must preside, is it proper that the Senate, in his absence, when the Vice-President or President pro tempore is occupying the chair, who may succeed in case the impeachment is successful—is it right with that organization of the Senate to prescribe the rules which shall govern the court which the Constitution itself provides for?

\* \* \* These rules, among other things, confer upon the Chief Justice presiding the power to decide certain questions, questions of the admissibility of evidence. These may be very important. It is conferring upon him a power which he would not possess in the absence of the rule. Now, that is a power which he is to exercise in the court, which we confer upon him when not organized into the court and not under oath.

In reply Mr. Timothy O. Howe, of Wisconsin, suggested that the Chief Justice would have no vote in adopting the rules, and as to his decisions on the admissibility of evidence, he said:

We confer that power upon him in pursuance of the authority of the Senate to make rules for its government in any particular in which the Senate may be called upon to act, as the Constitution says we may. Now, in any possible contingency, if we have the authority at any time to confer the power mentioned in the seventh rule upon the presiding officer, does it make any possible difference whether we do it to-day or to-morrow, whether we do it when the Chief Justice is here or when he is absent. If I could see that it did, I might hesitate upon the point; but as the same identical individuals are to do the thing whenever it is done, I can not for my life see what difference it can make whether it is done on one day or another.

The amendment proposed by Mr. Hendricks was disagreed to without division.

Immediately thereafter<sup>2</sup> Rule XXIV was read, prescribing forms for subpoenas of witnesses and of the summons to the person impeached. In these forms occurred the words "Senate of the United States, sitting as a high court of impeachment." Mr. Conkling moved to strike out the words "sitting as a high court of impeachment" wherever they occurred.

This motion was agreed to without very extended debate, Mr. Conkling stating that if his amendment should be adopted it would restore the forms to what they were in the trials of 1804, 1830, and 1862. Mr. Edmunds explained that the words objected to had been introduced to get a form applicable to all conditions, whether the Chief Justice, a Vice-President, or a President pro tempore should preside.

Mr. Conkling's motion was agreed to, yeas 23, nays 12. This was not, however, regarded as very significant on the question as to the nature of the court. Mr.

<sup>1</sup> Senate Journal, p. 244; Globe, pp. 1589, 1590.

<sup>2</sup> Senate Journal, p. 246; Globe, pp. 1591, 1592.

John Sherman, of Ohio, who voted for the motion, but championed the idea that the words high court should be retained as descriptive of the body, said that he did not consider it necessary, in summoning a witness, to inform him that the Senate was sitting as a high court of impeachment.

But on Rule XXV Mr. Conkling brought the question to issue<sup>1</sup> by moving an amendment which struck out the word "court."

Mr. Sherman said:

That this Senate is a court when it proceeds to try a case I think it does not need any very long speech to prove. We examine witnesses; we convict or acquit; we try a case; we are sworn; and if there is any element of a trial or any idea of a court that does not enter into our organization I do not know what it can be.

Mr. Conkling said:

The Constitution says that the Senate shall have the sole power to try all impeachments. It does not say that the Senate shall become a court ex officio; it does not say that there shall be a high court for the trial of impeachment, to be composed of the Senate and of the Chief Justice sitting ex officio. It says nothing of that kind, but simply that the Senate shall try all impeachments. Why not leave it there? If it is a court we do not destroy that character by omitting these superfluities from our rules. If it is not a court we do not clothe it with the ermine or the attributes of a court by putting in the rules that it is so.

Then why not take the thing precisely as we find it?

Mr. Edmunds said:

It is a matter of some regret to me and to those of us who differed from my friend from New York in committee, where we thought we had settled the matter, that he is not willing to take the decision of the Senate on Saturday, when we were pretty full, upon this very question, instead of bringing it up again now, after we have gone through with this whole thing. Of course he is perfectly justified in doing so if he thinks the importance of it demands that course on his part; but I am a little afraid that his fear of the canal board in his State being turned into a court has led him to be a little touchy on this subject.

On Saturday, it will be remembered, this very question was debated at great length, not an unnecessary length, but every gentleman expressed his views who chose to do so, and gave his reasons for them, and the precedents were referred to; and then upon the yeas and nays on the question of striking out the word "high" (in connection with which it was expressly stated by the Senator from Connecticut that if he succeeded in that he should follow it by the other motions which would leave the description of the body to be simply "the Senate," because it would be easier to get an affirmative vote upon striking out a word, which was, of course, a mere matter of form, than it would upon the whole) the proposition was voted down, and voted down upon a reference to the precedents.

I hold in my hand the Globe, showing those proceedings; and the first was the trial of Blount, in 1798, in which—I ask the attention of the Senator from New York to it—the formal resolution—not the entry of the Secretary, but the resolution of the Senate as offered and adopted—was "resolved, that at the next opening of the court of impeachment the president" shall do so and so. Then, when we come to the trial of Chase, which was referred to also in some parts of the proceedings, the expression "court of impeachment" appears only to be the entry of the Secretary, but in other parts of the proceedings it appears to be the judgment of the Senate itself. Then, when we come to the trial of Peck, on the question of the Senate's taking upon itself a judicial capacity, the formal resolution offered on the part of the committee appointed by the Senate to report rules in that case was:

*"Resolved, That at 12 o'clock tomorrow the Senate will resolve itself into a court of impeachment."*

So that we find ourselves from the beginning, in 1798, down to this time—and the case of Humphreys in 1862 is just the same—having adopted this phraseology as describing the Senate, when it was

<sup>1</sup>Senate Journal, p. 246; Globe, pp. 1593–1594. There is a discrepancy between the Journal and Globe, but the debate shows that the Globe must be correct.

exercising this function, as sitting as a court, saying nothing now about the word “high.” Then where is the use, after all the discussion we have had on this point and one decision of it in the face of these uniform precedents from the beginning to this time, of turning our faces back and oversetting the whole theory upon which these rules go?

Mr. Ferry said:

Whether the Senate, sitting for the trial of impeachments, be a court or not in ordinary language, whether that term as ordinarily used may properly enough be applied to it is one thing. Whether the Constitution calls it a court and designates it as a court is another thing. If that tribunal be a court according to the Constitution, I would like to have Senators who desire to retain this phraseology point out to me a statute on the face of the earth designating the presiding officer of the court in which a presiding officer has not somewhat more functions than Senators seem to be willing to attribute to the presiding officer of this court of impeachment. And I feel thus because I wish to preserve simply to the Senate—not in relation to this particular case; I care nothing about it in this particular case one way or the other—but to preserve to the Senate, and the Members of the Senate only, their constitutional functions without interference from outside. As I suggested before, it is not worth while for me to go over the argument again, because, using this language in the rules which we are prescribing, we ourselves prejudge the question and estop ourselves. As it seems to me, by declaring that the Constitution makes this tribunal a court in the legal, constitutional signification of the term, we estop ourselves from claiming that none other than a Senator is a member of that court.<sup>1</sup>

To this Mr. Edmunds retorted:

I ask him if he does not know that the House of Lords in England from time immemorial has always been called the high court of Parliament; and if he does not know that in proceedings in impeachment in that court the lord chancellor or lord high steward, the president of the court, has no vote unless he be a member of that court by being a peer, by the constant practice and frequent decision of that body?

Mr. Conkling’s motion was then agreed to—yeas 16, nays 13.

Then the rules were generally amended, on motion of Mr. Ferry, in such a way as to remove the word “court” or “high court of impeachment” wherever occurring,<sup>2</sup> and were agreed to.

On March 4<sup>3</sup> the Senate met, and the President pro tempore laid before them the following communication:

*To the Senate of the United States:*

Inasmuch as the sole power to try impeachments is vested by the Constitution in the Senate, and it is made the duty of the Chief Justice to preside when the President is on trial, I take the liberty of submitting, very respectfully, some observations in respect to the proper mode of proceeding upon the impeachment which has been preferred by the House of Representatives against the President now in office.

That when the Senate sits for the trial of in impeachment it sits as a court seems unquestionable.

That for the trial of an impeachment of the President, this court must be constituted of the Members of the Senate, with the Chief Justice presiding, seems equally unquestionable.

The Federalist is regarded as the highest contemporary authority on the construction of the Constitution; and in the sixty-fourth number the functions of the Senate “sitting in their judicial capacity as a court for the trial of impeachments” are examined.

In a paragraph explaining the reasons for not uniting “the Supreme Court with the Senate in the formation of the court of impeachments” it is observed that “to a certain extent the benefits of that

<sup>1</sup>The discussion as to whether the Chief Justice would have a vote in the proceedings had already taken place (Globe, pp. 1585–1588) and had suggested the allied question of the nature of the Senate in this function.

<sup>2</sup>Senate Journal, p. 248; Globe, p. 1602.

<sup>3</sup>Senate Journal, pp. 798–800; Globe, p. 1644.

union will be obtained from making the Chief Justice of the Supreme Court the president of the court of impeachments, as is proposed in the plan of the convention, while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was, perhaps, the prudent mean.”

This authority seems to leave no doubt upon either of the propositions just stated. And the statement of them will serve to introduce the question upon which I think it my duty to state the result of my reflections to the Senate, namely, at what period, in the case of an impeachment of the President, should the court of impeachment be organized under oath as directed by the Constitution?

It will readily suggest itself to anyone who reflects upon the abilities and the learning in the law which distinguish so many Senators that besides the reason assigned in the *Federalist* there must have been still another for the provision requiring the Chief Justice to preside in the court of impeachment. Under the Constitution, in case of a vacancy in the office of President, the Vice President Succeeds; and it was doubtless thought prudent and befitting that the next in succession should not preside in a proceeding through which a vacancy might be created.

