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Impeachment in America: In Search of Precedents: An Examination of the Presidential Impeachments of Andrew Johnson and Richard Nixon

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IMPEACHMENT IN AMERICA:
IN SEARCH OF PRECEDENTS.

AN EXAMINATION OF THE PRESIDENTIAL IMPEACHMENTS OF ANDREW JOHNSON AND RICHARD NIXON

A Thesis

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THESIS ACCEPTANCE

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The author hopes that this project justifies at least part of the investment of time and energies put into it directly or indirectly by all of the above individuals and institutions. This does not obviate the fact that all responsibility for errors of whatever sort, either of fact or of judgment; of commission or omission, remain the author's responsibility, and his alone.

CONTENTS

PART ONE:

THE CONCEPT OF PRESIDENTIAL IMPEACHMENT

AND ITS HISTORIOGRAPHY

This thesis examines the political, legal and constitutional issues involved in two fatally flawed American presidencies. It searches for relevant similarities and precedents which focus on American constitutional provisions for the possibility of impeaching and trying our sitting chief executive.[1] The two subjects of study are the administrations of presidents Andrew Johnson and Richard Nixon. In each of these the issue of presidential impeachment came to the fore, and continues to figure largely in historical assessments of the nature of executive vis-a-vis legislative powers.[2] These are necessarily and inextricably juxtaposed with related issues of judicial power and constitutional interpretation.[3] In part, too, this study provides an abbreviated source book for each presidency. The latter does not yet exist in the

case of the more recent Nixon presidency, and exists only incompletely in a number of separate treatments of President Andrew Johnson's administration.[4]

While the writer is inclined to agree with the not entirely cynical or despairing contemporary belief that history does not teach lessons, and ought not to represent itself as so doing, the study of history in some situations nevertheless often does provide the only recourse for other scholarly disciplines in their attempts to investigate, and sometimes to adjudicate, in other vital areas of human activity.[5] In a search for precedents, not merely in a legal, but also in a sociological and historical sense, the social sciences in general, and history in particular, occasionally provide the only true court of last resort for disputes among jurists and lawyers and politicians of all stripes.[6] Given the fact of its social importance, for historians to neglect or downplay this aspect of their activities represents something very much like dereliction of duty.

The two periods in American history investigated by this thesis provide prime historiographical examples of instances when it is the historian, not the jurist or politician or business person or military person or lawyer, who must rally to the task and provide such answers as do

exist.[7] In brief, the thesis represents an effort to come to terms with some of the more salient aspects of these two most serious episodes of presidential impeachment in American history, separated as they were by some one hundred years.[8] It poses the question of whether a search for precedents has led many practitioners astray, in their pursuits of explanatory certainty in cognate fields.[9]

The thesis questions whether the impeachment of Andrew Johnson, and the House Judiciary Committee's decision to vote for three articles of impeachment applying to Richard Nixon, have value as precedents in a juristic sense.[10] It asks whether, if the mechanical and operational characteristics of these two enterprises can be seen to have had much in common, their other points of similarity are more chimerical and misleading than real and valuable as either legal or even political precedents. It asks if these two episodes are not truly alike only in that they serve to focus attention on some curious and fragile aspects of constitutional law. It asks, too, whether precedents for the impeachment of executive officers perhaps have taken on a mischievous illusion of substantiality that, properly speaking, they ought not to have.[11]

For the sake of convenience, throughout this thesis the writer occasionally refers to the "impeachment" of Nixon, even though he was not impeached by a full vote of the House of Representatives. Such an approach spares the reader the additional burden of having to tolerate some complicated rhetorical gymnastics and circumlocutions in referring to it. The need to wade through such complicated and jawbreaking allusions as "the near impeachment of" (or) the "almost impeached Nixon" (or) the "would have been impeached Nixon," and so forth, is thereby eliminated.

This thesis necessarily discusses broad constitutional issues, as these have emerged amid controversy about political, social, and economic realities. As a result, it sketches in some wider aspects of the contemporary situations which surrounded efforts toward impeachment of these two presidents. Such an approach seems prudent, since impeachment is primarily a political and not a judicial enterprise.[12] Consequently, it must be looked at contextually, in complete awareness of the necessarily messy political and social reality which normally obtains in any democratic context.[13]

Both Andrew Johnson and Richard Nixon presided over what many historians and political scientists consider to have been two of the most spectacular failures in American

politics. Despite both chief executives' relative successes in conducting foreign affairs, and despite the fitful attempts of each to salvage his respective administration, the constitutional provisions for impeachment eventually rendered each president politically impotent. This thesis describes how such political situations developed. It also examines how and why relations between presidents and congresses came to such a pass that twice in American history the House of Representatives has found it necessary to set into motion the politically painful process of presidential impeachment.[14]

Notes to Part One, Pages 1 to 5

[1]There is a kind of consensus view of the impeachment of Andrew Johnson contending that he was the victim of an angry, Radical Republican Congress in search of a legal excuse to drive him from office. Most accounts of this period in American history mention only the fact of the 35 to 19 vote to acquit him, in the Senate, and concentrate more on the Civil War period, and the subsequent period of Southern Reconstruction, instead of his trial. Refer to David Miller Dewitt, The Impeachment and Trial of Andrew Johnson (New York: The Macmillan Company, 1903; republished, Madison, Wisconsin: The State Historical Society of Wisconsin, 1967). Dewitt's history of the trial, outdated and saturated with racism though it is, ranks as the best discussion of the trial itself; but it is highly biased in Johnson's favor, as even one of Dewitt's most laudatory commentators, McKitrick, has criticized. Refer to Eric L. McKitrick, Andrew Johnson and Reconstruction (Chicago: The University of Chicago Press, 1972), passim.

In writing this thesis; and in terms of assessing our own era's received historiographical verdict on Andrew Johnson's trial, the writer has used the following general works, among others. Together, these sources represent a cross-section of contemporary historiographical opinion on the presidencies of Andrew Johnson and Richard Nixon, as well as depicting the immediate context in which they occurred. The overall tone of the following works, therefore, has influenced many portions of this thesis dealing with such topics as the Civil War, Reconstruction, and the impeachment of Johnson, as well as similar subject areas significant in the Nixon era.

Refer to: John A. Garraty, The American Nation: A History of the United States to 1877. Fifth Edition (New York: Harper & Row, Publishers, 1966, 1983); Carl N. Degler, et al., The Democratic Experience, A Short American History (Glenview, Illinois: Scott, Foresman and Company, 1963, 1973); Richard N. Current, et al., The Essentials of American History to 1877 (New York: Alfred A. Knopf, 1976, 1977); Thomas A. Bailey and David M. Kennedy, The American Pageant: A History of the Republic, Volume II, 7th Edition (Lexington, Mass.: D.C. Heath and Company, 1956, 1983); and Rebecca Brooks Gruver, An American History: Volume II, from 1865 to the Present, Fourth Edition (New York: Alfred A. Knopf, 1984, 1985). Refer also to the six volumes cited in Note 4.

[2]Alexander M. Bickel, Chairman et. al., Watergate, Politics and the Legal Process (Washington, D.C.: American Enterprise Institute, 1974), pp. 30-33 and passim.

[3]Charles L. Black, Jr., Impeachment: A Handbook (New Haven: Yale University Press, 1974), pp. 53-64; and Raoul Berger, Impeachment: The Constitutional Problems (Cambridge: Harvard University Press, 1973), pp. 103-121.

[4]Hans L. Trefousse, Impeachment of a President: Andrew Johnson, the Blacks and Reconstruction (Knoxville: The University of Tennessee Press, 1975), pp. ix-xi.

This thesis explores the main aspects, or elements, involved in each of the two presidential impeachment processes studied. These include a general treatment and overview, accompanied by a discussion of the constitutional issues raised by the impeachments.

Many primary and secondary sources were consulted, but the following volumes in particular were of great help in illuminating areas demanding considerable expertise. Rather than risk misleading the reader on some crucial point of law or constitutional interpretation, the thesis occasionally includes rather lengthy extracts from them, usually in the form of endnotes. In so doing, the thesis provides a kind of sourcebook for continued research in this area. There is no "standard' treatment of either the Johnson or the Nixon eras which deals with the impeachments and the surrounding legal and political issues involved in any real detail or depth. Consequently, the thesis attempts to rehearse a brief history of both administrations, the lack of which is a severe handicap to research on these two presidencies; and without which background information it is next to impossible to study the two impeachments, themselves. As a result, the writer hopes that this thesis also might serve the more general requirements of students of other aspects of Andrew Johnson's and Richard Nixon's presidencies.

In the area of constitutional law, one volume in particular has been very helpful: Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, The American Constitution: Its Origins and Development (New York: W. W. Norton & Company, Inc., 1955, 1983). For chronological accounts of the Johnson and Nixon (or Watergate) eras, the reader is referred to two volumes: James M. McPherson, Ordeal by Fire: The Civil War and Reconstruction (New York: Alfred A. Knopf, 1982); and parts I and II, in several editions, of John M. Blum et al., The National Experience: A History of the United States [To 1877 and Since 1865] (New York:

Harcourt Brace Jovanovich, Inc., 1963, 1973). As an aid in understanding some technical issues associated with constitutional interpretation relating most especially to executive privilege; the veto power; and impeachment in general, as well as the so-called Nixon Cases, and precedents relating to the impeachment of federal judges, the reader is referred to: Walter F. Murphy and C. Herman Pritchett, Courts, Judges, and Politics: An Introduction to the Judicial Process, Third Edition (New York: Random House, Inc., 1961, 1979). For a more theoretical understanding of the nature of precedent, itself, necessarily becoming a major concern of students of these two impeachments, the reader is referred to what are undoubtedly among the best sources for such a discussion in our century: two works by the great former Associate Justice of the Supreme Court, Benjamin Nathan Cardozo: The Nature of the Judicial Process (New Haven: Yale University Press, 1921), and The Growth of the Law (New Haven: Yale University Press, 1924). Although these books were published some sixty years ago, they are classics in their field, and can be relied upon as being indicative of a strong tendency in the general mood of the Supreme Court up to and including the Warren era; and, in part, beyond it.

To supplement these remarks of Mr. Justice Cardozo, the reader is referred to critical, occasionally even hostile extracts from articles by Mr. Justice Rehnquist; and sociologically affirmative extracts from an article by Ronald Dworkin, Esq. Extracts from each of these authors were contained in Murphy, cited above (which is basically a sourcebook dealing with judicial decision-making and discipline, and so forth.) By utilizing these and other, similar narratives, the writer has tried to arrive at a consensus viewpoint, and summarized account. For this reason, the thesis has not taken serious issue with some differences in terms of factual details, estimates of importance of given events, and so forth, which occur in various histories of the periods under discussion. However, where there is a serious disagreement over the actions or motivations of key participants; or factual disagreement of one sort or another, such information is provided in an endnote, which presents alternative interpretations. The writer has also supplemented much of the contextual information on the Sixties and Seventies, and on the presidency of Richard Nixon, from memory; and has merely used those works cited as the main sources for a kind of generic background for each period. The thesis mentions additional, more detailed primary and secondary sources as they occur in appropriate chapters.

Unfortunately, there is no satisfactory, single text dealing with either the Andrew Johnson or the Richard Nixon presidencies, a fact already mentioned in passing, which greatly complicated matters. This necessitated producing a much longer thesis than originally planned.

[5]Avery Craven, Reconstruction: The Ending of the Civil War (New York: Holt, Rinehart and Winston, Inc., 1969), p. iii.

Refer also to Harold M. Hyman, in his introduction to Michael Les Benedict, The Fruits of Victory: Alternatives in Restoring the Union, 1865-1877 (Philadelphia: J. B. Lippincott, 1975), pp. xi-xii:

"'When you judge decisions, you have to judge them in the light of what there was available to do it,' noted Secretary of State George C. Marshall to the Senate Committees on the Armed Services and Foreign Relations in May, 1951. In this spirit, each volume in the 'America's Alternatives' series examines the past for insights which History--perhaps only History--is peculiarly fitted to offer. In each volume the author seeks to learn why decision makers in crucial public policy or, more rarely, private choice situations adopted a course and rejected others. Within this context of choices, the author may ask what influence then-existing expert opinion, administrative structures, and budgetary factors exerted in shaping decisions? What weights did constitutions or traditions have? What did men hope for or fear? On what information did they base their decisions? Once a decision was made, how was the decision maker able to enforce it? What attitudes prevailed toward nationality, race, region, religion, or sex, and how did these attitudes modify results?

"We freely ask such questions of the events of our time. This 'America's Alternatives' volume transfers appropriate versions of such queries to the past.

"In examining those elements that were a part of a crucial historical decision, the author has refrained from making judgments based upon attitudes, information, or values that were not current at the time the decision was made. Instead, as much as possible, he or she has explored the past in terms of data and prejudices known to persons contemporary to the event.

"Nevertheless, the following reconstruction of one of America's major alternative choices speaks implicitly and frequently explicitly to present concerns."

In a different context, refer to Carl N. Degler, Place Over Time: The Continuity of Southern Distinctiveness (Baton Rouge: Louisiana State University Press, 1977), pp. 100-101, and his discussions of the American Revolution and the Civil War, with special reference to parallel experiences and various historians' interpretations of these two political periods. Refer to E. Merton Coulter, The South During Reconstruction, 1865-1877 (Baton Rouge: Louisiana State University Press, 1947), pp. xi-xii.

Refer also to Aaron B. Wildavsky, in Bickel, p. 33:

"I've concluded that there are only [a few] things that can be said about Watergate with absolute certainty, [among them being] that Watergate doesn't have any lessons. Watergate is like a Rorschach. If you want to know what anybody thinks is wrong with the country, ask him what Watergate has to teach us. If you want to know what's deep inside of any person, ask what he or she thinks of Watergate, and you will get a response."

Any discussion of impeachment in America would be incomplete without a reference to the work of Raoul Berger. His pre-Watergate book, Impeachment: The Constitutional Problems [mentioned above], and various earlier articles by him influenced the attitudes of the members of the House Judiciary Committee preparatory to considering the impeachment of Richard Nixon. The Committee also included a great deal of material by him in a volume of sources and documents published as part of its ongoing investigation. Refer also to Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge: Harvard University Press, 1977). Berger's attitudes and conclusions are in sharp contrast to those of Irving Brant, Impeachment: Trials and Errors (New York: Alfred A. Knopf, 1972); and Peter Charles Hoffer and N. E. H. Hull, Impeachment in America, 1635-1805 (New Haven: Yale University Press, 1984), which are discussed elsewhere in this thesis.

For example, refer to Berger, Impeachment, pp. 298-299, for "lessons" of the Johnson impeachment:

"What lessons are to be drawn from the impeachment of Andrew Johnson? To deduce from its failure that impeachment of the President has proven its unfitness as an instrument of government is to disregard the Founders' knowledge that possible abuse of a power is no argument against its grant. Much less does abuse spell abandonment of a granted power. The Framers foresaw that impeachment might be subject to superheated partisanship, that it might threaten presidential independence; but recalling Stuart oppression they chose what seemed the lesser of evils. In

our own time the impeachment of President Truman, apparently for his conduct of the Korean War, was suggested by its staff to the Republican high command. There have been reiterated demands for the impeachment of President Nixon, arising out of dissatisfaction with his program for disengagement from the war in Vietnam. President Kennedy concurred with Attorney General Robert Kennedy that if he had not moved to expel Soviet nuclear missles from Cuba at the time of the confrontation with Khruschev, he 'would have been impeached.' Those who are unwilling to concede that the President, without a congressional declaration of war, may commit us to a full-scale war with all its ghastly consequences may yet turn to impeachment as a curb on such presidential adventures.

"The chief lesson which emerges from the Johnson trial is that impeachment of the President should be a last resort. Inevitably it becomes colored by party spleen, however justified in purpose; an attempt should first be made to accomplish that purpose by less explosive means. . . . A happier approach is to submit a controversy between Congress and the President, as Andrew Johnson wished to do. That approach met with the approval of Chief Justice Chase; unaware of that history I sought in 1965 to demonstrate that there are no legal obstacles to submission of such controversies to the courts. . . .

"If impeachment of the President there must be, it is, as Senator Fessenden stated, a power 'to be exercised with extreme caution' and in 'extreme cases.' Because it has proven itself infected with the taint of party, it needs to be limited to a cause that would win the assent of 'all right-thinking men,' not merely of an exasperated majority such as whipped on the Johnson impeachment.

"Finally, a decent regard for the design of the Founders, a resolve to avoid the excesses which forever stigmatized the Johnson trial, should constrain the Congress to disclaim unlimited power and to act within constitutional confines. . . . Every branch of government is confined to the 'limits' drawn in the Constitution, and the chief purpose of those 'limits' was to fence in the much-feared legislative branch. It was not left to the unlimited discretion of that branch to disrupt the other branches through resort to the impeachment power. The tremendous consequences of such disruption were disclosed by the Johnson impeachment; and the narrow escape from 'legislative omnipotence' in that trial should lead us to say as Voltaire said of God: if judicial review did not exist, it would have to be invented."

[6]Refer to Rembert W. Patrick, The Reconstruction of the Nation (New York: Oxford University Press, 1967), p. 126; and to Stanley I. Kutler in Dewitt, pp. xiii-xiv.

Raoul Berger, Impeachment, p. 5, comes to terms with this problem in a study of American impeachment that has become something of a minor classic:

"The constitutional grant of power to impeach raises important questions. Is it limited to criminal offenses? Is it unlimited? Does it exclude other means of removal? Does it comprehend insanity, incapacity, or nonofficial misconduct? Are members of Congress exempt from impeachment? These and still other questions have yet to receive satisfactory resolution. Bald assertion, proceeding from assumptions that are at war with the intention of the Framers, has too often substituted for analysis. Resort to the historical sources and close analysis of the several textual provisions may throw fresh light on the problems. To grasp the place of impeachment in the constitutional scheme, and its potential role for the future, we need better to understand the use to which it was put in the past. For it was with the historical past in mind that the Founders wrought."

In a footnote to this passage, Berger says in part: "For the Founders, 'history was the obvious source of information, for they knew that they must "judge of the future" by the past.' Gordon Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill, N.C., 1969), pp. 6-7."

[7]McKitrick, pp. 3-5, comments on the "rehabilitation" of Johnson over "the past thirty years," and addresses these other issues as well.

[8]Brant, pp. 44-45, comments on this type of activity as he believes it applied to the attempted impeachment of Senator William Blount [DR-TN] in December of 1798. Brant's comments on the implications of a broadly construed impeachment power is presented as a Federalist plot allied with the Alien and Sedition Acts, and aimed at Thomas Jefferson, James Madison, and the 1798 Kentucky and Virginia Resolutions. Refer to Black, pp. 49-52; and to Hoffer's summary and critique of Berger, pp. ix-14, 181-190, 256-270.

[9]W. R. Brock, An American Crisis: Congress and Reconstruction, 1865-1867 (London: Macmillan & Co., Ltd., 1963), pp. vii-ix, provides a different perspective. This British historian, writing about American Reconstruction, is inclined to favor the Northern Radical Republicans in their attempts at Reconstruction.

To gain insights into the mentality and mood of Congress, as it approached; proceeded through; and then followed Watergate and the Nixon era, the reader is referred to the following annotated list of documents and publications. There were obvious political overtones associated with many of the acts of Congress, and the activities of Americans in the capital, during the period, bearing directly on the events surrounding the Watergate investigation. For example, the cited works include a good sampling of the activities of politicking and stroking representatives at official Washington social functions. They also help in forming an estimate of some of the related material that went into the writer's gaining an understanding of the public pecking order, as Congress observed it, going into and through the subsequent Watergate period.

These documents are in the bibliography: U.S., Congress, House, Prayers: Offered by the Chaplain, Rev. Edward Gardiner Latch. . . . At the Opening of the Daily Sessions of the United States House of Representatives During the Ninety-Second and the Ninety-Third Congresses, 1971-1974. H. Doc. 417, 93rd Cong., 2d sess., 1975; U.S., Congress, Senate, Prayers: Offered by the Chaplain of the Senate of the United States, Rev. Edward L. R. Elson. . . . At the Opening of the Daily Sessions of the United States Senate During the Ninety-third Congress, 1973-1974, S. Doc. 60, 94th Cong., 1st sess., 1975; U.S., Congress, House, The Capitol: A Pictorial History (Sixth Edition), H. Doc. 139, 93rd Cong., 1st sess., 1973; U.S., Congress, House, Our Flag, H. Doc. 324, 93d Cong., 2d sess., 1974; U.S., Congress, Senate, Seventy-seventh Report of The National Society of the Daughters of the American Revolution, March 1, 1973 to March 1, 1974. October 29, 1975.--Ordered to be printed with an illustration, S. Doc. 117, 94th Cong., 1st sess., 1975; U.S., Congress, House, Unveiling of a Portrait of the Honorable Charles C. Diggs, Jr.; Chairman, Committee on the District of Columbia, U.S. House of Representatives. Proceedings before the Committee on the District of Columbia, January 30, 1974, 3:30 p.m. Room 1310, Longworth House Office Building, Washington, D.C. H. Doc. 120, 94th Cong., 1st sess., 1974; U.S., Congress, House, Unveiling a Portrait of The Honorable Leonor K. (Mrs. John B.) Sullivan, A Representative in Congress from the Third District of Missouri Since 1952, Elected to Eighty-Third Congress and Succeeding Congresses; Chairman, House Committee on Merchant Marine and Fisheries; A Senior Member of the House Committee on Banking and Currency and Chairman of its Subcommittee on Consumer Affairs. Proceedings before

the Committee on Merchant Marine and Fisheries, Tuesday, September 24, 1974. Hearing Room, 1101 Longworth House Office Building, Washington, D.C. 6:00 p.m. H. Doc. 412, 93d Cong., 2d sess., 1974; U.S., Congress, House, Proceedings in the House Committee on Rules Incident to the Presentation of a Portrait of The Honorable Ray J. Madden, A Representative in Congress from the First District of Indiana Since 1943. Chairman, House Committee on Rules. Thursday, October 25, 1973. Room 2118, Rayburn House Office Building. H. Doc. 93-320, 92d Cong., 2d sess. [A probable typographical error appears on its cover: "92d Congress" is written in ink, instead of (on the printed cover) "93d Congress."] There are approximately ten to fifteen other, similar miscellaneous references to bills, and so forth, mentioned in the bibliography intended for use in this fashion.

For a discussion of the contextual issues involving legalistic aspects of impeachment, refer to Berger, Impeachment, p. 297:

"Scholarly studies are more apt to provoke fresh polemics than to still incessant debate. Even so, I would maintain that history furnishes a plain answer to at least one question that has long cluttered analysis: the test of an impeachable offense in England was not an indictable common law crime. . . . To insist . . . that impeachment is criminal is to raise grave constitutional doubts: does a subsequent prosecution by indictment constitute 'double jeopardy'; is 'trial by jury' required on impeachment?"

[10]Trefousse, p. x, concisely discusses the diametrically opposed constitutional interpretations of Irving Brant (strict) and Raoul Berger (loose); for an American Marxist perspective on Reconstruction historiography, refer to Peter Camejo, Racism, Revolution, Reaction, 1861-1877 (New York: Monad Press, 1976), pp. 7-11; refer also to Gene Smith, High Crimes and Misdemeanors: The Impeachment and Trial of Andrew Johnson (New York: McGraw-Hill, 1976, 1985), pp. 293-294.

After completing a three-year study of the trial of Andrew Johnson, during the opening days of the Watergate inquiry, Smith discusses the relevance of historical models to contemporary events:

"At the end, standing on this pyramid of knowledge, one ought to be able to assess the lasting meaning of the events concluded when Senator Ross said, 'Not guilty.'

"This task, which has consumed more than three years of my time, was not rendered more simple by certain concurrent activities in Washington. Many times Sam

Ervin's face on the television screen hovered just above the desk where books on Ben Butler lay piled; and sometimes Thad Stevens looked up and gave his fellow Congressman Peter Rodino a baleful stare. . . .

". . . Sufficient research on Johnson's impeachment cannot be done. A lifetime would be too short. That is why I have confined my work to the study of secondary sources. Even there I have had to be selective, otherwise I would still be at my task."

[11]Richard Ben-Veniste and George Frampton, Jr., Stonewall: The Real Story of the Watergate Prosecution (New York: Simon and Schuster, 1977), pp. 227-232, analyze this issue from the standpoint of the Special Prosecutor's staff, at the time of Leon Jaworski's appointment to replace Cox.

Refer also to Smith, pp. 294-295:

". . . I permit myself to give a thought to that future historian, probably now unborn, who will attempt one day to do what I have done: write an unbiased book about another President and Congress between whom the word impeachment was thrown back and forth. I think he or she will be confronted by the same task in some respects that I faced. For very few books on Johnson fail to take a stand. Either Johnson is likened to the Antichrist, or Sumner and Stevens are compared to Satan. There seems little middle ground. The historian who will, half a century or more hence, attempt an unbiased book on the matter of Richard Nixon's proposed impeachment will sympathize with me, should he ever read these words, when I sigh over the wild passion displayed by my predecessors in chronicling Johnson. . . . History will put all things right, Andrew Johnson used to say. I will stand on that thought and leave to that future historian the task of giving, if not the final word on Nixon, then at least something approaching the final word. I do not claim for myself that I have accomplished for Johnson what he will attempt to accomplish for Nixon. But I have, I think, at least impartially synthesized that great mass of material, extracts from which are mentioned in the following bibliography."

[12]Ben-Veniste, pp. 229-230; refer also to Brant's discussion and comparison of Justice Marshall and Justice Douglas, and Congressman Gerald Ford's very political attempts to undo him, pp. 84-121.

[13]Coulter, pp. vii-xii.

[14]Joseph C. Spear, Presidents and the Press: The Nixon Legacy (Cambridge: The MIT Press, 1984), p. 36:

"When Lincoln was succeeded by Andrew Johnson, presidential-press relations took a severe turn for the worse and remained strained for decades. As he stepped forward to take on the impossible task of filling Lincoln's shoes, Johnson's critics condemned him as a drunk, a Catholic, an atheist, and an illegitimate child. The New York World berated him as 'an insolent drunken brute in comparison with whom Caligula's horse was respectable.'" Refer also to p. 176, concerning Nixon's 1972 "manipulation" of the press; and to p. 235, for the outcome of Nixon's battle with the press, and a description of his exit from the Oval Office.

Both Nixon and Johnson suffered the slings and arrows of outrageous satirical cartoonists and lampooners. Some of the best of the Nixon cartoons have been preserved in a bound volume. Since Nixon was so notoriously easy to caricature, editorial satirists and cartoonists always had a field day with him. Refer to Mike Peters [cartoons], Bill Mauldin [foreword], and Tom Teepen [introduction], The Nixon Chronicles (Dayton, Ohio: The Lorenz Press, Inc., 1976.) In addition to Peters's work, cartoonists for the Boston Globe produced some of the most trenchant satirical portraits of all.

PART TWO:

THE LACK OF COMPARATIVE STUDIES OF IMPEACHMENT

While there are relatively many studies of the situations surrounding Andrew Johnson's impeachment, in 1868; and the near-impeachment of Richard Nixon, in 1974, virtually no commentary exists that seeks to compare these two periods explicitly.[15] This thesis of course cannot attempt to be exhaustive. Instead, it concentrates on what, if anything can be said to have been learned in the course of America's two most significant attempts at presidential impeachment.[16] In the first instance, this did result in an actual impeachment and trial. In the second, the threat and seeming inevitability of impeachment forced a sitting president into the public disgrace of having to voluntarily forfeit most of his second term in office.[17]

Impeachment is specifically mentioned in the following articles of the United States Constitution: Article I: Section 2, clause 5; Article I: Section 3,

clauses 6 and 7; Article II: Section 2, clause 1; Article II: Section 4; Article III: Section 2, clause 3.

These read as follows:[18]

Article I; Section 2, clause 5:
The House of Representatives shall chuse [sic] their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article I; Section 3, clauses 6 and 7:
The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Article II; Section 2, clause 1:
The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences [sic] against the United States, except in Cases of Impeachment.

Article III; Section 4:
The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III; Section 2, clause 3:
The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[19]

It is far beyond the scope of this thesis to discuss in detail all the English precedents for impeachment, as well as most of the earliest American colonial and federalist precedents.[20] For a good, general introduction to the mechanics of the impeachment process, refer to Walter Ehrlich's Presidential Impeachment, An American Dilemma.[21] This study was prepared as a popular, brief introduction to the impeachment process. Its 1974 publication was occasioned by widespread contemporary interest among the voting public in what it might be able to do to legally remove Richard Nixon from the White House. Presidential Impeachment necessarily stops short of any treatment of the eventual House Judiciary Committee's favorable vote recommending to the full House of Representatives three separate articles of impeachment for Richard Nixon. He resigned a short time after the release of this Committee Report, and was later pardoned by the new president, Gerald Ford, and thereby succeeded in truncating the impeachment process before the articles had been submitted to a full vote of the House of Representatives.

Ehrlich provides an excellent introduction to its American subject. It is also thorough in its treatment of British precedents for impeachment.[22] The following excerpt from Ehrlich's introduction nicely defines the peculiarly admixtured political and legal nature of impeachment, as well as addressing what is probably the single most common misconception about the subject.

> The term 'impeachment' itself is often misused. Impeachment is only the first of two steps necessary for removal from office. A comparable process is the criminal proceeding of indictment and trial. Indictment is a formal accusation by a grand jury. It does not mean that the accused is guilty; it indicates only that there is sufficient evidence to justify a trial. The second step, the trial, occurs before the petit jury, and only there can the accused by [sic] found guilty. Procedurally, impeachment is comparable with a grand jury indictment. . . . One often hears, for instance, that no President has ever been impeached. President Andrew Johnson was impeached; he was not convicted. . . . Another misconception involves the nature of impeachment. Because it is commonly equated with criminal indictment, impeachment is assumed by many to be a criminal procedure too. This is incorrect. Impeachment (and subsequent trial) is not a judicial action. It is a political decision (a vote) made by a political institution (the elected members of Congress) to remove a political official (the President, Vice-President, or other civil officers of the United States). Indeed, the only 'punishment' allowed by the Constitution is removal from office. If the misdeed happens to be a criminal act, once the official is out of office he may be dealt with as an ordinary citizen in an appropriate criminal procedure. . . . Because many incorrectly conceive impeachment as a criminal procedure, they equally incorrectly assume that an

> official can be impeached only for an indictable criminal offense.
> . . . Knowledge of the history and development of impeachment will correct this misconception.[23]

The purpose of this thesis is to describe the historical facts surrounding those two episodes in American history in when the impeachment process was allowed substantially to run its course. It provides a brief account of the social and political contexts of the Andrew Johnson impeachment, and then examines the context of Richard Nixon's being forced into political and legal checkmate by the ongoing Watergate investigations that eventually forced him to resign; with actual impeachment, had he not resigned, a foregone conclusion.

Context becomes especially important in both of these historical periods for a variety of reasons, chief among them being that impeachment is most emphatically a political enterprise.[24] Any confusion with criminal standards of illegality is not merely ill-advised, but is incorrect. For this reason, some description of the political background is required, in order to gain a vantage point for understanding how the impeachment process was set into motion.

In the contingent cases of Abraham Lincoln, the Civil War, Andrew Johnson, Presidential and Congressional

Reconstruction, and the Johnsonian impeachment, composite (and appropriately consensual) histories have already been written.[25] Although their verdicts shall be subject to review, many competent historians have already laid foundations for subsequent investigations of the events leading to Johnson's impeachment that seem to be relatively secure from any substantial revisionist challenge in a completely new area, or on a completely new line of attack.[26]

During the later stages of the Watergate era, impeachment proceedings had advanced to the point that the House Judiciary Committee, chaired by Congressman Peter Rodino [D-NJ], published a series of documents relating to impeachment in general, and to presidential impeachment in particular.[27] The Rodino Committee eventually recommended that Nixon be impeached and tried.

