RADICAL REPUBLICAN PROPOSALS FOR GOVERNMENTAL REORGANIZATION 1865-1869

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CHAPTER I

INTRODUCTION

During the period 1865 to 1869, most Radical Republicans raised criticisms of the American governmental system. They believed that the system failed to function properly under severe and prolonged stress and that the separation of branches rendered the government ineffective during periods of crisis. To rectify these deficiencies, Radical Republicans made numerous proposals for fundamental changes in the Federal government. They envisioned a new system which required one principle change in the national government. Congress was to monopolize power with the executive and judiciary as merely auxiliary branches. This would erase the confusion and injustice arising from the separation of powers and result in something comparable to parliamentary government.

This was not the only time that this type of governmental reorganization had been proposed. Because these Radical proposals received more support and came closer to adoption than at any other time, this period of American history was unique. Much of the impetus behind the Radical reorganizational movement was to achieve narrow selfish political ends but this was not their only motivation. They believed that their proposed changes were necessary to protect the hard-won results of the Civil War and to form a more flexible and democratic government.

One important concession must be made to the Radicals in order to fairly evaluate the political reorganization during this period of sectional and political turmoil. This is, that to suggest various changes in the Constitution is not necessarily to attack the document. The writers of the Constitution recognized that, as new needs arose, it must be modified. The major difficulty confronting the Radicals was that nothing prevented the Constitution from being altered but, the people of the nation often perceived the proposed changes with alarm and suspicion. The great Radical task was to persuade the people to accept basic alterations in the Constitution as natural.

The primary objective of this study is to indicate the governmental changes proposed by the Radical Republicans between 1865 to 1869 and to demonstrate how these proposals did or would affect government. Because this examination is of a general movement, it is principally concerned with the constitutional and reorganizational aspects of the Radical proposals and not necessarily their sponsors or politics. Although there are many studies on various aspects of Reconstruction, none deal specifically with proposed Radical governmental reorganization plans from 1865 to 1869. This study is an attempt to fulfill that need in a single work.

Historians, who have generally given little attention to the issue of governmental change in the Reconstruction Era,

limit themselves almost exclusively to: (1) the Tenure of Office Act of 1867; (2) the Command of the Army Act of March 2, 1867; and (3) the impeachment of President Andrew Johnson. These are only a few of the Radical measures to modify the government. It is impossible, from these few measures, to gain overall insight into the problem of reorganization. Moreover, most Reconstruction historians are too extreme in either justifying or condemning the Radical Republicans. The best work on this limited aspect of Reconstruction is William Ranulf Brock's An American Crisis. His conclusion is that under the existing circumstances:

> the Constitution could obstruct and annoy but it could not reconcile. A drastic solution imposed by a simple majority unhampered by checks and balances might have shocked at the time, but it need not have left the festering sores which remained to plague relations between the North and South. . . . Yet when all was said, and all recriminations had been uttered, the Constitution remained the one symbol of nationality upon which Americans could unite.[1]

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[1]William Ranulf Brock, An American Crisis, (London: MacMillan & Company, 1963), p. 273.

CHAPTER II

EXECUTIVE REORGANIZATION

The basic executive powers in the American governmental system are vested in the President. Among his powers are the responsibility and authority to enforce the laws, command the armed forces, formulate and execute foreign policy and issue pardons and amnesties. Just as important as these enumerated powers are the broad presidential powers undefined by the Constitution. The office has great power and influence within the American political system.[2]

During Reconstruction, the Radical Republicans made numerous proposals to reorganize the national executive branch. Conditions in American politics provided an impetus behind their proposals. There was the struggle between the legislative and executive branches for predominant influence in determining reconstruction programs. Radical Republican sentiment was expressed by Thaddeus Stevens (R-Penn.) statement that:

> In this country the whole sovereignty rests with the people, and is exercised through their Representatives in Congress assembled. The legislative power is the sole guardian of that sovereignty. No other branch of the Government, no other Department, no other officer

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[2]Dell Hitchner and William Harbold, Modern Government (New York: Dodd, Mead and Company, 1965), pp. 326-27; and U.S. Constitution, Art. II, Sec. 2 & 3.

> of the Government, possesses one single particle of the sovereignty of the nation.[3]

The struggle was intensified by the fact that the legislative branch was controlled by Republicans and Northerners while the executive branch was headed by a Democrat and a Southerner. This condition, after an extremely bitter fratricidal war, could only result in a power struggle.

The second impetus for executive reorganization was the popular Radical Republican belief that government should be reformed by making it more responsive to the people, more efficient and powerful, and free from corruption and fraud. To accomplish their objectives, the Radicals proposed modification of the powers and structure of the executive branch.

Throughout American history, a consistent criticism of the Constitution was that it did not limit presidential terms. This criticism stemmed from the fear of a man's having Presidential powers over a long period. Many Radicals encouraged a limitation upon the number of presidential terms.

There were also Radical proposals to change the length of a presidential term. Some legislators preferred a shorter term on the grounds that the President should reflect current opinion. Others held that a longer term was necessary to ensure that the President had enough experience to be intelligent in handling public problems.

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[3]Congressional Globe, 39th Cong., 2nd Sess., p. 252.

This debate raised other vital questions concerning the organizational makeup of the executive branch. Legislators reflected upon the proper method of electing the President. The basic issue was whether there should be more direct electorate influence in the election. The Radicals also were concerned with the proper course to follow in the event of a presidential vacancy and the status and function of the vice president and cabinet.

Many Radical Republicans were apprehensive over growing presidential power and influence. In their opinion only the legislative branch truly represented the people and should, therefore, hold the real reins of power. This general Radical belief was responsible for many proposals to withdraw powers from the President or, at least, to place certain restrictions upon them.

The major presidential powers reexamined by the Radicals with the idea of modification were the: veto; the authority to make appointments and removals; responsibilities as commander-in-chief; and the pardoning power. The constitutional basis and the practical need of these powers produced many debates and proposals. Radicals even attempted to reduce presidential authority and realign governmental powers through the impeachment process. This was the most extreme effort to adjust the balance of power between the two branches.

A bitter fight for the power to design reconstruction policies and genuine desire for more representative and efficient government provided the momentum behind the numerous Radical plans to reorganize the executive branch. The methods used, the degrees of success achieved, and the long range effects of these propositions varied according to each particular issue.