It is not doubted that the Senate, while sitting in its ordinary capacity, must necessarily receive from the House of Representatives some notice of its intention to impeach the President at its bar; but it does not seem to me an unwarranted opinion, in view of this constitutional provision, that the organization of the Senate as a court of impeachment, under the Constitution, should precede the actual announcement of the impeachment on the part of the House.

And it may perhaps be thought a still less unwarranted opinion that articles of impeachment should only be presented to a court of impeachment; that no summons or other process should issue except from the organized court, and that rules for the government of the proceedings of such a court should be framed only by the court itself.

I have found myself unable to come to any other conclusions than these. I can assign no reason for requiring the Senate to organize as a court under any other than its ordinary presiding officer for the later proceedings upon an impeachment of the President which does not seem to me to apply equally to the earlier.

I am informed that the Senate has proceeded upon other views; and it is not my purpose to contest what its superior wisdom may have directed.

All good citizens will fervently pray that no occasion may ever arise when the grave proceedings now in progress will be cited as a precedent; but it is not impossible that such an occasion may come.

Inasmuch, therefore, as the Constitution has charged the Chief Justice with an important function in the trial of an impeachment of the President, it has seemed to me fitting and obligatory, where he is unable to concur in the views of the Senate concerning matters essential to the trial, that his respectful dissent should appear.

S. P. CHASE,

*Chief Justice of the United States.*

WASHINGTON, *March 4, 1868.*

This letter was referred to the select committee of which Mr. Howard was chairman.

Soon thereafter the managers presented themselves with the articles of impeachment, and delivered them to the Senate, the President pro tempore presiding.<sup>1</sup>

Then,<sup>2</sup> after the intervention of legislative business, the Senate agreed to the necessary resolutions for notifying the House of Representatives and the Chief Justice that on the following day “the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States,” etc.

A resolution providing that a printed copy of the rules be furnished to the House of Representatives was agreed to, although Mr. Charles R. Buckalew, of Pennsylvania, objected that this should not be done until after the court had been organized and had determined on rules.

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<sup>1</sup> Senate Journal, pp. 800–807; Globe, pp. 1647–1649.

<sup>2</sup> Globe, pp. 1657–1658; Senate Journal, pp. 807, 808.

On March 6,<sup>1</sup> after the organization for the trial of the articles of impeachment, the Chief Justice said, before putting the question on a resolution notifying the House of Representatives of the organization:

The Chair feels it his duty to submit a question to the Senate relative to the rules of proceeding. In the judgment of the Chief Justice the Senate is now organized as a distinct body from the Senate sitting in its legislative capacity. It performs a distinct function; the members are under a different oath; and the presiding officer is not the President pro tempore of the Senate, but the Chief Justice of the United States. Under these circumstances, the Chair conceives that rules adopted by the Senate in its legislative capacity are not rules for the government of the Senate sitting for the trial of an impeachment unless they be also adopted by that body. In this judgment of the Chair, if it be an erroneous one, he desires to be corrected by the judgment of the court, or of the Senate sitting for the trial of the impeachment of the President, which in his judgment are synonymous terms, and therefore, if he may be permitted to do so, he will take the sense of the Senate upon this question, whether the rules adopted on the 2d of March, a copy of which is now lying before him, shall be considered the rules of proceeding in this body. ["Question!"] Senators, you who think that the rules of proceeding adopted on the 2d of March should be considered as the rules of proceeding of this body will say "ay;" contrary opinion, "no." [The Senators having answered.] The ayes have it by the sound. The rules will be considered as the rules of proceeding in this body.

The journal of the Senate, in referring to proceedings in the trial, also refrains from the use of the words "high court of impeachment."<sup>2</sup>

The Chief Justice, however, in opening the daily sittings, directed the Sergeant-at-Arms to "open the court by proclamation."<sup>3</sup>

The answer of the President was also addressed to the "Senate of the United States, sitting as a court of impeachment."<sup>4</sup>

On June 3, 1868,<sup>5</sup> after the trial of the President had been concluded, Mr. Charles Sumner, of Massachusetts, presented to the Senate the following resolutions declaring the constitutional responsibility of Senators for their votes on impeachment:

Whereas a pretension has been put forth to the effect that the vote of a Senator on an impeachment is so far different in character from his vote on any other question that the people have no right to criticise or consider it; and whereas such pretension, if not discountenanced, is calculated to impair that freedom of judgment which belongs to the people on all that is done by their Representatives: Therefore, in order to remove all doubts on this question and to declare the constitutional right of the people in cases of impeachment—

1. *Resolved*, That, even assuming that the Senate is a court in the exercise of judicial power, Senators can not claim that their votes are exempt from the judgment of the people; that the Supreme Court, when it has undertaken to act on questions essentially political in character, has not escaped this judgment; that the decisions of this high tribunal in support of slavery have been openly condemned; that the memorable utterance known as the Dred Scott decision was indignantly denounced and repudiated, while the Chief Justice who pronounced it became a mark for censure and rebuke; and that plainly the votes of Senators on an impeachment can not enjoy an immunity from popular judgment which has been denied to the Supreme Court, with Taney as Chief Justice.

2. *Resolved*, That the Senate is not at any time a court invested with judicial power, but that it is always a Senate with specific functions, declared by the Constitution; that according to express words, the judicial power of the United States is vested in one Supreme Court and such inferior courts as

<sup>1</sup> Senate Journal, p. 811; Globe, p. 1701.

<sup>2</sup> Senate Journal, pp. 272, 276, etc.

<sup>3</sup> Globe Supplement, pp. 11, 28.

<sup>4</sup> Senate Journal, p. 829; Globe Supplement, p. 12.

<sup>5</sup> Senate Journal, p. 448; Globe, p. 2790.

Congress may from time to time ordain and establish," while it is further provided that "the Senate shall have the sole power to try all impeachments," thus positively making a distinction between the judicial power and the power to try impeachments; that the Senate on an impeachment does not exercise any portion of the judicial power, but another and different power, exclusively delegated to the Senate, having for its sole object removal from office and disqualification therefor; that, by the terms of the Constitution, there may be, after conviction on impeachment, a further trial and punishment "according to law," thus making a discrimination between a proceeding by impeachment and a proceeding "according to law;" that the proceeding by impeachment is not "according to law," and is not attended by legal punishment, but is of an opposite character, and from beginning to end political, being instituted by a political body, on account of political offenses, being conducted before another political body having political power only, and ending in a judgment which is political only; and therefore the vote of a Senator on impeachment, though different in form, is not different in responsibility from his vote on any other political question; nor can any Senator on such an occasion claim immunity from that just accountability which the Representative at all times owes to his constituents.

3. *Resolved*, That Senators in all that they do are under the constant obligation of an oath, binding them to the strictest rectitude; that on an impeachment they take a further oath, according to the requirement of the Constitution, which says, "Senators, when sitting to try impeachment, shall be on oath or affirmation;" that this simple requirement was never intended to change the character of the Senate as a political body and can not have any such operation; and therefore, Senators, whether before or after the supplementary oath, are equally responsible to the people for their votes, it being the constitutional right of the people at all times to sit in judgment on their Representatives.

It does not appear that this resolution was ever acted on.

**2058. During the Johnson trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.**—In the course of the arguments during the impeachment trial of Andrew Johnson, President of the United States, the question as to whether or not the Senate sitting for the trial had the attributes of a court was discussed at length. Mr. Manager Benjamin F. Butler, of Massachusetts, argued<sup>1</sup> that it did not. Of the Senators who filed written opinions, Mr. Charles Sumner, of Massachusetts, sustained at length the view that impeachment was a political and not a judicial proceeding.<sup>2</sup>

Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, argued that the Senate was a court,<sup>3</sup> and Mr. Thomas A. R. Nelson, of Tennessee, also of counsel for the President, took the same view, arguing at length,<sup>4</sup> as did Mr. William S. Groesbeck, of Ohio, also of counsel for the President.<sup>5</sup> Mr. William M. Evarts, of counsel for the President, argued from both English and American precedents, that the Senate sat as a court.<sup>6</sup> Of the Senators who filed written opinions in the case, this view was sustained by Mr. Garrett Davis, of Kentucky.<sup>7</sup>

**2059. The Senate, by majority vote, assumed jurisdiction to try the Belknap impeachment, although protest was made that a two-thirds vote was required.**—On June 6, 1876,<sup>8</sup> in the Senate, sitting for the impeachment trial

<sup>1</sup> Second session Fortieth Congress, Globe Supplement, p. 30.

<sup>2</sup> Pages 463, 464.

<sup>3</sup> Page 134.

<sup>4</sup> Pages 290, 291.

<sup>5</sup> Pages 310, 311.

<sup>6</sup> Pages 340, 341.

<sup>7</sup> Pages 438, 439.

<sup>8</sup> First session Forty-fourth Congress, Senate Journal, p. 948; Record of trial, pp. 162–164.

of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, presented the following:

Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Here in court comes the said William W. Belknap and moves the court now here to vacate the order entered of record in this cause setting aside and holding as naught the plea of him, said Belknap, by him first above in this cause pleaded, for the reason that said order was not passed with the concurrence of two-thirds of the Senators present and voting upon the question of adopting and passing said order, as appears by the record in this cause.

WILLIAM W. BELKNAP.  
J. S. BLACK,  
MONTGOMERY BLAIR,  
MATT. H. CARPENTER,  
*Of Counsel.*

The plea referred to was that the Senate had no jurisdiction to try the case, since Mr. Belknap had resigned before the impeachment was made.

At the previous sitting, on June 1, Mr. Carpenter had said: <sup>1</sup>

Speaking for myself only (not having consulted with my colleagues), I maintain that upon the whole record the order is void, for the reason that it was not concurred in by two-thirds of the Senators present and voting. Suppose a case in the Supreme Court, where only a majority of the judges need concur in the judgment; and suppose the record to show that only four judges concurred in the judgment while five dissented, but the minority directed the clerk to enter the judgment or order as the act of the court, and he should do so and certify it as such under the seal of the court. It is manifest, I think, that such judgment, if the dissent of the majority appeared of record, would be absolutely void, and would be so declared by any court where the judgment should come in question collaterally. I think this judgment is in the same category.

