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# High Court of Congress: Impeachment Trials, 1797-1936

by William F. Swindler

Twelve "civil officers" of the United States have been subjected to trials on impeachment articles in the Senate. Both colorful and colorless figures have suffered through these trials, and the nation's fabric has been tested by some of the trials. History shows that impeachment trials have moved from barely disguised political vendettas to quasi-judicial proceedings bearing the trappings of legal trials.

**I**MPEACHMENT—what Alexander Hamilton called "the grand inquest of the nation"—has reached the Senate (trial) level twelve times in American history. It has been brought against eight judges, one former senator, one justice of the Supreme Court, one cabinet member, and one president of the United States. Of these dozen instances in which bills of impeachment were presented by the House of Representatives, one was dismissed for want of jurisdiction, six resulted in acquittals (in four, because the majority to convict did not reach the constitutionally required two thirds), four resulted in votes to remove from office, and in one the defendant resigned from office before the trial began. Some thirty-four other cases of impeachment have been considered by the House and have been determined not to warrant further proceedings.

The House Committee on the Judiciary has produced two useful documentary studies—*Impeachment: Selected Materials* (October, 1973) and *Impeachment: Selected Materials on Procedure* (January, 1974).

The charges in the twelve impeachment trials are outlined in the tabulation on page 427. Whether they amounted to indictable offenses—one of the recurring issues in the latest debates on the impeachment question—depends not merely on a lawyer's professional analysis of each charge but also on the degree of sophistication with which each is correlated with the contemporary political passions that may have masqueraded behind the formal articles. It may be suggested, in fact, that the trial of Andrew Johnson represented a watershed. The blatant partisan plot scarcely concealed in his case climaxed the impeachment process *qua* political trial as it had been used up to that time, while the cases since then, perhaps purged by the Johnson spec-

tacle, appear to have rested more on objective (and perhaps quasi-indictable) charges.

The history of impeachment as a tool in the struggle for parliamentary supremacy in Great Britain and the understanding of it at the time of the first state constitutions and the Federal Convention of 1787 have been admirably researched by a leading constitutional historian, Raoul Berger, in his book published last year, *Impeachment: Some Constitutional Problems*. Like Americans, Englishmen once, but only once, carried the political attack to the head of state himself. In that encounter Charles I lost his case as well as his head. The decline in the quality of government under the Commonwealth thereafter, like the inglorious record of American government under the Reconstruction Congresses, may have had an ultimately beneficial effect. In England, particularly after the Glorious Revolution, the principle of a constitutional monarchy was established. In the United States the passing of the Radical Republican era brought a new balance to the separate and perhaps equal powers of government.

## Hastings Was Caught in a Power Struggle

The use of impeachments in England was vividly impressed upon the minds of the Founding Fathers. When the Constitutional Convention met in Philadelphia in 1787, the impeachment of Warren Hastings had been in progress in Parliament for a full year and was destined to continue until 1795. Hastings, the former governor-general of India, had been caught in a power struggle between Edmund Burke and William Pitt, with control of India by Parliament rather than the East India Company as the ultimate goal, and the attack on the former governor was one means to that end. After more than nine years of harassment, Hastings was finally acquitted on every article.

As a political trial of the first magnitude, the Hastings case would have appeared to the Americans as a normal means of attacking obstacles to a political objective. In any event, the parliamentary practice was familiar, and several state constitutions of the Revolutionary period had incorporated impeachment provisions. Massachusetts, New York, and Pennsylvania, in particular, adopted procedures similar to what subsequently appeared in the first and second articles of the federal Constitution: the House of Representatives to initiate the process, the Senate to try the accused, and the president, vice president, and "all civil Officers of the United

States" identified as impeachable parties. Within a decade of the Philadelphia convention, the process was invoked for the first time.

### Blount's Plans Violated Government Policy

Is a member of Congress a "civil officer of the United States"? And, as a corollary, is a former member liable to impeachment? As for the grounds for impeachment—"Treason, Bribery, or other high Crimes and Misdemeanors"—these did not seem nearly so vague to members of the post-Revolutionary generation as they do to us. It was a cataclysmic age of crashing empires and a welter of plans to build new ones, particularly in the New World. Anyone who appeared to be caught up in these grand designs, particularly if he failed, was a prime prospect for being charged with one or more of the actionable offenses.

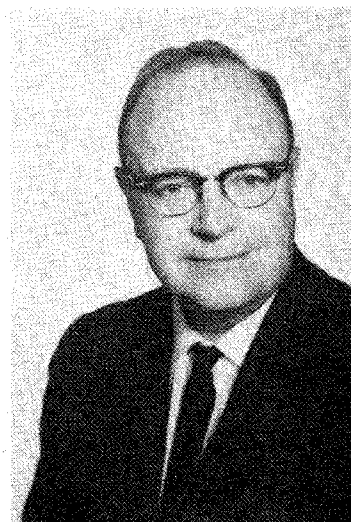
Such a man was William Blount of Tennessee—ironically, one of the delegates from North Carolina to the Constitutional Convention. He had moved westward in response to the lures of land speculation and the game of playing off various colonial empires against one other. Spain, after the peace treaty of 1783, had once more acquired possession of Louisiana and Florida. England plotted to get them back, and American settlers beyond the Alleghenies, convinced that they could do business better with English authorities in these regions, undertook a plot to incite attacks by the Gulf area Indians against Spanish territory in a joint venture with the British fleet.

