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A NEW LOOK AT THE IMPEACHMENT OF ANDREW JOHNSON

Few periods of American history have changed as radically in the eyes of historians as the era of Reconstruction. Students of America's early national period can still refer to Henry Adams's nine-volume *History of the United States during the Administrations of Jefferson and Madison* (1891) as a work of major significance and usefulness, but few historians of Reconstruction cite anything written before 1940 except to refute it. "Only one event has resisted this historical reversal — the impeachment and trial of President Andrew Johnson," says historian Michael Les Benedict, and his new book, *The Impeachment and Trial of Andrew Johnson* (New York: W. W. Norton and Company, 1973), is an attempt to extend the trend of reversal in Reconstruction historiography to the trial of Andrew Johnson.

Changes in opinion on the Negro since the Depression prompted historians to look at Reconstruction with new eyes, but changes in opinion on the American presidency tended to exempt the effort to remove Andrew Johnson from any fresh scrutiny. The crisis atmosphere of the New Deal and the Cold War encouraged increases in the powers of the President and encouraged even historians newly sympathetic to efforts to reconstruct the South to continue seeing any attack on the powers of the presidency with a jaundiced eye. The result was historiographical anomaly: the President who did the most to frustrate Reconstruction measures was still viewed as a maligned victim of a blatantly political, short-sighted, and malicious attempt at impeachment and removal. The vote to acquit Johnson was seen (in popular history magazines like *American History Illustrated*, for example) as "the most HEROIC act in AMERICAN history." Senator Edmund G. Ross of Kansas, a Republican who broke ranks and voted to acquit the President, "sacri-

THIS LITTLE BOY WOULD PERSIST IN HANDLING BOOKS ABOVE HIS CAPACITY.

AND THIS WAS THE DISASTROUS RESULT.

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Most historians have implied that Congress did not have a constitutional leg to stand on by picturing Andrew Johnson's impeachment and trial as an attempted radical *coup*. *Harper's Weekly* for March 21, 1868 pictured an insignificant Johnson crushed by the Constitution, thus taking at the time of the trial the opposite view. In the month's that followed, *Harper's* cartoons changed Johnson from a pip-squeak to a monarchial usurper.

ficed his political career to save the American system of government." John F. Kennedy chose Ross as one of the subjects for his *Profiles in Courage*.

How was it that the "American system of government" became so identified with the office of the presidency that impeachment (as firmly rooted in the words of the Constitution of 1787 as the presidential office itself) could be seen only as an un-American act? One need only sample the political-scientific wisdom of the early 1960's to see why historians might have been cool to impeachment. Two popular books, for example, were Richard E. Neustadt's *Presidential Power: The Politics of Leadership* (New York: John Wiley and Sons, 1960) and James MacGregor Burns's *The Deadlock of Democracy: Four-Party Politics in America* (Englewood Cliffs, New Jersey: Prentice-Hall, 1963).

Neustadt has been called the Machiavelli for the American Prince. Neustadt wrote a book analyzing the powers of the President because, in his words, "To make the most of power for himself a President must know what it is made of." The desire to increase presidential powers led to a lack of interest in constitutional restraints on executive power. Citing as an example of executive power President Truman's seven-week seizure of the steel mills in 1952 "without statutory sanction," Neustadt argued that one of the factors "making for compliance with a President's request is the sense that what he wants is his by right. The steelworkers assumed, as Truman did, that he had ample constitutional authority to seize and operate the mills." The constitutional contradiction evoked no response whatever from Neustadt.