Senator Benjamin Wade and Representative James Ashley, both of Ohio, originated many of the Radical propositions advanced from 1865 to 1869.[4] They also actively supported many reorganization proposals of others and even crossed party lines to support Democratic plans.

On February 20, 1866, Wade offered an amendment to the Constitution which would restrict the President to a single term. This proposal, Senate joint resolution No. 33, stated that:

> The executive power shall be vested in a President of the United States of America. He shall hold office during the term of four years, and shall not again be eligible to that office during the term of his natural life. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the

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[4] Biographical Directory of the American Congress, 1774-1961, 85 Cong., 2 Sess., H. Doc., No. 442, p. 492. Referred to at times as the "great proposer" Ashley was earlier in life a Democrat but his opposition to slavery led him into the Free-Soil Party in 1848 and into the Republican Party in 1854. He was elected as a Republican to the 36th and to the four succeeding Congresses but was an unsuccessful candidate for the 41st Congress in 1868.

> same shall devolve on the Vice President, who shall not again be eligible to the office of President of the United States during the term of his natural life. Whenever Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, such officer shall not again be eligible to the office of President of the United States during the term of his natural life.[5]

The Senator believed that his proposal would remedy a fundamental weakness in the government. He felt that the government would be much better administered if the President was eligible for only one term. Wade thought that the President did not act in the public interest but only to ensure his reelection. Because of the temptations in possessing the vast presidential powers and their possible misuse to advance an incumbent's reelection, only a limitation upon his number of terms could protect the public. This amendment was defended on the grounds that it would improve government administration because the President's attention would no longer be focused upon reelection.[6]

The amended Wade proposal was reported by the Committee on the Judiciary and debated by the Senate on February 11, 1867. The Committee amendment struck out everything and inserted "No person elected President or Vice President who

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[5] Cong. Globe, 39th Cong., 2nd Sess., p. 1140.

[6] Ibid., p. 1141.

has once served as President shall afterward be eligible to either office."[7]

Both the original proposal and the committee amendment had the same major objective. The primary difference between them was that in the former, any person attaining the office of the presidency, regardless of the method, was forever ineligible to again hold the post. In the committee version, an individual had to be elected to the presidency or vice-presidency and served as president to be ineligible. Appointment or succession to the presidency, except for the vice-president, did not impose a permanent disability on a person from holding the office again.

Both the Wade and committee proposals caused extensive debate and a number of alternate amendments. William P. Fessenden (R-Me.) voiced the objection that the proposal was unfair to the vice-president who should succeed to the presidency. Because he was not elected for that position, he should continue to be eligible until elected in his own right. Also, the vice-president could succeed to the presidency for only a few days but lose all eligibility.[8]

Wade maintained that an individual succeeding to the presidency would have a very great advantage over his opponent

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[7] Ibid., p. 1140.

[8] Ibid., p. 1141.

at the next election. He would also be exposed, Wade argued, to the same temptations as if he had been elected to the office and should, therefore, be ineligible. Moreover, the vice-president might succeed early in the unexpired term and be eligible for reelection even though he had held the office for nearly four years. Wade, therefore, believed that the limitation should apply to every individual who held the presidency regardless of the way he attained or the length of time he occupied the position.[9]

During the debate, congressmen suggested changes in other phases of the executive branch. Radicals gave the length of the presidential term a great deal of attention. Wade wanted the term to remain four years, but other Senators, notably Luke P. Poland (R-Vt.), Charles Sumner (R-Mass.), William Fessenden (R-Me.) and James Dixon (R-Conn.), advocated one term of six years.[10]

Poland offered such an amendment as a substitute for the Committee of the Judiciary amendment. It stated that:

> The President and the Vice President of the United States shall hereafter be chosen for the term of six years, and no person elected President or Vice President, who has once served as President shall afterward be eligible to either office.[11]

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[9] Ibid.

[10] Ibid., pp. 1142-1144.

[11] Ibid., p. 1143.

Wade opposed the longer term because of the vast and growing powers of the presidency. His opinion was that, because of the great importance and power of the office, no individual should hold the presidency for an extended length of time. The Senator argued that frequent elections were necessary to safeguard against presidential usurpation, and the ineligibility clause would not be harmful because more than one man was qualified for the position.[12]

Senator Reverdy Johnson (D-Md.) also favored increasing the presidential term to six years but only if there was to be a limitation upon the number of terms. That the awesome executive powers might be vested in one man for a six-year period did not alarm him. Many senators shared his attitude. There were a number of reasons for this optimism. First, there was the existing situation between the executive and legislative branches. The President, even with all the powers of his office, was ineffectual when he and the Congress disagreed over policy. Moreover, the Congress could deny the President the powers vested in the executive branch by precedent or by congressional interpretation of the Constitution. With legislative supervision of the executive branch there was no real danger to the peoples' liberties.[13] The second

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[12] Ibid., pp. 1142-1143.

[13] Ibid., p. 1143.

defense for the longer term of office was that it would give the president the experience needed to develop a program and to properly perform his duties.

Sumner agreed with the arguments supporting the longer term with a one-term limitation. The Senator, however, went further in expressing his views, although they were not presented in the form of proposals. If the presidential term were to be lengthened, he believed the office of vice-president should be abolished. Sumner's reasoning was based upon the political reality that the party nominee for the vice-president is often selected not for his ability, but to "balance" the presidential ticket. To nominate a politician who will insure the votes of a certain geographical region or a faction within the party is the objective, not to select a candidate with the idea that he may possibly become president. It seemed to Sumner that the possible harm of an unfit individual succeeding to the presidency far outweighed the minimal value of having a vice-president.[14]

Sumner made the last attempt to restrict the number of presidential terms on April 8, 1868, when he proposed a constitutional amendment to limit the president to one term. The bill was referred to the Committee on the Judiciary which made an adverse report in the next session.[15]

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[14] Ibid.

[15] Ibid., 40th Cong., 2nd Sess., p. 2275, 3rd Sess., p. 378.

These were the major arguments and proposals made by Senate Radicals dealing with this aspect of governmental reorganization. Far from being extreme or unreasonable, they contain elements of very sound political logic. Due to the bitterness and suspicions of the period and with tradition being hard to break, none of the preceeding proposals had any degree of success.