> [When the House Judiciary Committee started an impeachment inquiry on President Nixon], . . . It began by considering the meaning of the constitutional provision in Article II, Section 4, which stated that the president, vice-president, and other civil officers of the United States were impeachable for 'Treason, Bribery, or other high Crimes and Misdemeanors.' Did this refer to serious common law felonies or specific statutory crimes, or to abuse of power and gross disregard of constitutional duties? To put the matter another way, was impeachment a quasi-judicial political process for removing an official charged with a

> crime, or was it a quasi-political process for removing an officer whose main offense lay in a breach of public trust?[28]

When proceedings to impeach Richard Nixon began in earnest, the documents and records of the Johnson impeachment served as an approximate guide.[29] Furthermore, some additional, more recent precedents of the impeachments of federal judges were equally useful as guides for House and Senate organization and determination of jurisdiction and applicable rules of evidence.[30] But sufficient uncertainty and confusion still reigned at the time of the seemingly impending Nixon impeachment to set into motion an extensive preparation on the part of Congress and the public media amounting to a comprehensive re-education in the mechanisms and philosophical desiderata of the entire impeachment process.[31]

> The lesson of Andrew Johnson's impeachment trial, as it had been interpreted by most students of the presidency in the twentieth century, was that impeachment was essentially a judicial procedure that required an indictable offense. Most scholars who now renewed study of the matter, however, held that impeachment was intended to deal with serious politico-constitutional offenses, not mere criminal acts. The House Judiciary Committee staff adopted this view, contending that impeachment was a 'remedial measure' and 'constitutional safety valve' whereby a president might be removed for 'substantial misconduct' not necessarily of a specifically criminal nature. Not the intrinsic quality of a particular action, the committee staff argued, but the effect of a series of substantial

> actions on the constitutional system was the crucial consideration. On the other hand, the president's lawyers insisted that 'high crimes and misdemeanors' must be read to require the commission of a specific criminal offense. In the forceful vernacular of the moment, this became the 'smoking gun' theory of impeachment.[32]

This resulted in extensive Congressional investigation of what constituted grounds for impeachment. Congress depended almost exclusively on the Johnson impeachment and trial to determine the exact forms and practices that ought to be used in impeaching and then trying a president. In the Nixon era, the American public was understandably unfamiliar with the impeachment process. Quite simply, no president in living memory had been impeached. Moreover, the only other presidential impeachment itself had occurred during an especially volatile period in American history, during the early to middle period of Reconstruction, following close upon the double tragedies of the American Civil War and the assassination of Abraham Lincoln.

Civil War and Reconstruction historiography is extensive. Andrew Johnson's position on Reconstruction has been extensively studied in its own right.[33] But Johnson's impeachment itself has been less closely examined.[34] This becomes very clear when one compares the

extent of writings on it, with those analyzing the historical situation surrounding the projected impeachment of Richard Nixon.

Despite the considerable number of impeachments that have occurred, each new instance of suggested impeachment almost invariably seems to require a reinvestigation, almost a rediscovery, in effect, of its mechanics and limitations. A process of actual re-creation, almost a reinvention of applicable precedents seems inevitably to have occurred each time a new and likely candidate for impeachment appeared on the scene.[35] For this reason, some commentators and publicists have seriously questioned whether in practice impeachment can be considered to be applicable as a remedy for anything that does not also qualify as a criminally indictable offense.[36] This attitude is mistaken. The Framers included detailed provisions for impeachment in the Constitution for political reasons. Our two presidential excursions into the territory of impeachment seem to have detracted from this original intent of the Framers. The fact that these attempts ultimately resolved themselves over narrow questions of criminal activity ought not to disqualify the use of impeachment as primarily a political, not a criminal expedient.[37]

By virtue of its brevity, if this thesis cannot hope to deal exhaustively with all of the many substantive matters attendant upon presidential impeachment, then it still seems profitable to investigate some of them. These include many perennial questions that have revealed themselves to have overriding importance in any investigation of the mechanics of presidential impeachment, the degree of evidence entailed by it, and how it is set into motion. The House Judiciary Committee's eventual suggestion to impeach, much like a grand jury arraignment, is the hoped for culmination of this long process. It sees the petit jury (in this case, the Senate of the United States Congress) constitutionally empowered with the rather awesome capability of removing from office the chief executive of the United States Government. In a democratic context, however, the Senate's eventual removal power is complicated and politically compromised. The target of impeachment has himself or herself been duly empowered to act by virtue of a claimed mandate derived from having garnered a plurality in the American electoral college, chosen almost directly by the American voter.

During President Nixon's second term in office, the House Judiciary Committee, after having considered several articles of impeachment, eventually prepared a final report

containing the full text of all the proposed articles, along with amendations and dissenting opinions. One of the members of the Committee also included as part of his own comments a record of the roll call votes of Democratic and Republican members, asserting that he regarded it as his historical duty to do so.[38] Eventually, the Judiciary Committee recommended impeachment on the strength of only three of these articles. Of this final group, Article I was

> . . . a carefully constructed bipartisan compromise, [that] charged that Nixon had 'prevented, obstructed, and impeded the administration of justice,' in 'violation of his constitutional duty to take care that the laws be faithfully executed.' The bill of particulars made it clear that this had to do with the Watergate break-in. Article II charged the president with conduct 'violating the constitutional rights of citizens, impairing the due and proper administration of justice,' and 'contravening the laws governing agencies of the executive branch.' Here the bill of particulars dealt, among other things, with Nixon's attempted manipulation of the Internal Revenue Service, with his 'misuse' of the FBI, and with his maintenance of a secret White House investigative unit with its unlawful utilization of the CIA. Article III charged the president with ignoring the subpoenas of the House Judiciary Committee itself, by which the committee had attempted to obtain materials relevant to the impeachment process. Two additional articles, ultimately rejected, would have charged Nixon with illicitly bombing Cambodia [Massachusetts Democratic Congressman Reverend Drinan's earliest attempt to impeach Nixon had involved these charges] and with corruptive manipulation of his personal and partisan finances [which had undergone

> strong Republican, party line opposition on the Rodino Committee.] The committee tried to establish that Nixon's actions, more than being a mere indictable offense, posed a serious threat to the constitutional order. It is doubtful that the committee succeeded in this effort, however, for in the final analysis Nixon's criminal behavior was so obvious as virtually to compel adoption of the indictable-offense view of impeachment.[39]

The question of what constitutes appropriate grounds for the impeachment of presidents as well as of other federal officials remains a subject of argument among jurists and legal scholars.[40] The limitations on this process, in terms of punishment, are also unsettled, and most importantly, it remains an open question whether the popular misconceptions of impeachment as a criminal procedure are entirely misplaced. In the cases of both Andrew Johnson and Richard Nixon, the impeachment process has revealed itself to be an utterly political, and not a criminal procedure, both in origins and in motivation.

It was on political grounds that Minority Leader Gerald Ford [R-MI] attempted to impeach Justice William O. Douglas in 1970.[41] The Republican leadership in Congress did not produce any serious charges against Douglas.

> But Representative Gerald Ford, who led the impeachment drive, contended that 'an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.' A subcommittee of the House

Committee on the Judiciary not only cleared Justice Douglas of any wrongdoing but also specifically repudiated Ford's loose conception of impeachable offenses. . . . Some constitutional scholars contend that the Constitution established impeachment as 'the exclusive remedy against judges;' this was the position taken in 1979 by Justices Douglas and Black in their dissents in Chandler v. Judicial Council. On the other hand, the constitutional tenure of judges is 'during good behavior.' Raoul Berger argues that good behavior is not a meaningless phrase, and he would follow English precedent by making the writ of scire facias (now quo warranto) available to remove judges guilty of misbehavior. Other authorities have asserted that Congress may by law define good behavior and allow, as a number of states have done, a special court or commission to determine whether a judge's behavior justifies removal.[42]

Notes to Part Two, Pages 17 to 29

[15]In researching this thesis, the writer used a variety of government documents detailing constitutional provisions, House and Senate rules of procedure for undertaking a presidential impeachment, and so forth. Some of these materials necessarily duplicate information incorporated in another report or document (and, in some cases, in a book: for example, articles of impeachment and the United States Constitution.)

Some of the the basic sources used are listed, below. In a number of instances, the writer used different editions of substantially the same report. While this could be a subject of another fairly lengthy monograph in itself, one of the intriguing things in researching the Watergate period is observing the multiple requests for reprintings of documents containing materials on impeachment, and so forth. By using these formal documents, in addition to documentary material incorporated in source books listed in the bibliography, one speedily discovers a rich, variegated treasury of materials. This thesis had as one of its main objectives sorting out this vast amount of material. Along these lines, the following documents would provide anyone concerned with the day-to-day rules of procedure, and so forth, involved in an impeachment, much more information than he or she would be able to use.

Most of these materials are self-descriptive, by title, and those that are not have been briefly annotated. Refer to: See most especially: U.S., Congress, House, Manual and Rules of the House of Representatives, 93d Congress, [containing] The United States Constitution; Jefferson's Manual and Rules of the House of Representatives, etc., by Lewis Deschler, Parliamentarian, H. Doc. No. 384, 92d Cong., 2d sess., U.S. Government Printing Office, Washington: 1973; U.S., Congress, Senate, Senate Procedure: Precedents and Practices, by Floyd M. Riddick, Parliamentarian, S. Doc. 21, 93d Cong., 1st sess., 1974; U.S., Congress, House, The Constitution of the United States of America. H. Doc. 414, 93d Cong., 2d sess., 1975; U.S., Congress, Senate, The Constitution of the United States of America: Analysis and Interpretation; 1974 Supplement. (Annotations of Cases Decided by the Supreme Court of the United States to July 25, 1974), S. Doc. 134, 93d Cong., 2d sess., 1974; U.S., Congress, House,

Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States Ninetieth Congress, by Lewis Deschler. . . . Parliamentarian, H. Doc. 529, 89th Cong., 2d sess., 1967; U.S., Congress, House, Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States Ninety-Fourth Congress, by Wm. Holmes Brown, Parliamentarian. H. Doc. 416, 93d Cong., 2d sess., 1975; U.S., Congress, Senate, Senate Manual, 1971: Prepared Under the Direction of the Committee of Rules and Administration. United States Senate, Ninety-Second Congress; Prepared by Gordon F. Harrison and John P. Coder; Under the Direction of the Committee on Rules and Administration, United States Senate, Ninety-Second Congress. S. Doc. 1, 92d Cong., 1st sess., 1971; U.S., Congress, Senate, Rules and Manual, United States Senate, 1973: Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate; Jefferson's Manual, Declaration of Independence, Articles of Confederation, Constitution of the United States, etc. Committee on Rules and Administration, United States Senate, Ninety-Third Congress. Prepared by John P. Coder and Jack L. Sapp; Under the Direction of William McWhorter Cochrane, Staff Director, S. Doc. 1, 93rd Cong., 1st sess., 1973; U.S., Congress, Senate, The Constitution of the United States of America, Analysis and Interpretation, 1978 Supplement; Annotations of Cases Decided by the Supreme Court of the United States to July 3, 1978; Prepared by the Congressional Search Service, Library of Congress, Johnny H. Killian, Editor; George Costello, Associate Editor; Supplements Senate Document 92-82, The Constitution of the United States of America: Analysis and Interpretation, Stock Number 052-071-00603-6, S.S. No. 12980-7 Suppl., [48-700], U.S. Government Printing Office, Washington: 1979.

Smith, pp. 293-294; and Patrick W. Riddleberger, 1866: The Critical Year Revisited (Carbondale, Ill.: Southern Illinois University Press, 1979), pp. xi-xiii.

Refer also to Michael Les Benedict, The Fruits of Victory, pp. 151-154. Benedict suggests one reason this might be the case:

"No era has occasioned more extreme swings in historical interpretation than that of American Reconstruction after the Civil War. . . . The first scholarly assessments of Reconstruction appeared in the 1890s and the first decade of the twentieth century. . . . The 1930s also witnessed a growing challenge to the old portraits of the South during Reconstruction.

". . . But while most historians were persuaded by the 1940s that Reconstruction in the South had not been so disruptive as once portrayed, and that southern Republicans were something less than stone-hearted criminals and southern Democrats something more than suffering innocents, the total rejection of the old stereotypes did not begin until the 1950s, as scientists debunked traditional ideas about racial inferiority and Americans were transfixed by an ever-accelerating civil rights movement. . . . Neo-revisionism (as the new interpretation of Reconstruction is often called) has had less impact on our understanding of Reconstruction in the South. . . . Historians have also been trying to determine to which white groups southern Republicans appealed, and there is presently quite a bitter debate on the subject. . . . Neo-revisionists have also reassessed some special aspects of Reconstruction history. . . . This is by no means a complete review of the massive secondary literature in American Reconstruction after the Civil War."

Benedict's The Impeachment and Trial of Andrew Johnson (New York: W. W. Norton & Co., 1973) challenges the conclusions of DeWitt's The Impeachment and Trial of Andrew Johnson.

[16]Kenneth M. Stampp, The Era of Reconstruction, 1865-1877 (New York: Alfred Knopf, 1965), pp. 153-154; refer also to Brant, pp. 3-4, for one of the few tentative exceptions, before the fullblown affair of Watergate.

[17]Black, pp. 1-4.

Refer to Trefousse, p. 183:

"Nevertheless, the failure of the [Johnson] impeachment trial did have far-reaching effects. It has been repeatedly pointed out that it preserved the American system of the balance of governmental powers. As David M. DeWitt asserted a generation later, the precedent of not convicting Presidents upon partisan grounds alone was not likely to be broken afterward. Michael L. Benedict, insisting on the contrary that it was presidential power that had to be curbed, called impeachment 'a dull blade,' ineffectual for the removal of Presidents. At any rate, while the process or threat of impeachment was employed several times against Reconstruction governors, tainted federal officials, and controversial justices, until Richard Nixon no President since Andrew Johnson was seriously confronted with this ultimate constitutional weapon. And in Nixon's case, political considerations were not the major issue."

Refer also to Benedict in Trefousse, p. x. Benedict observes that "Because of the renewed interest in removing public officials from office in the 1970s, impeachment has once more attracted the attention of scholars."

According to Trefousse, Irving Brant believes that conviction is only possible for indictable offenses, while Raoul Berger holds an exactly opposite view. Trefousse also describes the work of Michael Les Benedict, in his own book-length treatment of the Johnson Impeachment. Benedict, according to Trefousse, "has sought to show that the President merited his fate and should have been convicted."

[18]Brant, pp. 6-23, provides a narrowly construed account, citing British models, Madisonian sentiments and constitutional specifications. Brant concludes:

"The necessity that lies ahead, therefore, is to search for an effective restraint upon the power to misuse power. That will be attempted in this book as it traces the history of impeachment" [Emphasis in the original.]

Refer also to Black, pp. 77-80, for a somewhat less emotional narrative of constitutional stipulations.

[19]Patrick, p. 126; and Dewitt, pp. 370-376.

Refer also to Hoffer and Hull, p. 269:

"The impeachment law promulgated in 1787 at the federal convention copied and refined the state law; this is clear in chapter 6. English references were window dressing or illustration by negation."

[20]Brant provides scattered discussions of the British "models" (finding these almost universally misleading and inapplicable, except in terms of a negative example of the Framers' intentions at the time they drafted the Constitution.) Refer also to Berger, Impeachment, pp. i-52, 54, 170-171, and 217; and to Hoffer and Hull, pp. xi-14, and passim. Hoffer and Hull's extensive criticism of Berger is discussed elsewhere in the notes to this thesis, at a more appropriate juncture. (Refer to Part Two, Note 23, pp. 36-38.)

[21]Walter Ehrlich; Richard Dudman, introduction; James Neal, consulting editor, Presidential Impeachment: An American Dilemma (St. Charles, Missouri: Forum Press, 1974, 2nd ptg.) Refer also to Black, and to M. B. Schnapper, editor, and Alan Barth, introduction, Presidential

Impeachment: A Documentary Overview (Washington, D.C.: Public Affairs Press, 1974), passim, for similar kinds of brief studies of impeachment.

[22]Black, pp. 5-6, and 49-52.

For a more recent discussion of indigenous American colonial and early federal attitudes, refer to Hoffer and Hull, pp. ix-xii, who take strong issue with Berger and those who follow his influential (but apparently partially ill-informed) interpretation. Hoffer and Hull's argument is a post-Watergate investigation, and because it is virtually never encountered either in "tertiary" survey texts, or in secondary sources, it deserves to be treated at length.

"The origin of this book was a question directed at one of the authors, for which neither she nor the interrogator had a ready reply. Ten years later, we can answer that impeachment was indeed common, and far more significant to contemporaries than historians have recognized. . . .

"In the period 1635-1805, Americans adopted English impeachment law, and in their turn, impeachment cases altered American political and constitutional experience. In colonial, early state, and federal impeachment cases and law, a tool used in Parliament to curb kings and punish placemen was molded into an efficient legislative check upon executive and judicial wrongdoing. The power of the English House of Commons to impeach anyone, for almost any alleged offense, was restrained; the threat of death and forfeiture upon conviction was lifted; and the interference of the Commons and the House of Lords with the regular course of justice was limited. American impeachment law shifted, at first inadvertently and then deliberately, from the orbit of English precedent to a native republican course. Federal constitutional provisions for impeachment reflected indigenous experience and revolutionary tenets instead of English tradition.

"Impeachments furthered the two central trends in early American constitutional history: the rise of representative lower houses and the emergence of checks and balances upon those two houses. . . . These threads of law and political exigency came together in the impeachment and trial of United States Supreme Court Justice Samuel Chase. With the Jeffersonians' failure to obtain his conviction, the heyday of partisan impeachments ended, but a more limited test for impeachable offenses survived and prospered. Impeachment continued in the states under a stricter construction of impeachable offenses; only the

doctrines of 'popular will' and 'dangerous tendency,' adopted by the Jeffersonians, were lost in the wake of Chase's trial.

"We have attempted to recover these lost cases and case law because we believe that they constitute a neglected but important episode in American constitutional and political history. The importance of tracing the case law cannot be overestimated.

. . . . . .

"In the absence of thorough recovery of American case law, students of impeachment in this country have fallen back upon English cases and commentary, assuming (by default) that American impeachment managers were familiar with and depended upon this body of materials. Such an assumption is misleading. The connection between American law and English law was real enough but always tempered by American conditions and ideas. Woe to the modern legal scholar, tutored by his or her own command of precedent, who substitutes hindsight and expertise for the inexact gropings of the historical principals. [Emphasis added.]

"Our only check upon the temptation to put more into our story than those who lived it could ever have known is to root our accounts in the political and legal circumstances of each case. We must not assume that impeachment takes place in a sort of legal ether, a pure substance which floats above the ordinary world of politics. Whether an impeachment was undertaken for partisan reasons or in response to a grave and obvious crime, all participants had some political relationships with one another."

[23]Ehrlich, Preface, unpaged.

Refer also to Dewitt, p. xiv, for a very different interpretation of the result of the Johnson impeachment:

"Never will the practice of deposing presidents become domicilated in this republic. Centuries will pass by before another President . . . can be impeached, unless the offense . . . is clearly non-political and amounts unmistakably to a high crime or misdemeanor." [1903 original; 1967 reprint.]

And refer to Brant's account of the trial of Judge John Pickering, pp. 46-57. Brant regards it as a perversion of the Constitution, in sharp distinction to Ehrlich's viewpoint. See as well Brant's remarks on this very tendency to broaden the definition of impeachability, pp. 176-177. Brant perceives it as a great danger to the American balanced system of tripartite government. Refer to Black, pp. 25-52, for a good, general discussion of what

constitutes an impeachable offense. Schnapper, passim, provides documentary accounts of various participants' theories during the Nixon period, including commentary by Nixon's lawyers and the American Civil Liberties Union, and so forth.

Refer to Berger, Impeachment, p. 297, who says in part:

"Scholarly studies are more apt to provoke fresh polemics than to still incessant debate. Even so, I would maintain that history furnishes a plain answer to at least one question that has long cluttered analysis: the test of an impeachable offense in England was not an indictable, common law crime. And when the Framers withheld from Congress the power to inflict criminal punishment which had been exercised by Parliament under 'the course of Parliament' as distinguished from the general and criminal law, when they limited congressional sanctions on impeachment to removal and disqualification and left criminal punishment to subsequent indictment and conviction, they plainly separated impeachment from criminal process. To insist despite that separation that impeachment is criminal is to raise grave doubts: does a subsequent prosecution by indictment constitute 'double jeopardy'; is 'trial by jury' required on impeachment."

Refer also to Hoffer and Hull, pp. 266-268, for a strong, articulate analysis of indigenous American colonial and state precedents. This argument contradicts Berger's sources, methodology, and conclusions. Since it challenges the prevailing attitude toward the historical antecedents of American impeachment, the authors' argument merits detailed examination.

"In his forcefully argued essay on impeachment, Raoul Berger turned to English precedent to trace the development of federal impeachment law. His thesis was that the framers of the Constitution had English cases before them 'inferably' and relied upon these cases to fashion our own law. To be sure, the origins of this branch of constitutional law lie in the practices of English Parliaments, but the historian must determine those ideas and experiences which actually influenced American constitutionalists. In our preface we warn against the seductive perils of 'omniscient' legal history. The danger is not merely academic, the risk of misreading the motivation of historical characters. Recovered legislative intent becomes part of living law, and misplaced attribution of precedent may alter the application of intent. Berger's transformation of the framers' scattered references to English cases into a body of ruling precepts

is a tour de force of scholarly omniscience. In the course of it, he mistakes acquaintance for intimate knowledge and illustrations for arguments from authority. . . .

. . . . . .

"Despite Berger's claim that the framers' basic notions of impeachment 'were but reflecting English sentiment,' a closer look at the Federalists' and anti-Federalists' words indicates that they used English cases as counter-examples and passing illustrations or miscited the English cases rather than holding them up as ruling law. . . .

. . . . . .

"Berger's use of George Mason's views on 'high crimes and misdemeanors' illustrates a third type of error. He noted that Mason borrowed the English formula, or at least had the English formula 'in mind.' This, even if true, does not establish Mason's acquaintance with the detail of English cases. It will be remembered that Mason had written a very different formula for impeachment into the 1776 Virginia Constitution. Did he master and learn to love English impeachment law between 1776-1787--or merely reach for a conventional phrase in the heat of debate?

"Fourth, Berger created the illusion of reception by juxtaposing similar English and American readings of the use and consequences of impeachment. . . .

"One final point throws doubt on Berger's thesis: impeachment had just about disappeared from the English constitutional horizon between 1718 and 1786. It was revived for a few treason cases, to prosecute Macclesfield for corruption, and to bring Warren Hastings to brook in 1786, when most of the framers were already versed in state cases and law. Hastings's trial did make an impression in America but it began in 1788, after the federal convention was over. For the framers to have had English cases 'before their eyes,' they would have had to look back, past their own Revolution and half a century without a noteworthy impeachment in England, to the early years of George I's reign.

"The one case in which Berger's view of the influence of English precedent was advanced by counsel, Bayard's and Harper's advocacy of universal impeachment in Blount, also proves Berger's thesis wrong. . . . Although both sides cited English case books, the defense used them to establish the danger and arbitrariness in the English doctrine of universal impeachment. And they prevailed.

"Our purpose in this appendix is not to file a brief against Berger's book. That would exacerbate the problem in it--for Berger has written a brief, not a

history. Missing from his work is an appreciation of American colonial and state precedents, the latter of which were far more important in influencing federal law than English examples. [Emphasis added.]

"If American impeachment law did not depend upon the English experience, where did the framers, and equally important, the next generation of early Republican impeachment proponents, obtain precedent? Throughout the current book we read the story not of borrowing and dependence but of deliberate divergence from English law. After 1775 we find that this distinctiveness was a product of self-conscious republicanism: an attempt to fit parliamentary impeachment (that is to say, impeachment in the lower house and trial in the upper house of a mixed monarchy) into republican systems. . . . Pennsylvania, the first state to adopt impeachment, had its own colonial impeachment precedent, and the connection between the two was no accident. All except one state had some colonial brush with impeachment before they adopted it, and all but one state that did not adopt it were free of colonial cases. A mixture of earlier colonial experience and perceived British precedent led to American incorporation of impeachment law." [Emphasis added.]

[24]Refer to Charles Crowe, ed., The Age of Civil War and Reconstruction, 1830-1900: A Book of Interpretative Essays (Homewood, Illinois: The Dorsey Press, 1966,) pp. 1-7, for a discussion of the developing historiography of regionalism and racism which set the stage for the political and social conflicts of Civil War and Reconstruction. Refer also to Berger, Impeachment, pp. 252-253.

"More than one hundred years have passed since President Andrew Johnson escaped conviction by one vote, yet the record remains immediately relevant. His impeachment poses an issue which may again confront us: is the President impeachable for violating a statute--for example, an act that prohibits the use of appropriated funds for maintenance of ground troops in Cambodia--if in his judgment it invades his constitutional prerogatives? And Johnson's trial serves as a frightening reminder that in the hands of a passion-driven Congress the process may bring down the very pillars of our constitutional system. To one who considers that impeachment may yet have an important role to play, the record is a sobering admonition against lighthearted resort to such removal of the President.

"Some knowledge of the historical background is essential to understanding of the forces that erupted into impeachment. The history of Reconstruction, however, is a 'controversial subject;' and an untutored lawyer ventures into its shoals at his peril. At the risk of oversimplification I must nevertheless attempt a brief sketch of the path that led to the impeachment and trial.

"Historians have dispelled the view that either Johnson or the Reconstruction radicals were villains; rather it was their deep commitment to opposing, honestly-held views which set them on a collision course. At the outbreak of the Civil War Johnson was a Democratic Senator from a border state, Tennessee, the only southern Senator to oppose secession."

Refer also to Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 (New York: Harper and Row, 1988,) pp. xxvi-xxvii:

"Beyond the desire to provide a new account of Reconstruction, this study has an additional purpose--to demonstrate the possibility, and value, of transcending the present compartmentalization of historical study into 'social' and 'political' components, and of historical writing into 'narrative' and 'analytical' modes. Some practitioners of the 'new' history have expressed fear that the very notion of 'synthesis' suggests a return to the excessively broad generalizations and narrow political focus of an earlier era. [Footnote eleven, Eric H. Monkkonen, 'The Dangers of Synthesis,' American Historical Review, 91 (December 1986,) 1146-57.] This is not my intention. Rather, my aim is to view the period as a whole, integrating the social, political, and economic aspects of Reconstruction into a coherent, analytical narrative."

[25]Coulter, p. xi, provides a different emphasis. This usually follows the line of Craven, pp. 221-222.

[26]Refer to Stampp, however, for a cautionary note about such revisionism, pp. 22-23.

Refer also to Trefousse, pp. ix-xi, especially p. ix, where he says in part:

"There are few Presidents of the United States whose historical image has changed more frequently than that of Andrew Johnson. In the immediate aftermath of the Civil War and Reconstruction, he was considered inept and stubborn. After some time, however, Reconstruction was no longer seen as a holy crusade, and his reputation began to

improve. . . . By the 1920s, Johnson had become a great hero who had courageously defended the Constitution against unprincipled radicals.

". . . [But later his] portrait was tarnished a second time. Not only was he now labeled a racist, but an inept politician as well.

"In the various assessments of the controversial Unionist from Tennessee, his dramatic impeachment and trial have generally been considered of great significance."

Refer also to Albert Castel, The Presidency of Andrew Johnson (Lawrence, Kansas: The Regents Press of Kansas, 1979),p. vii; Seth M. Scheiner, ed., Reconstruction: A Tragic Era? (New York: Holt, Rinehart and Winston, 1968), pp. i-8; and David Donald, The Politics of Reconstruction, 1863-1867 (Baton Rouge: Louisiana State University Press, 1965, 1968), pp. ix-xiv, for a concise survey of Reconstruction historiography, with special attention to primary sources and Andrew Johnson biography.

Refer also to Michael Les Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869 (New York: W. W. Norton & Company, Inc., 1974), pp. 13-33, and 339-377 (lists), and passim. Benedict's work is a major study of party allegiance and voting records during Reconstruction and the Johnson impeachment. As well as describing the shifts in historiographical interpretation of Andrew Johnson and Congress, it also supplies the best single collection of biographical and statistical information, including reproductions of portraits of most of the starring actors in impeachment, that the writer encountered. (Portions of A Compromise of Principle were published in Benedict's The Impeachment and Trial of Andrew Johnson, which is cited separately in this thesis. [p. 14, Compromise].)

Refer also to Eric Foner's Reconstruction, especially the following pages: 334-5, for a discussion of the "weak" articles of the Johnson impeachment; 335-6 for his discussion of the "contradictory" defense made by Johnson's attorneys in the Senate; and 336, for a discussion of the rewards granted to Kansas Republican Senator Edmund G. Ross, one of those voting in support of Johnson in his Senate trial, in the terms of lucrative patronage posts which were awarded to Senator Ross's friends by Johnson shortly after his vote.

"Contrary to later myth, Republicans did not read the 'seven martyrs' out of the party; and all campaigned for Grant that fall. It would be more accurate to suggest that the impeachment affair formed an important link in a chain of events that left the seven, and some who had voted

for conviction, increasingly disillusioned with Reconstruction. All four who survived to 1872 would join the Liberal Republicans." [Foner, Reconstruction, page 336]

In their Editors' introduction to Foner's book, Henry Steele Commager and Richard B. Morris, p. xvii, and passim, stated that:

"Probably no other chapter of American history has been the subject, one might say the victim, of such varied and conflicting interpretations as what attempts to give unity and coherence to the era we call Reconstruction."

Foner prefaced his own 1988 study by asserting that "Revising interpretations of the past is intrinsic to the study of history;" and that "historians have yet to produce a coherent new portrait of the era." [pp. xix-xxvii]

See as well Eric Foner's excellent earlier study, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War (New York: Oxford University Press, 1970), passim, for a general discussion of trenchant political infighting during the earliest attempts to organize the new Republican Party. This formed the matrix for post Civil War splits among party factions.

* * *

During the Watergate period, the United States Congress produced a variety of materials relating to presidential impeachment. A great deal of attention quite naturally was paid to precedents, and their application to the contemporary situation. As a result, fairly obviously, materials pertaining to Andrew Johnson's impeachment and trial were included prominently. But other trials, and the records of impeachment in Britain; and miscellaneous reports on the nature of impeachment, itself, in a more philosophical sense, were also reprinted. Appended, here, are the main documents used in arriving at the conclusions scattered throughout this text, relating to the theory and practice of presidential impeachment. In order to avoid a blizzard of footnotes, the thesis includes these in a clustered format. The most valuable of these included Richardson's edition of Presidential Papers of Abraham Lincoln and Andrew Johnson, and the trial records contained in the Selected Materials on Impeachment volume produced by Congress. (Both of these works are cited formally, below.) Because of the exigencies of time, and because of the voluminous materials encountered, the writer concentrated on Johnson's trial, rather than the lengthy (three volume) record of all the House proceedings.