\* \* \* \* \*

That we can raise these questions on a final hearing, is clear, because it can not be maintained that any question upon which conviction depends can be eliminated from such final determination by the action of less than the constitutional majority of two-thirds. Otherwise a mere majority of the Senate might defeat the constitutional provision.

In these cases of impeachment, if a mere majority can settle the question of jurisdiction, so a mere majority, by overruling a demurrer to the articles, can determine that the acts alleged to have been done or omitted by the respondent constitute in law a high crime or misdemeanor within the meaning of the Constitution; leaving the final judgment to rest only upon questions of fact or at the final hearing, none of these questions having been disposed of, some master tactician might first move a resolution declaring that the respondent had done or omitted the acts charged, and if sustained by a mere majority, might claim that the facts were settled, and that the final judgment must rest upon the question of law whether such facts amounted to a high crime or misdemeanor.

In briefer and plainer terms, no conviction can take place under this provision of the Constitution, unless two-thirds of the Senators concur in regard to every element necessary to conviction, and first and conspicuous among these, must be the question of jurisdiction.

Mr. Manager Scott Lord had said: <sup>2</sup>

On the point which the counsel has suggested, practically that a two-thirds vote is necessary on the question of jurisdiction, that Senators who voted that this court had not jurisdiction must therefore on the final vote, when the question is put, "Did this defendant take \$1,500 on a given occasion and for such a purpose?" say "Not guilty," because of their views in regard to jurisdiction—on this point I say we shall be prepared to show that there is nothing whatever in the suggestion; in fact, that

<sup>1</sup> Record of trial, pp. 159, 161.

<sup>2</sup> Pages 159, 160.

the whole practice of courts of impeachment has been in contravention of it; that the Constitution itself prevents any such possibility. Therefore when this question is raised in some proper form we shall desire to be heard upon it.

Mr. Allen G. Thurman, a Senator from Ohio, said: <sup>1</sup>

That question can be argued on the motion submitted by the counsel for the respondent. I suppose it can be argued at almost any time or in any way. In my judgment it never can be decided until we come to the final decision, but it can be argued on the motion submitted; although I think it is pretty clear, for reasons that I am not at liberty to state now, that it can not be decided on any such motion as that submitted by the counsel.

And Mr. Black, of counsel for the respondent, concurred:

I will say now that, so far as I can see, the statement of the law upon this point as made by the Senator from Ohio [Mr. Thurman] is what meets with my view. I have not had time to consult with the other counsel in the case and do not know how they feel about it; but I think, whatever may be done with this motion or whenever it may be argued, it can not really be directly decided until the final determination of the case, and that we ought to have, therefore, the privilege of arguing the point at any time. It is a question that arises and will arise at every step of this case as we go on.

Mr. William Pinkney Whyte, a Senator from Maryland, proposed this order:

*Ordered*, That the Senate sitting as a court of impeachment adjourn until tomorrow at one o'clock p.m., when argument shall be heard upon the motion offered by the counsel for the respondent.

The order was disagreed to, yeas 18, nays 23.

On June 16<sup>2</sup> Mr. Black, of counsel for the respondent, presented the following paper:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

And now, to wit, this 16th day of June, 1876, the said William W. Belknap comes into court, and being called upon to plead further to the said articles of impeachment, doth most humbly and with profoundest respect represent and show to this honorable court that on the 17th day of April last past he did plead to the said articles of impeachment, and in his said plea did allege that at the time when the House of Representatives of the United States ordered the said impeachment, and at the time when the said articles of impeachment were exhibited at the bar of the Senate against him, the said Belknap, he, the said Belknap, was and ever thereafter had been not a public officer of the United States, but a private citizen of the United States and of the State of Iowa; and that the plea aforesaid and all the matters and things therein contained were by him, said Belknap, fully verified by proofs, namely, by admissions of the said House of Representatives before said court; and the said Belknap further represents and shows to the court here that the truth and sufficiency of the plea pleaded by him as aforesaid were thereupon debated by the managers of the said House of Representatives and the counsel of this respondent, and thereupon submitted to this court for its determination and judgment thereon; and that such proceedings were thereupon had in this court on that behalf in this cause; that afterwards, to wit, on the 29th day of May last past, the members of this court, to wit, the Senators of the United States sitting as a court of impeachment as aforesaid, did severally deliver their several judgments, opinions, and votes on the truth and sufficiency in law of the said plea, when and whereby it was made duly to appear that only thirty-seven Senators concurred in pronouncing said plea insufficient or untrue; whereas twenty-nine Senators sitting in said court, by their opinions and votes, affirmed and declared their opinion to be that said plea was sufficient in law and true in point of law; so that the said Belknap in fact saith that, on the day and year last aforesaid, twenty-nine Senators sitting in said court declared therein that the said Belknap having ceased to be a public officer of the United States by reason of his resignation of the office of Secretary of War of the United States before proceedings in impeachment

<sup>1</sup>Page 163.

<sup>2</sup>Senate Journal, pp. 952, 955, 959; Record of Trial, pp. 169–173.

were commenced against him by the House of Representatives of the United States, the Senate cannot take jurisdiction of this cause; and that seven Senators did not vote upon said question, and only thirty-seven Senators, by their votes, declared their opinion to be that the Senate could take jurisdiction of said cause. And afterwards thirty-seven Senators sitting in said court, and no more, concurred in a resolution declaring that "in the opinion of the Senate William W. Belknap is amenable to trial on impeachment for acts done as Secretary of War, notwithstanding his resignation of said office," and that twenty-nine of said Senators sitting in said court, by their votes, affirmed and declared their opinion to be to the contrary thereof. And afterwards, on the day and year last aforesaid, it was proposed in said court that the President pro tempore of the said Senate should declare the judgment of the said Senate, sitting as aforesaid, to be that said plea of said respondent should be held for naught, and a vote was taken upon said proposition; and, as said vote showed, two-thirds of the said Senators present did not concur therein; but, on the contrary thereof, only thirty-six Senators did concur therein, and twenty-seven Senators then and there present, and voting on said proposition, did by their votes dissent from and vote against said proposition. All of which appears more fully and at large upon the record of this court in this cause, to which record he, said Belknap, prays leave to refer.

Therefore the said Belknap, referring to the Constitution of the United States, article 1, section 3, clause 6, which provides that "no person shall be convicted without the concurrence of two-thirds of the members present," (meaning on trial on impeachment,) avers that his said plea has not been overruled or held for naught by the Senate sitting as aforesaid, no such judgment having been concurred in by two-thirds of the Senators sitting in said court and voting thereon; but, on the contrary thereof, as the vote aforesaid fully shows, the said plea of the said respondent was sustained, and its truth in fact and sufficiency in law duly affirmed by the said Senate sitting as aforesaid, more than one-third of the Senators of said Senate, sitting as aforesaid, having by their votes so declared, to wit, twenty-seven Senators as aforesaid, and said twenty-seven Senators having by their votes declared and affirmed their opinion to be that said plea of said respondent was true in fact and was sufficient in law to prevent the Senate sitting as aforesaid from taking further cognizance of said articles of impeachment.

Wherefore the respondent avers that he has already been substantially acquitted by the Senate sitting as aforesaid; and that he, the said respondent, is not bound further to answer said articles of impeachment; the said order requiring this respondent to answer over not having been made with the concurrence of two-thirds of the said Senators sitting as aforesaid and voting upon the question of the passage of said order; and said order having been passed with the concurrence only of less than two-thirds of the said Senators sitting as aforesaid, and voting on the question of making and passing said order, the said order ought not to have been entered of record as an order of said court of impeachment in this cause; and said order appearing upon the whole record of said cause to be null and void as an order of said court.

And the said respondent prays the court now here, as he has before formally moved said court, to vacate said order; and the said respondent hereby prays said court that he may be hence dismissed.

WILLIAM W. BELKNAP.

MATT. H. CARPENTER,

J. S. BLACK,

MONTGOMERY BLAIR,

*Of Counsel for said Respondent.*

The Senate thereupon adopted the following order, the first clause being agreed to by a vote of yeas 26, nays 24, and the second by a vote of yeas 21, nays 16.

*Ordered,* That the paper presented by the defendant on the 16th instant be filed in this cause; and the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty.

This question was discussed somewhat at length during the final arguments in this case, Messrs. Montgomery Blair,<sup>1</sup> J. S. Black,<sup>2</sup> and Matt. H. Carpenter,<sup>3</sup> sus-

<sup>1</sup> Record of Trial, p. 287.

<sup>2</sup> Page 315.

<sup>3</sup> Pages 333, 334.

taining the contention already made by them, and Messrs. Managers William P. Lynde<sup>1</sup> and Scott Lord,<sup>2</sup> taking the opposing view.

The question had also been discussed briefly on July 6,<sup>3</sup> when the managers began to introduce testimony, Mr. Black having proposed the following:

The counsel for the accused object to the evidence now offered and to all evidence to support the opening of the managers, on the ground that there can be no legal conviction, the Senate having already determined the material and necessary fact that the defendant is not, and was not when impeached, a civil officer of the United States.

The question being submitted:

Shall the objection of counsel for the respondent be sustained?

it was decided in the negative without division.