In the House of Representatives, Ashley introduced, on May 30, 1868, one of the most comprehensive amendments among those dealing with many facets of the executive branch. His proposition would have fundamentally changed the executive branch. The relevant sections of his amendment include:

> Amend section three of article one, by striking out clauses four and five which read:
> The Vice President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.
> The Senate shall choose their other officers and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of the President of the United States.
> And insert the following:
> The Senate shall choose their own presiding and other officers.
> Amend section one, article two, by striking out the words 'together with the Vice President chosen for the same term;' so that it will read:
> The executive power shall be vested in a President of the United States of America; he shall hold his office during the term of four years . . .
> No person elected to the office of President shall thereafter be eligible to be reelected.[16]

The President would be restricted to one term. This simple

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[16] Ibid., 40th Cong., 2nd Sess., p. 2713.

proposition reflected the basic Radical Republican theory on this facet of executive reorganization.

These various plans, advanced in both the House and the Senate, had no real success. Although they seemed to command adequate support for passage, they all met the same fate. Some proposals were amended beyond the point of usefulness, others were defeated in various stages of voting, and most were buried in committees.

Another alleged weakness in the American governmental system was the long standing problem of presidential vacancy and succession. From 1865-1869, many changes were suggested to remedy this vaguely defined area of the executive branch. On presidential succession, the Constitution provides that:

> In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.[17]

On March 1, 1792, the Congress determined the line of presidential succession, if both the president and vice-president should die or be incapacitated, by placing congressional officers in the chain of executive ascendancy. Sections 9 and 10 of the law provided:

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[17]U.S. Constitution, Art. 2, Sec. 1, para. 6.

> That, in case of removal, death, resignation, or inability both of the President and Vice President of the United States, the President of the Senate pro tempore, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being, shall act as President of the United States until the disability be removed or a President shall be elected.
>
> That, whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forwith cause a notification thereof to be made to the Executive of every State, and shall also cause the same to be published in at least one of the newspapers printed in each State, specifying that Electors of the President of the United States shall be appointed or chosen in the several States within thirty-four days preceding the first Wednesday in December then next ensuing: Provided, there shall be the space of two months between the date of such notification and the said Wednesday in December, and if the term for which the President and Vice President last in office were elected shall expire on the third day of March next ensuing, the Secretary of State shall specify in the notification that the Electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the Electors shall accordingly be appointed or chosen; and the Electors shall meet and give their votes on the first Wednesday in December.[18]

This was the existing law between 1865-1869.

On December 6, 1865, Representative M. Russell Thayer (R-Penn.) introduced a bill which he considered to be a better solution to the succession problem. His proposition provided:

> that in case of removal, death, resignation, or inability, both of the President and Vice President of the United States, the President of the Senate protempore, and in case there shall be no President of the Senate then the Speaker of the House of Representatives for the time being, and in case there shall be no Speaker of the House of Representatives then the Chief Justice of the Supreme Court, and in case there shall be no Chief Justice

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[18] Annals of Congress, 2nd Cong., 1st Sess., pp. 1342-43.

> of the Supreme Court then the justice of the Supreme Court of the United States who has been the longest commissioned, shall act as President of the United States until the disability be removed or a President shall be elected.[19]

In comparing the March 1792 law with the Thayer bill, there is no actual change in the chain of succession. The latter proposal merely added to the list of officers on whom the presidency would devolve should the need arise. After the officials named in the 1792 law, the presidency would pass to the Chief Justice of the Supreme Court and then to the senior Supreme Court associate justice.

On January 23, 1867 Representative George Boutwell (R-Mass.) of the Committee on the Judiciary reported the bill back with an amendment and with the recommendation that it pass. The Committee's amendment added the following sections to the bill.

> Sec. 2 That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall, if the Senate and the House of Representatives by concurrent resolution so request and direct, forthwith cause a notification thereof to be made to the Executives of every State, and shall cause the same to be published in at least one of the newspapers printed in each State, specifying that Electors of President and Vice President shall be chosen in the several States within thirty-four days preceding the first Wednesday in the December next ensuing: Provided, there shall be a space of two months between the date of such notification and the said first Wednesday in December. But if there shall not be the space of two months between the date of such notification and the said first Wednesday in December, or if the term for which the President and Vice President last in office were elected shall not expire on the 3rd day of March

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[19] Cong. Globe, 39th Cong., 2nd Sess., p. 691.

> next ensuing, then the Secretary of State shall specify in the notification that the electors shall be chosen within thirty-four days preceding the first Wednesday in December of the year then next ensuing, within which time the electors shall accordingly be chosen and the electors shall meet and give their votes on the said first Wednesday in December . . .
>
> Sec. 3 That whenever the offices of President and Vice President shall both become vacant when Congress is not in session, it shall be the duty of the officer discharging the duties and powers of the office of President forthwith to issue a proclamation convening both Houses of the Congress of the United States.[20]

Although the Committee accepted the Thayer proposition, it also attempted to remedy what it regarded as weaknesses in the 1792 law.

Boutwell's objection to the existing law was that it did not allow for discretion on the part of the Secretary of State in issuing his notification for the election or appointment of presidential electors. If a vacancy occurred in both the presidency and the vice-presidency, the secretary was required by law to issue his call and a presidential election would have to take place. There was no lawful way to avoid these occurrences.[21] The problem foreseen by the Committee was that there was no power in Congress to provide for the election of a president and vice-president to complete the remainder of the term for which the president and vice-president last in office were elected. If an election were to

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[20] Ibid.

[21] Ibid.

take place, under the existing law, it would have to be for a four-year term from the next March 4th.

Boutwell's concern was that this oversight could rupture the original harmony of the presidential and congressional terms because a double vacancy could occur at any time and an election would have to be held. The elected candidate would serve a full term of four years which could destroy the symmetry of the election system.[22] The Committee's amendment would rectify this weakness in the 1792 law. Their amendment would make it optional for Congress to call an election or permit the officer discharging the duties of the presidency to continue in office until the next regular election. The Committee proposal would require an election only if insisted upon by a concurrent resolution of both Houses.