One commentator encountered early on, in the course of research, laments the fact that he does not have a lifetime to complete research on Johnson, noting that even

this would not be enough. The student begins to understand the sheer complexity of the period of Reconstruction the farther along he proceeds. If something had to be dispensed with, the writer resolved that it would be the proceedings leading up to the Senate trial, itself. In the case of Johnson's impeachment, this does not seem to be an especially serious omission; since he was, after all, impeached and tried. Therefore, the writer concentrated more on the latter, and its possible value as a precedent for the impeachment proceedings against Richard Nixon, a hundred years later.

Much of this material is repetitive, to a degree. Some of the congressional materials were republished commercially, and the writer has entered these books separately. There are obvious typographical differences, as well, in all these editions, including accounts of the trial of Andrew Johnson. However, the essence and substance of the accounts does seem to agree, in all cases. The writer will return to this, in the appropriate sections; but for the present, these are the main sources used in investigating both Johnson and Nixon.

U.S., Congress, House, Impeachment, Selected Materials: Committee on the Judiciary, House of Representatives, Ninety-Third Congress, First Session, October, 1973. H. Doc. 7, 93rd Cong., 1st sess., 1973. This publication contains a full account of the Johnson trial, as well as learned discussions of impeachment; previous instances of judicial impeachment, and so forth. It should be the first book consulted, in any serious study of either of these two episodes in American history. Some of the materials included in it necessarily duplicate materials presented somewhat differently in Erlich, previously cited.

James D. Richardson (Rep., Tennessee), Volume VI, 1861-1869. A Compilation of the Messages and Papers of the Presidents, 1789-1897. Published by Authority of Congress (Washington: Government Printing Office, 1897.) This work contains the presidential proclamations of both Lincoln and Johnson, as well as a biographical account of each, and a record of the proceedings of the Johnson Impeachment Trial in the United States Senate. Some of this material is duplicated in the previously cited volume, published during the Nixon era. It provides an authoritative, detailed account of the trial, and the Chase Memoranda associated with it; as well as, of course, a complete text of the final eleven articles of impeachment brought against Andrew Johnson.

R. W. Apple, Jr., introduction, Impeachment of Richard M. Nixon, President of the United States: The Final Report of the Committee on the Judiciary, House of Representatives; Peter W. Rodino, Jr., Chairman (New York: The Viking Press, 1975.) This is a commercially published edition of the following volume, the actual report. As mentioned elsewhere in this thesis, the titles are somewhat misleading, in both cases, since Nixon was not impeached. This is a common misperception of the Watergate and Nixon period, and one point should be stressed, even at the risk of redundancy: The House Judiciary Committee (i.e., the Rodino Committee,) did vote to recommend impeachment. But before action could be taken, in the full House of Representatives, Nixon had resigned. Compare this with: U.S., Congress, House, Impeachment of Richard M. Nixon: Report of the Committee on the Judiciary, House of Representatives; Peter W. Rodino, Jr., Chairman, H. Doc. 339, 93rd Cong., 2d sess., 1974. This was also separately published, as follows: U.S., Congress, House, Impeachment of Richard M. Nixon, President of the United States: Report of the Committee on the Judiciary, House of Representatives; Peter W. Rodino, Jr., Chairman, H. Rep. 1305, 93d Cong., 2d sess., 1974. This text does not differ from the other. Only the reprinting information, and correspondingly new filing information, make it a distinct edition. Substantively, both volumes are exactly the same. This text served as one of the major primary sources in the Nixon section of this thesis, in particular. It makes fascinating reading. Included are Supplementary Reports, as well as a full text of proposed and final articles of impeachment adopted. These had as their locus and centerpiece the obstruction of justice, in all cases. This was an obvious, selfconscious echo of the final eleven articles brought against Andrew Johnson. An insert also includes laboratory test data on the famous 18.5 minute gap on one of the tapes, and so forth. The members were acutely conscious of the need to provide a clear, accurate, and comprehensive historical record. The volume is extremely well-done; all the more especially so, since it is a government report, and apparently done in some haste.

The following documents relate to the Nixon Impeachment, as well. The writer has given their report numbers in all cases, as well as the Serial Set volume where they can be found. Many of them relate to reprinting materials concerned with impeachment; to the process and working of the American governmental system, and to financial and material matters that needed to be expedited in order to fund and continue the House Judiciary

Committee's and Senate Select Committee's work. The writer has included, as well, the index references to Johnson, mainly for reference. These relate to the earlier period of tentative articles of impeachment. As indicated above, this is voluminous material. The writer reviewed the House records, but did not rely upon them extensively in his research for this project. This was in contrast to his employment of the Senate proceedings, themselves heavily used.

Refer to: U.S., Congress, Senate, Senate Miscellaneous Reports on Public Bills (vol. 9). S. Rep. 616-663, 93d Cong., 1st sess., 1973. Contains: 643--Print as House Document, Booklet Entitled, Supreme Court of U.S.; and 644--Print as House Document, Impeachment, Selected Materials; U.S., Congress, Senate, Senate Miscellaneous Documents 57-136, with Exceptions (vol. 1). S. Doc., 93d Cong., 2d sess., 194-1975. Contains: 79--Federal Political System Improvement, High School Debate Topic; 102--Procedure and Guidelines for Impeachment Trials in U.S. Senate; and 120--Congress Looks to the Future, The Republican Report [i.e., propaganda by Hugh Scott]; U.S., Congress, Senate, Senate Special Reports 5-520 with Exceptions (vol. 3-1). S. Rep. 5-520, 93d Cong., 1st sess., 1973. Contains: (See the bibliography here, as elsewhere, for a more complete listing by Serial Set volume) 415--Constitutional Rights; 450--Constitutional Amendments; 463--Activities of Committee on Government Operations, 92d Cong.; and 497--Separation of Powers; U.S., Congress, House, House Miscellaneous Reports on Public Bills 749-805 with Exceptions (vol. 1). H. Rep. 749-805, 93d Cong., 2d sess., 1974. Contains: 774--Investigatory Powers of Committee on Judiciary with Respect to Impeachment Inquiry.]; U.S., Congress, House, House Miscellaneous Reports on Public Bills 1028-1080 with Exceptions (vol. 1-4). H. Rep. 1028-1080, 93d Cong., 2d sess., 1974. Contains: 1059--Reprint Additional Copies, Committee Print, Entitled, Procedures for Handling Impeachment Inquiry Material; 1060--Reprint Additional Copies, Committee Print, Works of Impeachment Inquiry Staff as of February 5, 1974; 1061--Reprint Additional Copies, Committee Print, Works of Impeachment Inquiry Staff as of March 1, 1974; and 1069--Sale and Distribution of Congressional Record.; U.S., Congress, House, House Miscellaneous Reports on Public Bills 1081-1145 with Exceptions (vol. 5). H. Rep. 1081-1145, 93d Cong., 2d sess., 1974. Contains: 1086--Reprint Additional Copies, Committee Print, Constitutional Grounds for Presidential Impeachment; 1091 --Print as House Document, Revised Edition, Our American

Government, What Is It? How Does It Work?; and U.S., Congress, House, Consolidated Index of the Reports of the Committees of the House of Representatives, from the Twenty-Sixth to the Fortieth Congress, Inclusive. Prepared under the Direction of Edward McPherson, Clerk of the House of Representatives, Fortieth Congress (Serial Set No. 1386). H. Rep., 40th Cong., 1869. Cites: 34th 3d--Impeachment of Judge John C. Watrous, vol. 2, no 175; 40th 1st--Impeachment of the President, vol. 1, no. 7; 40th 2d--Impeachment, Raising Money to be Used In, vol. 2, no. 75; 40th 2d--Impeachment, Managers, Investigation, vol. 1, no. 44; 26th, 1st--Johnson, Andrew, vol. 2, no. 502; 39th, 1st--Joint Committee on Reconstruction, Report of Them, vol. 2, no. 30.

[27]These were also reprinted in a commercial paperback edition: High Crimes and Misdemeanors: Selected Materials on Impeachment (New York: Funk and Wagnalls, 1974.) The reprint was published without any editorial commentary whatsoever. It supplies all of the material in the original, but the publisher made no specific claim to this effect. The book is interesting for its promotional material, printed on the back cover:

[Headlines]: "What is an / Impeachable Offense? "High Crimes and / Misdemeanors has the answers.

"HIGH CRIMES AND MISDEMEANORS is a concise guide to impeachment. The book tells what constitutes an impeachable offense and includes all the articles of impeachment ever voted by the House of Representatives. The provisions of the U.S. Constitution regarding impeachment are included as is the full report of the Impeachment Inquiry Staff of the House Judidicary [sic] Committee. For historical relevance, the transcript of President Andrew Johnson's impeachment trial is appended."

The tone of this publisher's puffery is similar to that of all too much misleading commentary on impeachment in general, and presidential impeachment in particular. Would that it "had the answers." This would make many jurists, historians, and politicians very happy.

Insofar as there are "grey areas" in the Constitution, impeachability constitutes a major one of these. It also represents a kind of Pandora's box or witches' cauldron of potential peril for the American constitutional system. This applies most obviously to relations between the Executive and Legislative departments, and the Judiciary.

In short, many accounts of impeachment under the Constitution are simply too glib and present the matter as too cut and dried. The burden of this thesis, therefore, in large part is to indicate how unsettled many issues are that are either directly involved in impeaching a president; or inevitably arise, whenever an impeachment must be contemplated by Congress for a variety of reasons.

[28]Kelly, p. 696; Black, pp. 14-19; and Alan Barth in Schnapper, pp. iii-v.

[29]Stampp, writing at a much earlier date, pp. 153-154.

[30]Hoffer and Hull, p. 270, include a discussion of the relevance of precedents in state and federal law as they interact and affect each other.

"The borrowing of precedent on corresponding interests has benefited both state and federal government. There is nothing binding about this exchange of ideas; instead, their relative unity determined whether they would be adopted by the borrower. This was particularly true in the earliest period of the federal government, for there was little substantive or procedural law to guide Congress, while the states had been in operation for a decade and a half and had learned much. The impact of the states' experience was felt to good purpose at the federal constitutional convention, and the first federal congressmen brought the influence of state practices with them to New York City. One must remember that state government was far more influential and commanded far greater loyalty in those days than it does today. John Jay, for example, resigned his chief justiceship to return to state government. . . . As the years have passed--especially since the ratification of the Fourteenth Amendment--the area of exclusive state jurisdiction has shrunk and the purview of the federal government has grown. . . . there is no reason to assume that seventeenth-century English precedent weighed more heavily than the immediate effects of Addison's and Shippen's cases."

Refer also to Berger, pp. 261-264:

"It was high tragedy that by an accident of history a man whose will ran counter to that of the party which had elected him, and ultimately to that of the great majority in the North, became President at a time of tremendous national crisis. But once President, he was by the Constitution entitled to exercise his own judgment, which in the event proved to be wiser than that of the majority.

. . . The current revulsion against Johnson may lead some to reject Morison's judgment that the Johnson impeachment 'was one of the most disgraceful episodes in our history.' 'No valid ground,' he states, 'legal or otherwise, existed for impeachment.' McKitrick views it as a 'great act of ill-directed passion . . . supported by little else.' Yet the legal issues are not so easily dispatched. What made the trial 'disgraceful' was not that the charges were altogether without color of law but that the proceeding reeked with unfairness, with palpable prejudgment of guilt. The filing of impeachment charges against a President, however unjustified his differences with Congress, does not place him outside the pale."

[31]Black, pp. 1-4, and passim; and Alan Barth, in Schnapper, pp. iii-v and passim.

[32]Kelly, p. 696; Benedict, Impeachment and Trial, pp. 126 and pp. 142-143; Stampp, p. 152; Trefousse, p. 183; Patrick, p. 127 (William Evarts's arguments;) Brant, pp. 3-9, for an entirely different appraisal of the lessons of Johnson's trial; and Berger, Impeachment, pp. 294-301.

[33]LaWanda and John H. Cox in Crowe, Civil War and Reconstruction, pp. 358-376 summarize concisely the ambivalencies of relationships between so-called "Radical Republicans" and Andrew Johnson. The writers discuss the many problems of identification and reinterpretation encountered by any politically neutral and regionally objective student of Reconstruction, in any form or phase.

[34]For a representatively dismissive treatment of impeachment as a minor issue, or even simple farce, refer to McKitrick, pp. 505-507 and passim.

Refer also to Berger, Impeachment, pp. 257-258:

"There is no doubt about Johnson's uprightness and honesty; he had an 'extreme reverence for the Constitution,' an 'almost hypnotic determination to follow what he conceived as its spirit and letter.' But there was no give in the man; he never appreciated that the other side could also have a tenable, respectable position; and as Eric McKitrick remarks, he 'never understood that he was expected to bargain with leading senators at all.' He was impervious to counsel, whether by moderate Republicans who sought to build a bridge to the party or by his own Cabinet. Chief Justice Chase recorded that he vainly counseled Johnson against removal of Secretary of War Stanton in order to avoid exciting the nation; Johnson,

said Chase, was in fact unaware of the depth of 'the feeling against him.' When the break came with the Republican party because of his vetoes of the Freedmen's Bureau and Civil Rights Bills, he was cut off from the party that elected him; and in the elections of November 1866 his policy suffered a stunning defeat. Well could Congress conclude that the overwhelming victory gave it a clear mandate to go forward with its policy."

All of Berger's quotations in the above are from McKitrick. In a footnote on page 252, Berger cites "Morison[, p.] 709, which contains an excellent summary of the Reconstruction period. I have relied largely on Eric L. McKitrick, Andrew Johnson and Reconstruction (Chicago, 1960); [and] W. R. Brock, An American Crisis: Congress and Reconstruction 1865-1867 (London, 1963)."

Berger is not an historian, and explicitly repudiates any claim that he should be considered one. However, this is a crucial point. See the remarks on Hoffer and Hull's critique of Berger's methodology, included in Part Two, Note 23, pp. 36-38 of this thesis. While Hoffer and Hull's point is related to earlier English precedents, the dependence of Berger's analysis upon McKitrick and Brock is similarly revelatory. This is by no means intended as an attack on Berger, much less as a brief against Berger in the style of Hoffer and Hull, even if it seems to be warranted on a much broader scale by any number of competent historians on a variety of fronts. But, since Berger's account was so influential at the time of the Nixon impeachment attempt (even to the point of dominating much of the discussion published by the House Judiciary Committee itself, in a book of background information,) it seems wise to suggest the qualifications that one ought to use in approaching Berger's work as a whole, as well as Black's and Brant's. Refer to the writer's notes on the historiography of the Civil War and Reconstruction period, confirming Berger's, but also severely restricting his interpretation of the Johnson impeachment and trial: Part Three, Notes 47 and 51, pp. 61-63 and 65-67; and Part Four, Note 92, pp. 99-102. Refer also to the writer's comments on the received "survey" historiography of this era, Part Two, Note 26, pp. 39-41; and on the historiography of the Nixon and Watergate period: Part One, Note 9, pp. 12-14; and Part Five, Note 173, pp. 120-123, for example.

Unfortunately, but inevitably, one faces not only a huge and problematic mass of argumentative and sensitive political commentary, in dealing with presidential impeachment; but also with various kinds of revisionism and amendation of the current received or consensus versions of

these periods. Both are subject to sudden sharp reversals, and even to wholesale discounting.

For an additional example of the latter, refer to the discussions of the terms "Radical Republican," "Carpetbagger," and "Scalawag" in connection with Craven, Part Three, Note 49, pp. 63-64 of this thesis. These are tedious and nitpicking concerns, to be sure. Unfortunately, they are vital and necessary ones, as well, especially when one is dealing with "tertiary" sources (like survey accounts of such complex and sensitive periods) and secondary sources that, in most cases, are the results of literally years or even decades of research spent in sifting through primary sources and collateral historiographical and jurisprudential treatises.

[35]Berger, Impeachment, pp. 297-301.

[36]Brant, pp. 163-177, discusses the cases of Judges Robert W. Archbald, Gene W. English, and Halsted L. Ritter, that "furnished tempting openings for future congressmen to veer into partisan politics and pass bills of attainder under the guise of impeachment. Three decades later, these tendencies bore fruit in the attempt to impeach Justice Douglas." (p. 163)

[37]Consider the following case, for example. Refer to the Omaha (Nebraska) World-Herald, October 8, 1987, Sunrise Edition, p. 6. A story dated Wednesday, October 7, 1987, cited a special panel of judges' report that U.S. District Judge Alcee L. Hastings "attempted to corruptly use his office for personal gain" and recommended that the House of Representatives consider impeaching him. This 381-page study led to the introduction by Representatives Henry Hyde [R-IL], and F. James Sensenbrenner [R-WI], of a resolution "demanding that the House initiate impeachment proceedings against Hastings [a Carter appointee, who is serving as Florida's first black federal judge.]" Judge Hastings is alleged to have received a $150,000 bribe from two convicted racketeers in exchange for a promise of lenient sentences. The Judge was quoted as saying to reporters: "You ain't gonna find even a fizzling cap pistol." [Hastings was eventually impeached.]

This "smoking gun" terminology, of course, dates directly from Watergate. The two attempts at presidential impeachment have tried to formulate evidence that was "criminal" in nature. In the case of Nixon, this clearly was the case. There is literally no doubt that he would have been convicted, if tried, on charges of obstructing

justice, and probably on a host of other criminal charges, as well. In the case of Andrew Johnson, however, this was definitely not true. The unfortunate byproduct of all this is to make the "criminal" nature of the proceedings paramount. In the case of a corrupt judge, this is especially serious; since, absent a time-consuming and expensive process of impeachment and Senate trial, there is effectively no good way to discipline a federal magistrate. It seems that this contemporary rationale unfortunately has been implanted so securely in the American political process that, for the near future, the basic political utilizations of presidential impeachment would never stand a chance of success in our current American juristicial and political climate.

[38]Don Edwards [D-CA]. Refer to: U.S., Congress, House, Peter Rodino, Jr., Chairman, Impeachment of Richard M. Nixon, President of the United States; Report of the Committee on the Judiciary, House of Representatives. August 20, 1974.--Referred to the House Calendar and ordered to be printed. 93d House Calendar No. 426; 93d Congress, 2d Session; Report No. 93-1305. Washington: U.S. Government Printing Office, 1974. House Document No. 93-339, p. 334. As part of his supplementary report, one of many prepared by committee members after Nixon's resignation, Edwards explained:

"The report of this historic impeachment proceeding would not be complete without a record of how each member voted on the five proposed Articles of Impeachment. Because regular House procedures do not provide that such votes should be printed in the body of the report, I am here submitting that material to be printed as a part of my additional views."

Facsimiles of the five Committee Roll Call votes are then reprinted, at the end of his report. For a record of these votes, in tabular form, refer to: Part Six, Note 226, pp. 155-156. Notice, too, that the title of this government document is incorrect. President Nixon was not impeached. The Committee on the Judiciary recommended impeachment, but the full House never acted on it, because of Nixon's resignation. For a list of the members of the committee, refer to: Part Six, Note 213, p. 153.

[39]Kelly, pp. 697-98; and the American Civil Liberties Union, in Schnapper, pp. 109-122.

[40]Black, pp. 25-52; and Hoffer and Hull, pp. 264-265.

[41]Berger, Impeachment, pp. 53-54, 94-95, 103-104, 123-125 and 298; Hoffer and Hull, p. 265; and Black, pp. 6-9, 14-19, and 30-33.

[42]Murphy, p. 168. This argument is similar to that made by the Republican managers against Johnson. Refer to Stampp, pp. 152-153.

Refer also to Brant, pp. 5-6, for a scathing denunciation of the Ford attempt to impeach Douglas. Brant alludes to the 924-page report issued by the [Emanuel Celler (D-NY)] House Judiciary Committee that "cleared Justice Douglas completely, finding no factual basis for removal even under Congressman Ford's catchall conception of congressional power. The report went further and specifically rejected Ford's conception."

PART THREE:

THE IMPEACHMENT AND TRIAL OF PRESIDENT ANDREW JOHNSON

The impeachment of Andrew Johnson has a unique place in American political and constitutional history.[43] For the first and only time, the House impeached and the Senate tried a sitting president, in keeping with the express, respective powers granted to each branch by the United States Constitution.[44]

> As the reconstruction acts went into effect in 1867-68, a constitutional crisis unique in the history of the republic gripped the government at Washington. After months of backing and filling and two false starts, a frustrated, embittered, yet withal reluctant Congress impeached President Johnson out of a conviction that he had improperly obstructed the carrying out of Congressional reconstruction policy.[45]

The history of the presidential impeachment and subsequent senatorial trial of Andrew Johnson begins with the Civil War, and events immediately preceding it.[46] As in the case of the Nixon administration, it would be redundant to recount this pre-history in great detail.

Nevertheless, a certain amount of background information is necessary to understand some of the events and individuals who figured prominently in Johnson's impeachment and trial.[47] According to recent American constitutional historians,

> On each side senators were prepared to vote according to their political convictions regardless of the evidence. Nor should this be taken as a total constitutional irregularity or failing. Whether one employs the broadly political or narrowly legalistic definition of 'high crimes and misdemeanors,' impeachment could hardly be expected to occur except in highly charged political circumstances. Under such conditions political convictions and principles rightly exert influence. The paradox of impeachment was that it required the use of judicial standards and rules to resolve what was essentially a political-constitutional crisis.[48]

There is a generally accepted view among contemporary American historians that the impeachment of Andrew Johnson represented a political vendetta rather than a legal or criminal action.[49] Virtually no-one writing today would dispute that premise. However, various authors naturally differ in the degree of emphasis they accord it.[50] In researching this thesis, one of the best, if somewhat eccentric accounts was that of Georges Clemenceau, who met and interviewed some of the main participants in the Johnson trial.[51] The future French Premier, while working as a correspondent for the journal Temps, reported

the impeachment in terms of political realities, strategies and tactics. Perhaps evincing political, sectional and regional biases, contemporary historians have differed in the degree of emphasis they place upon various aspects of Johnson's impeachment.[52]

Some commentators argue that the Johnson impeachment represented the nascent development of a form of parliamentarian government.[53] According to their hypotheses, the impeachment of Johnson was an attempt to usurp presidential power by a Republican Congress, heavily influenced by the radicals within it.[54] Anxious to preserve the hardwon victories of the Civil War, these Northern Republican Congressmen were gradually put in the position of actually moving toward a more parliamentarian form of government, rather than the tripartite American system of balanced powers.[55] As an illustration of this tendency, consider some of the comments made at the time of the House Judiciary Committee's final decision to recommend impeachment.

> 'The great question to be decided,' wrote one partisan of impeachment, was whether 'the national Legislature (is) to be as omnipotent in American politics as the English is in English politics. . . . May we not anticipate a time when the President will no more think of vetoing a bill passed by Congress than the British crown thinks of doing?'[56]

Some historians, writing quite recently about the Reconstruction period, continue to portray men such as Benjamin Butler [R-MA], Thaddeus Stevens [R-PA], Charles Sumner [R-MA] and Benjamin Wade [R-OH] in the most unflattering light possible.[57] They are seen as vengeful, narrow-minded Republican Congressmen whose desire for revenge against the South in itself was sufficient to blind them to the political dangers incumbent upon impeaching an incumbent chief executive. According to this group of historians, Johnson's putative "crimes" were wholly political. Insofar as they hold Johnson culpable for anything, it is only for being so stubborn and unyielding in the demands he made of an equally recalcitrant and unbending Congress. Since these concerned such fundamental issues as how to go about readmitting those former states that had been in rebellion, a confrontation between President and Congress became inevitable.[58]

> Historians have usually condemned Congress for using the impeachment power improperly to punish Johnson for mere political disagreements, on the assumption that political convictions ought to have played no part in the process. It is hard to agree with this premise, however. The purpose of impeachment is to deal with fundamental political controversies. It was intended by the founding fathers as a means by which Congress, ordinarily prevented from interfering with the discretionary powers of the president, might restrain the chief executive when his actions threatened the safety of

> the republic or the integrity of the constitutional order. Necessarily, impeachment is employed in situations which require political evaluation and judgment, so that it misses the point to criticize Congress for letting politics enter into impeachment decisions. Of course, it can always be objected that if the legislature can impeach for other than a clearly defined crime, there is a danger that it will use the power irresponsibly to pursue petty political objectives and punish the executive for mere disagreements of policy. If constitutionalism has any reality, however, this is an unlikely danger.[59]

The peculiarities of his political situation and the lack of legal precedents for Johnson's impeachment present many difficulties for the modern student. It is somewhat surprising to learn that the impeachment itself is often treated merely symptomatically and briefly, in most discussions of his administration and accounts of Reconstruction.[60] In sharp contrast to publications dealing with the subject of the tentative Nixon impeachment, comparatively few full-length studies have been devoted to Johnson's impeachment and trial.[61] Even some of his own biographers do not devote a great deal of attention to Johnson's Senate trial.

If there are simple lessons to be learned from the Johnson impeachment, they probably reside in its purely constitutional implications.[62] The contextual, political nature of the events immediately preceding and following it, are entirely relevant to the impeachment. They are

equally as important as other, more procedurally orientated analyses, such as investigation of the actual mechanisms employed in leading the House Judiciary Committee to recommend impeachment. They are equally (or more) important than the occasion of the House's actual vote to impeach, for example, as well as the somewhat ritualized, dramatic events that took place during Johnson's Senate trial.[63] In short, when one examines Johnson's impeachment, far more so than other American federal impeachments (with the possible significant exception of Justice Samuel Chase, early in our history) the political nature of the entire enterprise immediately asserts itself.[64]

> The decisive constitutional interpretation that Congress made in 1868 was to require evidence of an indictable offense, a clear violation of positive law, as warrant for impeaching a president. Once Congress committed itself to this position, the strength of its case depended on the nature and purpose of the law that Johnson violated. And the Tenure of Office Act proved to be a weak foundation for the undertaking. Not that the removal power belonged so unequivocally to the president that Congress had absolutely no business trying to regulate it in any way. The weight of constitutional history favored the president's position on removals, but it did not render all other approaches to the problem of removals patently unconstitutional.[65]

In general, most commentators and publicists tend to echo the view that the articles of impeachment brought against Johnson were relatively weak.[66] Some uncomplimentary historians interpret this as an act of vindictiveness on the part of Congress.[67] More sympathetic historians argue what seems to be a rather commonsensical proposition. They contend that the articles of impeachment used in the case of Andrew Johnson had been intended merely to give the illusion of criminality to what in reality were transparently civil, political, and perhaps vaguely social offenses.[68]

> [Johnson's] violation of the law was a pretext by which to reach his more substantively objectionable actions; it was symbolic of his overall obstructionist course. But once seized on and made the basis of impeachment proceedings, as the constitutional conservatism of the Republican majority required, violation of the Tenure of Office Act could not be dealt with merely as a symbol or legitimate pretext for Johnson's grave political offenses.[69]

When it was removed from its historical context, the actual trial itself necessarily became rather anticlimactic. This was due to its removal from a purely political milieu, when the Radical Republicans' desire or even lust to impeach had been satiated simply by their having brought threatening charges against Johnson.[70] To be sure, the trial did

contain many elements of high drama. Everyone concerned was very conscious of the role he was playing, since the Senate consciously was trying to establish precedents. The Senate chamber, in addition to having become a kind of courtroom, also served as a theater where the plot was developed and the starring actors improvised constitutional rationales for their activities.[71]

Notes to Part Three, Pages 52 to 59

[43]Stanley I. Kutler in Dewitt, p. v. Refer also to William Archibald Dunning, Essays on the Civil War and Reconstruction and Related Topics (New York: Peter Smith [reprint edition], 1897, 1931), pp. 253-303. Dunning's account of the trial broke new ground, and along with Dewitt's is one of those most frequently encountered in all subsequent work on this subject.

Although Dewitt's version is regarded as somewhat more faithful to a close reading of the voluminous documents associated with the impeachment, Dunning also makes use of the Congressional Globe in significant detail. Benedict's Impeachment and Trial is another major standard text dealing with this period. Survey texts in American history betray their indebtedness to Dunning's and Dewitt's accounts at every turn. James M. McPherson's Ordeal by Fire (not to be confused with Edward McPherson's documentary history, depended on so extensively by Dunning in his own account of Reconstruction) seems to be analagous to Benedict's works, also rapidly on its way to becoming a minor classic.

[44]For an excellent, detailed modern account, refer to Benedict, Impeachment and Trial, pp. 126-176. For a brief, anecdotal account, refer to Julia Dent Grant; John Y. Simon, ed., Bruce Catton, introd.; Ralph G. Newman, notes, The Personal Memoirs of Julia Dent Grant (New York: G. P. Putnam's Sons, 1975), pp. 169-170.

The most thorough account is the original three volume Trial of Andrew Johnson, President of the United States before the Senate of the United States on Impeachment by the House of Representatives for High Crimes and Misdemeanors, Published by Order of the Senate, (Washington: Government Printing Office, 1868; New York: Da Capo Press reprint, 1969.) The most extensive documentary history available is Edward Mcpherson's [Clerk, House of Representatives of the United States] The Political History of the United States of America During the Period of Reconstruction (from April 15, 1865 to July 15, 1870) (Washington: Solomons & Chapman, 1875; New York: Negro Universities Press reprint, 1969.) This remains the best and essentially exhaustive sourcebook for legislation, addresses, Presidential proclamations, party platforms, state constitutions, and so forth,

throughout much of the Reconstruction period. McPherson's compilation also includes voting records on most major pieces of legislation passed by Congress during Reconstruction.

[45]Kelly, p. 350; Smith, pp. 224-251, and passim. Refer to Edward L. Gambill, Conservative Ordeal: Northern Democrats and Reconstruction, 1865-1868 (Ames, Iowa: Iowa State University Press, 1981), pp. vii-viii, 76, 81 and passim, for a new appraisal of the Democratic Party's own role in Reconstruction politics.

[46]Smith, p. 293; George Harmon Knoles, in Robert W. Johannsen, ed., Reconstruction, 1865-1877 (New York: The Free Press, 1970), pp. 1-3; Dewitt, p. 1; Benedict, The Fruits of Victory, p. xiii; and W. E. B. Du Bois, Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880 (New York: Atheneum, 1970), pp. 346-361, for Marxist and laborite interpretations.

[47]Refer to U.S., Congress, House, House Reports, Serial Set 1314, The Reports of Committees of the House of Representatives for the First Session of the Fortieth Congress, 1867 (Washington: Government Printing Office, 1868) for a complete account of the House Judiciary Committee's considerations of the grounds for President Johnson's impeachment. Refer to U.S., Senate, The Senate Journal, Serial Set 1315, Journal of the Senate of the United States of America, Being the Second Session of the Fortieth Congress, Begun and Held at the City of Washington, December 2, 1867, in the Ninety-First Year of the Independence of the United States (Washington: Government Printing Office, 1868,) for a complete record of activities in the Senate prior and preparatory to the impeachment of President Johnson.

Refer also to Benedict, Impeachment and Trial, pp. 1-2; Camejo, pp. 66-83, for an American Marxist perspective; and to Donald, for an indication of how difficult (and potentially misleading) this can be. Donald includes an excellent series of charts and tables, rehearsing the voting patterns of Congress during Reconstruction, pp. 83-105.

Refer also to Scheiner, pp. 119-122, and passim. The book as a whole includes a representative sampling of historiography dealing with Reconstruction.

Refer also to Berger, Impeachment, pp. 295-296: "The impeachment and trial of Andrew Johnson, to my mind, represent a gross abuse of the impeachment process, an attempt to punish the President for differences with and obstructing the policy of Congress. It was a culmination of a sustained effort to make him subservient to Congress, to alter the place of a coordinate branch in the constitutional scheme. It undermined the separation of powers and constituted a long stride toward the very 'legislative tyranny' feared and fenced in by the Founders. Had it succeeded, no President, in the words of Senator Trumbull, would 'be safe who happens to differ' with the Congress 'on any measure deemed by them important.'