**2060. The Senate, in 1868, when certain States were without representation, declined to question its competency to try an impeachment case.—** On February 29, 1868,<sup>4</sup> the Senate was proceeding to the consideration of rules of procedure for impeachments, the occasion being the proposed impeachment of Andrew Johnson, President of the United States, when Mr. Garrett Davis, of Kentucky, moved to recommit the rules with instructions as follows:

That the committee report as a substitute for the rules just read the following:

“That the Constitution of the United States having appointed the Senate to be the court to try all impeachments, and having provided that the Senate shall be composed of two Senators from each State, and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Texas, Louisiana, and Florida having each chosen two Senators, and those Senators not having been admitted to their seats in the Senate, while they continue to be excluded the Senate can not be formed into a constitutional and valid court of impeachment for the trial of articles of impeachment preferred against Andrew Johnson, President of the United States.”

Mr. Davis argued elaborately in favor of his motion, saying in the course of his remarks:

The motion that I make is based upon the idea that while the present Members of the Senate exclude ten States from representation in the body the Senators representing the remaining States, which are not excluded, have no right to form a court of impeachment, and can not do so until the ten States whose Senators have been excluded are admitted as Senators. I think myself that the motion is properly made at this time to the Senate, not to the court of impeachment. Whether the Senate will form itself into a court of impeachment or not is a Senatorial question. It is not a question for the court of impeachment to decide. It does not come before the court of impeachment at all, according to my judgment of the matter. The Senate must be in such condition as to numbers and representation from all the States that it has the constitutional power to resolve itself into a court of impeachment. Whether it be in that condition or not is a question not for the court to decide, but for the Senate, before it resolves itself into a court of impeachment to decide. It seems to me that that is the correct position in relation to that point. Being of that opinion, I will proceed at no great length with my remarks.

If the ten excluded States had never been in the rebellion, if they were now represented upon the floor of the Senate, could the Senate or could the two Houses of Congress exclude from representation in both Houses ten other States; and having excluded ten other States, could the remaining Senators from twenty-seven instead of thirty-seven States resolve themselves into a court of impeachment for the trial of the President? I presume that no Senator will answer that question in the affirmative. If that is conceded, to my mind it concedes the whole principle and the whole proposition, and I will proceed to assign one or two reasons why I believe so.

<sup>1</sup> Pages 295, 296.

<sup>2</sup> Pages 335, 336.

<sup>3</sup> Senate Journal, p. 961; Record of Trial, pp. 180, 181.

<sup>4</sup> Second session Fortieth Congress, Senate Journal, pp. 236, 237; Globe, pp. 1516–1520.

Any State that was in rebellion, after the rebellion was suppressed and after the State submitted itself to the Constitution and laws and authorities of the United States, which fact was admitted by her representation in the Senate or in the House, was as much in the Union as though that State had never been in the rebellion. I will take the State of Virginia. The State of Virginia has had a representative in the Senate since the suppression of the rebellion and since the time when there was a single arm raised against the authority of the United States; that Senator has served two sessions here since the rebellion was entirely suppressed; he was recognized by the Senate as a representative of the State of Virginia, and the Senate in taking that course toward him admitted that State to be in the Union as a State with all the rights and privileges which she would be entitled to under the Constitution as if she had never been in the rebellion at all. In the case of *Luther v. Borden* that principle is decided, and I will read a passage from it. The honorable Senator from Indiana [Mr. Morton] and the honorable Senator from Oregon [Mr. Williams] and all the Senators who support the Congressional policy of reconstruction seem to rely upon that case as their principal authority, at least the principal experiment of their authority. I will read one paragraph from that decision:

“Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority.”

There is the plain principle. It is in conformity to the principle of the law of post limine, too; it is in conformity to our Constitution. It is a declaration of the principle of the Constitution in these few and simple words, that when Congress has admitted Senators and Representatives from a State both the existence and authority of the government under which they were appointed and its republican form have been recognized by the proper constitutional authority.

Sir, it seems to me that this decision settles the question as to Virginia and as to Tennessee. The Senators, or at least a Senator from Tennessee and Senators from Virginia, and Representatives from both States, have been admitted by Congress to their seats in both Houses. That, this decision says, is a recognition by the proper constitutional authority of the governments under which those Senators and Representatives were appointed and of the republican form of the governments under which they were appointed.

Mr. Oliver P. Morton, of Indiana, replied, saying, in the course of his remarks:

The Constitution requires no other Senate for the trial of an impeachment than what is required for any other purpose. The same Senate that can pass a bill can sit in the trial of an impeachment. The Senator can find no difference in the Constitution. There is nothing in the Constitution that says there shall be two Senators here from every State; it says that to convict on impeachment shall require the votes of two-thirds of the Members present—that is what it says.

But, Mr. President, the Senator from Kentucky ignores one fact in his argument, which I think is of some importance in the consideration of this question; that is to say, he ignores the fact that there has been a rebellion. He treats the ten States which now have no representatives on this floor as being illegally and improperly excluded without cause. He omits any recognition of the fact that there has been a rebellion, that the people of those States have been in arms against the Government of the United States. He omits to mention the fact that they withdrew their Senators from this Chamber for a treasonable purpose, and that they engaged in hostility against the Government of the United States. These facts are material in the consideration of this question.

He says that every State in this Union is entitled to two Senators upon this floor. I controvert that proposition entirely. If the people of a State have destroyed their State government, if they have no legal State government that is authorized to elect Senators, I ask how they can have Senators upon this floor? If we regard these ten States as States in this Union, still the fact remains that they destroyed their loyal State governments, and they have no State governments that are legal and are recognized by the Government of the United States, and therefore they have no means under the Constitution of putting Senators upon this floor.

But, Mr. President, I do not think it worth while to undertake to follow the Senator in his argument. As I remarked before, I regard his presence here as a protest against his whole argument.

Mr. James A. Bayard, of Delaware, opposed the motion of Mr. Davis, but solely on the ground that the subject was not one for the decision of the Senate, but was for the court of impeachment to decide.

The motion to recommit was decided in the negative, yeas 2, nays 39.

On March 23, 1868,<sup>1</sup> after the Senate had organized for the trial of the President, after the articles of impeachment had been presented but before the reply had been made, Mr. Davis presented the following:

Mr. Davis, a Member of the Senate and of the Court of Impeachment, from the State of Kentucky, moves the court to make this order:

The Constitution having vested the Senate with the sole power to try the articles of impeachment of the President of the United States preferred by the House of Representatives, and having also declared that "the Senate of the United States shall be composed of two Senators from each State chosen by the legislatures thereof," and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Louisiana, and Texas having, each by its legislature, chosen two Senators who have been and continue to be excluded by the Senate from their seats, respectively, without any judgment by the Senate against them personally and individually on the points of their elections, returns, and qualifications, it is

*Ordered*, That a court of impeachment for the trial of the President can not be legally and constitutionally formed while the Senators from the States aforesaid are thus excluded from the Senate; and this case is continued until the Senators from these States are permitted to take their seats in the Senate, subject to all constitutional exceptions to their elections, returns, and qualifications severally.

The question on agreeing to the order was taken without debate, and there appeared, yeas 2, nays 29. So the order was not agreed to.

**2061. The doctrine of disqualifying personal interest as applied to a Senator sitting in an impeachment trial.**

**In 1868 the President pro tempore of the Senate voted on the final question at the Johnson trial, although a conviction would have made him the successor.**

**A Senator related to President Johnson by family ties voted on the final question of the impeachment without challenge.**

**A question as to the time when the competency of a Senator to sit in an impeachment trial should be challenged for disqualifying personal interest.**

On March 5, 1868,<sup>1</sup> while the Senate was organizing for the trial of Andrew Johnson, President of the United States, and after the Chief Justice had taken the chair, the administration of the oath to Senators proceeded until the name of Mr. Benjamin F. Wade, of Ohio, was called. As Mr. Wade arose from his seat and advanced to take the oath Mr. Thomas A. Hendricks, of Indiana, a Senator, entered an objection:

The Senator just called is the Presiding Officer of this body, and under the Constitution and laws will become the President of the United States should the proceeding of impeachment, now to be tried, be sustained. The Constitution providing that in such a case the possible successor cannot even preside in the body during the trial, I submit for the consideration of the Presiding Officer and of the Senate the question whether, being a Senator, representing a State, it is competent for him, notwithstanding that, to take the oath and become thereby a part of the court? I submit that upon two grounds, first, the ground that the Constitution does not allow him to preside during these deliberations because of his

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<sup>1</sup> Senate Journal, pp. 828, 1829; Globe Supplement, p. 12.

<sup>2</sup> Second session Fortieth Congress, Senate Journal, p. 809; Globe, pp. 1671-1680, 1699, 1700.

possible succession, and, second, the parliamentary or legal ground that he is interested, in view of his possible connection with the office, in the result of the proceedings, he is not competent to sit as a member of the court.

An extended debate at once arose. Mr. John Sherman, of Ohio, urged that this tribunal was not to be tested by the ordinary rules of civil law. The State of Ohio had a right to send two Senators, and the Constitution gave them each a vote. Mr. Jacob M. Howard, of Michigan, made the point that Mr. Wade might not necessarily be President pro tempore at the end of the trial, and hence was not necessarily personally interested. Messrs. Lot M. Morrill, of Maine, and George H. William, of Oregon, urged that the question was premature, since the party interested to make the objection was not present, and no Senator should make it, and that the Senate should be organized before the question should be raised.

In the course of the debate Mr. Oliver P. Morton, of Indiana, said:

Mr. President, if it should now be determined that the Senator from Ohio shall not be sworn it would be an error, a blunder of which the accused would have just right to complain when he should come here. If a judge is interested in a case before him, or if a juror is interested in the result of the issue which he is called upon to try, it is an objection that the parties to the case have the right to waive; and they have always had that right under any system of practice that I have known anything about.