The major opponent of the proposal was A. J. Rogers (D-N.J.). His disapproval stemmed from the fact that it gave Congress the arbitrary power whether there would or would not be a new election in the event both the president and vice-president should die. This meant that, in case of a double vacancy, should the office revert to an individual with political views suitable to Congress, there would be no election. If, however, the person were not politically

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[22] Ibid.

satisfactory, the Congress would order an election. Rogers felt that this was wrong because it took the power away from the people by permitting Congress to determine when a new executive would be chosen.[23]

Many House members believed that the bill needed further study and consideration. It was, therefore, recommitted to the Committee on the Judiciary. The House reconsidered the proposal on February 16, 1867, when Boutwell again reported the bill from the Committee. The bill contained its original provisions and the Committee amendment. Upon their second consideration of the bill, the House made two additional amendments. The first was suggested by the author of the original proposal, M. Russell Thayer. In his opinion section three of the Committee's addition had a fundamental weakness because it did not require the "acting" president to convene Congress within a specified time. He believed that a stipulation was needed either to set the time within which Congress must meet or to require the "acting" president to convene the Congress without any unnecessary delay.[24]

The second amendment, suggested by William Lawrence (R-Ohio), stipulated that the words "and qualified" should be added to the first section of the bill. The original

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[23] Ibid.

[24] Ibid., p. 1288.

proposition stated that the "acting" president should continue in office until a president was elected. Lawrence's opinion was that a man might be elected president and yet never present himself to be qualified for the office because the law did not require it.[25]

Boutwell, although believing that neither of the amendments was needed, voiced no serious objection to them and the amended bill was passed. When the Senate received the bill, it was set aside for further study and permitted to die in committee.

Representative John C. Churchill (R-N.Y.), on March 30, 1868, made a new attempt to amend the 1792 succession act. His proposal, as the earlier versions, was to amend its ninth and tenth sections.[26] Churchill's proposition made only one actual change in section nine. It added the Chief Justice of the United States Supreme Court to the line of succession. This differed from the Judiciary Committee's 1867 plan by omitting the associate justices from the line of succession.

The major change in section ten was that the Secretary of State would issue a call for a presidential election only if more than eighteen months remained in the term, instead of automatically issuing his call as provided for by the

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[25] Ibid.

[26] Ibid., 40th Cong., 2nd Sess., p. 2224.

existing law or only at the discretion of Congress as proposed in 1867. If less than one and a half years remained in the term, the "acting" president would hold the office until the regular election.

Churchill was not too concerned about keeping the congressional and presidential terms in harmony. He followed the 1867 committee plan that every presidential election must be for a full four year term. The Churchill bill did not provide for an election if less than eighteen months remained in the term when the double vacancy occurred. After an election caused by vacancies, however, the election sequence would not necessarily coincide with the congressional elections. Churchill's bill subsequently died in the Committee on the Judiciary.

Representative James Ashley, on May 30, 1868, offered a general plan to revise the executive branch. Among his proposals was a system for presidential succession. It included abolishing the office of vice-president. Ashley's new chain of presidential succession would be:

> In case of the removal of the President from office by impeachment, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve temporarily on the member of the executive department senior in years. If there be no officer of an executive department, then the Senator senior in years shall act until a successor is chosen and qualified.
>
> If Congress be in session at the time of the death, disability, or removal of the President, the Senators and Representatives shall meet in joint session under such rules and regulations as the Congress may by law

> prescribe, and proceed to elect by viva voce vote a President to fill a vacancy. Each Senator and Representative having one vote, a quorum for this purpose shall consist of a majority in each House of the Senators and Representatives duly elected and qualified, and a majority of all the votes given shall be necessary to the choice of a President. The person thus elected as President shall discharge all the powers and duties of said office until the inauguration of the President elected at the next regular election.
>
> If Congress be not in session, then the acting President shall forthwith issue a proclamation convening Congress within sixty days after the death or disability of the President.[27]

The proposed abolition of the vice-presidency made Ashley's plan seem more extreme than the earlier proposals. His plan was also different from the others in that it excluded the President pro tempore of the Senate and the Speaker of the House from the line of succession. Instead, the presidential duties would first devolve upon the senior member, in years, of the executive cabinet and then, if necessary, upon the Senator, senior in years. In the place of automatic election, as provided for in the 1792 law, the Congress would meet in joint session and each member would vote for an individual to be acting president until the next regular presidential election.

Ashley's plan actually had some political logic and merit. It would maintain the harmony of the presidential and congressional terms. By naming an executive officer first in the line of succession, it would usually insure that the

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[27] Ibid., p. 2713.

last elected president's views and party would be represented in office. Although the peoples' will, as expressed in the last presidential election could be thwarted if the opposition party controlled Congress, this point is not too relevant. Usually the President and the congressional majority belong to the same political party. If this were not the case and the last election were a midterm one, the congressional majority of the opposing party might be more representative of the "general will" than the president's party.

The idea to abolish the office of vice-president may seem very extreme but it was not. Although Ashley would abolish the office, he would have the Senate elect its own presiding officer, and have changed the line of succession. His plan contains a degree of logic and it might have worked if it had been given a trial.

The Radical Republicans had many and varied ideas regarding presidential succession. Their plans, for the most part, were intellectually defensible and intended to eliminate a weakness in the nation's political structure. Radical proposals were certainly not extreme, but they all failed at various stages in the legislative process.

Another aspect of the executive branch which the Radicals thought needed revision was the method of electing the president and vice-president. As with their other proposed reorganizations, they had a double motive: (1) a belief in more popular

participation in government by the people; and (2) to increase Radical power against the executive in the struggle to control Reconstruction policies.

Many phases of presidential and vice-presidential election concerned the Radicals. Their chief proposal was to adopt a different way to elect the president. Radicals also were concerned with the nomination process, disputed elections, and the procedures to be followed if no candidate received the necessary vote for election.

Before 1865-1869, the only Constitutional provisions governing the election of the president and the vice-president were Article II, section I and the 12th Amendment. The major law regulating the executive election was the "Act Relative to the Election of a President and Vice President of the United States, and declaring who shall be President in case of Vacancies in the Offices of both President and Vice President." This bill was passed in 1792 and remained in force until 1887, although periodically amended.

The direct popular vote was the most common of all Radical proposals. Representative James Ashley and Senators Luke Poland and Charles Sumner were among those most actively seeking this change.