A letter from Blount, now a senator from Tennessee, to James Carey, a government interpreter assigned to the Cherokee, betrayed his interest in a plan that not only violated the government policy of pacification of the Indian tribes but also the neutrality and friendly relations, however tenuous, between the United States and the two European powers. The letter was intercepted and sent to Pres. John Adams, who on July 3, 1797, laid it before Congress.

Three days later Samuel Sitgreaves of Pennsylvania introduced a resolution in the House of Representatives that Blount "be impeached of high crimes and misdemeanors." He then outlined a plan of procedure that was endorsed by Rep. John Rutledge, Jr., who had been an observer at the Hastings trial in London. The Hastings trial, as well as state impeachment proceedings in Pennsylvania and South Carolina, were cited thereafter by Sitgreaves and Rutledge as precedents for the congressional procedures in preparing for the Blount trial.

On July 8, two days after the Sitgreaves resolution, the Senate, which had taken Blount into custody, expelled him from its membership, and the first session of the Fifth Congress then adjourned. It was not until the following February 7, well into the second session, that the House formally presented the Senate with articles of impeachment and named eleven of its members as managers of the trial. In the third session in December of 1798, Blount, on advice of his counsel,

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Thomas L. Williams

Jared Ingersoll and Alexander J. Dallas of the Philadelphia bar, demurred to the jurisdiction. For the remainder of that session Blount's lawyers and the House managers argued the jurisdictional question. Rep. James A. Bayard of Delaware successfully refuted the demand for a jury trial by pointing out that the Constitution vested impeachment trial power exclusively in the Senate and that "no court of common law could give judgment of disqualification." However, Bayard lost the following proposal that all citizens of the United States were liable to impeachment, it being ruled that the Constitution stipulated precisely who were impeachable officers.

Thus the ultimate question in the jurisdictional argument was reached: Did Blount fall into the category of impeachables? Here the Senate's act of expulsion proved the determinant. While it was conceded that a person impeached might not avoid trial and punishment by resignation, the "High Court of Impeachment" on January 7, 1799, formally sent word to the House: "The court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that the impeachment is dismissed."

### The First Trial Set Precedents

Despite this denouement, the first impeachment trial served several useful purposes. It established the congressional procedure, clearly relying on parliamentary precedents in the Hastings case. It suggested continuing liability to impeachment process after resignation. It implied, without directly addressing itself to the proposition, that members of Congress might come under the "civil Officers" classification. Of course, under the circumstances it never reached the question whether the articles of impeachment made out an actionable case

under congressional jurisdiction. Part of the answer to that question, however, was to come in the next impeachment trial.

The Jeffersonian campaign to break the power of the Federalist judiciary is a familiar story, beginning with the test case of *Marbury v. Madison*, 1 Cr. 137 (1803), followed by a plan of successive impeachments directed at specific judges and ending in the same degree of frustration in the attempts made by presidents ever since Jefferson to alter the Supreme Court by strategic appointments. As for the second step in the threefold strategy, it got under way even before Chief Justice Marshall handed down his *Marbury* opinion on February 24, 1803. Three weeks earlier, Jefferson had sent to the House a "letter and affidavits exhibiting matter of complaint against John Pickering, district judge of New Hampshire, which is not within executive cognizance."

#### Jacob Pickering Alleged His Father's Insanity

As it had in the Blount case, the House referred the matter to a select committee. One of the managers in the Blount case, Bayard of Delaware, was a member of this new committee, which had a suspiciously anti-Federalist cast—Lucas Elmendorf of New York, Joseph H. Nicholson of Maryland, John Randolph, Jr., of Virginia, and Samuel Tenney of New Hampshire. On March 3, one month after the first transmittal of the papers, Nicholson and Randolph appeared before the Senate to inform it of Pickering's impeachment. This being the last day of the Seventh Congress, the matter was continued to the opening of the Eighth the following October. Another select committee to prepare articles was appointed by the House, the articles were approved by the House as a committee of the whole on December 30, and on January 4, 1804, the Senate resolved itself into a court of impeachment.

For most of the next two months a Senate committee was put to work on drafting detailed rules of procedure, a necessary step which had never been reached in Blount's case. By March 2 everything appeared in readiness, when a New Hampshire attorney, Robert G. Harper, appeared as counsel for Judge Pickering's son, Jacob, and offered a petition alleging his father's insanity and requesting permission to submit proofs.

John Pickering was in declining health and declining years (he would die in 1805) when he was summoned to the bar of Congress, and his eccentricities had long been a matter of record. In 1801 he had suffered a nervous breakdown and had been unable for a term to perform his judicial duties. When he returned to the bench, his conduct was notably erratic; he appeared frequently in an intoxicated state and was volubly profane during the conduct of trials. Modern psychiatry might have a ready explanation of the behavior, but for a Congress of that time seeking a political sacrifice it was easy to charge "loose morals and intemperate habits" and behavior "disgraceful to his own character

as a judge and degrading to the honor and dignity of the United States."

The Senate determined, over the objection of the House managers, once more to hear argument on a preliminary question, in this case the right of a third party to be heard on the question of the mental competence of the accused. After receiving the testimony *quasi in camera*, the Senate proceeded to the trial itself, but as Judge Pickering was not represented in person or by counsel, the proceedings consisted largely of the uncontested presentation of the evidence by the managers. The Senate declined to postpone judgment until confirmation of the insanity of the accused. It declared that it would follow English precedent (including "the very celebrated case of Warren Hastings") and pronounce judgment on each of the articles. On March 4, 1804, the defendant was found guilty on all of these, and the Senate moved to declare him removed from office.