"That this 'towering act of abandoned wrath' failed is due, to quote Morison, to 'seven courageous Republican senators who sacrificed their political future by voting for acquittal.' In the midst of the storm that beat upon them they stood upright. Their calm, reasoned opinions, looking into the future, seeking to preserve the constitutional structure, stand in sharp contrast to the fierce invective of Butler, Bingham, Boutwell, Stevens, and Sumner. To the seven recusant Senators we owe it that American justice was not indelibly stained, and for this they deserve to be enshrined in the American Pantheon."

Berger relies on McKitrick, Morison, and Dewitt; and to a much lesser extent, on the Trial, itself. He also cites Kelly and Harbison.

Refer also to Donald, pp. 26-28: "Perhaps we have all been too much interested in individuals. Recognizing that the road to reunion was surveyed by the Republicans in Congress, historians have devoted much attention to the individual leaders of that body. . . . Biography has its value, but the biographies of these Reconstruction leaders do not add up to any consistent interpretation of the age. From them, as we have seen, no historian has been able to construct a tenable thesis which will serve to distinguish Radical Republicans in terms of personality, ideology, geographical origins, or social and economic status from their Moderate counterparts. [Emphasis added.]

"Once we leave this circle of well-known and much-studied leaders, we confront the fact that the majority of the members of Congress, the men who actually passed the laws which determined the Reconstruction process, are almost total blanks . . . the rest of the dreary roll call. Lest this be read as a plea for graduate students to do more and more research on less and less consequential politicians, let it be said at once that not

even the most enthusiastic state or local historian can resurrect most of these disembodied spirits. . . . In studying Republican factionalism it might be helpful to forget about personality, rhetoric, motives, and popular repute of individual Congressmen. Instead, we may hope to find significance in their objective behavior patterns--i.e., in the way they voted--and to explain their behavior in terms of political forces. [Emphasis added.]

"It is not, as we have seen, easy to find objective criteria for separating Radical from Moderate Republicans during the Civil War years. During the Reconstruction period the party situation became more complex, because a few Republicans . . . became identified with President Johnson's policies and formed a separate, clearly recognizable group of Conservatives, falling somewhere between the Democrats and the Republicans. But their defection did little to make the line between Moderate and Radical Republicans in Congress clearer." [Emphasis added.]

[48]Kelly, p. 353; Dewitt, pp. 373-374, for a harsh depiction of Radicals and their motivations; and Smith, p. 224.

Refer also to Berger, Impeachment, p. 267:

"Although an effort to compress into a chapter a tale which sprawls across three volumes of a printed record cannot linger on cumulative evidence, a few added details must flesh out the charge of unfairness. Consider the indecent haste with which defense counsel were forced to trial. The House agreed to the articles of impeachment on March 3, 1868, presented them to the Senate on March 5, and the court was convened on March 13. Defense counsel requested forty days to prepare an answer to the articles but were allowed ten, to March 23. A replication was filed by the Managers on March 24; the defense requested thirty days from that filing for preparation of their case, but the Senate set the opening of the trial for March 30. This was extraordinarily short shrift."

[49]This follows Dewitt, in the main. For example, refer to pp. ix-x. Brant, pp. 3-4, presents a modern evaluation of this theory (and agreement with it) from the standpoint of constitutional law. Refer also to Brock, pp. 1-2, for an entirely different viewpoint; and to Stampp, for another viewpoint, pp. vii-viii, 4-10, and passim. Refer also to Smith, p. 294; and to Castel, pp. 194-195.

Refer also to Berger, Impeachment, pp. 252-263, 295-296, and 299-301. His comments on page 269 are interesting, and reflect the usual tone of contemporary comments on the House Managers in particular, and the Radical Republicans in general:

"With Stevens, Sumner was one of the great actors in the spectacle, utterly unfitted by his fanatical commitment to sit in judgment on Johnson."

For additional illustrations of the difficulty of dealing with the motivations and group identifications of individuals during the Reconstruction period, refer to Craven, pp. 224-225, who says in part:

"The terms 'carpetbagger' and 'scalawag' have lost much of their meaning in recent years. . . . Yet the labels 'carpetbagger' and 'scalawag' carried heavy emotional charges and played an important part in Reconstruction days, as they have since in the writing of history. Like most labels, they badly distorted the facts and need to be used in quotation marks."

Craven runs afoul of this same problem, of course, as do most historians who have dealt with some aspect of the complex Reconstruction period. In his first mention of the term, on page 48, he uses this descriptive phrase: "so-called Radical Republicans." Later, on pages 64-65, he drops the "so-called." The passage where this occurs is informative both as an indication of Craven's own biases, and as one of the most commonly encountered historiographical depictions of the motivations of key participants in the post-Civil War Reconstruction period.

"With peace and the Confederacy gone, southerners were now only a badly beaten and disorganized body of fellow Americans, and Lincoln was realist enough to know that they and their states could not immediately resume their place in the Union. He therefore bluntly said it was well to forget all theory. Thaddeus Stevens, on the other hand, viewed the South as conquered territory, and Charles Sumner insisted that the states had committed suicide. Each demanded both punishment and social reconstruction. Nevertheless, all of them knew that some day the Union must be restored, and the problem was one of finding a way, not too un-American, by which all groups could be satisfied. There must be an air of legality and constitutionality about what was done, but it must be accomplished in such a way as to allow Radical Republicans to have what they called security and satisfaction."

[50]Trefousse, pp. 4-5, furnishes background information on Johnson and Tennessee. Johannsen, pp. 4-22, presents a good, balanced overview of the period and the issues involved. Refer also to Castel, p. 194; Coulter, pp. 340-341; and Benedict, A Compromise of Principle, pp. 13-15 and 21-41 for a more balanced (and more recent) major reinterpretation.

Refer also to Dunning, passim. In his Prefatory Note to his groundbreaking study, Dunning said in part, pp. vii-viii:

"To the younger generation of reading men at the present day the military history of the Civil War is familiar or readily accessible; the constitutional and political history is neither. As to the Reconstruction, the term is to most people merely a synonym for bad government, and conveys no idea of the profound problems of statecraft that had to be solved between 1865 and 1870."

[51]Virtually the only account of Andrew Johnson's Senate trial that is at all detailed, and exhibits familiarity with the extant materials, is that of David Miller Dewitt, who wrote his utterly pro-Johnson book at the turn of the century. He was a Democratic politician who served in Congress for a short time, and he displays both racial and regional biases. However, this is still regarded by many historians as the definitive work on its subject. A 1967 reprint includes an introduction expressing the fond hope that no presidential impeachment will ever again take place in this country.

The work of Eric L. McKitrick is also regarded by many subsequent historians as a standard text. McKitrick praises Dewitt's treatment of the trial, and regards it as still the best in its own field. McKitrick, himself, is helpful on the trial; but less so on the process of impeachment. His book is typical of many studies treating this period.

One of the best documentary histories of the entire era is that found in Walter L. Fleming, Documentary History of Reconstruction; Political, Military, Social, Religious, Educational & Industrial--1865 to the Present Time (Cleveland, Ohio: The Arthur H. Clark Company, 1906). In Fleming, one can consult the full texts of most of the most significant Congressional legislation passed during this era. It includes Johnson's veto messages, as well as excerpts from his swing around the circle campaign. It is also interlarded with news accounts and editorials, reproductions of handbills, and so forth.

John N. Dickinson, ed., Andrew Johnson, 1808-1875; Chronology--Documents, Bibliographical Aids (Dobbs Ferry, New York: Oceana Publications, Inc., 1970) is an extremely useful book. Dickinson baldly states that there is no good biography of Andrew Johnson, and he also cites Dewitt's The Impeachment and Trial of Andrew Johnson as the best available work on that subject. Chronologies are a strong point in Dickinson's work, as well.

Gene Smith's High Crimes and Misdemeanors: The Impeachment and Trial of Andrew Johnson, is the fruit of three years' work, completed during the last days of Watergate. The author watched some of the Senate hearings while he was working on his final drafts. His work is rather defensively and apologetically, but inescapably, derived from secondary sources. Smith makes the apt comment that the field is so large that even three years' work was not enough to begin to comprehend even all of the secondary work on the period.

James D. Richardson's Messages and Papers is invaluable for its treatment of the Senate trial of Andrew Johnson, as well as his veto messages, some speeches, and so forth. Milton Lomask, Andrew Johnson: President on Trial (New York: Farrar, Straus and Cudahy, 1960) has a pronouncedly pro-Johnson, anti-congress slant, but it is useful. Rembert W. Patrick, The Reconstruction of the Nation, is a solid piece of work. It deals with the whole period; but it does so in very general terms, and almost incidentally mentions Andrew Johnson's impeachment. W. R. Brock, An American Crisis: Congress and Reconstruction, 1865-1867, is a curious book. Written by a Briton, it has the advantage of providing a substantial overview of its period. Martin E. Mantell, Johnson, Grant, and the Politics of Reconstruction (New York: Columbia University Press, 1973) in general lives up to its title. It suffers from a definitely anti-Congress, pro-Johnson bias, however. Its investigation of the curious relationship between Johnson and Grant is especially well-examined.

Another account is interesting on several levels: Georges Clemenceau, edited and with an introduction by Fernand Baldensperger, translated by Margarent Mac Veagh, American Reconstruction, 1865-1870, and the Impeachment of President Johnson (New York: Lincoln Mac Veagh / The Dial Press, 1928). Clemenceau wrote most of this book, consisting chiefly of newspaper and journal articles, during and shortly after his stay in America, coinciding with Johnson's impeachment. He provides a sensitive account of the public perceptions involved, while Andrew Johnson was on trial. The book is highly readable, and

doubly fascinating because of Clemenceau's later political career. Edgar Bodenheimer, Jurisprudence; The Philosophy and Method of the Law, Revised Edition (Cambridge: Harvard University Press, 1974), contains a general discussion of the role of precedents in the law. It makes good reading alongside Cardozo's commentary on the nature of precedents, in his two books; as well as those of Rehnquist and Dworkin, in Murphy.

In addition to the more general works mentioned in Part One of this thesis, these studies help to create what might be called a generic account and appraisal of Andrew Johnson's presidency, in its political and social context. The descriptions given in this thesis, therefore, present a rather homogenized view of his era.

There is, however, no single definitive biography of Johnson; and nothing of any substance that evaluates his trial in relation to the rest of the period. With few exceptions, these books and others like them tend to carve out a rather narrow, specialized interest in Civil War and Reconstruction scholarship, and then pursue it to the virtual exclusion of other issues. A good account of the trial is still lacking, but Dewitt's traditional domination of the subject has probably influenced some four generations of American historiography. According to other historians, Dewitt's pro-Johnson, constitutional treatment of the issue was accomplished only at the expense of virtually ignoring the complexities of Congressional politics and power during the Johnson administration.

[52]Benedict, Impeachment and Trial, pp. 140-143. Among the most outspoken critics of Reconstruction is Claude G. Bowers, The Tragic Era: The Revolution after Lincoln (Boston: Houghton Mifflin, 1929, 1957, 1962). Refer to pp. v-vi, and passim. Donald, p. 82, recites these problems concisely; Coulter, pp. x-xii, and 312, displays a postwar Southern viewpoint.

Refer also to Jack B. Scroggs, "Carpetbagger Constitutional Reform in the South Atlantic States," contained in Scheiner, pp. 58-68. Scroggs uses the type of terminology excoriated by Craven, above. For example, consider these remarks on pp. 58-59:

"Not least responsible for this development were the newly arrived Northerners--the carpetbaggers, who, along with the Southern scalawags, have long borne the major blame for all Reconstruction ills in the South. Accused by contemporaries of every conceivable crime, both political and civil, the term carpetbagger even among recent writers has carried with it the taint of ineptness,

fraud, and corruption. This has tended to obscure the basic contributions made by the Northern immigrants who engaged in politics and to distort the role of the new Republican organizations in the South.

"Only of local importance during the early stages of Reconstruction, these Northern 'adventurers' achieved a commanding position in state politics with the advent of Radical control of the Reconstruction program early in 1867. The triumph of the Radicals in Congress brought about in the South a corresponding emergence of state Radicals, both white and Negro, and the Republican party developed as a formidable force in the new Southern political orientation."

[53]Patrick, p. 139 ["References" for Chapter VI]. Refer also to Dunning, p. 59:

"In the practice of the war-time, the only principle working efficiently in limitation of the government was that of frequent elections. Public opinion, in short, and not the elaborate devices of the constitution, played the decisive role in the United States just as it had played it in earlier centuries and presumably less favored lands. American chauvinists had boasted long and loudly of the superior stability of the written constitution; a great national crisis quickly revealed that it was no more secure against the forces of popular passion than the less artificial structures with which it had been so favorably compared."

[54]Bowers, pp. 155-160. Castel, pp. 18-22, yields a more balanced discussion. Refer also to Howard K. Beale, The Critical Year: A Study of Andrew Johnson and Reconstruction (New York: Harcourt, Brace and Company, 1930), pp. vii-ix, for the "vindictive" theory and for the dominant view criticized by Benedict in Note 54, below. Refer especially to pp. 211-224, "Chapter IX: Parliamentary Centralization or Federal Checks and Balances?" and to "Chapter XI: The [Congressional] Campaign [of 1866]," pp. 300-375, for an excellent analysis of the levels of passion aroused during the earliest phases of "Congressional" Reconstruction. Although many of its conclusions were attacked by later writers, this remains an important study, and many historians continue to pay it homage.

[55]C. Vann Woodward, Rumor and Reaction: The Compromise of 1877 and the End of Reconstruction (Boston: Little, Brown and Company, 1951), pp. 14-15; and Patrick, p. 120, who denounces the "knavery and selfish political ambition of B.F. Wade and B.F. Butler."

Refer to Brock, pp. 6-8, for an entirely different interpretation.

Benedict, in A Compromise of Principle, pp. 40-41, sharply criticizes James Ford Rhodes, John W. Burgess, William A. Dunning and James G. Randall, who "ceased referring to 'Radical Republicans' at all, instead denominating them 'vindictives.'" Benedict also criticizes "a second interpretation of radicalism," primarily expressed in Howard K. Beale's The Critical Year; and a third, Robert P. Sharkey's, "diametrically opposed to Beale's."

According to Benedict, the situation has changed, again, so that "with the new revisionism has come real confusion over what radicalism was. Dunning, Rhodes, Bowers, Beale, Randall, and Sharkey all seemed confident of what constituted radicalism. McKitrick, Donald, Brock, and the Coxes seem less certain. . . . Trefousse has called the radicals a 'vanguard for racial justice,' and historians tend to agree, but the amount of study being devoted to the subject reveals the depth of their perplexity.'"

[56]James McPherson, p. 532; Smith, p. 229; and Brock, p. 260.

[57]For example, refer to Bowers: pp. 73-84, on Stevens; and p. 197, on the Senate vote to acquit.

[58]Bowers, pp. 194-195. Refer to Craven, pp. iii-iv, for a discussion of this kind of regional bias and a strong attempt to consciously overcome it. Refer also to Coulter, pp. 119, 344, and 349-363; and to Patrick, p. 81.

Refer also to Dunning, pp. 258-259:

". . . the points of variance between the Republican factions were two in number. The first was as to what constituted impeachable offences in our system. The constitution provides that the House may impeach any civil officer for 'treason, bribery or other high crimes and misdemeanors.' Treason and bribery were sufficiently accurate terms, but what should be regarded as the scope of 'high crimes and misdemeanors'? By the radicals it was held that these words were employed in the widest and most extended sense known to jurisprudence, and included all cases of misbehavior in office, whether known to common or statute law or not. The moderate Republicans pretty generally adopted the view that these words limited the list of impeachable offences to such as were indictable either at common or by statute law. Otherwise, it was

said, it would be in the competence of the Senate to define an offence as it proceeded with the trial, and the accused would have no legal certainty on which to base his defence. Another theory, maintained in this instance chiefly by the Democrats, held that the expression 'high crimes and misdemeanors' was used generically in the constitution, and that it was left for Congress to declare by legislation what specific acts should be included in this designation. As Congress had taken no steps to define the offences, no impeachment could be based upon those words of the organic law."

[59]Kelly, p. 355; Smith, p. 237; Stampp, p. 8. Refer to Castel, p. 195, for a different view, citing later comments of some Radical Republicans; and to p. 153, for Johnson's own constitutional theories. Refer also to Black, pp. 51-52; Brant, pp. 3-6 and p. 23 for a much more pessimistic view; and to Brock, p. 260. Dewitt held a contrary opinion. For example, see p. xiii.

[60]Castel, p. vii; and Coulter, pp. 113-120, especially p. 119.

[61]Dewitt's retelling has become the standard account. It is flawed, however, by an obvious political bias in favor of Johnson. However, since its original appearance in 1906, no-one seriously has attempted another substantial treatment. McKitrick and others have simultaneously noted its valid attributes, but also have lamented the fact that the standard modern (pro-Johnson) interpretation of the trial stems largely from this single book. At least three generations of American historians have been obviously influenced by Dewitt's conclusions. The field awaits a modern, complete discussion in great depth and detail of the trial of Andrew Johnson; even as it also awaits a brief, comprehensive study of Richard Nixon's presidency. The historiographical situation in these two cases is similar. Both have political consequences and partake of liabilities inflicted upon them by excessive partisanship. Historical objectivity, assuming that such a thing can exist, has been the casualty, here. Other historians, writing about Andrew Johnson and finishing their works approximately during the course of the Watergate developments, have commented upon the difficulties attendant upon this type of historiography, specifically with reference to Andrew Johnson and Richard Nixon. Also, it is significant that the voluminous nature of the materials encountered in the case of Reconstruction,

itself, forces many of the best studies themselves to be heavily dependent upon secondary sources. Reconstruction emerges as a subject for lifelong study, simply to master the relevant documents. These most especially include such periodicals as Harper's Weekly and The Nation, both of which covered Reconstruction extensively, along with a wealth of other newspapers, journals and magazines. To summarize: there exists no thorough and satisfactory account of Andrew Johnson's trial. For example, most brief accounts of Reconstruction (and even some longer, more critical accounts of Andrew Johnson's presidency) tend to summarize the impeachment process in terms of a few lines' or few paragraphs' mention of the final vote.

In fact, there were four distinct phases leading up to his impeachment; and even after that point, there were scattered attempts in Congress to bring further articles of impeachment against Johnson, and to retry him. Even Dewitt's book, acknowledged by so many later generations of American historians as the best available study, does not mention these abortive and spasmodic attempts at another impeachment.

[62]Trefousse, p. 183.

[63]Ibid., pp. 184-189. Refer to Dunning, pp. 258-261, and passim. Refer also to Crowe's excellent preface to Civil War and Reconstruction, pp. vii-viii.

[64]Patrick, p. 129.

[65]Kelly, p. 355; and Berger, pp. 267-296.

[66]Trefousse, pp. 138-139.

[67]Dewitt, p. 360-371.

[68]Stanley I Kutler, in Dewitt, pp. x-xi.

[69]Kelly, pp. 355-56; and Patrick, p. 128.

[70]Patrick, pp. 131-132. Brock, pp. 66-67, provides a balanced discussion of the differences within the Republican Party factions. Dewitt, pp. 384-389, contains the full text of the proposed articles of impeachment. McKitrick, pp. 506-508, develops this theme briefly, even dismissively, but still persuasively.

[71]Patrick, p. 129.

PART FOUR:

FORMATION OF A CONGRESSIONAL MOOD FOR IMPEACHMENT

After Abraham Lincoln's assassination, Congress seriously considered the possibility of another outbreak of hostilities.[72] The Radical Republicans assumed that Secretary of War Edwin Stanton's continued presence in office, fortified in his position by both the Tenure of Office Act and the Army Appropriations Act, was necessary for the very preservation of the Union.[73] The Tenure of Office Act had stipulated that, without Senate consent, members of the president's cabinet could hold office during the term of the appointing president; and after the expiration of his term, for one month. Both acts were passed on March 2, 1867.[74]

Many historians have regarded the Tenure of Office Act as blatantly unconstitutional.[75] Both it and the Army Appropriations Act were designed to be primarily political and not criminal in nature.[76] They were proposed by a hostile Congress, and designed to hamper and contain the

potential abuses of a president whom many northern Republicans could only regard as a rogue, at best; or as actually or potentially a traitor, at worst.[77] In order to close any legal avenues of escape remaining to Johnson, Congress also passed three additional acts relating directly to powers of enforcement of Southern military districts. The president finally was forced to state formally that henceforth he would enforce the law as Congress had written it.[78]

Attempts by Congress to find some impeachable offense committed by Johnson continued in earnest throughout this period.[79] The Radical Republicans contended that the Constitutional phrase warranting impeachment for high crimes and misdemeanors had to be narrowly construed.[80] However, they also maintained that this phrase implied that it was possible to impeach a president for what were in actuality political acts, if these had as their net result the debilitation of the government, and the perversion of the Constitution. According to them, this seemed to be supported historically by those records of impeachment proceedings brought against judges, already existing as precedents.[81]

The House had voted to impeach judges sitting on the federal bench on five separate occasions. In only one instance had the proposed articles of impeachment been limited to narrowly indictable offenses.[82] In general, most jurists of the period seemed to be in agreement that impeachment was essentially a political, and not a narrowly legalistic offense.

> It was intended to deal not with single offenses otherwise indictable under federal statute or common law, but with abuse of power and public trust. On the other hand, it was true that judgments by the Senate in impeachment trials supported the view that the power could be used only against defined, indictable offenses. For in all but one instance--that of Judge Pickering [who had been regarded as demented, in 1804]--nonindictable offense had not led to conviction.[83]

As the debate continued, the original instigator of impeachment proceedings, Representative George S. Boutwell [R-MA], agreed that arraigning Johnson might not be feasible in terms of any single premise or allegation of crime.[84] He nevertheless opted for a charge that would have impeached Johnson for having been of assistance in helping former Confederates to regain political power.[85] Boutwell's arguments were countered by James F. Wilson [R-IA], who asked rhetorically how the House could possibly manage the impeachment of Johnson for some sort of explicit

criminal activity if the committee could not even succeed in setting down some sort of specific charges on paper.[86] Wilson did not think it possible that a case could be made for impeaching Johnson, and forcing a Senate trial, unless some kind of narrow charge could be drafted.[87] This argument convinced the House of Representatives. It rejected the committee's report by a vote of 100 to 57.[88]

Even though Johnson was obviously opposed to Reconstruction, and considered it a mad, infamous revolution, the Radicals were at a loss as how to go about evicting him from office.[89] They hoped to replace him with the President Pro Tempore of the Senate, Benjamin Wade [R-OH], but the record of successful impeachments, resulting in senatorial conviction, was disheartening.[90] The House had voted to impeach in the five aforementioned historical incidents, but the Senate had actually voted to convict a federal judge in only two of them.

Moreover, since no-one had ever used impeachment against a president, there simply were no specific precedents whatsoever.[91] Moderates continued to mount arguments to the effect that political impeachment was valid only if the specific charges brought forward might also be held to apply to a private citizen. The Radicals, on the other hand, repeated their arguments that the

original purpose of impeachment was to punish public officials.[92] Since the committee was dominated by moderates, even after its extensive hearings it still thought it extremely unlikely that Johnson could be forced out unless he committed some provocative act.[93] Unless he did so, the House realized that its attempts to impeach Johnson, even if successful, ultimately would be futile. The Senate was unlikely to convict him on any other grounds.[94]

Although the Republican Moderates were willing to concede that someday the president might have to be removed, for the present his activities in respecting Congressional wishes and appointing the necesssary generals to head the new military districts in the South kept them pacified.[95] For the time being, Johnson seemed to be in one of his occasionally "good" moods, or phases, and the Republican moderates were willing to find evidence in this that he would continue to support congressional policy from that point on.[96] This situation was altered irremediably by Johnson's attempt to replace Stanton with Major General Lorenzo Thomas as Secretary of War while Congress was in recess.[97]

Even Moderate Republicans had to admit that Johnson's actions in removing Stanton clearly had been intended to circumvent Congressional Reconstruction.[98] If it had not been a technical violation of duly enacted laws, then the removal certainly did violate the spirit of Congress in its plans to reconstruct the South.[99] Some formerly cautious Northern editorialists now became outspoken for impeachment.[100] Formerly, they had been conciliatory, and had favored the political tactic of preserving Johnson in office, lest he achieve his desired political martyrdom.[101] While this shift in public opinion was taking place, a dramatic change in voting pattern occurred on the House Judiciary Committee.[102] The change of a single Moderate Republican's vote enabled the committee to recommend impeachment by a five to four margin. Its grounds were essentially usurpation of power.[103]

To some observers, Johnson seemed to be moving toward something resembling a modern <u>coup d'etat,</u> firmly backed by the military.[104] Stanton promptly (and literally) barricaded himself in his office, and Republican Congressmen of whatever ideological orientation urged him to stay there.[105]

General Lorenzo Thomas had celebrated his "promotion" at a Washington's Birthday Ball in Washington. The next morning, severely hung over, General Thomas strode up to the office of the Secretary of War and informed Stanton that he was there to replace him.[106] Only then did Thomas discover that he had no keys, and the following episodes resembled something out of the Keystone Kops of a later era. Thomas didn't know what to do, and (as some accounts, at least, put it somewhat charitably) retired in some confusion, to confer with the president.[107]

Upon receiving this new evidence of Johnson's overt intention to challenge Congress on the constitutionality of the Tenure of Office Act, the Moderate Republicans quickly did an about-face.[108] As a consequence, on February 24, 1868, the House impeached Johnson on a strict party line vote of 126 to 47.[109] This was done in a mood of undeniable vindictiveness, coupled with something like simple relief. The House Judiciary Committee had produced its charges quickly this time. The articles of impeachment that it adopted were regarded as substantial points that would hold up in a Senate trial, under the color of constitutional law.[110] Radicals such as Thaddeus Stevens [R-PA], Benjamin Butler [R-MA], George Boutwell [R-MA], and John Logan [R-IL] all had a hand in drafting them.[111]

> In the manner of a grand jury indictment, the charges contained eleven counts framed in prolix legal language designed to cover every conceivable 'high crime or misdemeanor' allegedly committed by the President. The first eight counts dealt in one way or another with his attempt to remove Stanton and to appoint a successor without the Senate's consent. The ninth article charged Johnson with trying to persuade the army commander in the District of Columbia to violate the Command of the Army Act by accepting orders directly from the President. The tenth article, written by Butler, accused the President of trying to 'excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted.' The final 'omnibus' article in effect drew together all the charges in the previous ten.[112]

Seven so-called "managers" were appointed to serve the function of prosecuting attorneys, in the usual manner.[113] This is the customary procedure in a Senate trial for impeachment.[114] George Norris [R-NE], for example, once served as one of these managers in the case of an impeachment trial of a sitting judge, in the Twentieth Century.[115] These managers included the Republican Radicals Stevens, Boutwell, Butler and Logan, all of whom were much criticized, then and later, for their general ineptitude in presenting their case.[116]

It was the House managers' duty to prosecute the articles during the Senate trial. As his defense counsels, Johnson had the advantage of enlisting some of America's most prominent attorneys.[117] These included Henry

Stanbery, who had resigned his position as Attorney General to represent Johnson. Another of Johnson's legal defenders was William M. Evarts, who later served as Secretary of State. A former Justice of the Supreme Court, Benjamin R. Curtis, who had written the pivotal dissenting opinion in Dred Scott, added to the collective juristic and legal reputation of this group of men.[118] By all accounts they were much more experienced and knowledgable in the courtroom than Johnson's Radical Republican Congressional antagonists.[119]

In retrospect, a modern student can perceive that the trial's outcome was predetermined by a crucial series of decisions made before it had even begun.[120] For example, the philosophical and legal issue of what kind of entity the Senate formed when it was sitting in judgment was crucial to the trial's outcome.[121] Were the President to be tried by what was considered to be primarily a political entity, then the Senate would be empowered to hear evidence. But it might also convict upon the determination of a purely political offense. If the Senate was regarded as a legal entity, then the same rules of evidence that applied in a court of law would have to be adhered to, and the Senate could only convict on the basis of a clearly proven legal offense that, at least in theory, was applicable to any other United States citizen.[122]

Neither unnaturally nor unexpectedly, counsel for President Johnson preferred this stricter interpretation. It sought to persuade the Senators that their proceedings must follow common law terminology in their interpretation of impeachment. Johnson's attorneys argued that, according to the Constitution, the Senate was literally to try the case. That is, it would have to make a conviction and then enter a judgment. This argument further held that if the Senate were not to be considered in the sense of a court, but merely as what one might think of as a kind of moot court, or even as a debating society, then

> . . . the whole constitutional relationship between executive and congress would be threatened. . . . Were the president removable merely because he was politically unacceptable to congress, executive independence would be destroyed and parliamentary ascendancy would replace the American presidential system.[123]

Regardless of whether or not they were constitutionally and historically sound, these arguments did at least have the effect of putting Johnson's most obvious line of defense on much firmer ground. To counter them, the managers opted for a different interpretation altogether. They agreed that the nature of the offense itself seemed to suggest that the Senate was to be considered more than a court.[124]

These managers, inadvertently finding themselves having to function as the prosecution, argued that not only common law offenses were impeachable. Improper motive might also be considered impeachable, as well as activities that were undeniably against the public interest.[125] The larger question of who or what entity was to decide what constituted the public interest in this affair was skirted by both sides in the contest. Rhetorically, the managers asked how, if this was not held to be permissible under the Constitution, an incompetent officeholder ever could be removed from office?[126] They cited the impeachment of Judge Pickering as a precedent for such an interpretation in the case of executive officials, as well as justicial ones.[127]

The arguments of Johnson's attorneys proved decisive.[128] In effect, upon this adoption of groundrules for the trial itself, Johnson was saved. The final votes obviously might still be close, but Johnson now would be tried within a process that encouraged discussion of technical problems connected with the constitutionality of the Tenure of Office Act. Henceforth, Johnson's defenders would be able to fight more on legal and constitutional ground of their own choosing.

Once these mechanical and procedural details had been settled, and the articles of impeachment had been entered, Johnson's defense played variations on its theme that the Tenure of Office Act was unconstitutional.[129] In support of their arguments, Johnson's attorneys cited the precedent of Andrew Jackson's dismissal of Secretary of the Treasury William John Duane during his administration.[130] Jackson's action, they argued, had prefigured what was to become the general practice of eight years.[131] Throughout, Johnson's defense counsel consistently contended that the power to remove his own appointees from office remained entirely the prerogative of the chief executive. It had little or nothing to do, they contended, with appointments.[132]

In response, the managers countered with one of their strongest arguments. They held that the Tenure of Office Act was, in fact, an interpretation of the meaning of the Constitution.[133] The very fact of its passage had settled the issue of Constitutional interpretation, historically the source of so much argument.[134] This was the linchpin of the Radical Republican managers' case, since it posed a parliamentary notion of control of the Chief Executive, grafted onto the traditional tripartite theory of American governance as a whole. "[The managers'

argument] was tantamount to the assertion that Congress possessed a final right of Constitutional interpretation even with regard to issues apparently settled by long-established practice."[135]

Johnson's defense counsel also argued that by having deliberately sought a test case, to see if the Tenure of Office Act was in fact constitutional, he had not thereby subverted the law.[136] Again and again they reiterated the fact that Johnson simply wanted to see if it was or was not strictly constitutional.[137] In this respect, his attorneys argued, the act of having eliminated Secretary of War Stanton, and then having appointed Thomas in Stanton's place, could by no means be interpreted to have constituted a misdemeanor offense. To the contrary, it was all part and parcel of the President's attempt to force a judicial determination, not in itself a criminal act.