Representative James Ashley exemplified the Radicals who believed, of the Electoral College system, that:

> No system is defensible which defeats the will of the majority, or which fails to secure to the electors of the entire nation an equitable representation. No man who has given this subject proper reflection will claim that the electors of the nation have ever had an equitable representation in the Electoral College for the choice of President and Vice President, from the organization of the Government to this hour.[28]

On February 20, 1866, Senator Sumner expressed his views on the Electoral College during a debate on the Senate floor. He favored abolition of the Electoral College and the direct election of the president. This would give every ballot an equal weight in the presidential election. This would be more democratic by enabling all groups to be heard and to be a force in choosing the president.[29]

Senator Poland offered a constitutional amendment on February 12, 1867, to institute direct popular vote for president. The amendment died in committee.[30]

On May 30, 1868, Representative Ashley proposed a constitutional amendment which included provisions for direct election of the president. Those provisions were that:

> In lieu of clauses two, three, four . . . of article two and of article twelve of the amendments insert the following: The qualified electors shall meet at the usual places of holding elections in their respective States on the first Monday in April, in the year of our Lord one thousand eight hundred and seventy-two, and on the first Monday in April every four years thereafter,

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[28] Ibid., 40th Cong., 3rd Sess., p. 213 (appendix).

[29] Ibid., 39th Cong., 2nd Sess., p. 1144.

[30] Ibid., p. 1185.

under such rules and regulations as the Congress may by law prescribe, and vote for a citizen qualified under this Constitution to be President of the United States, and the result of such election in each State shall be certified, sealed, and forwarded to the seat of the Government of the United States in such manner as the Congress may by law direct.

The Congress shall be in session on the third Monday in May after such election, on the Tuesday next succeeding the third Monday in May, if a quorum of each House shall be present, and if not, immediately on the assemblage of such quorum, the Senators and members of the House of Representatives shall meet in the Representative Chamber in joint convention, and the President of the Senate, in presence of the Senators and Representatives thus assembled, shall open all the returns of said election and declare the result. The person having the greatest number of votes for President, if such number be a majority of the whole number of votes cast; if no person have such majority, or if the person having such majority decline the office or die before the counting of the vote, then the President of the Senate shall proclaim; whereupon the joint convention shall order the proceedings to be officially published, stating particularly the number of votes given for each person for President.

Another Election shall there upon take place on the second Tuesday of October next succeeding, at which election the duly qualified electors shall again meet at the usual places of holding elections in their respective States and vote for one of the persons then living having the highest number of votes, not exceeding five on the list voted for as President at the preceding election in April, and the result of such election in each State shall be certified, sealed, and forwarded to the seat of the Government of the United States as provided by law.

On the third Tuesday in December after such second election, or as soon thereafter as a quorum of each House shall be present, the Senators and members of the House of Representatives shall again meet in joint convention and the President of the Senate, in presence of the Senators and Representatives thus assembled, shall open all the returns of said election and declare the person having the highest number of votes duly elected President for the ensuing term.

No person thus elected to the office of President shall thereafter be eligible to be reelected.[31]

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[31]Ibid., 40th Cong., 2nd Sess., p. 2713.

Ashley was strongly committed to his amendment because he believed that it would remedy the fundamental weakness in the presidential elective process: elimination of the indirectness of the Electoral College.

His bill abolished the Electoral C-llege by nullifying clauses two, three and four of Article II and the 12th amendment to the Constitution. The Electoral College would be supplanted by a system of direct election. Just as urgent a need, in Ashley's opinion, was the abolition of the national nominating conventions. He viewed the conventions as "demoralizing in its practical workings, unfair in its representation of the great body of the voters, and repugnant to the principles of true democracy and republicanism."[32] Ashley was determined to replace conventions with a better system. A national election would be held which, for all practical purposes, would be a nominating election because it was doubtful that any candidate would receive the simple majority needed for election. In the second election, the people would vote for a candidate who had ranked among the top five in the first election. The candidate who received the most votes in this election would become president. This dual election would eliminate most of the indirectness which offended the Radicals.

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[32]Ibid., p. 2714.

The third fundamental defect of indirectness in the existing system was that it was possible for the House of Representatives, not the people, to elect the president. This had happened twice and Ashley wanted to prevent it from happening a third time. He opposed the House election because it permitted a small minority to elect the president. Under this election system each State has one vote which meant that the Representatives of very few people can elect the president. To let a limited group elect the president violated Ashley's democratic principles. He believed that it was much wiser to have a second election by the people.

Ashley foresaw another danger in the election of the president by the House of Representatives. This was that:

> the Representatives who are to determine the choice of a President when the election devolves on the House of Representatives are members of the Congress which expires on the day the new President is to be inaugurated; that the term of all members not reelected will cease on the fourth of March after the election of the President, and that such members will then be prepared to accept appointments.[33]

This type of election could encourage corruption.

Ashley's bill, proposing fundamental changes in the system of presidential elections, reflected his belief that there were weaknesses in the Electoral College. Despite his zeal in working for the proposal's adoption, it found little support and died in committee.

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[33] Ibid., p. 2718.

Representative George F. Miller (R-Penn.) was the author of another constitutional amendment to select the president by a direct popular vote. If there were a tie between the candidates, a congressional convention would elect the president. Miller's amendment, introduced on February 8, 1869, died in committee.[34]

Senator Oliver P. Morton (R-Ind.) advanced another proposal to modify the Electoral College on February 9, 1869. His major criticism of the electoral system was that the Constitution permitted the state legislatures to choose the electors. Morton's amendment would ensure the direct election of presidential electors. He would accomplish this goal in the following manner:

> The second clause, first section, second article of the Constitution of the United States shall be amended to read as follows: each State shall appoint, by a vote of the people thereof qualified to vote for Representatives in Congress; a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector; and the Congress shall have the power to prescribe the manner in which such electors shall be chosen by the people.[35]

This would change the provision of the Constitution which states that "Each State shall appoint in such manner as the

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[34]Annual Report of the American Historical Association for 1896, II, (Washington: Government Printing Office, 1897), p. 390.

[35]Cong. Globe, 40th Cong., 3rd Sess., p. 1042.

Legislature shall direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled."[36] Morton felt this was a dangerous power to place in the state legislatures. In an extremely close presidential election, a legislature might repeal the law allowing the people to elect the electors by a direct vote and appoint them. This was a source of danger to the nation which Morton would eliminate by his amendment. It would have made no change except to guarantee that the people choose the electors instead of the legislature, as in South Carolina. Surprisingly, nothing in the amendment required presidential electors to vote for the candidate chosen by popular vote. The amendment was adopted by the Senate but rejected by the House.