As was suggested by the Senator from Maine [Mr. Morrill] and the Senator from Oregon [Mr. Williams], it is not an objection to be made by 96 fellow juror, by another member of the court, or by anybody except the parties to the case; and if we now, in the absence of the accused, say that the Senator from Ohio shall not be sworn, the President when he comes here to stand his trial will have a right to say "A Senator has been excluded that I would willingly accept; I have confidence in his integrity; I have confidence in his character and in his judgment, and I am willing to waive the question of interest; who had the right to make it in my absence?" The Senator from Indiana, my colleague, and the Senator from Kentucky have no right to make the question unless they should do it in the character of counsel for the accused, a character they do not maintain.

Mr. President, I desire to say one thing further, that this objection made here, in my judgment, proceeds upon a wrong theory. It is that we are now about putting off the character of the Senate of the United States and taking upon ourselves a new character; that we are about ceasing to be a Senate to become a court. Sir, I reject that idea entirely. This is the Senate when sworn, this will be the Senate when sitting upon the trial, and can have no other character. The idea that we are to become a court, invested with a new character, and possibly having new constituents, I reject as being in violation of the Constitution itself. What does that say? It says that "the Senate shall have the sole power to try all impeachments." The Senate shall have the sole power to try; it is the Senate that is to try; not a high court of impeachment—a phrase that is sometimes used—that is to be organized, to be created by the process through which we are now going; but, sir, it is simply the Senate of the United States. The Senate "when sitting for that purpose shall be on oath or affirmation." That does not change our character. We do not on account of this oath or affirmation cease to be a Senate, undergo a transformation, and become a high court of impeachment; but the Constitution simply provides that the Senate, while as a Senate, trying this case shall be under oath or affirmation. It is an exceptional obligation. The duty of trying an impeachment is an exceptional duty, just as is the ratification of a treaty; but it is still simply the Senate performing that duty." When the President of the United States is tried the Chief Justice shall preside." Preside where? In some high court of impeachment, to be created by the transformation of an oath? No, sir. He is to preside in the Senate of the United States, and over the Senate; and that is all there is of it." And no person shall be convicted without the concurrence of two-thirds of the Members present." Two-thirds of the Members of the Senate.

Mr. President, if I am right in this view, it settles the whole question. The Senator from Ohio is a Member of the Senate. My colleague has argued this question as if we were about now to organize a new body, a court, and that the Senator from Ohio is not competent to become a member of that court. That is his theory. The theory is false. This impeachment is to be tried by the Senate, and he is already a Member of the Senate, and he has a constitutional right to sit here, and we have no power to

take it from him. As to how far he shall participate, as to what part he shall take in our proceedings, as has been correctly said, that is a question for him to decide in his own mind. But, sir, he is already a Member of this body; he is here; he has his rights already conferred upon him as a Member of this body, and he has a constitutional right to take part in the performance of this business, as of any other business, whether the ratification of a treaty or the confirmation of an appointment or the passage of a bill, which may be devolved on this body by the Constitution of the United States. Because he has been elected President pro tempore of the Senate does that take from him any of his rights as a Senator? Those rights existed before, and he can not be robbed of them by any act of this Senate.

But, sir, aside from this question, which goes to the main argument, this entire action is premature. There is nobody here to make this challenge, even if it could be made legitimately. The Senators making it do not represent anybody but themselves. The accused might not want it made. He might, perhaps, prefer the Senator from Ohio to any other Member of this body to try his case. It is always the right of the defendant in a criminal proceeding and of the parties in a civil action to waive the interest that a juror or a member of the court may have in the case.

**Mr. Reverdy Johnson, of Maryland, said:**

While I am up, permit me to say a few words in reply to the honorable Member from Indiana [Mr. Morton]. He tells us it is for the President of the United States—applying his remarks to the case which is to be and is before us—himself to make the objection, and that he may waive it. With all due deference to the honorable Member, that is an entire misapprehension of the question. The question involved in the inquiry is, what is the court to try the President? It is not to be such a tribunal as he chooses to try him. It is a question in which the people of the United States are interested, in which the country is interested; and by no conduct of the President, by no waiver of his, can he constitute this court in any other way than the way which the Constitution contemplates; that is to say, a court having all the qualities which the Constitution intends.

The honorable Member tells us that we are still a Senate and not a court, and that we can not be anything but a Senate and can not at any time become a court. Why, sir, the honorable Member is not treading in the footsteps of his fathers. The Constitution was adopted in 1789. There have been four or five cases of impeachment, and in every case the Senate has decided to resolve itself into a court, and the proceedings have been conducted before it as a court and not as a Senate. To be sure, these component elements of which the court is composed are Senators, but that is a mere descriptio personarum. They are members of the court because they are Senators, but not the less members of a court. The Constitution contemplated their assuming both capacities. As a Senate of the United States they have no judicial authority whatever; their powers are altogether legislative; they are to constitute and do constitute only a portion of the legislative department of the Government; but the Constitution for wise purposes says that in the contingency of an impeachment of a President of the United States or any other officer falling within the clause authorizing an impeachment they are to become, as I understand, a court. So have all our predecessors ruled in every case; and who were they? In the celebrated case of the impeachment against Mr. Chase, who was one of the associate justices of the Supreme Court of the United States, there were men in the Senate at that time whose superiors have not been found since, nor at any time before, and they adopted the idea and acted upon the idea that the Senate in the trial of that impeachment acted as a court and not as a Senate.

I submit, therefore, that the honorable Member from Indiana [Mr. Morton] is altogether mistaken in supposing that we are not a court. But look at the power which we are to have. We are to pronounce judgment of guilty or not guilty; we are to answer upon our oaths whether the party impeached is guilty or not guilty of the articles of impeachment laid to his charge, and having pronounced him guilty or not guilty, we are then to award judgment. Who ever heard of the Senate of the United States in its legislative capacity awarding a judgment.

But besides that, why is it, Mr. Chief Justice, that you are called to preside over the court, or the Senate when acting as a court to try an impeachment? It is because it is a court. You have no legislative capacity; your functions are to construe the laws in cases coming before you; and the very fact that upon the trial of an impeachment of the President of the United States the Vice-President is to be laid aside, and the ordinary Presiding Officer, if the Vice President himself does not exist, and you are to preside, shows that it is a court of the highest character, demanding the wisdom and the learning of the Chief Justice of the United States.

The honorable Member says, and other Members have said, that a question of interest or no interest is not involved in an inquiry of this description. Does the honorable Member mean to say that if the honorable Member from Ohio had a bill before the Senate awarding to him a sum of money upon the ground that it was due to him by the United States he could vote upon the question of the passage of the bill? Why not if the honorable Member from Indiana is right? He is a Senator. If he is right that the Constitution intends that each State shall have two votes upon every question coming before the body, then in the case supposed the honorable Member from Ohio would have a right to vote himself, and by his own vote to place money in his own possession. Who ever heard that that was a right that could be accorded anywhere?

Mr. President, courts have gone so far as to say that a judgment pronounced by a judge in a court of which he was the constitutional officer in a case in which he had a direct interest, was absolutely void upon general principles; not void because of any statutory regulation on this subject, but void upon the general ground that no man shall be a judge in his own case. Does it make any difference what may be the character of the interest? If the honorable Member from Ohio was the sole party under the Constitution to try this impeachment, could he try it? Would not everybody say it is a *casus omisus*? There can be no trial as long as he continues to be the sole Member of the court, because he has a direct and immediate interest in the result; because the judgment would be absolutely void as against the general principle founded in the nature of man, that no man should be permitted to adjudge a question in which he has a direct interest.

Mr. John Sherman, of Ohio, said:

Mr. President, I certainly do not appear here to represent my colleague on this question, but I represent the State of Ohio, which is entitled to two Senators on this floor. The Constitution declares that each Senator shall have a vote, and the Constitution further declares that each Senator shall take an oath in cases of impeachment. The right of my colleague to take the oath, his duty to take it, is as clear in my mind as any question that ever was presented to me as a Senator of the United States. The Constitution makes it plainly his duty to take the oath. He is a Senator, bound to take the oath, according to my reading of the Constitution; and every precedent that has been cited, and every precedent that has been referred to, bears out this construction. If after he has taken the oath as a Member of the Senate of the United States, for the purposes of this trial, anybody objects to his right to vote on any question that may be presented to this court or to the Senate hereafter, the objection can then be made and discussed; but his right in the preliminary stages to take the oath, and his duty to take it, is made plain by the Constitution itself. If hereafter, when the impeachment progresses, his right to vote on any question is challenged the question may be discussed and decided.

The case cited by my honorable friend from Maryland is directly in point. Mr. Stockton came here with a certificate from the State of New Jersey in due form; he presented it, and was sworn into office. Did anybody object to his being sworn? At the same time other papers were presented to the Senate challenging his right to be sworn, saying that the legislature of New Jersey had never elected Mr. Stockton; but because of that did anybody object to the oath being administered to Mr. Stockton? No one; although his right to take the oath was challenged, and a protest signed by a very large number of the members of the New Jersey legislature against his right to the seat, was presented. He was sworn in and took his seat here by our side, and voted and exercised the rights of a Senator. When the question of the legality of his own election came up, the Senate decided that he was not legally elected, and the question referred to arose upon his right to vote in that particular case. The question was whether he could vote, being interested in the subject matter. The Senator from Massachusetts made the objection, and offered a resolution that he had not a right to vote in the particular case; and after debate that was decided in the affirmative, although by a very close vote. My own conviction then was and is yet that Mr. Stockton, as a Senator from the State of New Jersey, had a right to vote in his own case, although it might not be a proper exercise of the right.