In reply, the House managers produced a strong argument. They contended that the President was not above, or immune from, taking responsibility for his actions.[138] He was entirely culpable at law, even as any citizen was liable at law for his own crimes and misdemeanors. If Johnson's violation of the Tenure of Office Act had been intentional, even assuming the best of motives

on the president's part, then he must still bear the consequences of such a violation.[139] The Senate, where Johnson was being tried, was the appropriate tribunal to make a decision on the constitutionality of the act in question.[140]

It is difficult to avoid perceiving a certain kind of circular reasoning, here. Even so, this point of the House managers seems to have been valid. "If the Senate decided that the Tenure of Office Act was constitutional then Johnson had committed a misdemeanor and must be punished regardless of intent."[141]

The trial ended on May 6, 1868, and the Senate cast its first ballots on May 16.[142] After having first determined the exact phraseology of the question to be put by Chief Justice Chase, before each Senator was asked to give his roll call response, the Republican majority decided that Chase should first request a vote on Article Eleven.[143] Since this article recapitulated all of the other charges contained in the articles as a whole, the decision to bring Article Eleven to a vote was in itself a political decision. Not unreasonably, the Radicals believed that doing so would offer them the most expedient strategy for a successful prosecution. Only one of the several articles had to achieve the necessary two-thirds

majority in order for Johnson to stand convicted. It was not necessary to convict him of them all; nor would it have been in the much later case of Nixon, had he been impeached and tried.[144]

There is little reason for us to hold our breaths at this point, since the Senate's verdict is a fact of American history that any undergraduate student encounters in his or her first or second course on the subject.[145] Its final vote was 35 guilty and 19 not guilty, just one vote short of the two-thirds majority needed.[146] The Senate immediately adjourned, with the Radical Republicans in complete consternation.[147] When it had reconvened, the Senate voted on Articles Two and Three. The vote was identical. At this point, the Senate realized that it was pointless to continue, and proceeded to adjourn sine die.[148] The crucial votes had been cast, in every instance, by these seven Moderate Republican senators: William Pitt Fessenden [R-ME], James W. Grimes [R-IA], John B. Henderson,[R-MO], Lyman Trumbull [R-IL], Peter G. Van Winkle [R-W.VA], Joseph S. Fowler [R-TN], and Edmund G. Ross [R-KS]. With the exception of these men, in each case the voting had proceeded strictly along party lines.[149]

For his part, Johnson had conducted himself with unusual dignity, especially in view of some of the escapades in his past when he had said and done things leading observers to ask, by no means rhetorically, whether the President was intoxicated, or merely insane.[150] Throughout his trial, Johnson himself never appeared in the Senate. Instead, he always functioned through intermediaries, never dealing in person even with the most moderate Republicans at one remove. Whether intended or not, Johnson's distancing of himself from the Senate had the effect of not helping to further inflame it against him.[151] After his eventual reprieve, moreover, the shaken President fulfilled his promises to Congress that he would enforce the Reconstruction Acts. He also appointed General John M. Schofield, of the Virginia Military District, as Secretary of War, succeeding Stanton.[152] In itself, this appointment had the presumably desired effect of reconciling most of the contentious Congressional factions.

Immediately after the House's impeachment, Republican state conventions had quickly and formally endorsed this action, obviously trying to extract from it all the political capital they could. But now, after the Senate's failure to convict, rumors circulated that bribes had been given to those moderate Republicans who had seemed

most likely to support Johnson. In this new climate of temporary intraparty animosity, rumors quickly circulated of conspiracies and backroom doubledealing of many kinds.

Johnson's trial in the Senate had begun on March 30, 1868, and continued for a full eleven weeks. Although he had requested more time to prepare his case, the preparations of previous defendants in earlier impeachment trials were used as a guide. Johnson's treatment therefore was comparable to their own.[153] In any event, the extended duration of these proceedings served to work in the President's favor, as also seems to have been true in earlier impeachments.[154]

When Richard Nixon found himself facing the prospect of impeachment, this same kind of stalling tactic was a conscious part of his own strategy.[155] Admittedly, this was before the onset of an actual impeachment and trial. For Johnson, his aloofness not only helped to cool Congressional tempers, but it had the additional positive effect of subduing hostile public opinion.[156] Elements of great drama had abounded during the course of the trial, reaching its zenith on May 16, 1868, when

> . . . [The Senate] finally voted on the eleventh article of impeachment (the omnibus article). . . . Not until West Virginia's Republican Senator Peter G. Van Winkle, near the end of the alphabet [on the

> roll call vote], voted nay did it become clear that Johnson was acquitted. The vote was 35 to 19; the nay votes of seven Republicans and twelve Democrats had caused the total for conviction to fall one vote short of the necessary two-thirds. Identical votes on articles 2 and 3 on May 26 came as an anticlimax. The impeachment managers conceded defeat. Although the seven 'recusant' Republicans endured bitter denunciations for a time, the impeachment passions soon died down as the party closed ranks for the presidential election. Johnson remained on his good behavior for the rest of his term. . . . reconstruction in the South proceeded without further presidential hindrance. A crisis that had shaken the constitutional system to its foundations ended without fundamentally altering the system.[157] [Emphasis added.]

This last account, although one usually encounters some reasonable facsimile of it in most survey accounts of the Reconstruction period, is incomplete. It ignores the fact that Johnson's behavior was not universally regarded as good, in spite of the fact that, somewhat like John Brown during his own trial and execution, Andrew Johnson's finest and most dignified and gracious hours perhaps came at the time of his greatest personal and legal crisis. In addition, other Congressional articles of impeachment were prepared at a later date. As a practical matter, however, their supporters could never generate enough interest in them to see them successfully past the hurdle of the House Judiciary Committee.[158]

In August, 1867, Johnson had removed Stanton, and appointed General Ulysses S. Grant to what Johnson had argued, and perhaps honestly believed, was the vacant cabinet post of Secretary of War.[159] However, this change was made while the Senate was not in session.[160] It did seem that President Johnson could make the legitimate claim that because of the special circumstances involved, since Stanton was Abraham Lincoln's appointee, and not his own, there had been no defiance of Congress's Tenure of Office Act.[161]

In accordance with the provisions of that act, however, Johnson did present a list of reasons to the Senate, stressing his contention that Stanton was not covered by it. The Senate refused to accept Johnson's reasoning, however, and in December of 1867, when the Senate would not confirm his appointment, General Grant resigned the position and Stanton retook his office.[162]

At this point, an irate and thoroughly vexed Andrew Johnson decided to force the constitutional issue.[163] In February of 1868, he notified Stanton that he was being removed, and appointed the infamous Gen. Lorenzo Thomas to be Stanton's successor. Since the Senate was now in session, as it had not been on that first occasion when Johnson had appointed Grant, Johnson now seemed to be in

complete violation of both the spirit and the letter of the Tenure of Office Act. It was on the strength of this perceived crime that, on February 24, 1868, the House of Representatives was quick to vote the impeachment of Johnson by a vote of 128 to 47. On March 2 and March 3, 1868, eleven articles of impeachment were agreed upon.[164]

The first three related to deliberate violations of the Tenure of Office Act, since Johnson had removed Stanton and unilaterally replaced him with Thomas. The fourth to eighth articles of impeachment accused Johnson of conspiring with Thomas to violate the law. This had been made punishable by a separate statute passed on July 31, 1861. The ninth article was aimed at Johnson's purported subversion of a provision in the Army Appropriation Act of 1867. That act had forced the chief executive to issue all his orders only through the General of the Army, Ulysses S. Grant.

The tenth article was broader and vaguer. In some ways, it was a sop for the Radical Republicans. The article contained more political overtones, and represented a kind of catch-all for the many imputed political crimes of Andrew Johnson. Specifically, it related to what were described as Johnson's attempts to bring Congress into ridicule; and to stir up hatred and contempt against it;

and, in general, to denigrate or "bring reproach upon" the Congress. The eleventh and final article summarized the other articles, charging Johnson with having acted to interfere with the enforcement of the three congressional Reconstruction Acts in the deep South, specifically that of March 2, 1867.[165]

In retrospect, the impeachment and trial of Andrew Johnson was essentially a political event, not a legal one, nor a criminal proceeding.[166] Although the authors of the eleven articles of impeachment brought against Andrew Johnson tried to include some hint of criminal culpability on his part, the President's actions did not seem to be truly worthy of criminal prosecution. It seems that this was true even in the opinions of those Radical Republicans who had framed them.[167]

> The pertinent questions about impeachment are whether the political considerations involved are light, transient, and trivial, and whether they obliterate all other considerations and influences. In Johnson's case it seems clear that while political passions ran deep--on both sides of the question--they did not banish a concern for fair procedure. It seems clear, furthermore, that Republicans had genuine reason to object to Johnson's legally correct but nonetheless obstructionist enforcement of the reconstruction acts. It is well to remember also that no model existed to guide lawmakers in exercising the impeachment power; Congress necessarily had to interpret the Constitution as it went along. No one could say what was Constitutionally correct in the impeachment of a president because it had never been done.[168]

The efforts of Radical Republicans in trying to establish that President Johnson and General Lorenzo Thomas were involved in some sort of criminal conspiracy, for example, seem rather ludicrous.[169]

As the next major section of this thesis explains in some detail, the articles of impeachment suggested against President Richard Nixon also partook of this need to dress things up: to make it appear, by means of considerable constitutional windowdressing, or precedental fig leaves, prudentially applied, that Nixon was manifestly guilty of those putative high crimes and misdemeanors that comprised the charges against him. In Nixon's case, overt and obvious criminal liabilities were also involved. In the final hours, even some of Nixon's strongest conservative and moderate Republican defenders on the House Judiciary Committee were forced to admit that Nixon ought to be impeached merely on the basis of criminal charges, alone.

Andrew Johnson's and Richard Nixon's terms did have a great deal in common, but only in ways that are fundamentally superficial. While historical analogies in this regard might be interesting, they are finally not really important in themselves.[170] More seriously, they might well prove to be mischievous, and downright

misleading, if students of impeachment go to the opposite extreme and overemphasize the social and political realities comprising the distinctive milieux of each movement toward impeachment.[171]

For example, it is superficial to compare a Nixon and a Johnson solely on the basis of their having come to office at the end or in the waning periods of two unpopular, divisive, and costly wars. Similarly, it is also misleading to dwell too much on similarities between the sharply contrasting apparent successes in foreign affairs, and the simultaneous domestic policy disasters, enjoyed by both these presidents.

The impeachment of Johnson, like that of Nixon, can only be comprehended historically: solely, that is, in the context of the major policy arguments afflicting each president's term in office. For Johnson, these were primarily concerned with Southern Reconstruction and its immediate aftermath. For Nixon, these included the Vietnamese War, Watergate, and Ping-Pong Diplomacy with the People's Republic of China.

Many constitutional issues of interpretation and authority arose in both administrations, directly and indirectly. These comprise the congruency between each of these two presidents' tenure of office.[172] After having

examined the trial of Johnson and the actions and motivations of his Radical Republical antagonists, we can review recent history leading to Congressional battles with President Nixon. The latter's experience with the threat of impeachment is especially interesting, since it may encapsulate the growth and eventual arrogance of executive power in the post World War II era.

Notes to Part Four, Pages 72 to 95

[72]Smith, pp. 192-193, and passim. Stampp, pp. 100-101, discusses the motivation of Radical Republicans during this period. Refer also to Dunning, p. 267; and to Du Bois, who recites the attitudes of Karl Marx, pp. 353-354.

[73]Craven, pp. 214-215, provides a very different account, extremely unfavorable to Stanton. Refer to Gambill, p. 119, on Grant's opinions; and to Coulter, pp. 118-123.

[74]Dewitt, pp. 180-199, gives an account of the passage of the Tenure of Office Act. Refer to Johannsen, pp. 89-100; Benedict, The Fruits of Victory, pp. 33-35; and to Riddleberger, pp. 248-249, for the mood of Congress going into early 1867. Refer also to Dunning, pp. 253-255. Gambill, p. 88, discusses the Supreme Court's influence during this period, when Congress had sought to lessen the conservative bias of the court by changing its membership from 9 to 7.

[75]McKitrick, pp. 490-491.

[76]Brock, pp. 260-261.

[77]Smith, pp. 176-178; Du Bois, pp. 332-337; and Riddleberger, pp. 4-5, 9-10. This worked two ways. For example, refer to Brock's description of Johnson's own suspicions of Congressional plots against him, pp. 107-108.

[78]Johnson was not without his defenders, however, even after the disgrace of his impeachment. Many of his cabinet members remained loyal to him, notably Secretary of State Seward and Secretary of the Navy Gideon Welles. Despite his two unsuccessful attempts to regain office, in his native Tennessee, shortly after his term had expired, he soon after managed to win a Senate seat. One of his first acts in the Senate was to denounce President Grant. Indeed, a further denunciation of Grant comprised one of Johnson's last public statements of any sort.

This thesis does not deal with Johnson's background in any great detail. He must have possessed a considerable intellect. The President was largely self-taught. While

he had worked as a tailor, his wife had taught him to read. He did not learn to write until he was actually serving in Congress. Seward was a special confidante. Other notables, including the historian George Bancroft, apparently ghostwrote some of his materials: e.g., Johnson's first Message as President, in 1865. But Johnson did have an impressive, conscientious intellect and character. And he was, presumably, seriously concerned about his constitutional duties as he understood them. Congress, according to Johnson and those around him, was comprised of a group of Great Rogues, chiefly under the tutelage of Charles Sumner and Thaddeus Stevens. It is not entirely surprising, therefore, that Johnson saw himself as the literal savior of his nation.

Although kind eulogies are to be expected, upon a man's death, especially when he has served as President of the United States, the tone of many of the speeches and memorial orations that were delivered in Congress, after his death, are more than merely politely laudatory. Refer to the volume called Memorial Addresses on the Life and Character of Andrew Johnson, A Senator from Tennessee, Delivered in the Senate and House of Representatives, January 12, 1876; Published by Order of Congress (Forty-Fourth Congress, First Session, 1876).

Virtually all of these speeches comment on Johnson as a defender of the Constitution. They make predictable comments on the quality of his war record, and his service during the Civil War; eventually, as Vice-President. But the tone is something more than one would expect merely as a representative sampling of eulogies and condolences, considered as a genre.

Johnson bears much closer study than he has heretofore received in American historiography. For example, his rumored alcoholism may have been merely the product of hearsay and groundless ridicule, during a prolonged period of illness. It is difficult to sort out the acrimonious political rhetoric and press coverage of that day, to arrive finally at anything like a balanced assessment of Andrew Johnson's character and abilities and intentions.

The President unfortunately remains, after all these years, a great enigma. One might not be disposed to like him, especially. (In fact, many historians have not been so disposed; even many of those among his defenders.) And one might believe that the somehow quaint and folksy scenario of a rampaging Congress, whose rambunction had obliged Johnson to hogtie it, has been greatly

overemphasized. (Some historians have so believed; again, even some of Johnson's defenders.) But it nevertheless seems sad, and perhaps even scandalous, that Andrew Johnson, in 1988, must still await his definitive and regionally unbiased biographer. This is especially unfortunate, since he figured so prominently in American history during one of its most critical periods.

For one of the best, sanest and most sober accounts, refer to Donald, passim. Refer also to Trefousse, pp. 110-111 and 189-190; Castel, p. 124; Smith, pp. 282-283; Gambill, pp. 81-82; and Dunning, pp. 253-261.

[79]Trefousse, pp. 48-66; and Castel, p. 149. Refer also to Edward McPherson, pp. 187-190, for the Ashley resolution of December 17, 1866; the Loan resolution of January 7, 1867; the Kelso resolution of January 7, 1867; the Ashley resolution of January 7, 1867; the Committee Report of February 28, 1867; the minority report of February 28, 1867; the Ashley resolution of March 7, 1867; and (in the Fortieth Congress) the Clarke resolution of March 29, 1867. Refer to Brant's comments, pp. 122-132, on the acquittal of Missouri Judge Peck in 1830, and the impeachment of Tennessee Judge Humphreys in 1861, producing contradictory precedents that Brant believes were misused by the managers in the impeachment trial of Andrew Johnson.

[80]Smith, p. 224.

[81]Dunning, pp. 279-280.

[82]Brant, pp. 155-177, (writing before Watergate, and the House Judiciary Committee's recommendation to impeach Nixon,) believes that in all of these cases the articles went too far afield. He concludes that impeachment is a "medieval" aspect of American politics. He advises that, on principle, it should cease to be used.

[83]Kelly, p. 351; and Dunning, pp. 278-283. Refer to Brant for discussions of the Pickering Trial, pp. 46-57; and Chase's trial and acquittal, pp. 58-63.

[84]Dunning, p. 259.

[85]Trefousse, pp. 98-114.

[86]Dewitt, pp. 288-314; and Dunning, p. 275.

[87]Castel, pp. 151-154.

[88]Kelly, p. 351. For an account of the makeup of Congress, refer to Stampp, pp. 83-86. Trefousse, pp. 139-140, produces a convincing explanation of why Wilson and others eventually became such strong proponents of impeachment. Refer also to Dewitt, pp. 225-231; Craven, pp. 211-214; and Patrick, pp. 122-124. Castel, p. 154, has 108 to 57: 66 Republicans in the affirmative and 42 Democrats in the negative. Some accounts have 100. Dunning, p. 260, suffers from a bad typographical error. He has "one hundred and eighty [sic] to fifty-seven."

[89]Smith, pp. 205-207.

[90]Craven, pp. 211-214; Patrick, p. 126; Benedict, Impeachment and Trial, p. 72; and Dewitt, pp. 225-231.

[91]Patrick, p. 126; and Dunning, pp. 277-281; refer to p. 280, in particular, for a slightly different interpretation.

[92]Difficulties in precisely identifying the principal actors during Reconstruction have been mentioned elsewhere in this thesis. However, it is important to have some frame of reference, however tentative, in dealing with the composition of both the House and Senate, during this era; and during the trial, itself. Refer to Donald, passim, for a straightforward method of determining who was what, throughout the period. Donald used voting analyses, in an attempt to sort out the main characters. His study indicated how difficult it is to probe beneath the commonly accepted (and generally, misleading) textbook stereotypes of so-called "Radicals," "Moderates," and "Conservatives" during Reconstruction.

For a recent, detailed study, replete with tables, charts and diagrams that takes Donald's pioneering study several steps farther, refer to Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869, pp. 27-33, 362-375, and passim (especially Appendix VII). Benedict attempts a provisional summary on pp. 26-27:

"Such analysis discloses that radical-conservative lines were fluid during the Thirty-eighth, Thirty-ninth, and Fortieth Congresses. Not only did congressmen frequently display different attitudes in different sessions, but groups were not completely distinct in any given session, with numerous representatives and senators falling between one faction and another. Major shifts in alignment occurred between the first and second sessions of

the Thirty-eighth Congress, when war issues gave way to those of peace and Reconstruction; between the second session of the Thirty-ninth Congress and the first session of the Fortieth, as questions of restoration gave way to those of impeachment and legislative-executive relations (in the Senate this shift occurred between the first and second sessions of the Thirty-ninth Congress); and between the second and third sessions of the Fortieth Congress, when--with most states restored to normal relations with the Union--congressmen began to consider the problem of permanent national government protection for citizens of fully equal states.

"Despite this chaotic inconsistency (and despite the fact that fewer congressmen were reelected in the 1860s than in later years), it is possible to compile a list of men who voted consistently as radicals, centrists, and conservatives during at least two Congresses from 1863-1869--the core of each group throughout these years. Significantly, the list includes most of the recognized leaders of each group, men like Stevens, Ashley, Dawes, Butler, Bingham, Blaine, and Schenck in the House, and Sumner, Wade, Chandler, Fessenden, Trumbull, and Sherman in the Senate. They were the magnets to whom the floating material in each house was attracted, stronger in one session than another, but always there, beacons in a sea of shifting allegiances. [Emphasis added.]

". . . the radical Republicans did not dominate Congress during the Reconstruction era. More Republican Senators scaled consistently conservative than radical, while in the House, where radicalism was stronger, consistent nonradicals (conservatives and centrists) still outnumbered radicals. The simplest index of radical strength, the percentage of Republicans voting for radical legislation from 1863 to 1869, reinforces the conclusion . . . The groups that supported radical legislation never made up 50 per cent of either house of Congress, constituted the majority of the Republicans only half of the time, and never controlled an overwhelming majority of the Republican votes." [Emphasis added.]

* * *

Benedict's analysis of voting patterns, pp. 27-33, 362-375, and passim, produced the following results for a description of **Republican** voting factions in the **House of Representatives,** Thirty-eighth to Fortieth Congresses:

"**CONSISTENT RADICALS:** Samuel M. Arnell, Tennessee; James M. Ashley, Ohio; Portus Baxter, Vermont; George S. Boutwell, Massachusetts; Henry P. H. Bromwell, Illinois; John M. Broomall, Pennsylvania; Benjamin F. Butler,

Massachusetts; Henry L. Cake, Pennsylvania; Sidney Clarke, Kansas; Amasa Cobb, Wisconsin; John Covode, Pennsylvania; Shelby M. Cullom, Illinois; Jacob H. Ela, New Hampshire; Josiah B. Grinnell, Iowa; Abner C. Harding, Illinois; George W. Julian, Indiana; William D. Kelley, Pennsylvania; William H. Kelsey, New York; John Lynch, Maine; Horace Maynard, Tennessee; Joseph W. McClurg, Missouri; Ulysses Mercur, Pennsylvania; Charles O'Neill, Pennsylvania; Halbert E. Paine, Wisconsin; Robert C. Schenck, Ohio; John P. C. Shanks, Indiana; Ithamar C. Sloan, Wisconsin; Aaron F. Stevens, New Hampshire; Thaddeus Stevens, Pennsylvania; William B. Stokes, Tennessee; Rowland E. Trowbridge, Michigan; Charles Upson, Michigan; Robert T. Van Horn, Missouri; Charles H. Van Wyck, New York; Hamilton Ward, New York; Thomas Williams, Pennsylvania; William Williams, Indiana; Stephen F. Wilson, Pennsylvania. . . .

"**CONSISTENT CENTRISTS:** Oakes Ames, Massachusetts; Nathaniel P. Banks, Massachusetts; James G. Blaine, Maine; John C. Churchill, New York; Reader W. Clarke, Ohio; Ebenezer Dumont, Indiana; Benjamin Eggleston, Ohio; Samuel Hooper, Massachusetts; George F. Miller, Pennsylvania; Burt Van Horn, New York; Martin Welker, Ohio. . . .

"**CONSISTENT CONSERVATIVES:** John A. Bingham, Ohio; Henry T. Blow, Missouri; Ralph Buckland, Ohio; Thomas T. Davis, New York; Henry L. Dawes, Massachusetts; Henry C. Deming, Connecticut; Thomas W. Ferry, Michigan; John A. Griswold, New York; Isaac R. Hawkins, Tennessee; Chester D. Hubbard, West Virginia; John H. Ketcham, New York; Addison H. Laflin, New York; George V. Lawrence, Pennsylvania; James M. Marvin, New York; Charles E. Phelps, Maryland (Johnson Conservative); Luke P. Poland, Vermont; Theodore M. Pomeroy, New York; William H. Randall, Kentucky; Worthington C. Smith, Vermont; Elihu B. Washburne, Illinois; Kellian V. Whaley, West Virginia. . . ."

* * *

Benedict, pp. 27-33 and passim, also applied the same kind of voting analysis to **Republican** members of the **Senate,** from the Thirty-Eight to Fortieth Congresses, and produced an equivalent classificatory scheme:

"**CONSISTENT RADICALS:** Benjamin Gratz Brown, Missouri; Simon Cameron, Pennsylvania; Zachariah Chandler, Michigan; Aaron Cragin, New Hampshire (consistently radical-centrist); Jacob M. Howard, Michigan; James W. Nye, Nevada; Charles Sumner, Massachusetts; John M. Thayer, Nebraska; Benjamin F. Wade, Ohio; Henry Wilson, Massachusetts; Richard Yates, Illinois. . . .

"CONSISTENT CENTRISTS: Justin S. Morrill, Vermont; Lot M. Morrill, Maine; John Sherman, Ohio (leaning towards conservatives); William Sprague, Rhode Island; Thomas W. Tipton, Nebraska. . . .

"CONSISTENT CONSERVATIVES: Henry B. Anthony, Rhode Island; Roscoe Conkling, New York; Henry S. Corbett, Oregon; Edgar Cowan, Pennsylvania (Johnson Conservative); James Dixon, Connecticut (Johnson Conservative); James R. Doolittle, Wisconsin (Johnson Conservative); George F. Edmunds, Vermont; William P. Fessenden, Maine; Ira Harris, New York; John B. Henderson, Missouri; Daniel S. Norton, Minnesota (Johnson Conservative); Lyman Trumbull, Illinois; Peter G. Van Winkle, West Virginia; Waitman T. Willey, West Virginia; George H. Williams, Oregon (leaning towards centrists)."

Refer also to Benedict, pp. 29-30:

"Nor were radicals overrepresented among the congressional Republican elite, that small number in each house who dominated proceedings--who spoke most often, reported bills from committees, managed them through the House or Senate, and served on conference committees to compromise differences with the other branch of the legislature, and whose influence invariably arose directly from their positions as chairmen or senior members of important committees . . . Nearly all of these seventeen most prestigious Republican representatives did support radical legislation in one session or another, but only four can be identified as consistent radicals, while seven clearly emerge as nonradicals."

As Benedict's long study indicates, the perceptions of a "Radical" Congress facing President Johnson might be slighly skewed. Attention to details of voting seems the best, commonsensical way to ascertain whether these individual Republicans were "Radical," "Moderate," [i.e., Benedict's "Centrist,"] or "Conservative." The issue is much too complex to delve into, in this thesis. But it is one of the more interesting and important contemporary excursions into Reconstruction by American historians. In addition to positioning the Republicans mentioned above somewhere on the political spectrum, the writer hopes this extract provides an example of both the methodology and the tentative discoveries of that study in ambivalencies and inconsistencies which is American Reconstruction historiography.

[93]Trefousse, p. 107. Refer to McKitrick, pp. 486-491, for a balanced account of Republican motives and contemporary political reality in the North. Refer also to Dunning, pp. 280-283, for a description of this attitude that eventually won out at the trial itself.

[94]Trefousse, pp. 106-107; and Kutler, in Dewitt, pp. xi-xii.

[95]James McPherson, pp. 525-26; Trefousse, pp. 109 and 139-140; and Brock, pp. 67-83, for a concise treatment of differences within the Republican party, and brief profiles of some leading Radicals who, according to Brock, cannot be lumped together indiscriminately.

[96]McKitrick, p. 493, argues that there was no pacific, compromising intent on Johnson's part, whatsoever. Refer to Dunning, pp. 261-262.

[97]Patrick, pp. 119-122. Craven, pp. 214-215, writes a brief account, unfavorable to the Radicals.

[98]Smith, pp. 224-225; and Dewitt, pp. 345-361.

[99]Castel, pp. 172-173 and 175-176. Refer also to Dunning, p. 270.

[100]Smith, p. 226. Gambill, pp. 107-110, discusses Northern Democratic attitudes.

[101]Smith, p. 207.

[102]Benedict, Impeachment and Trial, p. 73; Patrick, p. 129; and Dewitt, pp. 401-402. Riddleberger, pp. 202-229, gives an account of earlier electoral opinion. Refer to Castel, p. 176.

Refer also to Craven, pp. 215-216:

"On February 24, 1868, the House passed the Covode Resolution 'that Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors in office.' Specific grounds for such action were neither given nor asked for, but the bitter attacks on the President during the debate again showed that punishment for opposition to Congress in reconstruction was the real motive. That was Johnson's crime. Two days later, a committee was appointed to 'exhibit particular articles of impeachment . . . and make good the same.' [Emphasis in the original.]

"Having already voted impeachment without charges, it was now necessary only to frame articles of impeachment in such a way as to attract the most votes. Justice to Johnson was not even considered; any charge that might influence a vote was included or rejected on that basis. An effort was made in some of the articles of impeachment to permit a senator to vote for conviction without personal embarrassment."

Craven observes in a footnote that "The best account of impeachment is still D. M. DeWitt, The Impeachment and Trial of Andrew Johnson (New York, 1903)." Unfortunately, for all its defects, DeWitt's study probably still ranks as the best, most detailed account, even in 1988.

[103]Kelly, p. 352; and Gambill, pp. 107-110.

[104]Trefousse, p. 143; Du Bois, pp. 339-340; and Gambill, p. 114. Refer to William B. Hesseltine, Ulysses S. Grant, Politician (New York: Dodd, Mead & Company, 1935), pp. vii-viii and 85-115, for a detailed discussion of the problematic relations between Johnson, Stanton, Grant, and eventually Lorenzo Thomas; as well as for his balanced appraisal of Grant's own unique place in American history.

[105]Smith, pp. 214-221; Trefousse, pp. 134-136; and Dunning, pp. 261-271.

[106]Dewitt, pp. 343-357, presents a much more attractive image of Lorenzo Thomas than do virtually all other commentators.

[107]Castel, pp. 173-178; and Patrick, p. 124.

[108]Benedict, Impeachment and Trial, pp. 98-113. Refer also to Trefousse, pp. 139-141:

"By ousting Stanton in apparent contravention of the Tenure of Office Act and by appointing a secretary ad interim without the consent of the Senate, Johnson had defied Congress. He had assumed the right to judge the constitutionality of a duly passed law and seemingly denied the power of the Senate to advise and consent to cabinet appointments. . . . All these considerations were closely linked with the Southern question. In the last analysis, it was this problem that was the real cause for the impeachment of Johnson. Many historians have called the attempt to depose the President a radical plot. With the exception of Michael L. Benedict and Harold M. Hyman, who feel Johnson deserved conviction, they have described the proceeding as a senseless effort to humiliate a man stripped of all power, a defense of capitalism against populist anger, or a ploy to change the constitutional system of the United States. But in reality it was something else. A majority of the Republican party had become convinced that Reconstruction could not be completed

successfully as long as Johnson occupied the White House. The Southern problem had become closely identified with the success of the party. It must be solved if the Democrats were to be defeated in 1868. Not merely the radicals, but the moderates had come to this conclusion. And so they voted for impeachment."

[109]Smith, p. 223; Stampp, p. 150; Dewitt, pp. 358-373. Dunning has 128 to 47, p. 270. Refer to Gambill, pp. 114-115; and to Hesseltine, pp. 98-99, and 101-113.

[110]Stampp, p. 150; and Patrick, pp. 124-126.

For a strongly pro-Johnson, pro-Southern point of view, refer to Claude G. Bowers, p. v:

"The Constitution was treated as a doormat on which politicians and army officers wiped their feet after wading in the muck. Never has the Supreme Court been treated with such ineffable contempt, and never has that tribunal so often cringed before the clamor of the mob."

[111]Castel, p. 179; Craven, pp. 215-216; and Dunning, pp. 271-274.

[112]James McPherson, p. 531; Berger, Impeachment, pp. 252-296; Smith, pp. 224-225; Patrick, pp. 124-125; Du Bois, pp. 342-344; and Gambill, p. 115.

[113]Smith, p. 229. Stampp, p. 151, provides a list. Refer to Trefousse, p. 139; and Patrick, p. 127.

[114]Black, p. 9. Gambill, p. 120, records attempts to impugn their integrity by Johnson's counsel, regarding their alleged participation in the "Alta Vela Affair." Hesseltine recites the theory that impeaching Johnson was an anti-Grant measure, designed to make Ben Wade president, as well as the next Republican presidential candidate.