On February 11, 1869, Ashley presented two amendments in another attempt to resolve defects in the Electoral College. The first he offered, and actually preferred, was the same comprehensive amendment of May 30, 1868. When this amendment failed, he introduced his second measure providing that:

> The qualified electors of the United States shall, on such day as the Congress may by law appoint, meet in their respective States at the usual places of holding elections and vote by ballot for President and Vice President of the United States, one of whom shall not be an inhabitant of the same State with themselves.
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> The Legislatures of the several States shall be in session on or before the second Tuesday in January next

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[36] U.S. Constitution, Art. II, Sec. 1, para. 2.

> succeeding such election, and shall in such manner as the Congress may direct, canvass the returns of the election for President and Vice President in said State, and divide the whole number of votes cast by the number of Senators and Representatives to which such State may be entitled in Congress, and the product of such division, rejecting fractions, shall be the ratio for one elector. The Legislature shall thereupon appoint the number of electors to which the State is entitled, taking care to secure to each of the candidates voted for in the State an equitable representation, as near as may be, in the Electoral College, as indicated by the number of votes returned for each candidate, and the electors thus appointed shall vote for one of the candidates named for President and one of the candidates named for Vice President on the ballots cast by the qualified electors of the State at the general election.[37]

This amendment provided for a proportional division of the total popular vote cast in the States among the different presidential candidates. The plan did retain the Electoral College. After a brief discussion in the House, the amendment was referred to committee and buried.

Another possible defect within the elective system was the procedure in the case of disputed returns from a State. This was to become a Radical weapon in the struggle for predominant influence in Reconstruction. The Radical Republicans' interpretation of the Constitution was that because Congress had the right to count the electoral ballots, it also had the power to determine the legality of the votes. It must be remembered, however, that this authority was based upon interpretation and tradition, and was not necessarily specified by law.

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[37] Cong. Globe, 40th Cong., 3rd Sess., p. 1108.

In 1865, Congress actually passed a law giving itself the power to judge electoral votes. This law, known as Joint rule twenty-two, provided that "No vote objected to shall be counted except by the concurrent vote of the two Houses."[38] The basic objective of this law, unfortunately, was not to remove a weakness in the election system, but to prevent the unreconstructed Southern States from casting electoral votes. Because the impetus behind this was political and partisan and not reform, there was much dissatisfaction with the rule. It was finally abandoned when the House became Democratic in 1875.

The presidential powers reconsidered by the Radicals in their reorganizational schemes were those to: make appointments and removals; veto legislation; pardon offenders; and command the army and navy. Most Radicals wanted to diminish presidential powers rather than to increase them.

In the scheme of Radical governmental reorganization, the removal power was to play a much greater role than that of appointment. The president's power of independent removal was the subject of many proposals to curtail that power. The most famous regulation of the removal power was the Tenure-of-Office Act of 1867. This act, had it been carried to the

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[38]Andrew McLaughlin & Albert Bushnell Hart, Cyclopedia of American Government, I, (New York: D. Appleton & Co., 1914), p. 659.

end envisioned by the Radicals, would have made far-reaching changes in both the removal power of the president and the nature of the executive cabinet. Behind the act was both an element of Radical partisan politics and the sincere desire for governmental reform.

The basic purpose in the tenure law was, at the beginning, to prevent President Andrew Johnson from disrupting the Republican Party by wholesale dismissals from office. From this origin, two key thoughts emerged and became the objectives of many Radicals. The first was to gain senatorial control over presidential dismissals and the second was to make the cabinet responsible to the Congress.

They made their first attempt to attain these objectives in April 1866, by adding an amendment to the Post Office appropriation bill to prevent salary payment to an appointee not confirmed by the Senate, unless the vacancy resulted by a resignation, death or expiration of the original term of office. This proposition was to prevent the practice of withholding appointments until the concluding moments of Congress and then, following adjournment, reappointing officers who were never confirmed and possibly, even rejected by the Senate. The Senate first agreed to this proposition, but then reconsidered and rejected it.[39]

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[39]Cong. Globe, 39th Cong., 1st Sess., p. 2274.

The tenure bill which won final acceptance originated in the Senate. It was introduced on December 3, 1866, and referred to committee. When reported from committee it provoked heated debate. Only the first section of the proposition is germane. It read:

> That every person (excepting the Secretaries of State, of the Treasury, of War, of the Navy, of the Interior, the Postmaster General, and the Attorney General) holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be, entitled to hold such office until a successor shall have been, in like manner appointed and duly qualified, except as herein otherwise provided.[40]

The provision exempting cabinet officers was included in the bill, not because Congress lacked the political power to include these offices but primarily because it was thought the president needed this control to insure efficiency and security in his administration.

There were two significant amendments proposed to the bill. One of these was offered by Senator Sumner. It provided:

> That all officers or agents, except clerks of Departments, now appointed by the President or by the head of any Department, whose salary or compensation, derived from fees or otherwise exceeds $1,000 annually, shall be nominated by the President and appointed by and with the consent of the Senate; and the term of all such officers or agents who have been appointed since the first day of July 1866, either by the President or by the head of a

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[40] Ibid., 2nd Sess., p. 382.

Department, without the advice and consent of the Senate, shall expire on the last day of February, 1867.[41]

There were two fundamental differences between the original committee bill and the Sumner amendment. The latter required the consent of the Senate in making a large number of appointments where it was not then required by existing law. This was to be accomplished by defining the groups of persons who were to be recognized as the principal officers in the government. A monetary guide was used to distinguish between the principal officials of the government, which must be appointed by and with the consent of the Senate, and the inferior officers, who may be appointed by the courts, the president or the heads of Departments. This dividing line between the former and latter officials would be a compensation of one thousand dollars annually. While the reported bill merely undertook to regulate the tenure of the then recognized principal officers, Sumner's amendment greatly broadened this category of governmental officials.

The second difference was that the committee's bill gave the Senate power in the future to regulate the tenure of government officials. The objective of Sumner's amendment was to undo many of the appointments President Johnson had made. The terms of office for those appointed after July 1, 1866, would be limited and, therefore, terms of many Johnson

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[41] Ibid., p. 487

appointees would expire on the last day of February, 1867. The Senate would then have to approve Johnson's new nominations. Sumner favored strict Senate controls over the removal of executive personnel, but even his colleagues gave his proposal little support.