So, sir, this question has been decided two or three times in the House of Representatives. In the celebrated New Jersey case, where a certificate of election was presented by certain Members from the State of New Jersey and they were excluded, public history has pronounced their exclusion to have been an unjustifiable wrong upon the great seal of the State of New Jersey. I believe that action is now generally admitted and conceded to have been wrong. Those men presented their credentials in the regular form, and they had the right to be sworn. So in many other cases where the right of persons

to hold office is in dispute, those who have the prima facie right are sworn into office, and then the right is examined and finally settled. I had a matter presented to me once in which I was personally interested, and where I was sworn into office. I was directly and personally interested; but I took the oath of office, and I discharged my duties as a Member of the House of Representatives; and when the question came up whether I should vote on the election of a particular officer, I being a candidate for the office, I refused to vote. But it was my refusal which prevented my vote from being received. If I had chosen to vote, I had the right as a Member from the State of Ohio, even for myself. I have no doubt whatever of that. It is the right of the State; it is the right of the people; it is the right of representation. The power of the State and the power of the people must be exercised through their Senators and through their Representatives.

In the particular case here I do not suppose, I do not know at least, whether the question will ever arise. My colleague is required to take this oath as a Member of the Senate of the United States. You have no right to assume, nor have Senators the right to assume, that he will vote on questions which may affect his interest. That is a matter for him to decide; but the right of the State to be represented here on this trial of an impeachment is clear enough. Whether he will exercise the right, or whether he will waive it, is for him to determine. You have no right to assume that he will exercise the right or power to vote for himself where he is directly interested in the result.

It seems to me, therefore, that no Senator here has a right to challenge the voice of the State of Ohio, and the right of the State of Ohio to have two votes here is unquestionable unless when the question is raised in due form it shall be decided against my colleague. In the preliminary stages, when we are organizing this court, he ought to be sworn, and then if he is to be excluded by interest, unfitness, or any other reason, the question may be determined when raised hereafter; but no Senator has the right now to challenge his authority to appear here and be sworn as a Senator of the State of Ohio. His exclusion must come either by his own voluntary act, proceeding on what he deems to be just and right according to general principles, or it must be by the act of the Senate upon an objection made by the person accused in the trial of the impeachment. It seems to me that is clear and therefore I object to any waiver of the matter. I think my colleague has a right to present himself and be sworn precisely as I and other Senators have been sworn. Then let him decide for himself whether, in a case in which his interest is so deeply affected, he will vote on any question involved in the impeachment. If he decides to vote, when his vote is presented, then, not the Senator from Indiana, but the accused may make the objection, and we shall decide the question as a Senate or as a court, for I consider the terms convertible; we shall then decide the question of his right to vote.

Sir, several things have been introduced into this debate that I think ought not to have been introduced. The precise character of this tribunal, whether it is a court or a Senate, has nothing to do at present with this question. The only question before us is whether Benjamin F. Wade, acknowledged to be a Senator from the State of Ohio, has a right to present himself and take the oath prescribed by the Constitution and the laws in cases of impeachment. He is not the Vice-President; he is not excluded by the terms of the Constitution. He is the presiding officer of the Senate, holding that office at our will. You have no right to take away from him the power to take the oath of office and that to decide for himself as to whether, under all the circumstances, he ought to participate in this trial.

**Mr. James A. Bayard, of Delaware, said:**

Mr. President, I incline to the opinion that the objection made by the honorable Senator from Maine [Mr. Morrill] to the motion of the honorable Senator from Indiana [Mr. Hendricks], and also that made by the honorable Senator from Oregon [Mr. Williams], is correct. I can not see how a Senator is to object to another Senator being sworn in, although I think there may be some doubt raised on the question for this reason: The Constitution provides that in a case where the President of the United States is tried under an impeachment the Chief Justice of the United States, not the Vice-President, shall preside; and though that was intended originally to look to the Vice-President alone, yet if another person, from the death of the Vice-President, or from his absence or his acting as President, stands in precisely the same relation to the office of President under the law and the Constitution, whether he be a Senator or not, ought not the principle equally to apply?

It certainly excludes the Vice-President from being a member of the court. Does it not equally exclude the presiding officer of the Senate? It does not make him, being a Senator, less a Senator of the United States in his legislative capacity; but the clause of the Constitution prevents and is intended

to prevent the influence of the man who would profit as the necessary result of the judgment of guilty in the case. It supposes that he can not be or may not be sufficiently impartial to sit as a judge in that case or to preside in the court trying it. That is the object, as I suppose.

But, sir, there is great force in the objection that that point must come by plea or motion, if you please, from the party accused; and I should not have thought for a moment of embarking in this discussion had it not been for the renewal by the honorable Senator from Indiana [Mr. Morton] of the endeavor to disprove the idea that the Senate must be organized into a court for the purpose of a judicial trial. Now, sir, whether it is to be a high court of impeachment or a court of impeachment, or to be called by the technical name court, is, in my judgment, immaterial; but the honorable Senator's argument did not touch the Constitution. The Senate is to constitute the court; the Senate is to try. Is there nothing in the provisions of that article which gives the judicial authority—for it is not legislative, it is judicial authority conferred, a judicial authority in special cases—is there nothing in that article which, of necessity, makes the body a judicial tribunal whenever it assumes these functions, and not a legislative body? Otherwise, how comes the presiding officer who now fills the chair to be in the seat which he occupies? When the Constitution says that the Senate shall have the sole authority to try impeachments is it necessary that it should say that the Senate shall be a court for the purpose of trying impeachments if every clause of the Constitution shows that it must be a judicial tribunal and must be a court, or else the language is meaningless which is applied to its organization? The members of the body are to be sworn specially in the particular case as between the accused and the impeachers. Is not that the action of a court? They are to try an individual in a criminal prosecution. Is not that judicial action? Is not the entire judicial power of the United States vested in the Supreme Court and the inferior courts, with that exception, by the very terms of the Constitution?

But, further, the body is to give judgment, to pronounce judgment, a judgment of removal from office always as the result of conviction; and if they please to carry it still further, they may pronounce judgment of disqualification from hereafter holding any office. Do not these terms of necessity constitute a court?

Mr. Charles Sumner, of Massachusetts, dissented from the view that the Chief Justice was made the presiding officer because the Vice-President would be an interested party, and argued from the literature contemporaneous with the Constitution that the Vice-President was expected to perform the duties of the President while the trial was going on. As to the question of personal interest, Mr. Sumner said:

There were other remarks made by Senators over the way to which I might reply. There was one that fell from my learned friend, the Senator from Maryland, in which he alluded to myself. He represented me as having cited many authorities from the House of Lords tending to show in the case of Mr. Stockton that this person at the time was not entitled to vote on the question of his seat. The Senator does not remember that debate, I think, as well as I do. The point which I tried to present to the Senate, and which, I believe, was affirmed by a vote of the body, was simply this: That a man can not sit as a judge in his own case. That was all, at least so far as I recollect, and I submitted that Mr. Stockton at that time was a judge undertaking to sit in his own case. Pray, sir, what is the pertinency of this citation? Is it applicable at all to the Senator from Ohio? Is his case under consideration? Is he impeached at the bar of the Senate? Is he in anyway called in question? Is he to answer for himself? Not at all. How, then, does the principle of law, that no man shall sit as a judge in his own case, apply to him? How does the action of the Senate in the case of Mr. Stockton apply to him? Not at all. The two ewes are as wide as the poles asunder. One has nothing to do with the other.

Something has been said of the "interest" of the Senator from Ohio on the present occasion. "Interest." This is the word used. We are reminded that in a certain event the Senator may become President, and that on this account he is under peculiar temptations which may swerve him from justice. The Senator from Maryland went so far as to remind us of the large salary to which he might succeed, not less than \$25,000 a year, and thus added a pecuniary temptation to the other disturbing forces. Is not all this very technical? Does it not forget the character of this great proceeding? Sir, we are a Senate and not a court of *nisi prius*. This is not a case of assault and battery, but a trial involving the destinies of this

Republic. I doubt if the question of "interest" is properly raised. I speak with all respect for others; but I submit that it is inapplicable. It does not belong here. Every Senator has his vote to be given on his conscience. If there be any "interest" to sway him, it must be that of justice and the safety of the country.

On March 6,<sup>1</sup> Mr. Hendricks, after discussing the various questions raised, withdrew his objection, saying:

But, Mr. President, I find that some Senators, among them the Senator from Delaware [Mr. Bayard], who agree with me upon this question on the merits, are of the opinion that the question ought more properly to be raised when the court shall be fully organized, when the party accused is here to answer. I do not believe that he can waive a question that goes to the organization of the body; I believe it is a question for the body itself. But upon that I find some difference of opinion; and when I find that difference of opinion among those who agree with me upon the merits, upon the main point, whether he shall participate in the proceedings and judgment who may be benefited by it—while I find some Senators, who agree with me upon that question, disagreeing with me upon the question whether it ought to be raised now or when the Senator from Ohio proposes to cast a material vote in the proceedings, I choose to yield my judgment—my judgment, not at all upon the merits; my judgment not at all upon the propriety and the duty of the Senate to decide upon its own organization; but I yield as to the time when the question shall be made in deference to the opinion of others; and for myself, sir, I withdraw the question which I presented for the consideration of the President of this body and of the Senate yesterday.

The oath was then administered to Mr. Wade.

It appears from the Journal of the proceedings of the trial that Mr. Wade did not vote on any record vote until at the close of the trial, on May 16,<sup>2</sup> when his name is recorded on a question relative to the order of passing judgment on the several articles of impeachment. Thereafter he voted both on incidental questions and on the question of guilty or not guilty.

It appeared from the debate on the question as to Mr. Wade that another Senator was related to President Johnson,<sup>3</sup> but no objection was made to him on the ground of affinity, nor did any Senator urge that this should be considered an objection.<sup>4</sup> This Senator was Mr. David T. Patterson, of Tennessee, and he was son-in-law of the respondent. Mr. Patterson participated in the trial throughout, and on May 16<sup>5</sup> voted "not guilty" on the main question.

**2062. Reference to a discussion as to the right to challenge the competency of a Senator to sit in an impeachment trial.**—The right to challenge a Member of the Senate sitting for the trial of an impeachment case was discussed<sup>6</sup> at length by Mr. Manager Benjamin F. Butler during the impeachment of President Andrew Johnson.