[115]Brant, pp. 9-10, discusses an exception in the case of Gerald Ford's attempt to impeach Justice Douglas. Refer to p. 165 for Brant's remarks on Norris, in the prosecution of Judge Archbald, Circuit Judge of the Commerce Court:

"Congress has never had a member of higher character than Norris--honest, intelligent, liberal, and supremely devoted to the welfare of his country. But he assumed that the Senate as a body possessed his own excellencies, so that his high standards of morality and citizenship added to the ultimate evils resulting from his reasoning."

[116]Benedict, Impeachment and Trial, pp. 113-115; Castel, pp. 179-180; Dewitt, pp. 385-386 and 395-398. Craven, pp. 217-221, gives a concise, bitter description of the trial from the viewpoint of the defense. Refer to Gambill, pp. 118-119.

Refer also to Berger, Impeachment, pp. 270-271:

"Before we enter further into the trial, we should glance at Butler and his fellow Manager, George S. Boutwell, who, with James M. Ashley, are described by McKitrick 'as baleful a trio of buzzards as ever perched in the House. Boutwell had preferred the monstrous charge . . . that Johnson was accessory to the murder of Lincoln.' Butler had 'illustrated an oration on the horrors of presidential reconstruction by waving a bloody shirt which allegedly belonged to an Ohio carpet bagger flogged by Klansmen in Mississippi.' The 'composite personality' of the Managers, said McKitrick, 'was a curious blend of demagogue and rascal,' and as Morison justly states, 'they appealed to every prejudice and passion.' In their zeal to convict they were contemptuous, as we shall see, of constitutional restrictions; indeed, Stevens had allegedly called the Constitution a 'worthless bit of old parchment.' [Emphasis added.]

"But I would concur with Butler, on the basis of the materials earlier set forth in Chapter II, that a common law crime is not prerequisite to impeachment. For present purposes, it suffices to accept his inclusion within impeachable offenses of a 'violation of the Constitution or law.' So impeachment was epitomized by Blackstone and restated by Kent."

[117]Stampp, p. 151; and Patrick, pp. 128-129.

[118]Dewitt, pp. 397-400, discusses the "guano" case of Johnson's former counsel, Judge Black.

[119]Ibid., and passim. Refer to Castel, pp. 180-181.

Refer also to the laudatory remarks of Bowers, p. v.:

"So appalling is the picture of these revolutionary years that even historians have preferred to overlook many essential things. Thus, Andrew Johnson, who fought the bravest battle for constitutional liberty and for the preservations of our institutions ever waged by an Executive, until recently was left in the pillory to which unscrupulous gamblers for power consigned him, because the unvarnished truth that vindicates him makes so many statues

in public squares and parks seem a bit grotesque. That Johnson was maligned by his enemies because he was seeking honestly to carry out the conciliatory and wise policy of Lincoln is now generally understood, but even now few realize how intensely Lincoln was hated by the Radicals at the time of his death."

[120]Dunning, pp. 280-283; and Gambill, pp. 118-119. Refer to Craven, pp. 221-222:

"So [the impeachment attempt] had miserably failed--failed because it deserved to fail, as do all such drives born of passion with no sound national purpose behind them. The most alarming fact about it all was that Congress was only revealing a widespread national attitude. The determination to convict the President at any cost, which began with the assertion that the Senate was not a court bound by any laws, rules, or precedents, had reached a climax in the firm denial of the Senate's right to acquit even before it had heard the evidence or the respondent's case. Moreover, Republican members were threatened with infamy if they acquitted, and one of the managers for the prosecution openly 'dared' them to acquit. Meanwhile, the New York Tribune boldly announced that this was 'altogether a party proceeding--the mere execution of a determination to which the party had already come, and that any senator who refused to carry out this determination would be expelled from the party, and that all talk about the sanctity of their oaths was 'cant.'

"Impeachment had indeed exposed the strange tangle of values and interests that Reconstruction had wrought in the American mind." [Emphasis added.]

[121]Benedict, Impeachment and Trial, pp. 115-122; Patrick, pp. 126-128; and Dunning, pp. 271-303.

[122]Dunning, pp. 281-283.

[123]Kelly, p. 353; Benedict, Impeachment and Trial, p. 122; and Castel, pp. 184-186. Patrick, pp. 128-129, discusses William Evarts's constitutional defense. Refer to Dewitt for his treatment of Benjamin Wade, and the related question of Colorado's admission to the Union (providing two additional votes to convict), pp. 174-179.

For a Marxist perspective, consider Du Bois, p. 344:

"Whether [the senators] were right or wrong, the failure legally to convict Johnson has remained to frustrate responsible government in the United States ever since. But no President since Johnson has attempted indefinitely to rule in defiance of Congress."

For another point of view, see Brant, pp. 131-154, who terms the Johnson trial "Attainder by Impeachment." He excoriates the whole enterprise as having been potentially "the deepest tragedy in American political history," had President Johnson been convicted.

[124]Benedict, Impeachment and Trial, pp. 122-125; and Dunning, pp. 284-286.

[125]Stampp, pp. 151-152.

[126]Patrick, p. 131, discusses the later, similar cases of Myers [1926] and Rathburn [1935] and their eventual contradictory decisions on the scope of the removal power.

[127]Dunning, pp. 286-287. Brant, pp. 46-57, interprets the Pickering trial very differently.

[128]Trefousse, pp. 139-141, contributed a concise analysis of the constitutional implications.

[129]Castel, pp. 182-185, on McCardle; Craven, pp. 218-219; and Dunning, pp. 297-279.

[130]William John Duane accepted Jackson's appointment in May of 1833, and began serving on June 1, 1833. Jackson dismissed him on September 23, 1833. His approximately four months in office came during President Jackson's attempts to eliminate the National Bank. When he refused to transfer funds, while Congress was not in session, Jackson (who seems to have appointed Duane as a pawn or catspaw) dismissed him.

[131]Ben-Veniste, p. 137.

[132]Dunning, pp. 277-299, includes a detailed analysis. Du Bois, p. 334, explores the subject from an anti-Johnsonian viewpoint.

[133]Castel, p. 186; Dunning, pp. 288-290; and Brant, pp. 188-192.

[134]Kelly, pp. 353-54.

[135]Ibid., p. 354. Refer to Patrick, p. 124, citing William Lawrence [R-OH]; Brock, pp. 262-268; Dunning, pp. 277-281 and 290-293; DuBois, pp. 328-338; and Brant, pp. 152-154.

[136]Castel, p. 186. For Chase's apparent agreement on this point, refer to Gambill, pp. 119-120.

[137]Patrick, p. 128.

[138]Dunning, pp. 288-293.

[139]Ibid., pp. 277-278 and 292-293.

[140]Brock, pp. 271-273, interprets the Constitution as a unifying, national symbol, and as the beneficiary instead of the agent of change. Refer to Black for a discussion of the Supreme Court in relation to impeachment, pp. 53-64.

[141]Kelly, p. 354; and Dunning, pp. 290-293.

[142]Dunning, pp. 299-303. Refer to Black, pp. 9-14, for a general discussion.

[143]Gambill includes a good analysis of Chase's position, pp. 117-119.

[144]Castel, pp. 186-187; and Craven, pp. 219-221.

[145]Edward McPherson, pp. 270-271, includes the record of voting on the articles of impeachment in the full House of Representatives. Refer to pp. 271-281 for Johnson's counsel's reply to the charges, and p. 282 for the official record of the trial and the judgment of the Senate. Refer to the Trial of Andrew Johnson, Volumes I-III, for a full record of testimony and a rehearsal of all evidence presented at the trial, as well as a record of debates on such topics as whether Ben Wade should be allowed to participate in the Senate's voting, and so forth. Refer also to Berger, pp. 297-301.

[146]For a good, general account, refer to Benedict, Impeachment and Trial, pp. 168-180; Patrick, pp. 130-132; and to Camejo, p. 108, for an American Marxist perspective.

[147]It is beyond the scope of this thesis to include an account of the Republicans' complicated, mixed and shifting attitudes toward those voting to acquit, as well as explaining the Republican Convention in Chicago that nominated Grant. Hesseltine, pp. 117-122, gives a brief summary. Refer to Gambill, pp. 121-122, for a rehearsal of evidence suggesting that some Democrats [!] might have wished for Johnson's impeachment, as well as the Radical Republicans. Gambill regards the importance of Ben Wade's being next in line for the presidency as having been crucial in determining the voting outcome.

[148]In the meantime, Grant had been nominated as the Republican Party's candidate for president.

[149]Castel, pp. 191-192; and Craven, pp. 220-221, especially the footnote on p. 221. Refer to Hesseltine, pp. 114-115, for Grant's relations with the Radicals, including seeing that contents of Johnson's wastebaskets found their way into the hands of the managers; and for Wade's projected cabinet, as disclosed to Grant, should Johnson be impeached.

[150]Castel, p. 189.

[151]Ibid., pp. 193-194.

[152]Ibid., p. 195. Refer to Hesseltine, pp. 115-117, for Grant's position with regard to the Schofield appointment; and his relations with Ben Butler; as well as Hesseltine's appraisal of Chase's political position both as Chief Justice and as potential presidential candidate. Refer to Gambill, who recounts the Schofield decision as an earlier attempt by Johnson to compromise with the Radicals. Craven, pp. 223-224, gives an even kinder appraisal of Johnson.

Dunning, p. 302, also includes a friendly treatment of Johnson, indicating that he was left in a stronger position than might seem to have been the case. Dunning concludes that "The radicals retired, and the President was left in possession of the field."

[153]Castel, p. 181.

[154]Benedict, Impeachment and Trial, pp. 122-125.

[155]Spear, pp. 192-196.

[156]Castel, p. 181.

[157]James McPherson, p. 533; Smith, pp. 278-281; and Stampp, pp. 153-154.

[158]Castel, pp. 197-201; and Patrick, pp. 131-132. Refer to Dunning, pp. 302-303:

"As a matter of partisan politics, it is now generally conceded that the impeachment was a mistake. In the view of constitutional history, the impeachment must be considered as marking the utmost limit of the sharp reaction which followed the sudden and enormous concentration of power in the executive department during the stress of arms. Since 1868 the progress toward the normal equilibrium of forces has been constant. With the accession of President Grant, in 1869, the most offensive clauses of the Tenure-of-Office Act were repealed. Twenty years later, the whole act, having become practically obsolete, was struck from the statute-book almost without opposition. The single vote by which Andrew Johnson escaped conviction marks the narrow margin by which the Presidential element in our system escaped destruction. It is highly improbable that circumstances so favorable to the removal of a president on political grounds will again arise. For better or for worse, the co-ordinate position of the executive has become a permanent feature of the constitution."

Dunning also says that the vote was actually less in doubt than it seems: other votes were available, although he does not specify those senators who were so inclined. Brant, pp. 196-200, compliments Johnson's counsel, "who saved the country from the disaster of a partisan, prejudiced impeachment."

[159]Smith, p. 201.

[160]Dunning, pp. 263-264.

[161]Patrick, pp. 122-126; and Dunning, pp. 264-267.

[162]McKitrick, pp. 499-504.

[163]Dunning, pp. 267-268, provides an appraisal.

[164]McKitrick, pp. 504-509.

[165]Kelly, pp. 351-52. Refer to James McPherson, pp. 264-270, for a complete text.

[166]Patrick, pp. 119-120.

[167]Dunning, pp. 293-297; and Black, pp. 51-52.

[168]Kelly, p. 355; Benedict, Impeachment and Trial, pp. 126-140; Stanley I. Kutler, in Dewitt, pp. xiii-xiv; and Black, pp. 25-41 and 51-52.

[169]Dunning, pp. 297-299, interprets this somewhat differently. His narrative is relatively devoid of the issues of personality afflicting and beclouding most other accounts of these events.

[170]Smith, pp. 293-294.

[171]Black, pp. 49-52.

[172]Ibid., pp. 51-52.

PART FIVE:

THE ABORTED IMPEACHMENT OF PRESIDENT RICHARD NIXON

After having preoccupied Americans for so long, and having been of supreme political importance, the decline and fall of Richard Nixon in 1974 might at least have been hoped to have engendered a series of stern object lessons, and some procedural guidelines, for the future conduct of both the executive and legislative branches of our government.[173] This has not been the case.[174] The near-impeachment of Nixon was truncated by his own premature withdrawal from office.[175] In its broad outlines, the commonplace, contemporary and by now almost generic account of Nixon's election, downfall and resignation, together with some of the constitutional implications of his administration's conduct, and its sins both of commission and omission usually resembles the following representative commentary.

> President Richard M. Nixon's overwhelming victory in the election of 1972 signified the response of the existing order to the radical protest

movements of the late 1960's. . . . [The Watergate investigations and the subsequent attempt to impeach Richard Nixon were] not merely about the president's involvement in the Watergate break-in, but also about a whole series of executive actions of questionable legality and constitutional propriety dating from the start of the Nixon administration . . . [which] provoked an independent inquiry by the House of Representatives, and when it appeared certain in August 1974 that the House would vote to impeach him, Richard Nixon became the first president in United States history to resign from office.

. . . Ultimately, however, Watergate was a constitutional crisis that transcended politics and personality and threatened to create an unprecedented executive sovereignty within the federal government. Moreover it was rooted not in the character traits of Richard Nixon, important as these were to the outcome of the drama, but in aggrandizements, distortions, and excesses of presidential power dating from the time of Franklin D. Roosevelt.

. . . . . .

After the Supreme Court ruled that the president must surrender [subpoenaed tapes of conversations in the Oval Office], his lawyers reviewed the tape of June 23, 1972. In it Nixon had ordered his staff to use the CIA to abort the Watergate investigation--unequivocal evidence of the crime of obstruction of justice. Facing almost certain impeachment by the House of Representatives and possible conviction in the Senate, Nixon resigned on August 8, 1974. [He prepared the resignation on August 8, but it became effective at noon on August 9, 1974.] . . . Notwithstanding Nixon's usurpations of power and abuse of constitutional trust, it was revulsion against his criminal acts that drove him from office. With respect to constitutional law, therefore, the Watergate scandal will probably be taken as supporting the indictable-offense theory of impeachment.[176]

In the 1968 presidential election, the combined vote for Nixon and Vice-President Hubert Horatio Humphrey was rather stunning. It set records as the largest in American history, 73.2 million. However, the number of those voting in 1968 represented only 61 percent of those eligible, compared to 62 percent in 1964 and 63.8 percent in 1960. The "new" Nixon's supposedly Secret Plan To End The War (that he of course could reveal Only After The Election) had borne fruit with a war-weary public.[177] He received 31.8 million votes, while Humphrey earned 31.3 million and Governor George Wallace garnered 9.9 million. That is, Nixon entered office with only 43.4 percent of the vote. In the electoral college, Nixon won 301, Humphrey 191, and Wallace 46 votes, exclusively from the Deep South. Democrats took control of the Congress. In addition to being a minority president, Nixon had the additional disadvantage of serving without his own party holding a clear majority in either the House or the Senate.[178]

Given the benefit of hindsight, many writers have remarked that many actions of the Nixon administration now seem from the start to have been at best unfair or else rather obnoxious to many segments of American society. When chronicling President Nixon's arrogation to himself of

such administrative and legislative tools as impoundment of funds, and frequent employment of an absolute pocket veto, they find it surprising that he was not the target of much earlier, widespread domestic protest.[179] The first public protest directed at Nixon's domestic actions began in earnest only in 1973. There was a generally liberal cast to the Establishment in Washington, D. C., and Nixon actually profited electorally from the mutual animosity existing between him and the entrenched and generally moderate or liberal bureaucrats of the capital.

The 1972 elections merely reinforced Nixon's attitudes, therefore, since the president had been re-elected by such a large plurality.[180] After the election, the president had cut himself off even more from power elites in Washington.[181] Instead, the Washington bureaucracy and the national press became favorite targets of both Vice-President Spiro Agnew and Nixon. His relations with both of these Washington institutions had never been cordial, and sometimes were hardly polite.[182]

After his landslide victory in 1972, Nixon "cultivated a direct relationship with the people that pointed toward a new conception of executive power. This was the idea of the plebiscitary presidency."[183] Such a concept is not to be found in the early constitutional

debates in America, but it found its defenders nonetheless, due to a gradual increase in power of the federal government. The basic idea of the plebiscitary presidency evolved from interpretations of a new form of relationship believed to have developed between the president and the electorate.[184] In certain ways, it perhaps echoes some of the theory of President John Adams, and the early Federalists, although none of them presumably ever actually talked about it in precisely these terms. Some historians and political scientists have attempted to make their case that

> Jefferson, Jackson, Wilson, Franklin Roosevelt, and other liberal Democratic presidents clearly regarded the president as uniquely qualified to act for the nation. A long line of reformers since the progressive era had argued that there was nothing to fear in a generous exercise of executive power, provided only that it was kept accountable to the people in free elections.[185]

Nixon, of course, made many references to his representative affiliation with, and the devoted support of, the so-called "silent majority." Given the size of the vote he had received over Senator George McGovern [D-SD] in 1972, supporters of the the plebiscitary concept believed that the next logical step for Nixon was to move to a more radical position. In this new scenario, the American

voters' function was to retroactively sanction whatever actions had been taken by Nixon's rather freeform plebiscitary presidency. Nixon supporters could argue that the voters' function was not so much to vote for him and his policies, as to approve them only after the fact. Quite simply, they either would or would not vote for him. These voters either would or would not give him a free hand with American policy at home and abroad.

Such an interpretation of the American executive branch's mandate as giving a president virtual administrative carte blanche, is obviously flawed. It might work in governmental systems possessing electoral mechanisms that allowed for a more direct, participatory, and "responsible" kind of democracy, perhaps with a provision for some form of speedy recall. It might work in Britain, in a parliamentary system.[186] But the American system of tripartite, shared powers under the Constitution, together with fixed electoral terms, simply does not lend itself to this kind of retrospective approval or disavowal of presidential activities, on what generally seem to be de facto and ad hoc bases.

During his 1972 campaign for re-election, Nixon had gradually distanced himself from the Republican National Committee, and instead had depended on his

private, separate campaign organization.[187] The Committee to Re-Elect the President, or CREEP, had been entirely White House directed, and never had any substantial contact with other 1972 Republican candidates running for any office. The only thing that had counted or mattered to CREEP (later CRP) was ensuring a massive Nixon majority, henceforth to be claimed as a mandate for his formulation of policy. In terms of the plebiscitary concept, the importance of such a mandate, or formal signification of approval on the part of the voters, is critical. Apparently, this organizational scheme embodied an eccentric Nixonian blend of independence and insecurity. For example, it seemed to reflect President Nixon's ambivalent relationships with his original California electorate; with President Dwight D. Eisenhower during Nixon's two terms as Vice President; and with the American press throughout the course of Nixon's three campaigns for the presidency.

Notes to Part Five, Pages 113 to 119

[173]Bickel, pp. 30-44.

There is no single, all-encompassing work dealing with the Nixon era. In large part, this is due to the continuing unavailability of many papers and documents. What does exist, concerning Nixon, is a great deal of episodic material. Unfortunately, this literature is often flawed and rendered suspect for a variety of reasons. Much of it was written by individuals with something to defend, or to rationalize, or perhaps simply to hide. Other memoirs, chronologies and accounts were drafted by people whose political predispositions and predilections show immediately. Many of these authors have axes to grind with Nixon And Company. As a result, most of them are not at all bashful about displaying their biases, or loathe to go for the Nixon jugular.

A number of these books deal with various aspects of Richard Nixon's career, and there are of course quite a few biographical studies of marginal utility. Watergate, itself, produced what at times seems to be an almost infinite, entirely open-ended amount of material. The unprecedented extent of press coverage, alone, is staggering. The writer reviewed some twenty books, on the shelves, as well as depending on a number of those cited in the Bibliography appended to this thesis, to set the scene for an investigation of the Watergate context, and the spinning out of Nixon's infamous cover-up.

The best general treatment one encounters is probably that of Theodore H. White, in Breach of Faith: The Fall of Richard Nixon (New York: Atheneum Publishers / Readers Digest Press, 1975). White's treatment depends heavily upon journalistic sources, interviews, press coverage in general, and a healthy dollop of materials from the Library of Congress and the United States Government Printing Office. White's book is readable and informative. The period covered by it ends shortly after Nixon's pardon; with Nixon living the life of a recluse in a rather melancholy state in California, concentrating on writing his memoirs, in anticipation of huge debts, including back taxes owed to the U.S. Government, totaling some $500,000.

This study's description of Nixon's personality and the background events of the late Sixties and early Seventies that formed the national mood during the Watergate period, was very much influenced by Gary Wills,

Nixon Agonistes: The Crisis of the Self-Made Man (Boston: Houghton Mifflin Company, 1969; New York: New American Library [Mentor], 1971, 1979.) The same might be true of Barbara Kellerman, The Political Presidency; Practice of Leadership from Kennedy through Reagan (New York: Oxford University Press, 1984); and Thomas E. Cronin, ed., Presidential Studies Quarterly, Volume XVII, Number 2, Spring, 1987. Bicentennial Issue: The Origins and Invention of the American Presidency, (New York: The Center for the Study of the Presidency, 1987).

Frank Mankiewicz, U.S. v. Richard M. Nixon: The Final Crisis (New York: Quadrangle, 1975), is an excellent, if vindictive, account of the developing Watergate mess. It provides a lot of intimate material about the activities of various participants in the affair that is otherwise missing from any coverage encountered. Mankiewicz is excellent when he discusses the participation of the various investigating committees. He treats the entire story generally like a bit of detective fiction. He is also especially good in describing some of the more graphic and blow-by-blow activities of the White House Special Prosecutor's Office during the "Saturday Night Massacre." Refer also to his earlier work, Perfectly Clear: Nixon from Whittier to Watergate (New York: Quadrangle [New York Times], 1973).

Barry Sussman [special Watergate Editor of the Washington Post], The Great Coverup: Nixon and the Scandal of Watergate (New York: The New American Library, Inc. / Signet, August, 1974) is well worth reading. It is one of the many I Was There accounts that were churned out during that period. The book is fastpaced and extremely good reading. It brings to bear a lot of original source material that otherwise seldom or never appears in most of the Watergate coverage. For example, this study's description of the burglary itself, and the fact that it was an extremely close thing because regular police did not respond, and thereby alert the lookouts across the street, is derived partially from this source. There is, however, an almost "generic" Watergate Story that one taps into, in many of these accounts. What is preserved in the narrative, in this area as in others, constitutes the Main Line, Authorized Standard Version account of many of the factual activities associated with Watergate, and with Richard Nixon's Administration.

The Washington Post Editorial Staff, The Presidential Transcripts (New York: Delacorte Press / Washington Post Co., 1974) is a commercialized version of materials gleaned from the White House Tapes. It largely

duplicates materials in the eventual Rodino Committee's report on the impeachment of Nixon. The transcripts themselves make fascinating reading. But after wading through them, one comes away feeling that one has not learned anything one did not already know; had already heard; or otherwise, nothing that one did not already suspect, or have good reason to believe had transpired in the Oval Office when Nixon was its inhabitant. Donald N. Wood, Mass Media and the Individual (St. Paul, Minnesota: West Publishing Company, 1983), contains some generally laudatory and interesting commentary on press coverage during and immediately following the revelations of Watergate's misdeeds. The image of the press as the fourth branch of government is fully and appreciately developed, here. A good sourcebook for American press coverage during Watergate is Edward W. Knappman and Evan Drossman, editors, Watergate and the White House, 3 Vol. (New York: Facts On File, Inc., 1974). The volume also contains an excellent chronology, and a recapitulation of the events of Nixon's last days in the White House.

Gary Allen, Nixon's Palace Guard (Boston [Belmont, Mass.] and Los Angeles: Western Islands, 1971) is an exceptionally interesting book. It characterizes Nixon as being little short of a Leftist, and his courtiers are seen as virtual Marxists in the White House. Refer also to his The Man Behind the Mask (Boston [Belmont, Mass.] and Los Angeles: Western Islands, 1971).

C. L. Sulzberger, The World and Richard Nixon (New York: Prentice Hall Press, 1987) provides a prime representative example of the current drive to rehabilitate Richard Nixon. Sulzberger dismisses Watergate as "that mess," and tries to sweep it under the rug in a few paragraphs. He professes to be amazed that so many Americans still feel such personal animosity toward Nixon, and concentrates on extolling what he considers to be the very important foreign policy achievements of the Nixon and Kissinger "team."

The sources used in discussing the more detailed, procedural circumstances of the impeachment have already been cited elsewhere, in Part Two of this thesis. In addition, although they are not listed as references in this section, many of the House Reports contained in the Serial Set (about Impoundment, for example; and about the War Powers Act) were consulted; but were not directly used in the commentary. Finally, the writer did not directly use the following material, either; but he undoubtedly was influenced, if only unconsciously, by some of the discussions in Peter Braestrup, ed., (Wilson Center

Conference), Vietnam as History; Ten Years after the Paris Peace Accords (Washington, D.C.: University Press of America, January, 1984).

[174]Clark R. Mollenhoff, Game Plan for Disaster: An Ombudsman's Report on the Nixon Years (New York: W. W. Norton & Company, Inc., 1976, passim, presents many examples of this attitude. For example, he recommends the creation of a government ombudsman as a constant feature of American government, and so forth. Refer also to Leon Jaworski, The Right and the Power: The Prosecution of Watergate (New York: Pocket Books, 1976, 1977), pp. 99-127.

Both Bickel and Peter H. Schuck, director, The Ralph Nader Congress Project, The Judiciary Committee: A Study of the House and Senate Judiciary Committees (New York: Grossman Publishers, 1975), illustrate some of the attempts at drawing conclusions about necessary changes in American government in the wake of Watergate. However, not everyone believed that there were clear object lessons to be gleaned from the experience of Watergate, and the Nixon impeachment proceedings. For example, Aaron Wildavsky, in Bickel, p. 34, says in part: "But I don't think there's anything you can learn from Watergate."

[175]Black, pp. 49-52, discusses the lack of precedents prior to Nixon. Hoffer and Hull, pp. 264-265, present a brief post-Douglas, post-Nixon discussion of the impeachment process.

[176]Kelly, pp. 682-3 and 698. Refer to Black, pp. 41-49, for a more general discussion completed prior to the House Judiciary Committee's recommendation to impeach Nixon.

[177]William Whitworth, Naive Questions about War and Peace (Conversations with Eugene V. Rostow, former Under-Secretary of State for Political Affairs) (New York: W. W. Norton & Company, Inc., 1970), pp. 11-16; and Ralph De Toledano, One Man Alone: Richard Nixon (New York: Funk & Wagnalls, 1969), pp. 333-339, 368 and 372.

[178]This fact, among a host of others, is ignored in the representative Ultra-Right commentary of writers like Gary Allen, who portrayed Nixon as having a socialist agenda going into his first term. De Toledano, pp. 340-375, provides a brief account of Nixon's return to national politics in 1967. For a psychohistorical discussion of Nixon's personal and administrative

character, refer to David Abrahamsen, Nixon vs. Nixon: An Emotional Tragedy (New York: Farrar, Straus and Giroux, 1977), pp. vii-xii and 141-248. On p. ix, Abrahamsen discusses James David Barber's The Presidential Character and Bruce Mazlish's In Search of Nixon, and the issue of psychohistory's strengths and weaknesses as a discipline on pp. x-xi. Refer also to Bruce Mazlish, In Search of Nixon: A Psychohistorical Inquiry (New York: Basic Books, Inc., 1972), pp. v-11 and 159-170, for a general discussion of the psychohistorical approach, with special reference to Nixon.

[179]For a good account of the national mood at the start of Nixon's first term, refer to De Toledano, pp. 360-375. Refer also to Mazlish, pp. 131-140; Bickel, pp. 14, 24-25, and 32-33; and Black, pp. 41-49 and 65-69.

[180]Spear, pp. 186-189.

[181]Ibid., pp. 190-191.

[182]Ibid., pp. 39, 45-46, and passim.

[183]Kelly, p. 690. Refer to Mankiewicz, U.S. v. Richard M. Nixon, for McGovern's response to contemporary Watergate-related activities, pp. 211-218.

[184]Abrahamsen, p. 223.

[185]Kelly, p. 236; and Bickel, pp. 35-36, 39, and 41-43.

[186]But perhaps a plebiscitary executive system would not work, even in a parliamentary system like Britain's. For example, refer to the negative commentary of Bickel, pp. 34-35.

[187]De Toledano discusses what he perceives as an illustration of this tendency in Nixon's earlier California candidacies, pp. 103-104. Refer to Ben-Veniste, pp. 97-100, for a thorough discussion of the organizational structure of CREEP (or CRP).

PART SIX:

WATERGATE AND THE COVERUP

The famous Watergate Break-In occurred on the night of June 17, 1972, when five intruders were caught inside the offices of the Democratic National Committee, located in the Watergate Complex of apartments, shops and office suites in downtown Washington. Equipped with cameras and electronic surveillance units, and with their pockets filled with new one-hundred dollar bills, these men were indirectly connected with the White House.[188] Nixon's intraparty foes in the Rockefeller camp and in the much distrusted Eastern Establishment of his own party perhaps had helped provide the impetus for Nixon's having all but formally separated his own presidential campaign from local Republican campaigns, prior to the 1972 elections. Scholars have taped evidence of Nixon's thought along these lines in snippets and patches of revealing commentary by him, when he was unburdening himself in the Oval Office. In their tone, many of these ruminations

resemble the following quotation, pertaining to Nixon's perceptions of his political enemies: what they might do to him; and what he in turn intended to do to them, with Nixon obviously perceiving this merely as a kind of pre-emptive strike.

> Musing about his enemies, Nixon told the White House hatchet man, Charles Colson, 'One day we'll get them--we'll get them on the ground where we want them. And we'll stick our heels in, step on them hard and twist, right, Chuck?'[189]

At the height of Nixon's campaign for re-election in 1972, White House Counsel John Dean circulated the so-called "Enemies List" within the White House, whose purpose was, in Dean's words, to "use the available Federal machinery to screw our political enemies."[190] Plans to increase mail and electronic surveillance, and to engage in domestic spying of all sorts on a widespread basis, had been put forward earlier in a memo prepared by Nixon operative T. C. Huston, in 1970.