James MacGregor Burns argued in his book that there were really four parties in America, congressional Republican and Democratic parties and presidential Republican and Democratic parties. The congressional Republicans and Democrats, elected on local issues in safe gerrymandered districts frequently in off-year elections, had more in common with each other than with the presidential wing of their own parties geared for election on well-publicized national platforms in national elections. Burns pictured the congressional/presidential split as a split between small-town lawyers and big-city lawyers, independent entrepreneurs and big businessmen, state legislators and intellectuals. Burns (himself a Democrat) was more interested in weakening the congressional at the expense of the presidential party than the Republican at the expense of the Democratic party. In his single-minded zeal for the presidency, Burns revealed the same blindness to constitutional issues that Neustadt had shown. Burns's hero "must be willing to take sweeping action, no matter how controversial, and then to appeal to the electorate for a majority, as Jefferson did in 1804 after the Louisiana Purchase. . . ." At the time, Jefferson had been rather embarrassed by the whole affair. He thought himself that the action was unconstitutional because there was no provision about acquiring territory in the United States Constitution. But like Truman's act for Neustadt, Jefferson's evoked little comment from Burns except his saying that the Louisiana Purchase was "magnificently vindicated in history." Burns and Neustadt were intent on increasing presidential power, constitutional balance was their enemy, and constitutional scruple never occurred to them.

In such an atmosphere as that of the era of Neustadt and Burns, no one was likely to view a major congressionl effort to limit the actions of an executive as a vital subject for historical investigation. It is little wonder that, as Benedict points out, there has been only one moderately detailed treatment of Johnson's impeachment, and that was done seventy years ago. But Benedict was the student of a legal and constitutional historian (Harold M. Hyman) and was trained to investigate those very issues which seemed like non-issues to Burns and Neustadt.

The major revisionist point of Benedict's book is simple: "To a large extent, the prejudicial view of impeachment most historians have adopted is based on the mistaken notion that government officials can be impeached only for actual criminal offenses indictable in regular courts. However, numerous studies of impeachment have contradicted this widely held conviction, sustaining the position adopted by the more radical Republicans during the crisis." Others, like historian Gaddis Smith, disagree and assert that a President's "high crimes and misdemeanors" must be essentially crimes and high ones at that to merit impeachment (see "The American Way of Impeachment," *New York Times Magazine*, May 27, 1973, page 53). In fact, it matters little for the purposes of his book whether Benedict is right about the abstract meaning of impeachment or not, and his claims to constitutional infallibility seem out of place in a history book. What is important is the historical meaning of impeachment in 1868. Fortunately, Benedict does make a case in regard to the common understanding of impeachment in 1868; it rests on these three points:

(1) English legal precedents were of little weight because in England any citizen could be impeached by the legislature; confining impeachment to indictable crimes in England was a protection of individual citizens' liberties from the government. In America, impeachment was applicable only to office holders (and specifically forbidden by the Constitution from use against private citizens) and was meant itself as a protection of the citizens from the government. In England, impeachment was meant to punish crime, and the criminal could be sentenced to death by the House of Lords. In America, impeachment could lead only to removal from office and permanent disqualification from office-holding.

(2) American precedents were few and far between, and they were mixed in import. On the one hand, the House of Representatives "had limited its accusations to indictable crimes in at most one of the five impeachments it had presented to the Senate before 1867." On the other hand, the Senate had decided innocence of the House's charges in two cases because none of the articles of impeachment named an indictable crime. On one occasion, however, the Senate had removed a judge for drunkenness and profanity in the courtroom, rather than for indictable crimes.

(3) With English experience clearly irrelevant and the relevant American precedents simply unclear in meaning, Americans in 1868 had to rely on the constitutional commentators and theoreticians of the day. Here Benedict points to the key historical factor, "the unanimity with which the great American constitutional commentators had upheld the broad view of the impeachment power." "Story, Duer, Kent, Rawle, and the authors of *The Federalist*," says Benedict, ". . . recognized that the danger to liberty and the efficient workings of government lay not in the possibility that the president or lesser executive officers might act illegally, but rather that they might abuse the powers the Constitution *had* delegated to them."

