

The Big Impeachment Trial of 1868

By ARLEN J. LARGE

Andrew Johnson, President of the United States! Andrew Johnson, President of the United States! Appear and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

WASHINGTON — That was the dramatic declamation of George T. Brown, Sergeant at Arms of the U.S. Senate, ceremonially opening on March 13, 1868, the impeachment trial of President Andrew Johnson. The President, however, did not stride dramatically into the Senate chamber to face his accusers, that day or ever during the trial that lasted until May 26. Three of his lawyers answered for him.

So that's one precedent. If the House should ever impeach Richard Nixon, he could follow the Johnson example and not go personally to the Capitol for his Senate trial. Indeed, Mr. Nixon and all future Presidents, and all Congresses as well, would be governed closely by the precedents established during that winter and spring of 1868. Because a President has never been impeached before, the people who conducted those proceedings were terribly aware they were also setting the pattern for impeachments to come.

At the outset, Chief Justice Salmon Chase told the Senate: "All good citizens will fervently pray that no occasion may ever arise when the grave proceedings now in progress will be cited as a precedent, but it is not impossible that such an occasion may come."

The Constitution, for example, specified only that the Chief Justice of the Supreme Court would be the Senate's presiding officer when a President is on trial. But how would a judge "preside" over a legislative body acting as a jury? Could he rule whether evidence was admissible? Could he break a tie vote of Senators?

He would learn the answers to that and more before the trial was over. And now all the precedents of the Johnson impeachment and trial, squirreled away in congressional archives these many years, have been dusted off and re-examined as the House takes its first tentative steps toward Mr. Nixon's possible impeachment.

Ugly and Troubled Times

Congress today may be able to re-create the impeachment machinery used 105 years ago against Andrew Johnson, but fortunately it can't recapture the ugly spirit of that troubled time. The situation then facing the country was far more serious than now. The Civil War had ended militarily but not politically. Ten of the 11 Confederate states still weren't represented in Congress. Abraham Lincoln's let-'em-up-easy Reconstruction policies hadn't been fully formulated at the time of his death, and as President Johnson tried to put them in practice, the dominant congressional Republicans objected that the presidentially sanctioned new state governments in the South were eroding the North's Civil War victory.

Particularly irksome were the "Black Codes" denying rights to former slaves that had been adopted by all-white Southern legislatures. For his part, the President, a Tennessee Democrat who had run in 1864 with Mr. Lincoln on a one-time "Union" ticket, accused the Republicans of trying to keep the secession states out of Congress until they, too, embraced the GOP. Narrowly Mr. Johnson was charged with official misconduct, but the impeachment really was part of a broad policy struggle over how to put the American union back together again.

Can a President be impeached just because Congress disagrees with him about this policy or that? If so, it would require a rather loose construction of the Constitution's murky list of impeachable offenses: "treason, bribery or other high crimes and misdemeanors." Three years ago just that kind of loose construction was being pushed by soon-to-be Vice President Gerald Ford in seeking the impeachment of Supreme Court Justice William Douglas. Rep. Ford told the House that an impeachable offense "is whatever a majority of the House of Representatives considers it to be at a given moment in history."

But the House didn't buy that in 1970, and it wasn't buying it in 1867, either, when an impeachment drive began against Mr. Johnson. The House Judiciary Committee in November of that year recommended impeachment to the full House, enumerating a list of grievances against the President. During House debate in early December Rep. James Wilson of Iowa, a Republican who opposed impeachment, called the judiciary committee report "a bundle of generalities" and asked: "If we cannot state upon paper a specific crime, how are we to carry this case to the Senate for trial?" On Dec. 7, the House rejected impeachment by a vote of 108 to 57.

There's a lesson in that vote for Sen. George Aiken and others who urge that the House either impeach Mr. Nixon or "get off his back." For President Johnson, there was no deadline for the question to be settled by the House "one way or another." As with the unfolding Watergate story this year, his fight with Congress was an unending series of slams and shocks, of Reconstruction bills angrily vetoed and grimly overriden, of harsh insults traded by both sides. On Feb. 21, 1868, just two and a half months after the first House vote, the President dropped the next bombshell by appointing Gen. Lorenzo Thomas Secretary of War.

The Stanton Problem

The problem was that according to the Senate, Edwin Stanton still filled that job under terms of an 1867 law requiring Senate approval of the dismissal of Executive Branch officers. Mr. Stanton, a Lincoln appointee who disapproved of Johnson-type Reconstruction, had been fired by the President in August 1867. But encouraged by congressional Republicans, Mr. Stanton kept physical possession of his office, and on Feb. 21 the Senate formally voted 28 to 6 not to concur with his removal. Right then, the President appeared to be breaking the Tenure of Office Act, which pointedly classified any violation as a "high misdemeanor."

Now the House had what it lacked in December: a presidential deed equivalent to an indictable crime. Three days later the House voted 128 to 47 for impeachment.

The 11 articles of impeachment the House finally approved reflected the continuing uncertainty about the kind of offense for which a President could be tried. The first nine articles dealt in several ways with the Stanton firing, the supposed violation of law. The tenth article was closer to the political heart of the quarrel with the President. It accused him of going around the country making speeches "in a loud voice" intended "to bring into disgrace, ridicule, hatred, contempt and

reproach the Congress of the United States. . . ." The last article combined in a hybrid package allegations of both the political crime of denigrating the laws of Congress and the legal crime of firing Edwin Stanton.