> [The White House in] July, 1970 endorsed and promulgated a memorandum prepared by Tom Huston, a youthful White House staff member, which authorized a comprehensive program for surveillance of those Americans who 'pose a major threat to our internal security.' The memorandum called for the warrantless search of domestic mails, infiltration by government agents into radical student organizations on university campuses, the

> monitoring of all overseas mail, cable, and phone communications by American citizens, and outright burglary of both offices and private homes where surveillance authorities thought it necessary. The president at the same time ordered warrantless wiretaps placed on thirteen members of the National Security Council as well as on several newspapermen. None of this rested on any statutory authority.[191]

Some of the suggested activities outlined in Huston's proposals had disturbed Federal Bureau of Investigation Director J. Edgar Hoover, and the memo was not acted upon.[192]

> The Huston security program was blatantly unconstitutional on its face. Hoover denounced the program as illegal and unacceptable. The president ordered the plan abandoned, but executive-authorized domestic espionage, mail searches, and the like continued. Early in 1971 the president set up an Intelligence Evaluation Committee to coordinate undercover White House espionage activities.[193]

The latter incident may have been a precursor of future Nixon White House events. For example, in 1971, following disclosures of former National Security Council employee Daniel Elsberg, and the subsequent publication of the Pentagon Papers, a unit of so-called "Plumbers" was established in the White House to prevent new leaks. Ironically, many such leaks to the press seem to have been issued for reasons of political strategy by the executive branch, itself.[194]

The Watergate Trial began in January of 1973, presided over by Judge John J. Sirica.[195] It dragged on until February 2, 1973, when Sirica announced that he doubted the complete story had been told, and resolved to continue his own investigation.[196] On February 7, 1973, the Senate established a Select Committee to investigate general charges of corruption and illegal influence and appropriation of funds in the 1972 election. Its Chairman, Senator Sam Ervin [D-NC], began a systematic investigation drawing upon additional sources that had been unavailable to those tapped by other Watergate investigators, official and unofficial. Pre-eminent among the latter were reporters Robert Woodward and Carl Bernstein of the Washington Post, who continued to develop their own White House informants, and eventually came to depend greatly upon a person known only pseudonymically as "Deep Throat."[197] Other sources of information included agents of the FBI who had objected to the White House's hampering of their own investigation of Watergate-related activities.[198]

On March 21, John Dean informed President Nixon that "We have a cancer--within--close to the Presidency, that's growing. It's growing daily. It's compounding."[199] The first tangible piece of evidence for

Watergate investigators came when James McCord deserted the Nixon team.[200] On March 23, 1973, McCord told Judge Sirica, in a sealed letter, that perjury had occurred in the trial held before him.[201] Moreover, some of the defendants had endured political pressure to force them to plead guilty and not testify. The Nixonian coverup began to fall apart quickly from that moment on.

The White House adopted a defensive posture, and resorted to "damage control" and "stonewalling" in order to prevent more secrets of its inner circle from potentially ruinous revelation in courtrooms or Congressional chambers. As part of this attempt to limit damage to highly placed or more intimately involved executive officials, the White House transcripts revealed that Nixon and his advisors were prepared to sacrifice lower echelon functionaries, and even a few highly placed scapegoats, in order to protect themselves.[202] Such candidates for immolation came fast and furiously. The conversations about them in the transcripts of the tapes provide fascinating reading. They convey the sense of each of the speakers wondering when his own turn would come: whether he could really trust any of the others in this increasingly claustrophobic, paranoid political world they all shared. One of the first

candidates for immolation was Jeb Stuart Magruder, former Deputy Director of the Committee to Re-Elect the President, and currently the interim FBI director.

John D. Ehrlichman, Advisor to the President on Domestic Affairs, suggested that they might "let [Magruder] twist slowly, slowly in the wind."[203] Dean later revealed that he believed he himself must have been a candidate for human sacrifice to the Nixonian gods of Watergate. John Mitchell, whom his compatriots referred to as "The Big Enchilada," was another possibility. By April, both Dean and Magruder believed that they were being set up, themselves, and agreed to testify in return for immunity from prosecution. Then, on April 30, Harry Robbins ("Bob") Haldeman, White House Chief of Staff, and Ehrlichman, Nixon's two closest White House advisors, were forced to resign.[204]

On May 17, 1973, Senator Ervin's Senate Select Committee began televised public hearings. During his confirmation hearings as new Attorney General, Elliott Richardson of Massachusetts had agreed to appoint a special prosecutor to review the Watergate case. He assigned this task to his Solicitor General, Archibald Cox of Harvard Law School.[205]

Since its establishment on February 7, 1973, Senator Ervin's Select Committee and Special Prosecutor Archibald Cox seemed almost in competition. John Dean appeared before the Senate Select Committee in June. An accumulating torrent of testimony from Dean and others of "The President's Men" steadily eroded the foundations of Nixon's defenses. These witnesses painted a convincing picture of the President as having done more than merely accede to an already ongoing coverup of White House connections with the Watergate break-in. Instead, they portrayed Nixon as having masterminded the many alternate White House "game plans" that existed, improvised to mislead investigators. The President had participated in creating false trails and setting up road blocks and decoys to frustrate law enforcement officials and Congressional researchers. In brief, he had obstructed justice.[206]

On July 16, Alexander P. Butterfield, an Air Force Colonel and former White House Aide, further embellished these scenarioes of administrative misdeeds and crimes. Butterfield testified that Nixon had ordered the installation of an automatic taping system in the Oval Office, capable of surreptitiously recording conversations and phone calls.[207] A dispute over some of these tape recordings, subpoenaed by the Special Prosecutor, was to have calamitous results for the Administration.[208]

Nixon's dismissal of Archibald Cox and his immediate subordinates in the Special Prosecutor's Office triggered the first massive public outcry for his impeachment.[209] This sequence of events became known as the infamous "Saturday Night Massacre," and was reported with outrage in the public press. Almost overnight a massive public protest began, and within a week's time, the White House had received approximately 500,000 disapproving telegrams.

> Newspapers and magazines called for Nixon's resignation. Impeachment resolutions were introduced in the House of Representatives. Under the explosion of public indignation, Nixon yielded the nine tapes. Leon Jaworski of Texas was named to succeed Cox.[210]

The number of prosecutions of Nixon's aides increased. During the course of the Committee and courtroom investigations, new issues related to Nixon and his conduct of public policy, as well as his private affairs, continued to surface.

For example, a review of Nixon's tax forms for the most recent years revealed that he had paid only $792 in 1970 and $878 in 1971. Moreover, he had illegally backdated claims for deductions based on "donations" of his own vice-presidential papers in order to avoid payments

following a revision of the tax laws.[211] In sum, it seemed that Nixon now owed the government almost $500,000 in back taxes. He also had made extensive, and very expensive improvements on private properties in San Clemente, California, and Key Biscayne, Florida, at public expense. Nixon defended these additions by arguing that they had been insisted upon as part of the Secret Service's attempt to ensure the safety of the President and his immediate family.[212]

Finally, on December 20, 1973, Congressman Peter Rodino's [D-NJ] House Judiciary Committee chose John Doar as its chief counsel and undertook a preliminary investigation regarding legal grounds for the impeachment of Richard Nixon.[213] Almost immediately, the Rodino Committee confronted fundamental constitutional concerns previously not addressed. Unfortunately, it seemed that no precedents applicable to the present situation existed.[214]

According to President James Madison, impeachment was to be utilized in protecting the country against "the incapacity, negligence or perfidy of the Chief Magistrate."[215] Contrasting Madison's broader interpretation, Alexander Hamilton, in The Federalist No. 65 contended that impeachment should be used as a remedy only for

> '. . . those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL.'[216]

For his part, Nixon successfully continued to stone wall, and in a televised address to the nation in November the besieged President protested his innocence bluntly and emphatically, acknowledging that the citizens of the United States had a right to know that their president wasn't a crook.[217] Throughout this early period, before the revelation of the existence of the presidential tapes, the Watergate investigators had been dealing only with onesided accounts of conversations between witnesses and Nixon. Without some means of corroborating their testimony, naturally assumed to be extremely biased, there was no way to penetrate the inner sanctum of the Oval Office and substantiate any charges against Nixon. Once the existence of the tapes had become public knowledge, the search began in earnest for an infamous "Smoking Pistol" that could provide all the evidence needed to tie Nixon directly to the Watergate coverup and make him subject to impeachment.[218]

The situation was similar to that confronting Republican Radicals during the administration of Andrew Johnson. A strong sentiment for impeachment already

existed, and in some quarters had for quite some time. But the House Judiciary Committee could find no single event, deed or issue suitable for using to frame any articles for impeachment.[219] This "Smoking Pistol" metaphor, related to calls for impeachment, is still very much with us in today's political vocabulary. Nixon developed his Executive Privilege arguments, and increasingly came to rely almost exclusively upon them. As a highly competent lawyer, Nixon well knew that without ironclad proof linking him with the Watergate burglary, and obstruction of justice following it, he could escape conviction for any statutory crime.[220]

Nixon's strategy touched upon one of the two most extreme theories of what constitutes an impeachable offense. The differences between these two interpretations became important in future deliberations of the House Judiciary Committee, even as they had during Andrew Johnson's impeachment and trial, albeit in a different and somewhat subsidiary fashion. Andrew Johnson might or might not have been that drunkard, liar, scoundrel, traitor to his party, manic depressive, megalomaniac, paranoiac or hysteric that his Congressional antagonists portrayed him. Modern historians can select from among this sampling of alternatives, or many other ones, and defend any one of

these labels to a certain extent. They have in fact done so, producing accounts of his character so different from each other as to be diametrically opposed. Most of these same historians, however, are in approximate agreement that Andrew Johnson probably did advance bona fide constitutional arguments. The modern historical consensus seems to be that Johnson honestly believed in the importance of his sworn obligation to uphold the Constitution. He was able to express his consciousness of this obligation in ways that gave some credibility to claims that, as chief executive, he was merely defending the constitutional prerogatives of his office.

In stark contrast, President Nixon quite simply did not. When Nixon spoke of executive privilege, for example, he successfully conveyed the impression that he was only trying to save himself.[221] In the light of subsequent revelations throughout the course of the Congressional Watergate investigations, this does not seem to be too extreme a statement.

Nixon's best personal defense was to portray attacks against him as attacks upon the United States.[222] Moreover, he represented these as being essentially treasonous, since they detracted from the success of self-perceived Nixonian foreign policy initiatives

throughout the world, especially in the Mideast and in Southeast Asia.[223] He also interpreted them as attacks on the institution of the presidency, by striving to limit the extent of the executive branch's constitutional powers.

After a series of lengthy hearings extending over several weeks, its counsel, John Doar, finally presented the House Judiciary Committee with a summation of charges against the President. The Committee ultimately approved three articles of impeachment based on them.[224] They charged the President with having obstructed justice in the course of the Watergate coverup. John Dean, in one of his conversations with Nixon, had indicated that he, himself might be vulnerable to such a charge. As finally passed, the Nixonian articles of impeachment also included charges that Nixon had abused the powers of his office, and that he had unconscionably defied the subpoenas of the House Judiciary Committee.[225]

Only the third article met with any significant opposition on the part of many Republican members of the committee. When voting on the first article, six Republicans had aligned themselves with the Democratic majority. And on the second article, seven Republicans voted with the Democrats to recommend adoption. A separate proposed article of impeachment dealing with Nixon's

illegal incursion into Cambodia was not considered.[226] Representative Robert Drinan [D-MA] had introduced this proposed article early on, and some members of the Rodino Committee continued to support it to the very end. Despite the theoretical arguments of some constitutional scholars, and the strength of opinion in favor of it on the part of some Committee members, it survived only as an historical footnote to the final Rodino Committee report.[227]

While the House Judiciary Committee was preparing its final report, the Supreme Court, in United States v. Nixon, ruled that Nixon should submit the subpoenaed tapes.[228] If said tapes contained evidence of criminal activity, the Court had reasoned, then the public interest required that the President must respect the subpoena powers of the courts. The Supreme Court agreed with Nixon's attorneys that the release of these tapes might be potentially damaging to the institution of the presidency. However, the Justices ruled that, in this situation, their concern for the preservation of American political life must override any other considerations.[229]

The Supreme Court ruled against him, in this instance and others, despite the fact that Nixon was presenting his case before his own political appointees to

the bench.[230] Widespread public and Congressional animus to Nixon's well-publicized and dramatic refusal to obey both Congressional and Court orders for his Oval Office tapes had also added another social and political dimension to the Tapes Case.[231]

> Before the Supreme Court's decision in United States v. Nixon, the President's counsel refused to give assurance that Nixon would surrender the Watergate tapes if ordered to do so. Had he in fact refused, the mood of Congress ensured that his impeachment would have quickly ensued.[232]

For long months, the country had watched the White House endure a prolonged period of isolation, introspection and demonstrative agony.[233] This situation was not to be relieved until pivotal Watergate testimony of Nixon, himself, became public knowledge. It occurred during Nixon's tape recorded conversation with Haldeman on June 20, 1972. The President had been in Florida over the weekend of the break-in, and Dean had been in California. Nixon said that upon hearing news of the break-in, he had thrown an ashtray across the room in anger. But the context of his tape recorded remarks made it clear that it was only the level of stupidity involved in having first ordered this operation and then having bungled it, that had so infuriated the President.

Listening to his conversation with Haldeman made it obvious that Nixon from the very start had joined in planning the steadily more elaborate coverup of White House involvement in the Watergate affair. He obviously had not been the innocent bystander he had portrayed himself as being to the American public. Far from having been victimized by the self-described bizarre series of events grouped under the general heading of Watergate, Nixon had helped orchestrate them. To anyone who read excerpts from his Oval Office tapes, it was obvious that Nixon had been involved in the obstruction of justice from the onset of his return to Washington after the weekend arrests.[234]

Sympathetic and obfuscatory commentary like that of Permanent Chief of White House Staff Alexander Haig (replacing H. R. Haldeman) to the effect that the eighteen-and-a-half minute gap discovered on another crucial tape was unfortunate for Nixon, since it forbade his proving his innocence, increasingly seemed even more ridiculous.[235] After the revelations of this transcript became public knowledge, Republicans on the House Judiciary Committee immediately switched their votes and supported his impeachment. According to Senator Barry Goldwater [R-AZ], only some fifteen negative votes might be counted on in the Senate, should Nixon eventually be put on trial.

George Bush, in his capacity as Chairman of the Republican National Committee, urged Nixon to resign. With Vice-President Spiro Agnew's resignation, after having first requested his own impeachment as part of a stalling tactic in his attempt to withstand charges of bribery and tax evasion, there was no longer any reason not to impeach Nixon.[236]

Many Democrats who might have been reluctant to vote to impeach Nixon if doing so meant putting Vice-President Agnew into office in his stead, no longer had to entertain any such reservations. The parallels with Republican Moderates who had opposed the impeachment of Andrew Johnson if it meant putting Benjamin Wade into office are obvious. Gerald Ford as Vice-President was a much more congenial choice. The philosophical case in support of Nixon's impeachment was also strengthened by Ford's accession to office, since it might help substantiate a purely political interpretation of impeachment. In his own earlier attempt to impeach Supreme Court Justice William O. Douglas, then House Minority Leader Gerald Ford [R-MI] had argued that an impeachable offense was whatever the majority of the House of Representatives thought it was, requiring no evidence whatsoever of criminal wrongdoing.[237]

Within four days of the release of these taped revelations, on August 8, Nixon prepared to resign his office, effective at noon the next day.[238] On August 9, 1974, Nixon left the White House. His resignation was unprecedented in American history. Agnew's earlier resignation had been only the second of a vice-president. The first had occurred when John C. Calhoun resigned, under entirely different circumstances, and not at all in disgrace, to return to his home state of South Carolina after extreme political and constitutional differences with President Andrew Jackson had made it impossible for him to serve out his term.

While it spared the nation more political and social trauma, in terms of an inevitable, protracted trial in the Senate, Nixon's resignation presented additional difficulties for jurists and historians alike. No way existed of deciding whether Nixon's personal guilt had been objectively determined. A vote of the House Judiciary Committee to recommend his impeachment obviously was not quite the same thing as actual impeachment. Nor was it enough to satiate an increasing judicial and historical thirst for the Nixon Administration's rather constitutionally anemic blood. More seriously, Nixon's resignation, coming as it did only in the very teeth of

virtually certain impeachment and probable senatorial removal from his office, left the issue of what constituted an impeachable presidential offense still very much in doubt.

Some of the charges brought against Nixon had been overtly criminal in nature. Others, those producing voting basically along party lines in the Committee, tended to be broader in scope, and might be considered more generally political. The most serious charges were those involving obstruction of justice. In the domestic climate of demands for law and order that Nixon's own administration had used rhetorically to catapult itself into power, this had proved the deciding factor in the final shift of votes among Republicans on the House Judiciary Committee. Obstruction of justice was, of course, a very serious criminal offense.[239]

At the time of Nixon's resignation, over forty members of his administration either already were or soon would become defendants in criminal prosecutions.[240] Most notably these included former Vice-President Agnew and former Attorney General John Mitchell. In addition, those who were eventually tried included another cabinet member; more than ten members of the President's staff; and some fifteen others from the executive branch. Eventually, all

of these men either pleaded guilty or else were tried and convicted. In addition, after concurrent Congressional investigations of illegal campaign practices, some twenty chief executive officers of major American Fortune 500 corporations were convicted of having supported Nixon with illegal donations to his campaign's war chest.

In the midst of this litigation and palpable evidence of widespread corruption in American corporate and political life, public reaction split dramatically.[241] Some people expressed initial relief at Nixon's resignation and were quick to demonstrate the traditional American virtue of not holding grudges. They were simply relieved that it was all over. The long process of wasted time, energy and money involved in the Watergate investigations had at last come to an end. Some of these same people were jubilant in their belief that Nixon's resignation demonstrated that the American system of government still worked. It had succeeded in throwing out most of the rascals, and had engaged in a wholesale cleansing of unscrupulous business leaders.[242]

In sharp contrast, other Americans strongly protested this conclusion drawn from evidence available and wellknown to the American public.[243] Those holding such reservations suggested that if a combination of fortuitous

circumstances had not obtained from start to finish during the Watergate period, Nixon never would have been put in the position of being forced to resign. This argument usually proceeds along some variation of the following.[244]

If Nixon had disposed of the tapes there would have been no way of convicting him for any criminal offense, regardless of what kind of political case might have been made in the Senate for his impeachment.[245] If the night watchman at the Watergate Complex had not chanced to come along just when he did; and if the usual, uniformed District police force had been assigned to patrol the Watergate, then the burglars could not have been caught redhanded in the Democratic National Committee offices. The CREEP lookout stationed across the street from the Watergate Complex would have observed police cars responding with their sirens blaring and lights flashing, instead of the offduty plainclothesmen in their unmarked car who had chanced to investigate after the watchman's alert.

Furthermore, this argument continues, if Judge John Sirica had not continued the case in his court, only on a hunch that the truth was not being discovered; and if a paper of the ideological and political disposition of the Washington Post had not existed in Washington, at that

time; and If This and If That, then not only might Nixon and Company have survived the Watergate crisis, but it might never have existed. American history might have turned out very differently in domestic politics and international relations.

Impeachment, providing one way out in such cases, cumbersome and ineffective and expensive as it necessarily is, still seems vital as a supplement to a deceptively much simpler and straightforward replacement by the ballot box in many cases involving the clear commission of a public wrong on the part of a president of the United States.[246] One of the greatest advantages in having a tripartite system of government, including a formalized system of checks and balances, is that for the most banal and most human of reasons, it does seem unlikely that all three departments of government could ever become simultaneously corrupted.[247]

Although it still did not call into question President Ford's reputation for candor and honesty, the sense of security that the American populace had been lulled into during its honeymoon interlude with the new president was rudely disrupted only a month after he had taken office. On September 8, 1974, Ford granted Nixon a full pardon for whatever crimes he might have committed

while serving in the White House.[248] Under virtually anyone's interpretation of the American Federal Constitution, it is impossible for an impeached official to get a presidential pardon. However, a resigned president of course could receive such a presidential pardon. Also, while the exact legal status of a resigned president is still entirely open to question, it seems entirely possible to try him in either criminal or civil court for whatever crimes he might have committed while in office.[249]

In the case of impeachment, the Constitution explicitly states that after the impeachment process has been concluded, whose sole punitive gesture is removal from office and nothing more, the offending individual might still be liable to any criminal prosecution of whatever sort. The essential point here is that an intelligent lawyer like Richard Nixon presumably knew full well exactly what he was doing, throughout the last weeks before his resignation. By resigning, Nixon had managed to spare himself any threat of subsequent prosecution that would still have existed had he been impeached, tried, and convicted. Under the Constitution, an impeached president, or any other impeached federal official, is the only type of criminal who cannot be pardoned by the chief executive.

In fairness to Ford, he rationalized his stunning action on the basis of desiring to assist the nation in healing its political wounds, and in preventing any additional divisive effects involving a trial of Richard Nixon. The future prospects of the Republican Party undoubtedly also entered into Ford's decision to pardon Richard Nixon. Whatever his intentions, Ford's actions had the opposite effect.

After he had chosen former New York Governor Nelson Rockefeller as his Vice-President, one of the most outstanding representatives of Nixon's own feared and much maligned Eastern Establishment within his own party, the public response to President Ford's pardon of Nixon was to comprehend it as a blatant betrayal of elemental justice. While so many of Nixon's subordinates and counselors, as well as the lowly Cuban refugees who had burgled Watergate, were all tried and convicted for their crimes, and in general served comparatively harsh sentences; and while Richard Nixon had left in his wake a palpable and obvious hodgepodge of betrayed confidences, trusts, and oaths, President Nixon himself escaped any punishment whatsoever.[250]

Moreover, at the time of his resignation, Nixon had never displayed so much as the slightest hint of remorse. Nor, to the best of my knowledge, has he ever

done so since, either in his published writings or in any interviews granted since that have touched even remotely on the subject of Watergate or his own resignation from office.

Many political commentators, both in and out of government service, attacked the Nixon pardon on the simplest level, asserting that it illustrated a perceived double standard of American justice. They argued that this attitude demonstrably had been in evidence throughout Nixon's entire tenure in office.[251] To many chagrined and thoroughly scandalized Americans of both the Left and the Right, Ford "seemed to have espoused the principle, dubious in a democracy, that the greater the power the less the accountability."[252]

President Ford's detractors, at the time of the Nixon pardon, argued that the cause of American democracy and jurisprudence would have been much better served had Nixon been taken into court and the charges against him detailed. They contended that a case ought to have been made against Nixon, and the verdict (either of the Senate and/or of the courts) preserved for the judgment and edification of posterity. Apart from such possibly opinionated hypotheses, one thing at least is clear. More than any other single factor, it seems to have been his

pardon of Richard Nixon; and the rumors and innuendoes following it, (about possible backroom "deals," or else simple bad judgment), that eventually so handicapped Gerald Ford's brief presidency as to ensure his eventual defeat in 1976 by a Washington outsider: Democratic Governor Jimmy Carter of Georgia.[253]

Notes to Part Six, pages 125 to 150

[188]For detailed accounts of these events, refer to 93d Congress, 2d Session, House of Representatives Report No. 93-1305, Impeachment of Richard M. Nixon, President of the United States; Report of the Committee on the Judiciary, House of Representatives, Peter W. Rodino, Jr., Chairman (Washington: U.S. Govt. Printing Office, 1974.) Refer also to Ben-Veniste, pp. 11 and 97; and Mankiewicz, U.S. v. Richard M. Nixon, pp. 143-146.

[189]Blum, p. 809. Refer to the Presidential Transcripts of September 15, 1972, 5:27-6:17 p.m.; and March 13, 1973, 12:42-2:00 p.m. Refer also to Spear, p. 128; and Abrahamsen, pp. 218-221.

[190]Blum, p. 809. Refer to the Presidential Transcripts of September 15, 1972, 5:27-6:17 p.m. Refer also to Spear, p. 129; and Ben-Veniste, pp. 97-98.

[191]Kelly, pp. 691-92; Ben-Veniste, p. 83; and Mankiewicz, U.S. v. Richard M. Nixon, pp. 101-102.

[192]Mankiewicz, U.S. v. Richard M. Nixon, p. 102, argues that Hoover's dislike was based on the fear of "bureaucratic downgrading" of the FBI, and not on "the restraints of the law and the Constitution."

[193]Kelly, p. 692. Ben-Veniste, p. 124, comments that the Huston Plan was "supposedly torpedoed by J. Edgar Hoover." Refer to Mankiewicz, U.S. v. Richard M. Nixon, pp. 130-132.

[194]Spear, pp. 128-130; Jaworski, pp. 36-40; and Mankiewicz, pp. 133-143.

[195]Mollenhoff, pp. 247-259.

[196]Spear, pp. 191-192; and Ben-Veniste, p. 101.

[197]Ibid., pp. 226-228.

[198]Refer to Mollenhoff's dedication in Game Plan for Disaster.

[199]Blum, p. 810. Refer to the Presidential Transcripts of March 20, 1973, 7:29-7:43 p.m.; March 21, 1973, 10:12-11:55 a.m.; and March 21, 1973, 5:20-6:01 p.m. Refer also to Ben-Veniste, p. 100.

[200]Bickel, pp. 47-72, contains an overall discussion of some of the more serious legal issues involved in what is euphemistically called "Watergate."

[201]Ben-Veniste, pp. 100-103.

[202]Mankiewicz, U.S. v. Richard M. Nixon, p. 130.

[203]Blum, p. 810. Refer to the Presidential Transcripts, April 14, 1973, 8:55-11:31 a.m.; 1:55-2:13 p.m.; 2:24-3:55 p.m.; 5:15-6:45 p.m.; 6:00 p.m.; April 17, 1973, 5:20-7:14 p.m.; and April 18, 1973, 2:50-2:56 p.m.

[204]Ben-Veniste, pp. 95-110, describes this period from the vantage point of the Special Prosecutor's staff.

[205]Ibid., pp. 15-26 and 41-42, contains a description of the composition of the Special Prosecutor's staff.

[206]Mollenhoff, pp. 301-325.

[207]Ben-Veniste, pp. 111-112.

[208]Ibid., pp. 112-122. Refer to Abrahamsen, pp. 200-203, for an analysis of some moral and psychological issues involved in Nixon's use (and nondestruction) of the tapes; and in Haldeman's [!] reluctance to see them destroyed, conjecturally because of their worth in possible future attempts at blackmail (of Nixon, [!] as well as of others.) Refer also to Jaworski, pp. 51-73, 337 and passim.

[209]Ben-Veniste, pp. 123-157; and Jaworski, pp. 1-21.

[210]Blum, p. 811; Ben-Veniste, pp. 150-157; and Jaworski, pp. 22-24.

[211]Abrahamsen, pp. 216-218.

[212]Mollenhoff, pp. 324-325.

[213]Ben-Veniste, pp. 262-395, discusses this entire period. Refer to Mollenhoff, p. 325 and passim; and to Peter W. Rodino, in Schnapper, pp. 92-108.

* * *

Membership of the **House Committee on the Judiciary, 93rd Congress** (i.e., "The House Judiciary Committee," "The Rodino Committee"):

Democrats

Peter W. Rodino, Jr., New Jersey, Chairman; Harold D. Donohue, Massachusetts; Jack Brooks, Texas; Robert W. Kastenmeier, Wisconsin; Don Edwards, California; William L. Hungate, Missouri; John Conyers, Jr., Michigan; Joshua Eilberg, Pennsylvania; Jerome R. Waldie, California; Walter Flowers, Alabama; James R. Mann, South Carolina; Paul S. Sarbanes, Maryland; John F. Seiberling, Ohio; George E. Danielson, California; Robert F. Drinan, Massachusetts; Charles B. Rangel, New York; Barbara Jordan, Texas; Ray Thornton, Arkansas; Elizabeth Holtzman, New York; Wayne Owens, Utah; and Edward Mezvinsky, Iowa.

Republicans

Edward Hutchinson, Michigan; Robert McClory, Illinois; Henry P. Smith III, New York; Charles W. Sandman, Jr., New Jersey; Tom Railsback, Illinois; Charles E. Wiggins, California; David W. Dennis, Indiana; Hamilton Fish, Jr., New York; Wiley Mayne, Iowa; Lawrence J. Hogan, Maryland; William J. Keating, Ohio; M. Caldwell Butler, Virginia; William S. Cohen, Maine; Trent Lott, Mississippi; Harold V. Froehlich, Wisconsin; Carlos J. Moorhead, California; and Joseph J. Maraziti, New Jersey.

[214]Schuck (Ralph Nader Congress Project), pp. xviii, 3, 50, and 56-57, includes scattered discussions of the Judiciary Committee. The Nader Group's emphasis was on the roles and compositions of both the House and Senate Judiciary Committees, and not on Watergate and impeachment. It uses discussions of these subjects merely as a prelude to its much fuller, broader discussion. Its comments on Rodino and the character of proceedings during the Nixon impeachment inquiry are illustrative of more liberal attitudes toward each, at the time of the ongoing investigation.

[215]Blum, p. 811. Refer to James Madison, [E. H. Scott, ed.] 2 vols., The Journal of the Constitutional Convention; Reprinted from the Edition of 1840, Which Was Published Under the Direction of the United States Government from the Original Manuscripts, (Chicago: Albert, Scott & Co., 1894): [on Trials], pp. 585, 619, 654, 688, 690, 698, 702 and 750; [on Presidential Impeachment], 70, 98, 161, 171, 371, 384, 390, 392, 423, 432, 447, 457, 613, 655, 668; [and passim, on the subject generally].

Refer also to DeWitt, pp. 296-297; and to The Trial, p. 352: Senator George H. Williams [R-OR] comments in part that "During this trial we have been treated to much from the writings of James Madison. . . . If James Madison was a judge here to-day [sic] he would vote for impeachment."

Compare this example with Brant, pp. 13-23, where he presents a decidedly different interpretation of Madison's thought on the subject. On pp. 21-22, for example, Brant specifically accuses the House Managers of selective quotation of Madison. He regards this use of Madison as a perversion, and in defiance of Madison's contention, against the Federalists of 1798-1800 that "the Constitution by implication embodied the common law of England, and thereby conferred power on congress to inflict punishments for all common law crimes."

[216]Blum, p. 811. Refer to Alexander Hamilton, John Jay and James Madison, [John C. Hamilton, ed.], The Federalist: A Commentary on the Constitution of the United States (Philadelphia: J. B. Lippincott & Co., 1866). In particular, consider the arguments in No. 65 [Hamilton], pp. 490-495; No. 66 [Hamilton], pp. 496-502; and No. 75 [Hamilton], pp. 556-561, especially 560-561. Refer also to Brant, pp. 188-193, in part citing Hamilton in The Federalist, No. 78.

[217]Ben-Veniste, pp. 154-210.

[218]Ibid. Refer to pp. 227-229 for a concise brief of the earliest developing case against Nixon. Refer also to Mollenhoff, pp. 301-306.

[219]Stampp, p. 150. Ben Veniste, pp. 18-20, describes the role of the Special Prosecutor's Staff and the lack of precedents for its own activities.

[220]Mollenhoff, pp. 299-301.

[221]Ibid., pp. 11-15 and 260-266.

[222]Abrahamsen, p. 223.

[223]Jeff McMahan, Reagan and the World: Imperial Policy in the New Cold War (London: Pluto Press, 1984), pp. 72-73, reappraises The Nixon Doctrine and Vietnamization, and discusses their possible implications for the Reagan Administration. Refer also to Spear, p. 200, for a good example.

[224]Mankiewicz, U.S. v. Richard M. Nixon, pp. 189-201, discusses Agnew's difficulties; as well as a representative case made against Nixon in the court of public opinion, prior to the Judiciary Committee's final actions. Refer to Mollenhoff, pp. 325, 328-332, 341-345, and 354-356.

[225]Black, pp. 6-9 and 14-52.

[226]Refer to Impeachment of Richard M. Nixon, President of the United States, pp. 334-339:

Roll Call Votes on Proposed Articles of Impeachment I.-V.