The latter point is crucial. If it was conventional legal and constitutional wisdom to believe presidents impeachable for abuse of powers constitutionally granted, then impeachment for actions short of indictable crimes was not necessarily a radical act. Thus the so-called Radicals of what used to be called "Radical Reconstruction" were not radical at all in constitutional matters. The constitutional wisdom of Kent and Story has been called many things, but never, one imagines, "radical."

Benedict marshals much more evidence to prove that impeachment was, like much of the rest of "Radical Reconstruction," really the result of compromises which pleased Republican moderates (and gained their support) and of intransigent opposition from Andrew Johnson. In many ways, this evidence constitutes the most persuasive part of the book.

Gaddis Smith in the article mentioned above sets the stage for his discussion of the Johnson impeachment episode by saying that the "Radical Republicans . . . gained full control of Congress after the 1866 elections." He implies that everything that followed — including impeachment — was a radical move. In fact, the House's impeachment resolution did not follow a Radical capture of the House in 1866 but rather a sound thrashing of the Radicals in the 1867 elections. The Republican party, on record as favoring impartial suffrage and on the ballot in three Northern states with proposals to eliminate white-only constitutional restrictions on the franchise, lost votes in practically every state. The Republican vote in Massachusetts, for example, dropped from 77 per cent (1866) to 58 per cent (1867), and in Maryland from 40 per cent to 25 per cent. The Democrats took California by arguing that Republican policies would lead to enfranchising orientals. They took Ohio's state legislature too, thus blasting the presidential hopes of Ohio's Radical Republican Senator Benjamin F. Wade. For the fence-

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Two weeks before the cartoon pictured on page one, *Harper's* had drawn a more sinister Johnson carrying plans for a "coup d'etat" in his hands. The congressional cannon which Edwin M. Stanton and Ulysses S. Grant aim at Johnson is loaded with cannonballs labeled "constitution." Johnson's attempts to use the patronage to help not the Republican party but a personal following may have caused some Republicans to fear a *coup d'etat* by the President.

sitting Republican politician, the message was clear: he had better moderate his policies in the direction of the Democrats. And it was the fence-sitters who counted, for the movement to impeach had been stopped totally by conservative votes in the July, 1867 session of Congress. The impeachment resolution did not pass until February, 1868, when the fence-sitters joined the Radicals because Johnson had openly violated a law, the Tenure of Office Act.

That the key voters awaited Johnson's overt violation of a law is, to be sure, further proof of Republican moderation on impeachment. Yet it is not a little disruptive of Benedict's argument concerning the mid-century legal understanding of impeachment that so many Republican congressmen — who surely must have gained their legal understanding from the same constitutional commentators the others read — awaited an indictable crime. Benedict chooses not to wrestle with this anomaly, but it could be resolved easily if Benedict confined his argument to proving that impeachment was a moderate move rather than that it was also legitimate or right one. The impeachment resolutions themselves were clearly the result of a compromise and not of a radical *coup*, for they cited both indictable crime and vaguer political abuses.

Gaddis Smith cites Benedict's study of Johnson's presidential actions as though it were new evidence of illegal *and therefore impeachable* acts, but for Benedict it is important only to set the scene for impeachment. He is not trying to find other illegal things for which Johnson could have been indicted, because he does not believe he needs to. Impeachment, he feels, was widely understood as a remedy for abuse of constitutional powers the President did have. All Benedict wants to show is that impeachment was a part of Reconstruction politics and not an embarrassing sideshow or a separate factional power play.