**2063. A quorum of the Senate sitting for an impeachment trial is a quorum of the Senate itself and not merely a quorum of the Senators sworn for the trial.**—On February 23, 1905,<sup>7</sup> in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. William B. Allison, of Iowa, asked

<sup>1</sup> Senate Journal, p. 811; Globe, p. 1700.

<sup>2</sup> Senate Journal, p. 942.

<sup>3</sup> Mr. David T. Patterson, a Senator from Tennessee, was son-in-law of the respondent.

<sup>4</sup> Speech of Mr. Howard. Globe, p. 1671.

<sup>5</sup> Globe, p. 411.

<sup>6</sup> Second session Fortieth Congress, Globe Supplement, pp. 30, 31.

<sup>7</sup> Third session Fifty-eighth Congress, Record, pp. 3175, 3176.

for a call of the Senate and there appeared forty-two Senators, and, the Presiding Officer,<sup>1</sup> said:

Upon the call of the Senate, forty-two Senators have answered to their names, A quorum of the Senate sitting in the impeachment trial is not present.

Then, on motion of Mr. Knute Nelson, of Minnesota, the Sergeant-at-Arms was directed to send for absentees.

Later the Presiding Officer said:

A quorum of Senators who have been sworn in the impeachment trial is present—forty-three Senators.

The proceedings under the call were then dispensed with, and the Presiding Officer put the pending question on the admissibility of certain testimony.

There appeared yeas 10, nays 34—a total of 44 Senators responding, and the Presiding Officer announced that the evidence was not admitted.

Mr. Henry M. Teller, a Senator from Colorado, raised a question as to whether or not forty-four Senators constituted a quorum.

The Presiding Officer said:

Forty-three Senators make a quorum of the Senators who have been sworn in the impeachment trial.

Later Mr. Teller again raised the question:

Mr. President, I have been under the impression for a good many years that a majority of this body—in this instance forty-six Senators—made a quorum. I was somewhat surprised to find that a majority of the Senators sworn are held to be a quorum. I am not aware myself of any provision of the Constitution that allows this body to do business with less than a majority. You could not pass here a ten-dollar pension bill without a majority. Is it possible that less than a quorum can exercise the most important function that has been placed on the Senate by the Constitution? In my judgment, there is no court here present tonight. I raise that question.

The Presiding Officer said:

The Presiding Officer is of opinion that the point of order is well taken. He will state in this connection, however, that it has not been observed in proceedings of the Senate hitherto.

Thereupon further proceedings were taken to secure a quorum, and the Presiding Officer announced:

On the call of the Senate forty-six Senators have answered to their names. A quorum is present.

The Presiding Officer thinks it becomes the duty of the Presiding Officer again to submit to the Senate the question with regard to the admission of evidence offered by counsel for respondent, which was submitted when a quorum of the Senate was not present, but when a quorum of the Senators sworn in the impeachment trial was present.

A little later the Presiding Officer said:

A short time ago the Presiding Officer stated that he thought in this trial there had been a call of the Senate and that business had been conducted when there was less than a quorum of the Senate. He finds upon examination that he was mistaken, and that on the two occasions when the roll call was had to determine the existence of a quorum there was on each occasion a quorum of the Senate present.

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<sup>1</sup> Orville H. Platt, of Connecticut, Presiding Officer.

**2064. An attempt of the House to investigate alleged corruption in connection with the votes of Senators during the Johnson trial was the subject of discussion and investigation in the Senate.**—On May 21, 1868,<sup>1</sup> in the Senate sitting in legislative session, but at the time when the impeachment trial of Andrew Johnson, President of the United States, was pending, Mr. John B. Henderson, a Senator from Missouri, rising to a question of privilege, said:

On Saturday last after a vote had been taken in the court of impeachment on the eleventh article, and the Members of the House had retired to their own Chamber, one of the managers offered and the House adopted the following resolution:

“Whereas information has come to the managers which seems to them to furnish probable cause to believe that improper or corrupt means have been used to influence the determination of the Senate upon the articles of impeachment exhibited to the Senate by the House of Representatives against the President of the United States: Therefore,

*Be it resolved*, That for the further and more efficient prosecution of the impeachment of the President the managers be directed and instructed to summon and examine witnesses under oath, to send for persons and papers, to employ a Stenographer, and to appoint subcommittees to take testimony, the expenses thereof to be paid from the contingent fund of the House.”

It was advocated by its mover, one of the managers, on the ground that base and corrupt motives had determined the judgment of the Senate; and another one of the managers being asked during a debate on Monday last in the House if he would have Senators perjure themselves, replied that “perjury would not hurt them much.”

On Tuesday, the 19th instant, I received the following notice from the managers:

“FORTIETH CONGRESS UNITED STATES,

“HOUSE OF REPRESENTATIVES,

“Washington, D. C., May 19, 1868.

SIR: A question has arisen in the course of our investigation wherein your testimony will tend to instruct the House of Representatives and aid its inquiry.

“Will you do the committee of managers the courtesy to attend at the earliest possible moment at the Judiciary Committee room of the House, where they are in waiting to receive you?

By direction of the managers.

“Your obedient servant,

“B. D. WHITNEY, Clerk.

“HON. J. B. HENDERSON.”

To which I replied as follows—the reply not being delivered, however, till the next morning:

“WASHINGTON CITY, May, 1868.

“GENTLEMEN: Yours of this date is received. You say ‘a question has arisen in the course of our investigations wherein your (my) testimony will tend to instruct the House of Representatives and aid its inquiry,’ and thereupon you request my early attendance before the managers as a witness.

“This request, I take it, is intended to answer the purposes of a subpoena, and is issued under authority of a resolution adopted by the House on Saturday last in the following words, to wit:

“I have already read the resolution.

“A prosecution by impeachment against the President is set on foot, and now, when the evidence and arguments have been fully submitted and the Senate as a court is deliberating on its judgment, a second prosecution is instituted against the Senate itself. Whatever may be the purpose of this inquisition—and I use the word in no offensive sense—it is, in my judgment, not only a direct insult to the body of which I am a member, but a proceeding of most dangerous tendency in the future. A large part of our proceedings has been conducted in secret, the managers, counsel, and reporters being excluded. If a member of the court can now, before the rendition of judgment, be withdrawn from consultation and subjected to the inquisition of the prosecutors, that inquisition may reach to all proceedings, and thus

<sup>1</sup>Second session Fortieth Congress, Senate Journal, p. 416; Globe, pp. 2548–2558.

subvert the dignity and independence of the Senate. If it be to purge corruption from the Senate, the Senate is the proper body to guard and protect its own honor.

“Personally, I have no objection to appearing and testifying before you to all matters within my knowledge on the subject of impeachment. And were I to refuse, I know a new shower of calumny, base and grievous enough already, would certainly be poured upon me. But in my judgment this proceeding rises above personal considerations. It concerns public justice and effects the character, honor, and dignity of the Senate.

“I am engaged to appear before another committee of your body to-day, and on the meeting of the Senate to-morrow I shall submit this question for its consideration and be governed accordingly.

“Yours, respectfully,

“J. B. HENDERSON.

*“To the managers of impeachment on the part of the House of Representatives.”*

Mr. Henderson urged that the resolution under which the summons had issued contained a direct insult to the Senate, and that the summons was an invasion of the privileges of the Senate.

Mr. Henderson also presented another letter received later from the managers:

WASHINGTON, D.C., *May 20, 1868.*

SIR: The managers have the honor to acknowledge your communication of 19th instant in answer to their request, which was not intended to serve the purpose of a subpoena, but as a courteous intimation to you that you could aid them in the investigation with which they have been charged.

If it had occurred to them to speculate upon the topic, they would have supposed you might do them the justice to believe that they would have asked no question indecorous or improper, certainly not as to anything which occurred in the secret sessions of the Senate. They were not aware at the time they sent their note to you that the Senate was in session for “deliberation on its judgment” or otherwise, and they also believed that if they so far transgressed the limits of propriety as to make any inquiry which you deemed improper you would certainly have the efficient remedy of declining to answer.

Accepting the theory of your note, that you are a judge, they do not perceive on that account any objection to your answering as to matters pertinent in a further prosecution of the respondent on trial before the Senate for other and different offenses, because it is well known among lawyers that in both civil and criminal trials the presiding judge may be, and when occasion requires is, sworn as a witness in the very case then pending.

Jurors, in like manner, are called from their seats and sworn during the trial; and either, during the adjournment of the court, might legally and properly be called before a grand jury to give evidence on which to find an indictment against the prisoner at the bar for other and different offenses.

They bring these considerations to your notice in order that, seeing the theory upon which they have acted, you will acquit them of any discourtesy either personal to yourself or to the honorable Senate. Without indicating any opinion upon the question whether a Senator is liable to examination as a witness before a committee of the House, they desire to add that they did not intend to assert such claim in their communication to you of 19th instant. They had no purpose other than to avail themselves of your knowledge of facts, if agreeable to you, to give them the benefit of your knowledge, to aid them in pursuit of justice and right.

By direction of the managers.

Your obedient servant,

B. D. WHITNEY, *Clerk.*

Hon. J. B. HENDERSON.

In the course of the debate arising over the presentation made by Mr. Henderson, Mr. Timothy O. Howe, of Wisconsin, asked for the consideration of a resolution presented on a previous day by Mr. Garrett Davis, of Kentucky:

Whereas it is represented that some persons have been and are engaged in violating the rights and privileges of the Senate by the use of threats, intimidation, and other unlawful and improper means toward its Members to constrain them in their consideration, action, and judgment in the matter of the

articles of impeachment against the President of the United States now pending before the Senate as a court of impeachment; therefore be it

*Resolved*, That a committee of three, to be appointed by the Chair, do proceed to inquire into the facts of such imputed threats, intimidation, and other unlawful means aforesaid, and the names of the persons, if any, using, or that have used, them; and that said committee have power to send for persons and papers, to take evidence, employ a stenographer, and report the facts to the Senate.