The other major amendment proposed to eliminate the clause which exempted the heads of departments from Senate control from the bill. This proposition, made on January 10, 1867, was discussed at length. On one side were the Senators who disagreed with the theory that the heads of departments should be confidential advisers to the chief executive. They believed that the Congress and the cabinet should be connected in some way. The principal advocate of a "close tie" relationship was Senator Timothy Howe (R-Wis.). His argument was to:

> deny that the Cabinet is the President's Cabinet, that it was intended so to be by law, that it ought to be in fact. It is the Cabinet of the people . . . It is to enable him to exert powers and influences not given to him by the Constitution or by law that it is thought to be essential that he should have control of the tenure of these heads of Departments; and it is precisely because you cannot give him control of the terms of these officers, without giving him powers and influences which the Constitution never designed that he should have, that I object to leaving the control in his hands.[42]

The opposing Senators stressed the necessity of allowing the president to maintain control over removals in order

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[42]Ibid., p. 383.

to insure efficiency and unity within the executive branch. Senator John Sherman (R-Ohio), despite his vote at Johnson's trial, was the leader of the forces defending this theory. Sherman felt that:

> the Cabinet officers ought to retire with the President, and the Cabinet officers ought to have harmonious relations, personal and political with the President . . . The executive office is a unit, and must necessarily be so. All the heads of Departments must conform to the wishes of the President in a great measure. He must have power and control over them. It is impossible to divide the executive authority.[43]

This latter view prevailed with the Senate refusing to delete the clause from the bill which exempted the heads of departments from senatorial control. A later attempt to remove the clause was again decisively defeated and the original bill was then passed by the Senate.

The path of the bill in the House followed a slightly different route. Although the motion to eliminate the exemption clause was defeated the first time, it was passed after reconsideration. The committee bill with this amendment then passed the House.

Following another failure by the Senate to withdraw the exemption provision, a conference committee was appointed to reach an agreement over the single difference between the Senate and House bills. The only issue was whether the tenure of Department heads should be regulated. The House plan made

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[43] Ibid., p. 1046.

their removal subject to Senate discretion while the Senate version left removal solely to the president. The compromise was:

> That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: Provided, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the consent of the Senate.[44]

This section of the compromise bill had only one major difference from the earlier versions. The difference was the regulation of tenure for Department heads under certain conditions. Basically the tenure rule stipulated that individuals appointed by the chief executive, during his term of office, could not be removed without Senate consent. The term of the appointed official expired 30 days after the end of the term of the president who appointed him.

The committee bill, with the amended first section, was passed by both Houses, but President Johnson vetoed it. The House overrode the veto 133-37; the Senate passed it 35-11. The Tenure-of-Office Act became law on March 2, 1867.

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[44]Walter Fleming, Documentary History of Reconstruction, (Cleveland: Arthur H. Clark Company, 1906), p. 404.

President Johnson expressed his objections to the Tenure Act on the grounds that:

> The President may be thoroughly convinced that an officer is incapable, dishonest, or unfaithful to the Constitution, but under the law . . . the utmost he can do is to complain to the Senate and ask the privilege of supplying his place with a better man. . . . Under such a rule the Presidnet cannot perform the great duty assigned to him of seeing the laws faithfully executed . . .[45]

Less than a year later, the Senate attempted to expand its influence over removals. The proposition was in the form of:

> a bill to vacate at the end of thirty days the tenure of a great number of general and special agents, who had been appointed by the President or heads of Departments, and to make appointments to such positions thereafter subject to the advice and consent of the Senate.[46]

Although this bill passed the Senate 32-9 on February 7, 1868, it never came to a vote in the House of Representatives.

I In 1869 there was renewed discussion and proposals over tenure. On January 11, a bill repealing the 1867 Tenure Act was passed by the House. In the Senate the measure was never brought to a vote.

A measure, however, was passed which modified the 1867 Act. This new Tenure Act allowed much more executive discretion than the earlier version. The sections in the 1867 Act

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[45]George Henry Haynes, The Senate of the United States, II, (New York: Russell & Russell, 1960), p. 802.

[46]Ibid.

which had regulated suspensions of office during the recess of the Senate were completely repealed. Previously these suspensions were limited to those caused by misconduct, crime, disqualification or disability. The new act substituted provisions which permitted suspensions by the president at his own discretion. The Senate also repealed the provision requiring the president to report the evidence and reasons for a suspension to the Senate. The president could remove an official, during a session of Congress, in whose appointment the Senate had shared, if he nominated a successor.[47]

The Act of 1869 repealed some of the 1867 tenure legislation, but it did not satisfy President Ulysses S. Grant who wanted a total repeal. This was not done until the Act of March 3, 1887.

There were two primary considerations in the various proposals to modify the president's removal power. The first was a change in the cabinet's composition. This would be done by tenure legislation which would replace the discretion of the president for that of the Senate. This would ensure a major change in the character of the presidential cabinet by making it responsible to the Senate rather than the president and could have evolved into something similar

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[47]Cong. Globe, 41st Cong., 1st Sess., p. 37 (appendix).

to the British parliamentary system. The principle was rejected with the Tenure Act's repeal in 1887, and much of the importance and significance of the tenure laws were lost because they were such a temporary factor in the American political system.

The second consideration was whether the Senate had the constitutional right to participate in any part of the removal process. This was the most important aspect of the tenure acts. In examining this facet of the problem, it must be remembered that the system which seemed best or most essential was not necessarily sanctioned by the Constitution. Although it may seem necessary to have sole presidential control over removal to insure efficiency and unity within the executive branch, it does not mean that the tenure acts were illegal.

The debate over the tenure proposals was based primarily on differing interpretations of congressional acts as precedents and related provisions of the Constitution. Naturally, the Radical Republicans supported the doctrine that the Senate had a right to share in the removal power. Supporters of the executive argued that the removal power was vested solely in the president.

In analyzing the congressional acts that were used as precedents, it is necessary to review congressional policy from 1789. When the Departments of State, War and the Treasury

were formed, within each there was a subordinate who was to take charge of Department affairs if the Department head were removed by the president. It was argued that Congress had indeed set a precedent for presidential removal of cabinet officers. Section two of the Act of August 7, 1789, which organized the Department of War, reads as follows:

> There shall be in said Department an inferior officer, to be appointed by the said principal officer, to be employed therein as he shall deem proper, to be called the Chief Clerk in the Department of War, and who, whenever the said principal officer shall be removed from office by the President of the United States, of in any case of vacancy, shall during such vacancy have the charge and custody of all records, books, and papers appertaining to the said Department.[48]

This act was the basis for the argument that the president could remove the department's secretaries.