In delineating the Reconstruction context of impeachment, Benedict is again very effective. Largely through his unqualified right to pardon and through his natural powers to enforce the laws of Congress as he chose, President Johnson almost single-handedly dismantled Congress's Reconstruction program. He ignored the Test Oath Act and appointed former Confederates as provisional governors in several states. Treasury Secretary Hugh McCulloch (a hold-over Lincoln appointee) ignored the law also by appointing men who could not take the loyalty oath to Treasury jobs in the South (Reconstruction, as it had been initiated by President Lincoln in Tennessee, Arkansas, and Louisiana had been built around provisional governors and federal appointees who had always been loyal to the Union). Attorney General James Speed (another Lincoln hold-over) halted proceedings to sell confiscated lands in Florida and Virginia despite the intent of Congress's Confiscation Act. Despite the Freedmen's Bureau Bill establishing Freedmen's Bureau Courts (which were a form of military commission), Johnson proclaimed an end to trials by military commission where civil courts were in operation. The difference, of course, was that the civil courts were local and Southern; the military courts were federal and Northern. A freedman could anticipate very different treatment in the one rather than the other. This is Benedict's conclusion: ". . . within a year of Andrew Johnson's elevation to the presidency, the preliminary Reconstruction program enacted by Congress lay in utter ruin. In pursuing his own policy, Johnson had destroyed it, without violating a law, using only his constitutional powers as president of the United States." Such obstruction brought confrontation.

Benedict is also very effective in reminding us of what we should have suspected but nonetheless ignored during the long years of executive ascendancy since the New

Deal. It was not necessarily abstract political-scientific views of the nature of the presidency but practical politics that dictated much of the outcome of the impeachment movement. High-minded regard for constitutional checks and balances might have dictated one course for congressmen; practical politics reminded them to think first of who would in fact occupy the office next were Johnson actually removed. Since there was no vice-president, that honor would have fallen to Benjamin Wade, the president *pro tempore* of the Senate. Wade was a friend of a high protective tariff and an enemy of Hugh McCulloch's policy of contracting the currency inflated by Civil War greenback financing. Wade was therefore *persona non grata* to the hard-money, free-trade wing of the Republican party. The prospect of President Wade was as powerful a deterrent to impeachment as the prospect of a weakened presidency. To remember this is to put in proper perspective those history books which see only the votes *for* conviction as politically motivated.

Moreover, conservative Republicans opposed Wade's succession for party as well as factional reasons. To launch a man of such well-known economic convictions to the leadership of the party would be to split a party made up of former free-trading Democrats and former high-tariff Whigs by focusing on the issues that divided the party rather than the issues (loyalty of returning governments and safety of the freedmen) which united it. Such worries were exacerbated by rumors that Wade would appoint E. B. Ward, a leading opponent of contraction of the currency, as Secretary of the Treasury and Benjamin Butler as Secretary of State. Moreover, other votes to acquit were at least as thoroughly motivated by politics. The Democrats and Johnson conservatives who "would under no circumstances have voted to remove the President and turn the office over to the Republicans" were in fact "more consistently antipathetic to the entire proceeding that even the most hostile Republicans."

Accusing only one side of political motivation (rather than seeking to identify the political content of the beliefs of both those in favor of acquittal and those in favor of conviction) ignores too many stubborn facts. For example, more than half of the House Republicans who voted for impeachment had refused to do so at some time in the past. The impeachment resolution had failed previously before it passed in February, 1868, when the moderates joined the Radicals because Johnson had openly violated a law. Senator Edmunds had voted *against* a resolution declaring that the President had acted contrary to law in removing Secretary of War Stanton from office. But he decided Johnson was guilty, so voted in the end, and said that had Wade not been president *pro tem* of the Senate, moderates like William Pitt Fessenden would have reached the same conclusion. In other words, some men were simply convinced by the lawyers' arguments during the trial, as any juror might be.