So far as impeachment powers are concerned, the Pickering trial emphasized the continuity of British political and legal precedents and premises. So far as demonstrating the impropriety of impeachment as a means of removal of manifestly unfit officeholders, the case dramatized a problem with which state judicial removal commissions have only begun to deal in the twentieth century. So far as launching the Jeffersonian campaign against the Federalist judiciary, the outcome was insubstantial, and of necessity, Congress moved on at once to bigger game—a Supreme Court justice.

#### Chase Was an Anti-Federalist Target

As the Pickering proceeding overlapped *Marbury*, so the attack on the Supreme Court overlapped the Pickering case in 1804. On January 5 Representative Randolph of Virginia delivered a speech concerning the need for "preserving unpolluted the fountains of justice" and moved that a committee be appointed to "inquire into the official conduct of Samuel Chase, one of the associate justices of the Supreme Court of the United States" and to determine whether his conduct warranted "the interposition of the constitutional power of this House."

The jurist from Maryland was a far more provocative target for anti-Federalist fire. An aggressive activist from his youthful service in the Continental Congress, where he had excoriated moderates of all persuasions, he had criticized the new Constitution for fostering an oligarchic rather than democratic form of government. If this sounded almost Jeffersonian, Chase's true character of irascible prejudice became clearer with the passing years. His bullying conduct as chief judge of the Maryland criminal court had once led to a move to oust him from the bench. It won a majority vote but fell short of the two-thirds requirement. His nomination to the Supreme Court in 1796 had been confirmed by the Senate without debate, but also without notable enthusiasm from the profession. Still, his incisive opinion in *Ware v. Hylton*, 3 Dallas 191 (1796), asserting the supremacy of treaty law over state law, and his opinion

in *Calder v. Bull*, 3 Dallas 386 (1798), limiting the *ex post facto* clause to criminal law, established landmarks of constitutional law that still remain.

Chase was a capable jurist but an irrepressible politician, and his intolerant partisanship ultimately gave the Jeffersonians the chance they were seeking. His electioneering for John Adams during his first year on the Court was followed by his all-out endorsement of the Alien and Sedition Acts when they were before Congress. His highly prejudicial conduct of the trial of a Jeffersonian editor, James Callendar, shocked even the Federalists. He was charged with pressuring federal marshals to exclude Jeffersonians from juries that tried sedition cases, and he repeatedly delivered harangues from the bench, the climax being an address to a Baltimore grand jury in which he condemned democracy and the Republican (later Democratic) Party as enemies of established government.

### Fugitive Burr Presided over the Senate

Jefferson himself, as commander-in-chief of the anti-judiciary campaign, sent the printed report of Chase's Baltimore grand jury address to Nicholson, one of the House managers of the Pickering impeachment, as a signal to begin proceedings. Another Federalist judge, Richard Peters of Pennsylvania, was also named for investigation, but no charges were brought against him. On March 12, 1804—the day Pickering was convicted—the House approved its committee recommendation for proceeding against Chase, and the action was reported to the Senate the following day. Eight articles, climaxing in the Baltimore speech, eventually were presented to the Senate, with reservation of right to add to these later. Senate action was deferred until November when the second session of the Eighth Congress began.

The spring, summer, and fall of 1804 were taken up with avid public discussion of the forthcoming trial, which was generally recognized as a test of political power over the judicial branch of government. The political prospects were formidable. With twenty-three of thirty-four Senate votes needed for conviction, the anti-Federalists nominally could claim at least twenty-five. An additional bizarre fact was the presence of Vice President Aaron Burr, a fugitive from New York law for his slaying of Alexander Hamilton in a duel the previous summer, as presiding officer. His term had only a few more weeks to run, but Jefferson sought his return to preside over the Chase trial on the assumption that an anti-Federalist presiding officer would further cement the prosecution.

The antijudiciary strategy, however, tended to overreach itself. Burr proved to be a ferocious but fair presiding officer, "with the dignity and impartiality of an archangel but with the rigor of a devil," who won a vote of appreciation even from his critics at the end of the trial. In addition, Chase prepared to fight the charges vigorously and engaged a battery of leading members of the bar as his counsel, including Luther

Martin and Philip Barton Key of Maryland, Joseph Hopkinson of Pennsylvania, Charles Lee of Virginia, former United States attorney general under Washington and Adams, and Jacob Pickering's lawyer, Robert G. Harper of New Hampshire.

Chase did nothing to help his own case in appearing at the equivalent of the preliminary hearing when he came before Burr in response to the Senate's invitation to make answer to the charges. The justice denigrated his accusers as "puling in their nurses' arms whilst I was contributing my utmost to lay the groundwork of American liberty," one of several utterances for which Burr called him to order. Confident that they had a strong case, the anti-Federalists prepared to make it a spectacle as well. The benches in the Senate chamber were covered in crimson, special boxes were installed for all the parties to the trial, and sections were reserved for members of the government, the diplomatic corps, and ladies of the members' families. On February 5, 1805, the spectacle began.