To this Mr. Edmund G. Ross, of Kansas, proposed an amendment adding:

And that said committee be authorized to request the managers on the part of the House to furnish said committee a transcript of all the testimony that has been or may be taken by them in the case of the impeachment of the President.

After debate the further consideration of the subject was postponed.

On May 27<sup>1</sup> the consideration of the resolution was resumed, when Mr. Davis was permitted to withdraw the resolution and submit it in the following modified form:

*Resolved*, That a committee of five be appointed by the Chair to inquire into and report the facts in relation to any threats, intimidation, or other improper influences that were used or offered to be used, directly or indirectly, to control or influence the consideration or decision of the Senate or any Senator in the matter of the impeachment of the President of the United States lately pending before the Senate as a court of impeachment. Also, to inquire into and report the facts in relation to any overture or offer of an improper character to any person by or in the name of any Senator or other person in connection with said impeachment trial, and the names of any persons connected with said transactions or any of them. Said committee to have power to send for persons and papers, to summon witnesses, to take their evidence, and employ a stenographer, and to report as early as practicable.

Mr. Ross thereupon proposed an amendment in the nature of a substitute:

That a committee be appointed by the President of the Senate, to be composed of five Senators, whose duty it shall be to inquire whether improper or corrupt means have been used, or attempted to be used, to influence the votes of the Members of the Senate in the trial of the impeachment of the President; and that the said committee be authorized and empowered to send for persons and papers, and to do all things that in their judgment may be necessary for the furtherance of the object of the resolution.

The amendment was agreed to, after debate, and then the resolution as amended was agreed to.

**2065. Title by which the Chief Justice is addressed while presiding at an impeachment trial.**—In the course of the impeachment trial of Andrew Johnson, the Chief Justice, who was the Presiding Officer, was variously addressed as “Mr. President” and “Mr. Chief Justice.” Mr. Manager Butler, in opening the case for the House of Representatives, used the former designation, while Mr. Benjamin R. Curtis, of counsel for the President, in his opening used the latter title. Mr. Thaddeus Stevens, of Pennsylvania, one of the managers, in his closing argument, addressed the Presiding Officer as “Mr. Chief Justice.” This was the title used by Mr. William M. Evarts and other counsel for the President. In general the managers preferred the title “Mr. President,” Messrs. Managers Benjamin F. Butler and John A. Bingham using it almost if not quite invariably. The Chief Justice in ruling usually said, “The Chief Justice thinks,” etc., but sometimes said, “The Chair thinks.” In the *Journal and Record of Debates*<sup>2</sup> the words “Chief Justice” are invariably used. The Senators used some one and some the other designation in addressing the Chair.

<sup>1</sup> Senate Journal, p. 423; Globe, pp. 2598–2599.

<sup>2</sup> Second session Fortieth Congress, Globe Supplement, pp. 65, 123, 166, 168, 320, 337, 379, 410–414.

**2066. Forms for addressing the Vice-President or President pro tempore while presiding at an impeachment trial.**—In the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore<sup>1</sup> of the Senate presided. The managers and counsel for the respondent, in addressing the Senate sitting for the trial, used the form “Mr. President and Senators.”<sup>2</sup>

In the impeachment of William Blount, the Vice-President (Thomas Jefferson, of Virginia) presided, and we find this form of address, “Mr. President.”<sup>3</sup>

**2067. During the Johnson trial Chief Justice Chase gave a casting vote on incidental questions, and the Senate declined to declare his incapacity to vote.**—On March 31, 1868,<sup>4</sup> during the impeachment trial of Andrew Johnson, President of the United States, a motion was made that the Senate retire for consultation, and there appeared on the vote. yeas 25, nays 25.

The Chief Justice thereupon said:

The Chief Justice votes in the affirmative. The Senate will retire for conference.

The Senate having retired, Mr. Charles Sumner, of Massachusetts, offered the following proposition as an amendment to the pending question:

That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any question during the trial, and he can pronounce decision only as the organ of the Senate, with its assent.

This was disagreed to, yeas 22, nays 26.

Later Mr. Sumner proposed the following:

*Resolved*, That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any question during the trial.

This was objected to as not relating to the subject for consideration of which the Senate had retired, and was not considered.

On April 1 Mr. Sumner offered the following:

It appearing from the reading of the Journal of yesterday that on a question where the Senate were equally divided the Chief Justice, presiding on the trial of the President, gave a casting vote, it is hereby declared that in the judgment of the Senate such vote was without authority under the Constitution of the United States.

This was rejected without debate, yeas 21, nays 27.

On April 2, 1868,<sup>5</sup> the question was taken as a motion that the Senate sitting for the impeachment trial adjourn, and there appeared yeas 22, nays 22. Thereupon the Chief Justice said “The Chief Justice votes in the affirmative,” and so adjournment was voted.

**2068. Discussion of the propriety of arbitrary abridgment by the Senate of the time of an impeachment trial.**—On February 21, 1905,<sup>6</sup> in the

<sup>1</sup> T. W. Ferry, of Michigan, President pro tempore.

<sup>2</sup> See Record of trial, pp. 272, 287, 295, etc., First session Forty-fourth Congress.

<sup>3</sup> See Annals of Fifth Congress, Vol. II, p. 2278.

<sup>4</sup> Second session Fortieth Congress, Senate Journal, p. 868; Globe Supplement, pp. 62, 63.

<sup>5</sup> Senate Journal, p. 878; Globe Supplement, p. 92.

<sup>6</sup> Third session Fifty-eighth Congress, Record, p. 2974.

Senate sitting in legislative session, Mr. Eugene Hale, a Senator from Maine, offered this resolution:

*Resolved*, That all proceedings in the impeachment trial now before the Senate sitting as a court shall be terminated on Saturday, February 25 next, and a final vote shall be taken on the afternoon of that day at 4 o'clock.

Later, on the same day, in the Senate sitting for the impeachment trial, Mr. Hale introduced the same resolution, for action at a future time.

On February 22,<sup>1</sup> in the Senate in legislative session, Mr. Hale withdrew the resolution and submitted the following:

*Ordered*, That all proceedings before the Senate sitting in the trial of the impeachment against Charles Swayne, judge of the United States in and for the northern district of Florida, shall terminate on Saturday, February 25 next, and, in pursuance of this order, all testimony upon either side shall be closed on Friday, the 24th day of February next, and the Senate shall commence its session sitting for the trial of said impeachment proceedings at 12 o'clock meridian on said Saturday, the 25th day of February next; and, without any other motion or proceeding intervening, the counsel for the defense shall have until 2 o'clock of said day to present the case of the defendant, said time to be apportioned or divided as said counsel may determine; the managers on the part of the House of Representatives shall have, to present the case against said Charles Swayne, the time from 2 o'clock until 4 o'clock of said day, said time to be apportioned or divided as the managers may determine; at 4 o'clock, without further motion or proceeding intervening, the final vote shall be taken upon said impeachment proceedings.

In support of this resolution, Mr. Hale cited the backward condition of the legislative business.

Mr. Augustus O. Bacon, of Georgia, said in reply:

Mr. President, I quite agree with the Senator from Maine that the legislative business before this Senate is of extreme importance, but I do not think that anything is of more importance than that the Senate shall give such direction to any measures which it may deem necessary for expedition of the impeachment trial as will not bring into discredit and disrepute the very high and important function which we are now performing. In trying the impeachment presented by the House we are complying with the requirements of the Constitution, through which alone the purity and integrity of the public service can be guarded and secured.

The suggestion which I desire to make in this connection, in order that a wrong impression may not go abroad, is that everything which looks to expedition of the impeachment trial should, so far as necessary and practicable, be in the nature of additional time given by the Senate to this work in the interval which now remains at our command, and that it should not be directed to the arbitrary abridgment of the necessary presentation of this case by the House of Representatives, performing, as it does, a high constitutional function in bringing and presenting to the Senate its case. If we desire that the impeachment trial shall close by Saturday, then the proper course is to give more time to it each day, so that the managers on the part of the House and the counsel for the respondent may have before them full time in which to fully present their respective cases to the Senate. We all know that this session must end at noon on the 4th of March, and that we are limited in time by law; and the objection which I make to the suggestion of the Senator is not to his effort that we may by proper expedition in the disposition of the impeachment matter have sufficient time for the proper discharge of the important duties of another kind which devolve upon us. My objection is to the method proposed. I prefer that instead of that the direction should be given to this matter which will impose upon us, if it need be, additional labor by providing for additional time to be devoted to the trial each day, and that it be not disposed of by the suggestion of an arbitrary abridgment in the opportunity of the House of Representatives to present its case here, and of the time for the proper consideration by ourselves as to how this important matter shall be determined, and what final disposition shall be given to it.

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<sup>1</sup>Record, pp. 3020, 3021.

Mr. William M. Stewart, of Nevada, said:

Mr. President, I should like to make one suggestion in regard to this matter. It is suggested that the Constitution restrains the Senate, and that to comply with the provisions of the Constitution no limitation should be put upon time. We have a constitutional right to trial by jury, we have a constitutional right to have cases heard by the courts, and the courts exercise in pursuance of that a reasonable discretion as to the time to be used. The Supreme Court of the United States have rules in regard to the time to be used in cases to be argued there, and in criminal proceedings the courts put a reasonable limit to the time to be allowed for argument. They have to facilitate a trial in order to comply with the Constitution at all.

This brought from Aft. John C. Spooner, of Wisconsin, this question:

Has the Senator ever known a court before which there was a criminal case to fix a limit of time within which limit testimony for the defense should be presented?

The matter went over.