Summary:

Article I....approved..27-11. {obstructed justice}
Article II...approved..28-10. {violated citizens' rights}
Article III..approved..21-17. {ignored House subpoenas}
Article IV...rejected..26-12..{derogated war powers}
Article V....rejected..26-12..{evaded taxes, etc.}

Votes:

	I	II	III	IV	V
DEMOCRATS:					
Rodino (New Jersey)	YES	YES	YES	**NO**	YES
Donahue (Massachusetts)	YES	YES	YES	**NO**	**NO**
*Brooks (Texas)	YES	YES	YES	YES	YES
*Kastenmeier (Wisconsin)	YES	YES	YES	YES	YES
*Edwards (California)	YES	YES	YES	YES	YES
Hungate (Missouri)	YES	YES	YES	YES	**NO**
*Conyers (Michigan)	YES	YES	YES	YES	YES
Eilberg (Pennsylvania)	YES	YES	YES	**NO**	YES
Waldie (California)	YES	YES	YES	YES	**NO**
Flowers (Alabama)	YES	YES	**NO**	**NO**	**NO**
Mann (South Carolina)	YES	YES	**NO**	**NO**	**NO**

	I	II	III	IV	V
{DEMOCRATS, continued:}					
Sarbanes (Maryland)	YES	YES	YES	**NO**	**NO**
Seiberling (Ohio)	YES	YES	YES	**NO**	YES
Danielson (California)	YES	YES	YES	**NO**	YES
Drinan (Massachusetts)	YES	YES	YES	YES	**NO**
*Rangel (New York)	YES	YES	YES	YES	YES
*Jordan (Texas)	YES	YES	YES	YES	YES
Thornton (Arkansas)	YES	YES	YES	**NO**	**NO**
*Holtzman (New York)	YES	YES	YES	YES	YES
Owens (Utah)	YES	YES	YES	YES	**NO**
*Mezvinsky (Iowa)	YES	YES	YES	YES	YES
REPUBLICANS:					
*Hutchinson (Michigan)	NO	NO	NO	NO	NO
McClory (Illinois)	NO	**YES**	**YES**	NO	NO
*Smith (New York)	NO	NO	NO	NO	NO
*Sandman (New Jersey)	NO	NO	NO	NO	NO
Railsback (Illinois)	**YES**	**YES**	NO	NO	NO
*Wiggins (California)	NO	NO	NO	NO	NO
*Dennis (Indiana)	NO	NO	NO	NO	NO
Fish (New York)	**YES**	**YES**	NO	NO	NO
*Mayne (Iowa)	NO	NO	NO	NO	NO
Hogan (Maryland)	**YES**	**YES**	**YES**	NO	NO
Butler (Virginia)	**YES**	**YES**	NO	NO	NO
Cohen (Maine)	**YES**	**YES**	NO	NO	NO
*Lott (Mississippi)	NO	NO	NO	NO	NO
Froelich (Wisconsin)	**YES**	**YES**	NO	NO	NO
*Moorhead (California)	NO	NO	NO	NO	NO
*Maraziti (New Jersey)	NO	NO	NO	NO	NO
*Latta (Ohio)	NO	NO	NO	NO	NO

KEY: An asterisk (*) indicates a straight party line vote on all five articles. An indented name, underscored, indicates a break with the party over I, II, or III, only.

[227]Dunning, pp. 56-62, discusses the status of the War Power during the Civil War. Ben-Veniste, pp. 283-297, explains the legal strategies employed by the House Judiciary Committee. Refer to Berger, Impeachment, p. 252; and Black, pp. 44-45. Refer also to Bickel, pp. 72-89, for specifically legal issues related to impeachment, with special reference to concurrent criminal trials, executive privilege, impoundment of funds, and the issue of what constitutes impeachability.

[228]Black offers a contradictory viewpoint. He contends that Nixon was within his rights in keeping the tapes. Since the author is by no means pro-Nixon, this perhaps should carry a certain kind of evidentiary weight. This is despite the fact that its apparent wrongheadedness makes it a virtual minority of one among serious commentaries on the subject.

[229]Mollenhoff, pp. 13-14, interjects some cautionary commentary on the weakness of the Burger Court's ruling as a precedent for future executive privilege cases.

[230]Ben-Veniste, pp. 282-297; and Bickel, pp. 84-85.

Refer also to Murphy, pp. 123-124:

"Perhaps no President has ever been quite so frank and explicit in declaring what qualifications he would look for in his nominees as President Nixon. During the 1968 campaign Nixon attacked the record of the Warren Court, particularly its decisions on the rights of defendants in criminal cases, which he deplored as having weakened the 'peace forces' in society. He promised that if elected he would appoint to the Court 'strict constructionists who saw their duty as interpreting law and not making law.' His first nominee, Warren E. Burger, fitted within the confines of this unrealistic description of judicial policy making, for as a judge on the Court of Appeals for the District of Columbia he had publicly attacked the Warren Court's decisions regarding criminal procedure. Nixon then announced that his next nominee would come from the South, and he made two unsuccessful efforts to appoint Southerners. Only after the Senate refused to confirm Clement F. Haynsworth, Jr., of South Carolina and G. Harrold Carswell of Florida did he turn to a non-Southerner, Harry A. Blackmun of Minnesota, with an angry charge that the Senate 'as it is presently constituted' would not confirm Southern conservatives."

Refer also to Murphy, p. 165:

"Unprecedented problems for the Court, four members of which had been appointed by President Nixon, arose in the two cases where Nixon himself was a party, the executive privilege case (United States v. Nixon [1974]) and the White House tapes case (Nixon v. General Services Administrator [1977]). Justice Rehnquist did not participate in the former, but all four Nixon appointees sat in the second case. In fact, if all four had disqualified themselves, the Court would have lacked a quorum (six justices) to decide the cases."

Refer also to Morton Mintz [The Washington Post, July 5, 1977], in Murphy, pp. 185-186:

"No one becomes a member of the Supreme Court unless a President nominates him and until the Senate confirms him. Thus the potential for conflict of interest is always present. But it reached a peak level in the last term.

"The court had to decide a case involving President Nixon, who had put on the court four of its nine members: Chief Justice Warren E. Burger, and Justices Harry A. Blackmun, Lewis F. Powell Jr. and William H. Rehnquist. [Emphasis added.]

"None of the Nixon appointees disqualified himself from considering and deciding the case, which involved the constitutionality of a law giving government archivists control over access to the former President's papers and tapes.

"Blackmun and Powell were among the seven justices who voted against Nixon. Burger and Rehnquist each wrote a strong dissent.

"Earlier, the court had to act on petitions by Nixon's two top aides in the White House, H. R. Haldeman and John D. Ehrlichman, and John N. Mitchell, the Attorney General during most of the Nixon presidency. All wanted the court to keep them out of prison by agreeing to review their Watergate cover-up convictions.

"Without explanation, as is customary, Rehnquist, who had been a top Justice Department official under Mitchell, disqualified himself in the matter, which was the fount of the notorious National Public Radio 'leak' about how the justices purportedly had lined up in a preliminary secret vote.

"That left eight justices. Review would have been granted if four of them had voted for it. All that's known is that fewer than four did so.

"Behind the scenes, some lawyers entertained the notion of asking Burger and possibly other Nixon appointees to disqualify themselves. Burger, among other things, had been reported to be on some of the tape recordings in the Nixon papers case.

"Nothing came of the idea, partly because of the Rule of Necessity, which has been traced back in English common law to 1430. The rule--akin to Harry Truman's 'The buck stops here'--is that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case."

Refer also to Berger, Government by Judiciary, p. 335, who comments in passing about "the revulsion not long since against some proposed Nixon appointments, including an ineffable trio who shall here be nameless, illustrates that the nation's salvation is dependent upon the 'luck of the draw.' Anthony Lewis observed that 'the run of Supreme Court appointments in our history has not been particularly distinguished.' Levy more bluntly stated that they have run from 'mediocre to competent'--with a few distinguished exceptions such as Holmes."

Refer also to Berger's footnote 38, p. 323:

". . . Richard Nixon selected men who would give effect to his desires. ' That the Nixon Court favored law-enforcement values is no surprise. Burger, Blackmun, Powell and Rehnquist got their seats on the bench because of their supposed or known lack of sympathy for the rights of the criminally accused.'" [Quoting Levy in Against the Law; emphasis added.]

[231]De Toledano, pp. 318-320, gives a brief account of Nixon's famous California press conference after having lost the gubernatorial election to Gov. Pat Brown [D-CA].

[232]Murphy, p. 357.

[233]Spear, pp. 199-209; and Mollenhoff, p. 325.

[234]Spear, p. 234.

[235]Mollenhoff, pp. 318-325.

[236]For a psychohistorical analysis of Nixon's choice of Agnew, and his uses of the Vice-President, refer to Abrahamsen, pp. 203-205.

[237]Brant, pp. 5-6.

[238]Ben-Veniste, pp. 295-315. Refer to Abrahamsen, pp. 242-248, for a description and analysis of the resignation on a more personal level. Black, pp. 2-4, does not believe Nixon should have had to forfeit the tapes, even though Black is openly hostile to the President.

[239]Ben-Veniste, pp. 291-395; and Jaworski, pp. 338-354.

[240]Mankiewicz, U.S. v. Richard M. Nixon, pp. 203-207. Refer to pp. 93-113 for a descriptive summary of related incidents of civil rights, privacy, tax fraud, and so forth, involving Nixon, his aides and associates both directly and indirectly.

[241]Ibid., pp. 1-5. Mankiewicz describes press and public reaction to Watergate early in Nixon's second term, as well as recording an early call for his impeachment.

[242]For a retrospective discussion of the Nixon Imperial Presidency transmuted into the Reagan Presidency, refer to McMahan on Chile and ITT, pp. 6-7. Refer also to Jaworski, pp. 311-312; and Ben-Veniste, pp. 291-315.

[243]Ben-Veniste, pp. 392-395, provides a very negative appraisal.

[244]Mollenhoff, pp. 13-14.

[245]Abrahamsen, pp. 200-203, analyzes Nixon's decision not to destroy the tapes. Refer to Mollenhoff, p. 368. Black, p. 2, expresses his opinion that Nixon had the right to retain the Oval Office tapes, on grounds of confidentiality.

[246]Brant disagrees entirely with this view. Refer, for example, to pp. 189-200. He focuses his arguments on connecting impeachment with ex post facto laws in general, and attainder in particular. Brant is writing in reaction to Gerald Ford's attempted impeachment of Justice Douglas. He tries to support his arguments by references to Hamilton's Federalist No. 78, the writings of Madison, and Marshall's opinion in Marbury v. Madison. Brant wrote a six-volume biography of Madison. It seems reasonable to assume, therefore, that his interpretations ought to be well-informed. According to some commentators, however, this is not the case.

For example, refer to Ehrlich, p. xxvi:

"The only recent work [in April, 1974] on the twelve American impeachments is Irving Brant's Impeachment: Trials and Errors (New York, 1972). Unfortunately it is very weak. . . . He argues that impeachment was intended by the Framers of the Constitution as a remedy only against criminal violations, and he very narrowly rejects the many English and American precedents which do not conform to this thesis. In spite of Brant's earlier scholarly

successes, especially his biographical studies of James Madison, his book is poorly reasoned and cannot be acceptable as a valid history of American impeachments and trials. [Emphasis added.]

"Relatively few scholarly articles have been written on impeachment, and they are primarily legal analyses by lawyers and political scientists rather than historical studies on impeachment."

Brant concludes that "In fact, the whole medieval impeachment system could well fall into disuse, with nothing but benefit resulting." He arrives at this conclusion by asserting that, since the Constitution is the supreme law of the land, the Supreme Court (even in cases involving a Supreme Court justice) can rule on any "attainder by impeachment" that comes before it.

Brant's arguments in general are not persuasive, and some of them display circular reasoning. From Brant's perspective, any kind of impeachment not based on the narrowest grounds of criminal culpability would seem to be automatically classifiable as an act or bill of attainder. Moreover, his glowing defense of Johnson's counsel is too generous. Brant ignores the political context of their own decisions, as partisans in their own right. (Even Chief Justice Chase entertained political ambitions of his own.) In a sense, in addition to defending Johnson, some of his counsel at least were additionally pleading for their own future political careers. They obviously would be out of office were Johnson found guilty. That is, their "constitutional" arguments, developed in such a political cockpit, might seem doubly unreliable.

Black, pp. 27-33, discusses this issue in its historical context. In general, Black's approach to the whole constitutional concept of impeachment seems much more balanced and much less emotional than does Irving Brant's.

[247]Mollenhoff, p. 15; Hoffer and Hull, pp. 266-270 and 264-265; and Jaworski, pp. 336-337. Berger, Impeachment, pp. 297-301, believes that impeachment still has a valid place in the constitutional scheme of things, in sharp contradistinction to Brant's arguments. (See Note 246, above.)

[248]Mollenhoff, pp. 356-367; and Jaworski, pp. 265-302.

[249]Ben-Veniste, pp. 291-315; 317; 338-339, and 386-395.

[250]Mollenhoff, pp. 365-367.

[251]There are some moral and legal ambivalencies, however. Mollenhoff, pp. 261-266, raises the issue of confidentiality for press sources; as well as "secrecy doctrines" during previous administrations.

[252]Blum, p. 815; and Jaworski, pp. 294-298, 310, and 334-337.

[253]Mollenhoff, pp. 367-369; and Bickel, pp. 32-36. Refer to 93d Congress, 2d Session, House. Document No. 93-273, [Compiled by the Congressional Research Service, Library of Congress,] Resolved: That the Powers of the Presidency Should Be Curtailed (Washington: U.S. Government Printing Office, 1974,) for a representative sampling of American attitudes toward the institution of the Presidency shortly after the resolution of Watergate.

PART SEVEN:

SUMMARY AND CONCLUSIONS

Any investigation and analysis of the eleven articles of impeachment drafted by the House Judiciary Committee, in its attempt to impeach and try President Andrew Johnson; and the three articles of impeachment drafted by the House Judiciary Committee, in its attempt to impeach and try President Richard Nixon, seems calculated to give a student more than a little sense of deja vu. In each case, the central feature was some variant of obstruction of justice.

The actual decision to recommend impeachment was merely the end result of a long chain of social and political events that had set the executive and the legislative branches at loggerheads. Each of these proceedings has to be regarded in the context of its own era, and each must be analyzed in relation to existing political, social and economic situations.

There is substantially little that can, or for that matter should, stand as a clear constitutional or legal precedent for any future contemplation of political impeachment and trial by the Congress of the United States of any future incumbent president. This is unfortunate, but true, and no amount of wishful thinking will suffice in eliminating this root problem. Each situation involving the impeachment of a president must be initiated at once de novo and in media res: without blessing or curse of previous example, and in the midst of pre-existing and complex, nationally divisive issues.

Consideration and analysis of the constitutional impeachment process of federal officers proceeds along lines seeking to arbitrarily group and then relate some quite dissimilar incidents of both failed and successful impeachments of American executive and judicial officers. Such retrospective rehearsals of American impeachment also incorporate a grab-bag fist-full of somewhat irrelevant and universally antique British precedents.[254] This widespread search for relevant precedents seems to represent a misplaced emphasis.

The situation of a federal judge, for example, is quite different from that of an elected official in the executive branch. Claims that an impeachment in one case

has some automatic application in another seem to be unfounded. The judiciary has been drawn into this contest of political power, as well. Although ideally they might seem to be merely referees or umpires, historically both the Supreme Court and the federal court system as a whole have proven themselves to have their own interests and their own priorities, and have managed to set their own parallel agendas, during the course of impeachment proceedings touching upon their own spheres of activity.

Had he not resigned, Richard Nixon undoubtedly would have been impeached. Furthermore, it is entirely likely that upon a Senate trial he would have been removed from office. The evidence of his own tape recorded conversations with many of his numerous White House counselors and aides also would seemingly have ensured that Nixon and many others in his administration would also have been liable to criminal prosecution. The House's case against Nixon in the Senate therefore could have been made on the strictest, most narrowly construed interpretation of the constitutional provisions for executive impeachment.

There are essentially two theories concerning impeachability. One of these claims that it is necessary to frame articles of impeachment accusing individuals of

actual crimes and misdemeanors that, were the charged person out of office, and not protected under color of constitutional law, could see him or her indicted and tried on the same standards of guilt and in accordance with the same rules of evidence and procedure as any other private citizen.

The second theory advocates a looser construction. It regards impeachment as a means of redressing what essentially amounts to the politically obnoxious or socially odious behavior of a departmental officer. This interpretation would permit impeachment for political reasons, supporting Congressman Gerald Ford's contention that Justice Douglas could be impeached at the risk of introducing parliamentary theories and standards of responsible, not representative government into the American legislative process.

As a consequence, the question of determining what existing precedents are applicable in cases of presidential impeachment is much less settled, and unfortunately more generally ignored, until events dictate otherwise, than is the question of what precedent applies in the contemplated removal of a judge on the federal bench. American juristic and political practice has produced many precedents relevant to contemplated impeachments of members of the

federal judiciary.[255] As in the case of executive officers, and former legislative officeholders, however, the issue is far from settled. For this reason, the question of what constitutes impeachability has surfaced every time a serious attempt has been made to impeach a president. And it has occasionally appeared even in the defenses of impeached federal judges. The exact philosophical nature of what constitutes a legal as opposed to a merely political precedent invariably has been called into question in all such cases.

Unfortunately, the way that President Nixon ended his second term in office can teach us little or nothing in this regard. Nor, for that matter, can the successful defense and acquittal of Andrew Johnson during his Senate trial, after his own impeachment. Both situations were too dependent upon the contextual accidents of history. Each occurred in a political climate that was complex and volatile. As a result, the specifically legal issues involved in each of them cannot be fully separated from, or fully comprehended outside the narrow confines of their own emotionally charged historical settings.

In effect, and only by default, this seems to argue in defense of an operational definition of what can be construed as warranting and validating impeachment. It

seems to strengthen the arguments of those loose constructionists who, like President Gerald Ford, have contended that proper and appropriate grounds for impeachment, be they of an Andrew Johnson, a William O. Douglas, or a Richard Nixon, are whatever a majority of the members of the House of Representatives think they are, in and of any given historical and political moment. Any other interpretation of the Constitution, in a purely conceptual sense, seems to contain more fiction than fact.

> . . . In recent years we have seen two impeachment efforts that remind us of the uncertainty of these boundaries. The attempts to impeach Justice William O. Douglas for unpopular judicial opinions and unsavory conduct away from the bench failed. The impeachment of President Richard M. Nixon was well on its way to success when the president resigned. He was accused of a variety of misconduct, some criminal, some not indictable at all, which together amounted to a serious breach of his official powers. The lesson is plain: though corruption and malfeasance may be inevitable, they can be curbed. The framers intended to safeguard the republic against the misuse of power with impeachment and trial, and thus far their plan has succeeded. [Emphasis added.][256]

Regardless of whether or not impeachment could be sustained in a subsequent Senate trial, this deliberately vague area of the Constitution becomes much more lucid and straightforward when it is considered in broadly political terms. Such an observation does not alter the fact that

its provisions for impeachment remain among those areas of constitutional law that are weakest and most vulnerable to political abuse by the legislative department of the United States of America's federal government.

Notes to Part Seven, Pages 163 to 169

[254]Refer to Brant, pp. 7-14; Black, pp. 27-33, discussing the conversation of September 8, 1787, between Mason, Madison and Morris at the Constitutional Convention; Berger, pp. 3, 86, 123, 172, 93-94, 97-98, 101, 155, and 128; and to Kelly, pp. 698-700.

Refer also to Hoffer and Hull, pp. 264-265:

". . . there are lessons we can derive from this parade of guilty and innocent, prosecutor and defendant.

"The first is just what constitutional theorists from the Commonwealthmen to the authors of the Federalist agreed: no form of government was safe from the corruption of its officials, and no set of officers in whatever form of government would be entirely free from official malfeasance and private turpitude. In the heady years after the war for independence, Americans relearned this lesson in impeachment after impeachment. We should remember it ourselves . . . in our own modern, sophisticated system of checks and balances, our officeholders are not proof from temptation. When they fall to it, the entire system of government is endangered.

"The second lesson is more important: under English tutelage and then the genius of our own experience, the framers of American republicanism created a tool for dealing with corruption--efficiently, fairly, within the system of laws. Impeachment and trial did not replace prosecution in the regular courts but provided an alternative form of investigation, confrontation, and punishment. While the boundaries of impeachable offenses swelled and then contracted in the first years of our nation, certain acts were always impeachable and others were always protected by law or custom."

[255]Fourteen Americans have been impeached by the House of Representatives, most of them judges:

* * *

Senator William Blount [DR-TN], 1797-1799.

John Pickering, District Judge, District Court for the District of New Hampshire, 1803-1804.

Samuel Chase, Associate Justice, Supreme Court, 1804-1805.

James H. Peck, District Judge, District Court of Missouri, 1826-1831.

West H. Humphreys, District Judge, District Court for the District of Tennessee, 1862.

Andrew Johnson, President of the United States, 1867-1868.

William W. Belknap, Secretary of War, 1876.

Charles Swayne, District Judge, District Court for the Northern District of Florida, 1903-1905.

Robert W. Archbald, Circuit Judge, United States Court of Appeals for the Third Circuit, serving as Associate Judge of the United States Commerce Court, 1912-1913.

George W. English, District Judge, District Court for the Eastern District of Illinois, 1925-1926.

Harold Louderback, District Judge, District Court for the Northern District of California, 1932-33.

Halsted L. Ritter, District Judge, District Court for the Southern District of Florida, 1933-1936.

Harry E. Claiborne, Chief Justice, U.S. District Court of Nevada, 1986.

Alcee L. Hastings, District Judge, Florida, 1988.

* * *

According to Paul S. Fenton, "The Scope of The Impeachment Power," in Impeachment, Selected Materials, p. 663:

"A thirteenth [sic; now fifteenth], United States District Judge Mark Delahay, was impeached by the House in 1873, but the case was dropped before articles of impeachment were drawn up. Those cases not resulting in impeachment were disposed of in various ways. In most instances the person under inquiry resigned, resulting in the proceedings being discontinued. In some instances the investigatory committee either filed a report recommending against impeachment or dropped the investigation without even filing a report. In other instances the committee recommended censure rather than impeachment."

Nixon's resignation in the face of an imminent impeachment, therefore, itself had precedents. The capability of intimidating an officeholder with the threat of impeachment has occasionally proved sufficient to remove him from office, provided that the House evinced seriousness of intent in so doing, and demonstrated a willingness to see the procedures through. In the other cases, that seems to have been the deciding factor. This is beyond the subjective range of this thesis, but there have been many nearly contemporary state impeachments, chiefly of governors, which have themselves been the subjects of relatively little historical or legal scholarship. Some of the most interesting of these occurred in New York, Texas, and a few other Southern and Southwestern states.

[256]Hoffer and Hull, p. 265.

CHRONOLOGY--ANDREW JOHNSON AND RECONSTRUCTION

March 2, 1867	Congress passes the Military Reconstruction Act, creating five military districts in the South.
_____.	Congress passes the Army Appropriation Act.
_____.	Congress passes the Tenure of Office Act.
March 23, 1867	Congress passes the Second Reconstruction Act.
Spring, 1867	A House Investigating Committee completes its study and reports, in July, that no grounds for impeachment of Johnson can be found.
July 19, 1867	Congress passes the Third Reconstruction Act.
August, 1867	President Andrew Johnson removes Secretary of War Edwin Stanton from office and appoints General Ulysses S. Grant in his stead. The Senate is <u>not</u> in session.
December, 1867	The Senate refuses to confirm Grant's appointment, and he resigns. Stanton retakes his office.
_____.	Rep. George S. Boutwell [R-MA] recommends impeachment, but his House committee can find no grounds upon which to base it. As a result, the full House rejects its committee's report, 100 to 57.

February 22, 1868	Johnson removes Stanton and appoints General Lorenzo Thomas in his stead. The Senate *is* in session.
February 24, 1868	The House votes for Johnson's impeachment, 128 to 47.
March, 1868	Congress passes a Fourth Reconstruction Act.
March 2, 1868	The House approves eleven Articles of Impeachment.
March 30, 1868	Johnson's impeachment trial begins in the Senate. Chief Justice Salmon P. Chase presides.
May 16, 1868	The Senate votes 35 to 19 on Article 11. This is one vote short of the two-thirds majority necessary to convict.
May 26, 1868	The Senate votes on Articles 2 and 3, and once again produces a 35 to 19 result in each case. The Senate adjourns *sine die*. The House never again makes a serious attempt to impeach President Johnson. He serves out his term quietly.

CHRONOLOGY--WATERGATE AND RICHARD NIXON

June 17, 1972	Five men are arrested at the Democratic National Headquarters during a break-in at Washington's Watergate Complex.
June 20, 1972	President Richard Nixon; White House Chief of Staff, H. R. "Bob" Haldeman; and Advisor to the President on Domestic Affairs, John D. Ehrlichman, discuss how to handle negative publicity in the wake of Watergate. (The taped record of this conversation is partially obliterated by the infamous 18.5 minute gap on the Watergate Tapes.)
July 1, 1972	Attorney General John Mitchell resigns as Nixon's campaign manager.
February 7, 1973	The Senate establishes a Select Committee (the "[Sam] Ervin[, Jr.] [D-NC] Committee") to investigate the Watergate bugging and other espionage activities.
May 17, 1973	The Senate Select Committee [S.S.C.] on Presidential Campaign Activities begins hearings.
May 18, 1973	Attorney General Elliot Richardson appoints Archibald Cox as Special Watergate Prosecutor.
June 25-29, 1973	White House Counsel John Dean implicates Nixon and submits the contents of his "Enemies List" in Senate testimony.
July 16, 1973	The S.S.C. hears testimony revealing the existence of a secret Oval Office tape recording system.
August 9, 1973	The S.S.C. sues for the Watergate Tapes.

August 22, 1973	Judge John Sirica orders Nixon to turn over the tapes. Nixon refuses.
October 10, 1973	Vice-President Spiro Agnew resigns and pleads "no contest" to charges of tax evasion.
October 12, 1973	The Court of Appeals orders Nixon to surrender the Oval Office tapes.
October 20, 1973	The infamous "Saturday Night Massacre:" Nixon fires Cox. Elliot Richardson resigns in protest. Deputy Attorney General William Ruckelshaus resigns. Solicitor General Robert H. Bork, as Acting Attorney General, takes charge of the Justice Department.
October 23, 1973	Protesting telegrams flood the White House. As the result of public outrage, Nixon promises the secret tape recordings to Judge Sirica.
October 30, 1973	The House of Representatives begins its impeachment inquiry.
November 1, 1973	William B. Saxbe becomes the new Attorney General. Leon Jaworski is appointed as the new Special Prosecutor.
February 6, 1974	The House approves its Judiciary Committee's impeachment investigation, 401-4, and grants it subpoena power.
February 21, 1974	The House Judiciary Committee's [H.J.C.] Staff Report contends that violation of criminal law need <u>not</u> be a requisite for impeachment.
March 1, 1974	The Watergate Grand Jury [W.G.J] indicts seven of Nixon's men on charges of covering up the Watergate break-in. (Nixon is named as an unindicted co-conspirator, but this does not become public knowledge until a June 6, 1974 White House announcement.)

March 18, 1974	Judge Sirica rules that the W.G.J's report on Nixon's involvement in Watergate should be sent to the H.J.C. (On March 21, Sirica's decision is upheld by the Court of Appeals.)
March 19, 1974	Sen. James L. Buckley [Cons.R-NY] urges Nixon to resign on the grounds that he has lost his 1972 election mandate.
April 8, 1974	Senator Lowell P. Weicker [R-CN] accuses the IRS of authorizing politically motivated tax audits of individuals and organizations opposed to the President.
April 11, 1974	The H.J.C. votes 33-3 to subpoena Nixon, demanding tape recordings of forty-two conversations.
April 18, 1974	Judge Sirica subpoenas tapes of sixty-four conversations, dating from June 20, 1972 to June 4, 1973.
April 29, 1974	Nixon announces in a television address that he will turn over 1,200 pages of edited transcripts of the tapes.
May 9, 1974	The H.J.C. opens hearings with a brief public session, and then goes into closed session to hear a description of events leading to the break-in.
May 22, 1974	Nixon tells the H.J.C. that he will not comply with subpoenas past or present.
May 30, 1974	The H.J.C. informs Nixon that any refusal to comply might constitute grounds for his impeachment.

June 11, 1974	The H.J.C. releases a 4,133 page record of evidence assembled by its staff about the Watergate Democratic National Headquarters break-in and its aftermath.
July 13, 1974	The S.S.C. issues its final report, focusing on Nixon's campaign abuses.
July 24, 1974	The Supreme Court rules 8-0 that Nixon must provide sixty-four tapes subpoenaed by Special Prosecutor Jaworski.
July 30, 1974	The H.J.C. recesses after having approved three articles of impeachment. These charge Nixon with obstruction of Justice, abuse of presidential power, and attempting to impede the impeachment process by defying the H.J.C.'s own subpoenas for evidence. The White House turns over twenty Watergate tapes to Judge Sirica.
August 5, 1974	In a public statement, Nixon admits that he tried to obstruct the investigation of the Watergate break-in. (Prior to the President's statement, the Assistant Senate Republican Leader, Sen. Robert P. Griffin [R-MI], had called for Nixon's resignation.)
August 6, 1974	Nixon tells his Cabinet that he does not intend to resign.
August 8, 1974	Nixon announces his resignation, to be effective at noon the next day.
August 9, 1974	Nixon resigns and leaves the White House. Newly appointed Vice-President Gerald Ford is sworn in as President.
September 8, 1974	President Ford pardons President Nixon for all federal crimes against the United States he "committed or may have committed or taken part in" during his term in office.

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VITAE

Larry Meysenburg was born in David City, Butler County, Nebraska. He attended the Wood River, Nebraska, elementary school; Blessed Sacrament School, Grand Island, Nebraska; St. Mary's Grade School, David City; and St. Thomas Aquinas Central Catholic High School of Butler County, David City. Upon matriculation at Aquinas, he was awarded a Nebraska State Regents Scholarship. Meysenburg attended Allegheny College, Meadville, Pennsylvania, as a participant in a pilot program of independent study, "Operation Opportunity," under the auspices of the Ford Foundation. The author served as editor of the student newspaper, and was sponsored by Allegheny for summer study at the School of Journalism, University of Iowa, Iowa City, Iowa. In addition to auditing classes in Newspaper Design and Production, and Typography at Iowa, he also deviled in the Newspaper Production Laboratory.

He left Allegheny to take the first of several positions in the Boston, Massachusetts area as a publisher's assistant; newspaper editor; production manager; art department foreman, and so forth, for various publishing and book-and-job printing firms there; and eventually, also in Omaha, Nebraska. While in Boston, he had served an accelerated apprenticeship under the auspices of PINE (Printing Industries of New England) and the International Typographical Union, and had become a journeyman printer.

Meysenburg completed work on his undergraduate degree at the University of Nebraska at Omaha in December, 1986, with three majors: philosophy, religion, and history. He was named to the Dean's List, was awarded the title of "Outstanding Undergraduate in Philosophy" in 1986, and received his B.A. conferred summa cum laude. Upon completing his undergraduate work, Meysenburg received a ninety-eighth percentile ranking on the history portion of the Graduate Record Examination, and a ninety-sixth percentile ranking on the Literature in English subject test. He also received a raw score of ninety, out of a possible one-hundred on the Miller Analogies Test.

The author served as a graduate teaching assistant in the history department of the University of Nebraska at Omaha for three academic terms, while completing work leading to the Master of Arts degree. In spring, 1988, he was honored by being named "Outstanding Graduate Student in History" by the graduate faculty in history, in conjunction with the Missouri Valley History Conference. He is working toward a doctoral degree at Louisiana State University and Agricultural and Mechanical College, Baton Rouge, Louisiana. His work there is being supported through the generosity of an LSU Alumni Federation Fellowship. Meysenburg's interests center around United States legal and religious history, with special emphasis on the South and the historiography of Reconstruction. His interests in philosophy cluster around the existential and phenomenological aspects of epistemology, aesthetics and ethics (in roughly that logical and ontological [if not necessarily metaphysical] order.) He is also interested in British, and Empire and Commonwealth history.