Neither Chase nor his counsel denied the facts in the charges but directed their defense at the proposition that "high Crimes and Misdemeanors" were of necessity indictable acts. Hopkinson pointed out that a grand jury's power to indict did not give it latitude "to make anything indictable which they might disapprove" and added that "high Crimes and Misdemeanors" must be acts as indictable as treason and bribery, with which they were joined in the constitutional language. Martin distinguished the principal English cases cited by the House managers to support the nonindictability argument. Harper pointedly reviewed the political motivations of the Hastings trial and all but read into the record the political commentary that had been a prelude to the current trial. The arguments were astute and achieved their intended effect. On February 27 the court found Chase not guilty on any of the articles.

### Chase Trial Established Judiciary's Independence

Whether the Chase trial settled the question of "high Crimes and Misdemeanors" as being limited to indictable offenses is difficult to determine. On five of the eight charges, which to modern observers might be strong grounds for removal of a judge under contemporary state disciplinary authority, the majority vote of the court of impeachment was in Chase's favor. Anti-Federalist members of the court took this sort of behavior for granted and were not prepared to condemn a Federalist judge for what they would expect of an anti-Federalist one. It was only on the articles charging clearly nonindictable offenses that a majority to convict was mustered, but even that fortuitously fell short of the required two thirds.

The only definite principle established by the Chase trial is the independence of the judiciary from purely political attack. As John Quincy Adams, then a senator, wrote his father, the assault on Chase, had it been successful, "would have swept the Supreme Judicial Bench

clean at a stroke." Instead, it became settled that mere unpopularity of behavior or decision is not a ground for impeachment.

The judge as tyrant in his own courtroom is an old problem in Anglo-American legal history. Chase's unbecoming behavior on the bench did not seem reprehensible to the majority of senators in 1805. Would things change with the passage of time? This was to be the sole question in the impeachment trial of James H. Peck, which had as a by-product a legislative limitation on the use of the contempt power of federal judges.

### Had Peck Abused His Authority?

Peck was the United States district court judge for the District of Missouri. In December, 1825, he held against certain claimants to lands held under a grant made by Spanish authorities prior to the Louisiana Purchase. The case was appealed to the Supreme Court, which ultimately reversed Peck (10 Pet. 100), but while appeal was pending the appellants' counsel, Luke E. Lawless, published a pseudonymous letter in a Saint Louis newspaper listing a number of alleged errors in construction of the Roman law on which the Spanish grants had been based. For trying his case in the press, Lawless was cited for contempt by Judge Peck, adjudged guilty, and sentenced to twenty-four hours' imprisonment and eighteen months' suspension from practice. Lawless sought a remedy by writing his congressman, alleging Peck's breach of the "good behavior" tenure.

Impeachment was a long time coming, however. The first motion by Rep. John Scott of Missouri came in December, 1826, but it was January, 1830, before Rep. James Buchanan of Pennsylvania requested permission for the House Judiciary Committee to send for relevant papers in the case. Even then, the committee indicated considerable uncertainty as to how it should proceed on a complaint based essentially on a publication in a privately published newspaper. The single article in the impeachment bill it finally brought before the Senate was also hazy in its allegations. Peck, it declared, had published in one newspaper his decree and his reasons for it, while Lawless had replied with his allegations of error. The contempt citation, the article suggested, was an abuse of judicial authority because it was arbitrary and oppressive.

Ostensibly, Peck was charged with violation of the Eighth Amendment's prohibition of excessive fines and cruel and unusual punishments, but as a practical matter the question was whether there was a limit to a judge's power to determine on his own initiative what was excessive, cruel, or unusual. As former Attorney General William Wirt, one of Peck's defense counsel, argued, *mens rea* was essential for a conviction; a judge "is not answerable either civilly or criminally for a mistake of judgment in his judicial character." Under the Chase precedent, the argument was hard to refute. Peck was acquitted, but Congress the following year enacted a statute (4 Stat. 487) limiting contempt powers of fed-

eral courts to in-court behavior.

The Civil War presented the first occasion since the Blount case to charge treason as an impeachable act, and a federal judge for the Tennessee district was selected for the test case. West H. Humphreys, who had held judicial office in both the state and federal systems, was charged in January, 1862, with having advocated and supported secession and with then having accepted a judgeship under the Confederate government. Since the facts were well established—as to Humphreys and other erstwhile federal judges in the South—and since Humphreys made neither appearance nor defense, the articles were uncontested and the Senate almost mechanically found him guilty on all but one stipulation in one article.

After the Civil War, Humphreys returned to practice following *Ex parte Garland*, 4 Wall. 333 (1867), a general decision on amnesty for members of the bar in seceded states, but he made no attempt to seek judicial appointment. The case was little more than a recital of the obvious and perhaps the most forgettable of the dozen impeachment cases in our national history. But the next case was to be the most memorable.

### Johnson's Trial Produced a Glut of Villains

The impeachment of Andrew Johnson was the product of a combination of malevolences—the assassination of Abraham Lincoln in April of 1865, which touched off a wave of hysteria and vindictiveness; the alienation of Johnson from any base of congressional power: his position as an ex-Democrat who had been made Lincoln's running mate as an expedient and as a Southern moderate in a Radical hotbed; and the twofold objectives of the Reconstruction Congresses: to wreak vengeance on the prostrate Confederacy and to wrest back from the executive branch some of the power that had accrued to it under the demands of war. The divided nation seethed with hatreds, the president-by-accident compromised his own courageous stand on principle by ill-advised personal attacks on opponents who were too powerful for these tactics, and Congress, which disliked Johnson for various reasons, was in the grip of zealots who, in Henry Demarest Lloyd's phrase, had never in their lives had a noble thought.