In the end Benedict's revisionist point of view brings new relevance to the actual proceedings and arguments at Johnson's trial. Some of these arguments persuaded some men how to vote. Many of the arguments, as Benedict outlines them, were powerful. Was the Senate a court bound by the rules, precedents, and technicalities of the common law, or were the Senators, as Benjamin Butler (one of the managers of the prosecution's case) put it, "a law unto yourselves, bound only by the natural principles of equity and justice . . ."? The common law risked the escape of the guilty in order to protect the rights of the innocent; in the long run the risk was better for society as a whole. Was society as a whole better served by risking the escape of the guilty in impeachment proceedings where the guilty had such great powers they could affect the life of every member of society? Had Johnson violated a law or violated an unconstitutional law which was null? When the prosecutors tried to answer that question, they undermined their own case. To argue about it was to show that the President, right or wrong in his actions, had done something about which there *could* be argument. He had made a mistake, perhaps, but a mistake is not a *criminal* act because it does not show criminal *intent*. Granted a President could not be the sole person to decide whether a law was constitutional and therefore to be enforced by the executive, was it not the case that the President could disobey a law (in order to bring a case before the Supreme Court) which limited his authority and thus left only the President himself with an interest in challenging it? The questions were complicated, the arguments by the lawyers were of high quality, and there were many more issues than these, questions of fact, questions of admissibility of evidence, and other questions of law. The lawyers did not treat the case as though its outcome was predetermined by political prejudice.

Benedict's analysis of the votes in the Johnson verdict may surprise the reader, but that and many other pleasant surprises await the reader of *The Impeachment and Trial of Andrew Johnson*. It is a good book, it argues persuasively, it is on the whole well written, and its subject is long overdue for study. It is to be regretted, however, that the book lacks a leisurely pace. On page 143, for example, Benedict says: "There were numerous minor elements in the House's case for impeachment, and a complete analysis of them would require a longer monograph than I have undertaken here. Nonetheless, that is a job that needs doing." Then why, I was at first tempted to say, did you not do the job yourself? The answer (in many similar cases at least) is that the inflexible demands for publication for tenure (and publishers' demands on book length) tend to put a premium on the sort of book that takes two or three years to write and research and to make the book that is ten or twelve years in the writing a liability to one's career. To blame Benedict for cutting short the effort would be to blame a victim for the system that victimizes.

A fault which can be traced to the author, however, is a certain lack of balance in the book. I do not mean that his case is too one-sided, for when one is fighting seventy years of American historiography and an orthodoxy of the sort championed by James MacGregor Burns and Richard Neustadt, one need not bend over backwards to present the case for the other side. The other side's case is all we have heard for years; we all know it by heart whether we have read a book on Andrew Johnson or not. The lack of balance to which I refer is the failure to give the proper weight to the more important strands of his own argument. If the "prejudicial view of impeachment" stems from "the mistaken notion that government officials can be impeached only for actual criminal offenses indictable in regular courts," then Benedict's whole effort at revision rests on proof that this is not the case, or rather, that such was not necessarily the belief of everyone in the nineteenth century. Yet when Benedict makes his case on this crucial point, we get the same hurried rush through the evidence.

It is crucial to Benedict's case to prove "the unanimity with which the great American constitutional commentators had upheld the broad view of the impeachment power." Yet his proof consists of a quotation from a constitutional commentator, John Norton Pomeroy, whose book was copyrighted the year of Johnson's impeachment. There is a quote also from William Rawle, but the opinions of Kent and Story are not quoted or even paraphrased; they are merely page numbers in a footnote.

It would have been much more convincing to render a more leisurely treatment of the historic views of the impeachment power even if it had to come at the expense of the several tables and charts of votes that dot the book but do not add immensely to the argument (partly because they are rather poorly placed and lack an easy-to-follow legend to explain their import). In this case, argumentative power was sacrificed to book size and to the fashionableness of modern voting analysis.

I do not mean to intimate, however, that the book is a brief written for the current moment or even a book written because the subject is timely. Such is clearly *not* the case. The scholarly tone and the massive documentation are proof that the book was in the works long before impeachment became a subject for television discussions. If that is not proof enough, then an explanatory blurb on Professor Benedict that appeared in the December, 1972 issue of *Civil War History* is certainly proof, for he is there described already as the author of "a forthcoming volume, *The Impeachment and Trial of Andrew Johnson*." It is a volume worth reading now, to be sure, but it is also a volume that will be read by historians of Reconstruction for years to come .