Across the Capitol in the marble Senate wing, then just nine years old, the 54 members of course knew what the House had been doing and were getting ready for their big moment. Rules for conducting the trial were drawn up, and on March 4 seven House "managers," or prosecutors, appeared in the Senate chamber for a formal reading of the articles of impeachment. Sergeant-at-Arms Brown, who seemed to have all the good lines, sang out:

"Hear Ye! Hear Ye! Hear Ye! All persons are commanded to keep silence on pain of imprisonment while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Andrew Johnson, President of the United States."

Any modern spectator returning to those packed galleries (1,000 tickets were printed for use each day) would have seen that the Senate was behaving, well, like the Senate. Procedural bickering broke out continually, requiring roll-call votes on the pickiest details. But some of the procedural matters were important. Democratic Sen. Garrett Davis of Kentucky objected that no trial could be held until Senators from the 10 absent Southern states were admitted; he was voted down 49 to 2.

Early in the trial, one of the President's lawyers objected to a question asked of a witness, but Chief Justice Chase ruled the question should be answered. A Senator protested that the Chief Justice should have let the Senate itself decide, without making a preliminary ruling. The wrangling continued until someone suggested that the Senate go to a nearby conference chamber to argue in private. That was put to a vote, and it was a tie, 25 to 25. The Chief Justice broke the tie by voting "aye." (Note that, Chief Justice Burger.) In the end, the Senate decided 31 to 19 to let the Chief Justice rule on admissibility of evidence, but that the rulings could be appealed to a vote of the full Senate.

A ticklish question came up at the time Senators were swearing their special oath to do "impartial justice" during the trial. A Johnson loyalist said the oath shouldn't be given to Ohio Republican Benjamin Wade, who was the Senate's President Pro Tempore. The law of succession in those days put Sen. Wade next in line for the presidency because there was no Vice President. Letting him vote to put himself into the White House at Mr. Johnson's expense would be a blatant conflict of interest, but the Senate let him be sworn anyway and he ultimately voted "guilty." That wasn't the only instance of suspected partiality. Voting "not guilty" was Democratic Sen. David Patterson of Tennessee, President Johnson's son-in-law.

As the trial progressed the President's lawyers argued Mr. Johnson didn't really violate the Tenure of Office Act because it didn't apply to Mr. Stanton. The Secretary of War, they said, was a Lincoln appointee whose protection under that law ran out with the former President's death. Somewhat contradictorily, the White House lawyers also claimed that Mr. Johnson fired Mr. Stanton to get a court test of a law he considered unconstitutional. Thus he had no criminal intent.

President Johnson never did get his test, but the Supreme Court in 1926 ruled that Congress can't interfere with the Executive's power of dismissal within his own branch. That decision has been studied closely in recent weeks by members of Congress trying to figure out how to write a law preventing President Nixon from firing a new special Watergate prosecutor.

On May 16 the Senate was finally ready to vote on conviction itself. A separate vote would occur on each of the 11 articles of impeachment, and a two-thirds majority for "guilty" on any one of them would topple the President from office.

The House managers wanted the first vote to come on the eleventh article, deemed to be the strongest because it combined both the legal and political charges. Just before the roll call Republican Sen. James Grimes of Iowa, who had suffered a stroke two days previously, was carried into the chamber to his desk. Chief Justice Chase admonished the galleries to keep "absolute silence and perfect order."

Republican Sen. Henry Anthony of Rhode Island was first on the alphabetical list of 54 members.

The Chief Justice addressed him: "Mr. Senator Anthony, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty, or not guilty, of a high misdeameanor as charged in this article of impeachment?"

"Guilty."

The Chief Justice asked his tortuous question 53 more times, and at the end of the roll call the tally was 35 "guilty" and 19 "not guilty."

One vote short.

The chair ruled: "Two-thirds of the Senators present not having pronounced him guilty, Andrew Johnson, President of the United States, stands acquitted of the charges contained in the eleventh article of impeachment."

The losers quickly moved to adjourn the Senate for 10 days, in hopes of converting at least one of the seven Republicans who had voted for acquittal. But on May 26 the lineup was exactly the same on the second and third articles. The Senators saw no reason to keep voting and the trial was over for good.

History and Revisionism

The impeachers of Andrew Johnson generally have received a bad press from historians, who tend to cast the struggle in terms used by Sen. Edmund Ross of Kansas, one of the seven Republicans to vote for acquittal. Had Mr. Johnson been pulled down, Sen. Ross wrote later, "the office of President would be degraded, cease to be a coordinate branch of the government, and ever after subordinate to the Legislative will."

Sen. Ross was lionized for his acquittal votes by Sen. John Kennedy in his 1956 book, "Profiles in Courage." Sen. Ross "may well have preserved for ourselves and posterity constitutional government in the United States," Sen. Kennedy wrote.

More recently, however, revisionists have been at work, concluding that the Republicans had no other defense against a President who was trying to freeze Congress out of policymaking at a time of grave national peril. In his 1973 book "The Impeachment and Trial of Andrew Johnson," Ohio State University Assistant History Professor Michael Benedict puts it this way.:

"In many ways, Johnson was a very modern President, holding a view of presidential authority that has only recently been established. Impeachment was Congress' defensive weapon; it proved a dull blade and the end result is that the only effective recourse against a President who ignores the will of Congress or exceeds his powers is democratic removal at the polls."

That may well be true when attempted impeachments are the climax of heavy policy fights, as in the Johnson case. But the impeachment weapon was really intended to be unsheathed against blatant personal misconduct by high officials of the government, whether it be obstruction of justice for political ends or stealing money or something worse. If strong evidence of personal crime is ever lodged against a President, the Senate Sergeant at Arms will be reaching for that "hear ye" script again, and the impeachment blade may prove sharper than it was in 1868.

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