The drama of the Johnson impeachment produced a glut of villains and no shining hero. The president, for his steadfastness, eventually earned some qualified degree of honor. The same retrospective view consigns congressional leaders like Benjamin Butler, Thaddeus Stevens, Charles Sumner, and Benjamin Wade to a kind of political purgatory or worse. And the blackest figure, whose treachery in Johnson's cabinet eclipsed his service in Lincoln's, was Secretary of War Edwin M. Stanton.

The first attempt at impeachment fell short. It began with a motion by Congressman James M. Ashley of Ohio on December 17, 1866, and was amended and broadened on January 7, 1867, by another motion by Benja-

min F. Loan of Missouri. "The impeachment of the officer now exercising the functions pertaining to the office of president," said the motion, was necessary for the proper reconstruction of the rebel states and the extension of the franchise to the freedmen. Translated, Congress and not the president was to have exclusive control of the postwar nation.

A desultory debate on the motion, principally revolving about the complaint that no specific violation of law was set out, occupied the House for all of 1867, and eventually in December the motion was voted down, 57 to 108. The next month—January, 1868—a new motion was offered to investigate the president's record for specific violations of law. This motion referred the investigation, not to the House Judiciary Committee, but to Stevens's Committee on Reconstruction. With the business now in Radical hands, the plan advanced rapidly.

### Congress Was Confident of Its Freedom

After less than two weeks of ex parte investigation, the committee reported out a recommendation of impeachment on a series of charges related to Johnson's attempted removal of Stanton as secretary of war in violation of the Tenure of Office Act, passed March 2, 1867, over the president's veto. The doubtful constitutionality of the law, which denied the chief executive the power to remove any of his cabinet officers without permission of Congress, had not been accepted for review by the Supreme Court, which, already cowed by events, was sliding rapidly into its nadir of effectiveness. Confident of its freedom from judicial intervention, the House on February 24, 1868, voted the impeachment of Johnson, 128 to 47.

On March 5 Chief Justice Samuel P. Chase, himself obsessed with a desire for the presidency, entered the Senate chamber to preside at the trial. He and all the senators, in accordance with constitutional provision, were specially sworn, whereupon the House managers were presented: Butler and George S. Boutwell from Massachusetts, Stevens and Thomas Williams from Pennsylvania, John A. Bingham and James F. Wilson from Ohio, and John A. Logan from Illinois. For his defense Johnson had a staff headed by Henry Stanbery, who had resigned as attorney general to take the brief, former Supreme Court Justice Benjamin R. Curtis, and three highly reputed Washington lawyers, Jeremiah S. Black, William M. Evarts, and T.A.R. Nelson. It was symptomatic of the corruption of the era that Black sought to blackmail the president into authorizing a disposition of some government business favorable to one of Black's clients. When Johnson refused, Black withdrew and was replaced by another Washington lawyer, William S. Groesbeck.

Any resemblance to an objective trial is difficult to discern in the record of the case before the Senate. Obstreperous senators frequently ignored the chief justice's attempts to keep order and to exclude irrele-

vant testimony. Johnson's lawyers were granted only a fraction of the time they had requested to prepare their case, and the president's own article-by-article response to the charges was rejected summarily by the House. When the trial itself was in progress, the Senate moved to throw open the galleries for the benefit of the orators on the floor, but when the time came for final debates on the merits of the case, it ordered the record to be closed. From beginning to end the proceedings seem to merit the description of the historian James Schouler: "a solemn theatrical fiasco."

The eleven articles focused on separate acts of law-breaking in the attempted removal of Stanton and the attempted substitution of an acting secretary of war, while the final article condemned the president for a speech he had made the previous August challenging the validity of legislation passed by "a Congress of only part of the states." At the conclusion of final arguments, the eleventh article was proposed for a test vote by George H. Willis of Oregon, and on May 16 the vote was taken. It stood at thirty-five to nineteen—one short of the constitutional majority.

Ten days later, after furious backstage campaigning among the senators, the second and third articles were offered for vote, with the same result. The chief justice then called attention to one of the rules agreed to for the trial—the authorized entry of a judgment of acquittal if no two-thirds majority was recorded for any articles voted on. The Radicals confessed defeat and did not offer any of the remaining eight articles. On May 26 the high court adjourned *sine die*, and by the narrowest possible margin, as a later scholar noted, "the presidential element in our system escaped destruction."

### It Was Easy To Find Genuine Wrongdoing

With the Reconstruction carnival of the Johnson trial, the use of impeachment as a political tool fell into disfavor. Amid the virulent corruption that infected government generally in the post-Civil War generation, it was easy enough to find instances of genuine wrongdoing. In January, 1876, the House directed its committees on military and Indian affairs to inspect the records of these agencies for irregularities or errors, and two months later the Committee on War Department Expenditures reported to the House "unquestioned evidence of the malfeasance in office of General William W. Belknap," secretary of war in Grant's cabinet. The gravamen of the charge was that Belknap, who in 1870 had appointed one John S. Evans manager of the trading post at Fort Sill, had received a total of \$24,450 from Evans and others over the following six years. The House voted impeachment unanimously.

Belknap, meantime, had submitted his resignation, and Grant had accepted it. In the final Senate vote on impeachment, twenty-two of twenty-five senators voted in the negative and declared that they did so not on the merits but on the conviction that the resignation had



terminated the "civil officer" status of the accused and thus their jurisdiction. Had they not been so persuaded, the inference may be drawn that the uncontested evidence would have won a large majority. As it was, the vote of thirty-six to twenty-five fell short of the required two thirds.

At the time of the trial, Belknap's supporters insisted that he was a victim of circumstance, that he was unaware of the payments from the trading post beneficiary, that the payments had been made at his wife's suggestion, and that the funds had actually come to her. While the prosecution was based on the defendant's being chargeable with knowledge of the events, the primary importance of the Belknap case is the emphasis on specific allegations of wrongdoing, supported by the evidence, as contrasted with the politically oriented proceedings of the period up to 1868. The contention of a substantial number of senators voting against conviction—that the resignation of the defendant tolls the impeachment power—would appear to have been corroborated by Congress's action in the case of George W. English half a century later.

#### Swayne's Acquittal Established a Principle

In the first impeachment trial in the twentieth century, the stress was manifestly on the need for hard evidence to sustain the charges, although novelties in procedure continued to arise. In December of 1903 House proceedings were prompted by a memorial from a state legislature alleging misbehavior on the part of Charles Swayne, judge of the United States District Court for the Northern District of Florida. The House Judiciary Committee was closely divided in its report in March, 1904, and in its continued effort to frame a resolution and articles of impeachment the committee sought testimony from Swayne and numerous witnesses, at the same time excluding hearsay evidence and holding irrelevant and inadmissible testimony relating to matters not considered to be grounds for impeachment.

The first seven articles, which were allegations that Swayne had padded expense accounts, appropriated a railroad coach for his personal use without compensation to the owner, and established residency outside his district in contravention of federal law, were voted by the House only by a small majority. The remaining articles, relating to alleged arbitrary and prejudicial use of the contempt power in out-of-court situations, did win unanimous House approval. All twelve articles (a thirteenth having been stricken) were negated in the Senate trial. Counsel for Swayne entered pleas to the jurisdiction and a general denial in the first seven articles of the charges, while the rule in the Peck case was offered in defense to the remaining articles.

Swayne's acquittal pointed up a firm new principle in impeachment procedure. When the charges amount to allegations of criminal conduct, the prosecution is to be held to the standard of proof beyond reasonable doubt that would obtain in a judicial process.

Proof beyond reasonable doubt was readily available in the next case, brought in 1912 against Robert W. Archbald, a federal circuit judge and judge-designate for the ill-fated Commerce Court. Pres. William Howard Taft, in submitting the papers on the Justice Department investigation of Archbald, noted that "in my opinion—and I think it will prove in the opinion of the [Judiciary] Committee—it is not compatible with the public interests to lay all of these papers before the House of Representatives until the Committee on the Judiciary shall have sifted them out."

On July 8, 1912, the committee unanimously recommended impeachment, and the House accepted the recommendation, 223 to 1. The articles set out at length a record of specific malfeasance, with supporting facts, and the Senate, on resolving itself into a court of impeachment, added several rules of procedure conformable with established rules in several federal courts. Archbald through his counsel demurred to the articles, and the House through its managers filed a replication. Lists of witnesses were then prepared and submitted. On December 3, 1912, Judge Nicholas Worthington, one of Archbald's lawyers, stated:

Mr. President and Senators, for the first time in an impeachment trial in this tribunal the opening statement for the respondent is to be made at the beginning of the case instead of at the close of the testimony on behalf of the managers. We have desired to do this . . . for two reasons. One is that the Members of the Senate may know when the introduction of testimony is going on what are the questions of fact in dispute. The other is that Senators may know from the beginning what we rely upon as the law of the case.

Familiar enough as reasoning in a judicial proceeding, the novelty of the statement in the court of impeachment was one further indication of the emphasis on orderly procedure in what had too often in the past been a political spectacle. The evidence was introduced and tested, and Archbald was convicted on four of the first five articles. But no one was heard to accuse Congress of arbitrary and injudicious action.

Archbald was convicted under the constitutional stipulation that judges "shall hold their Offices during good Behaviour." The articles on which he was found guilty were specific—profiteering from a receivership established under his jurisdiction, exercise of improper influence in cases before his court, collusion with counsel, improper solicitation of credit—but the House of Representatives in voting impeachment had sternly added that he had "degraded his high office and . . . destroyed the confidence of the public in . . . judicial integrity." Impeachable acts, the House emphasized, included offenses against the dignity of government. This was the underlying theme of the final trial, Ritter's case, before the Senate in 1936.

The primary purpose of the impeachment process is to remove a wrongdoer from an office of public trust. If this purpose is served by a voluntary resignation,



## IMPEACHMENT TRIALS IN UNITED STATES SENATE

Party Impeached	Dates*	Articles of Impeachment	Vote	Disposition
William Blount	February 7, 1797- January 9, 1799	1. Conspiring to violate U. S. neutrality 2. Conspiring to incite Indian uprising 3. Conspiring to corrupt Benjamin Hawkins, government agent 4. Conspiring to corrupt James Carey, government agent 5. Conspiring to foment Indian disaffection toward U. S.		Dismissed for want of jurisdiction
John Pickens	February 4, 1803- March 12, 1804	1. Entering judgment in admiralty case contrary to express provisions of act of Congress 2. Entering summary judgment against U. S. without affording party right to submit proofs 3. Refusing to grant leave to appeal 4. Intemperate and unbecoming behavior in court room	19-7 19-7 19-7 19-7	Found guilty and removed
Samuel Chase	March 12, 1804- February 27, 1805	1. Arbitrary actions on circuit, Philadelphia 2. Arbitrary rulings in Callender case 3. Denial of right of defense witness to testify in Callender case 4. Harassment of Callender and counsel 5. Unusual punishment of Callender 6. Denial of adequate time to prepare defense in Callender case 7. Harangue to grand jury, Wilmington 8. Harangue to grand jury, Baltimore	16-18 16-24 18-16 14-16 0-34 4-30 10-24 19-13	Acquitted
James H. Peck	April 29, 1829- January 31, 1832	1. Arbitrary use of contempt power	21-22	Acquitted
West H. Humphreys	June 9, 1862- June 27, 1862	1. Advocacy of secession 2. Support of ordinance of secession 3. Support of armed resistance to U. S. 4. Violation of oath of office 5. Refusal to perform duties as judge 6. Step 1. President at conviction of unionist Step. 2. Confiscated U.S. property Step. 3. Imprisoned unionists 7. Arrested unionists	37-0 36-1 35-4 28-10 39-0 36-1 12-24 35-1 35-1	Found guilty and ordered removed
Andrew Johnson	March 5, 1868- May 12, 1868	1. Removal of Cabinet officer in violation of Tenure of Office Act 2. Violations of Tenure of Office Act 3. Appointment of Acting Secretary of War when no vacancy existed 4. Impeding of Secretary of War in lawful duties 5. Same; second count 6. Seizure of files of Secretary of War 7. Same; second count 8. Unlawful attempt to impound War Department appropriations 9. Disregard of act of Congress limiting powers as commander-in-chief 10. Contempt and ridicule of Congress 11. Denunciation of Congress	35-19 35-19 35-19 35-19 35-19 35-19 35-19 35-19 35-19 35-19 35-19	Acquitted
William W. Belknap	January 14, 1876- August 21, 1876	1. Bribery in appointment of manager of Indian trading post 2. Same; second count 3. Same; third count 4. Bribery (17 stipulations) 5. Itemization of illegal payments	35-25 36-25 36-25 36-25 37-25	Acquitted following resignation
Charles Swayne	December 30, 1903- February 25, 1905	1. Falsified expense accounts 2. Same; second count 3. Same; third count 4. Acceptance of favors from bankrupt 5. Same; second count 6. Illegal residence outside judicial district 7. Same; second count 8. Arbitrary use of contempt power 9. Same; second count 10. Same; third count 11. Same; fourth count 12. Same; fifth count	33-49 37-50 32-50 13-69 13-69 31-51 19-63 31-51 31-51 31-51 31-51 31-51 35-47	Acquitted
Robert W. Archbald	April 23, 1912- January 13, 1913	1. Undue influence and profiteering 2. Same; second count 3. Conspiracy and undue influence 4. Collusion with counsel in case pending 5. Undue influence in lease contracts 6. Undue influence in purchase contracts 7. Undue influence in consent decree 8. Improper solicitation of personal loans 9. Bribery in pending cases 10. Same; second count 11. Same; third count 12. Improper appointment of counsel 13. Improper solicitation of credit	68-5 46-25 60-11 52-20 69-6 24-45 29-36 22-42 23-39 1-65 11-51 19-46 42-20	Found guilty and removed
George W. English	March 25, 1926- November 11, 1926	1. Improper court room behavior 2. Collusion with receivers 3. Same; second count 4. Diversion of impounded funds 5. Denial of jury trial to defendant		Resigned and proceedings discontinued
Harold Louderback	May 26, 1932- May 23, 1933	1. Conflict of interest 2. Improper allowances, etc. 3. Misleading of parties in cases 4. Conflict of interest, second count 5. Favoritism in treatment of parties	34-42 23-47 11-63 30-47 45-34	Acquitted
Husted L. Ritter	March 3, 1936- November 11, 1936	1. Fee splitting 2. Same; second count 3. Practice of law during tenure as judge 4. Collusion with party in case 5. Income tax evasion 6. Same; second count 7. Abuse of office	55-29 52-32 44-39 35-48 36-48 46-37 56-28	Found guilty and removed

\*Starting dates vary with records of case; some are dates of initial motion in House of Representatives, others are date of formal report on impeachment. Final date is date of final action by court of impeachment.

Congress has the option of discontinuing the impeachment and perhaps is barred in fact by the jurisdictional question, as a substantial number of senators contended in the Belknap case. In the case of Judge George W. English, the House voted to discontinue the impeachment proceedings on his resignation, since the original objective—to remove him from the bench if convicted—had been accomplished by the resignation. The constitutional limit to the impeachment power—that it “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”—seems to accommodate this policy.

The principal articles against English charged that as a judge in the Eastern District of Illinois he had designated banks in East Saint Louis and Centralia, Illinois, as depositories for federal bankruptcy funds and had arranged to transfer the funds from other depositories on condition of various personal accommodations. The House filed its notice of impeachment on March 25, 1926, and the Senate announced that plans for the House managers to begin their prosecution had been completed on November 3. English submitted his resignation on November 4. On November 11 the Senate, sitting as a court of impeachment, heard the formal request of the managers to terminate the trial.

### Louderback's "Good Behavior" Was at Issue

On May 2, 1932, the Bar Association of San Francisco addressed a letter to President Hoover calling attention to certain newspaper stories and other statements concerning the conduct of Harold C. Louderback of the Northern District of California. After an inquiry by the House Judiciary Committee, the majority reported out a recommendation of censure rather than impeachment, but on motion of Fiorello La Guardia, then a New York Representative in Congress, the minority report was substituted and adopted. On March 3, 1933, the Senate proceeded to trial.

The articles alleged that Louderback improperly discharged a receiver in bankruptcy for refusing to appoint a particular individual as attorney for the receiver, that he allowed extortionate fees and other charges in the case of other receiverships; and the final article was a summary based on the “good behavior” standard of judicial tenure. While this was the most general in terms, it was the only article to win a substantial, although less than two-thirds, majority of the final Senate vote. It is therefore worth noting:

That the said Harold Louderback as judge . . . did so conduct himself in his said court and in his capacity as judge in making decisions and orders in actions pending in his said court . . . as to excite fear and distrust and to inspire a widespread belief in and beyond said northern district of California that causes were not decided in said court according to their merits, but were decided with partiality and with prejudice and favoritism to certain individuals . . . all of which is prejudicial to the dignity of the judiciary.

Louderback was acquitted on all articles, but the readiness of the Senate to make a conviction turn on a summary charge of "good behavior"—that charge being greater than the sum of the prior charges—was to be the pivotal issue in the final impeachment trial of record to date.

### Ritter Was Tried on All Seven Articles

Halstead L. Ritter, judge for the Southern District of Florida, was impeached on March 3, 1936, on seven articles charging fee splitting and tax evasion—none of the first six articles mustering a two-thirds majority for conviction. The seventh article stipulated that the "reasonable and probable consequence of the actions or conduct . . . is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the federal judiciary."

Ritter, by his counsel, moved to strike this article on the ground that it "constitutes an accumulation and massing of all charges in preceding articles upon which the court is to pass judgment prior to the vote on Article VII, and the prosecution should be required to abide by the judgment of the Senate rendered upon such prior articles and the Senate ought not to countenance the arrangement of pleadings designed to procure a second vote and the collecting or accumulation of adverse votes, if any, upon such matters." The impeachment court denied the motion and proceeded to try the case on all the articles, with the seventh proving at the last to provide the conviction.

It is interesting to note the disparity of voting, by supplementing the vote summary in the table with the "not voting" record:

Articles	Guilty	Not Guilty	Not Voting
Article I	55	29	12
Article II	52	32	12
Article III	44	39	13
Article IV	36	48	12
Article V	36	48	12
Article VI	36	47	13
Article VII	56	28	12

It is evident that if one of the nonvoting senators had joined with the majority in Article I, or if four had joined with the majority in Article II, Ritter would have been convicted on three counts instead of one—which is only to say that the one-vote majority on the final article is not all that fortuitous. At the time, however, Warren Austin of Vermont addressed the presiding officer and suggested that since the vote did not include two thirds of the senators present, it was invalid. The court ruled him out of order. Ritter later sought to test the issue in court by a suit for back salary, but the Court of Claims dismissed for want of jurisdiction (84 Ct.Cl. 293 (1936)), and the Supreme Court denied certiorari (300 U.S. 668). So on a note both tenuous and querulous ended the most recent impeachment trial in the records of the Senate.

### Social Ethic Cannot Be Prescribed

This, to date, has been the record of the impeachment process in Congress since the first decade of the Republic—a record that began in a well-established English common law tradition of political inquisition, reached a nadir in the vindictive ordeal of Andrew Johnson, and for the past century has groped for standards of judiciousness that have yet to crystallize into uniform or consistent rules of procedure. The emphasis since 1876 has been on the type of evidence cognizable in a judicial proceeding. Defendants in the twentieth century have been exclusively judicial personnel. Pressure for the alternative of resignation—the case of former Vice President Spiro Agnew being conspicuous—has tended to replace impeachment as a means of dealing with presumably flawed qualifications for nonjudicial offices.

One rather evident reason for the still inchoate definition of impeachable conduct is the nature of public service itself—a combination of legal guidelines and social ethic. The legal guidelines are presumably amenable to specific procedural formulas; the ethic in the nature of things cannot be. Yet the ethic may be the essence of the issue from which the impeachment process must arise. If this is granted, it is simply to say that impeachment depends for its justification on the degree of responsibility exercised by those to whom it falls to conduct the process. ▲

### Hearing Examiners Needed

THE Bureau of Hearings and Appeals of the Social Security Administration is conducting an examination to hire more than 250 lawyers to be hearing examiners under the supplementary security income program of Title XVI of the Social Security Act. The examination will consist of a detailed application, responses to qualification inquiries, a written demonstration, and an oral interview. The dates of the written demonstration phase will be determined later according to the number of applications filed and the processing cycle.

Appointments will be made at GS-13 grade level (\$20,677 to \$26,878) and the GS-14 level (\$24,247 to \$31,519). The positions will be located in cities throughout the United States.

To qualify one must be licensed to practice law and have at least four to six years, respectively, of judicial, trial, administrative law, or other legal experience. Further information and the examination announcement may be obtained from the Bureau of Hearings and Appeals, Social Security Administration, S.S.I. Task Force (326 Webb), Box 2761, Washington, D.C. 20013.