The Departmental Acts of 1789 were also used by the Radicals for their precedent and they followed it to a more logical conclusion. Even though using the 1789 Acts as proper precedents, it should not be concluded that the 1867 Tenure Act was unconstitutional. A number of reasons were found by the Radical Republicans in defending their idea that the Tenure Acts were constitutional.

It was their major contention that the Acts of 1789, far from setting a permanent and binding precedent, merely gave a legislative construction to the Constitution regarding

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[48]Annals of Congress, 1st Cong., vol. 2, p. 2160.

removal power. They argued that a legislative interpretation was not a permanent settlement of the issue. The logical precedent set by the First Congress in passing the 1789 Acts was that they made the removal question a proper subject for legislative construction. The right of legislative control was established, nothing else. With this theory, the Radicals argued that merely because the Departments Acts were passed by the First Congress, the precedent was not necessarily conclusive. The 1867 Congress had the same power as the First Congress. What an early Congress established by congressional construction, a later Congress could reverse by the same method. There was nothing unconstitutional about this because it was merely a matter of congressional interpretation. If one Congress had the right to exercise this power then all Congresses possessed the same authority. It was not a relevant question at this late date whether or not the legislature should have control over the removal power. This was determined by the First Congress.

The Constitution was used to support the arguments of both sides. There is no reference in the Constitution to removal, except by the method of impeachment. If there were no explicit reference and both the Radicals and the presidential supporters agreed that impeachment was not always a practical method of removal, the answer to who possessed the power must be found in the implied powers of the Constitution.

The opponents of the Tenure Acts justified their arguments primarily upon two Constitutional provisions: that the executive power was vested in the president who was responsible for the faithful execution of the laws. Because the removal power had an executive character and its exercise was, at time, essential to insure proper execution of the laws, the Constitution implied that the removal authority was vested solely in the president. This made the Tenure-of-Office Acts unconstitutional.

The Radicals also based their theories upon the implied powers of the Constitution and, according to their interpretations, the removal power was not vested solely in the president but conjointly between the president and Congress. This conclusion was drawn from the fact that the president had the power to nominate appointees for office but the Senate had to advise and consent to their appointment. Because the Constitution qualifies the appointment power by requiring Senate confirmation and because no procedure was expressly provided for the removal of officials, the Radicals believed that the restrictions placed upon one must be applied to the other.

Another constitutional implication which seemed to favor the Radical cause was that Congress had the legal power to establish offices. It was only logical, according to the Radicals, to assume that it was within congressional authority

to determine the grounds upon which the offices were to be held. According to Representative Timothy Howe:

> the framers of that Constitution supposed that the legislative department would emanate their example, and so often as they created a new office would fix the term of it and to secure to the incumbent of it an estate in it during the existance of the term, and leave him independent in that office, subject to removal only by the intervention of that great tribunal which can remove a President, a Vice President, or a judge.[49]

There were offices which were established by the Constitution which also defined the qualifications and tenure of office holders. These were constitutional offices and were completely beyond the reach of congressional restrictions. The Tenure Acts applied only to those offices which Congress created. Because of their origin, Congress possessed the right to define the method of appointment, tenure of office and the compensation for service for these offices, including cabinet members.

The Radical Republicans were adamant in professing the right of Congress to pass the Tenure Acts. For many Radicals, the Acts were simply a device to hamper President Johnson, but others believed the laws were a needed governmental reform and would prevent wholesale political removals from office.

Another amendment affecting the president's appointing and removal power was introduced by Representative Ashley on

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[49]Cong. Globe, 39th Cong., 2nd Sess., p. 1039.

February 13, 1869. It provided for the election and removal of cabinet officers by Congress. The amendment stipulated that:

> There shall be an executive council to aid the President of the United States in administering the Government; they shall keep a record of each meeting and of all official transactions, which record shall at all times be subject to examination by a joint committee of the two Houses of Congress. The executive council shall consist of a Secretary of State, a Secretary of the Treasury, a Secretary of War and Navy, a Secretary of the Interior, an Attorney General, and a Postmaster General; They shall hold their offices for six years, and be elected as follows: The Senators and Representatives shall meet annually on the second Monday in December (unless Congress by law appoint a different day) in the Hall of the House of Representatives, in joint convention, and proceed to elect, under such rules and regulations as the Congress may by law prescribe, the members of the executive council hereinbefore named, each Senator and Representative having one vote, and a majority of all votes given shall be necessary to the choice of a member of the executive council; they shall be elected separately, and the term of office for each shall commence on the 4th day of March next succeeding their election. Immediately after their first election the members of said executive council shall assemble and determine by lot which of their number shall go out of office at the expiration of each year, so that one member of the executive council shall thereafter be elected annually. Congress shall by law provide for any vacancy which may occur in the executive council between the periods of each annual election, and shall at the time appointed for their regular joint meeting elect a person for the unexpired term caused by such vacancy . . . Any member of the executive council may be removed from office by a concurrent vote of the Senate and House of Representatives separately given. Each member of the executive council, with the approval of a majority of said council, including the President, shall, by and with the advice and consent of the Senate, appoint all officers for his Department which by law may require the confirmation of the Senate. The persons thus appointed and confirmed and all other officers or agents in any Department may be removed in such manner as Congress shall by law provide.[50]

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[50] Ibid., 40th Cong., 3rd Sess., pp. 207-8 (appendix).

Ashley, convinced of the great need to subordinate the executive branch to the Congress, believed restriction of the president's appointment and removal power was an effective way to achieve this. His amendment would make the president powerless to select or dismiss subordinates. Ashley's amendment was repudiated by the House.

With the ever present Radical objective to obtain a more representative government and subordinate the executive to the legislative branch, it was only natural that they would finally turn to impeachment. As defined in the Constitution, impeachment is a quasi-judicial power exercised by Congress. In using impeachment to achieve executive reorganization, the Radicals were determined to modify the rationale and mechanics of impeachment proceedings. A president can be removed from office only through impeachment and conviction for "treason, bribery or other high crimes and misdemeanors."[51] Impeachment is passage of a bill of charges by a majority vote in the House of Representatives.[52] The trial is by the Senate, and it is presided over by the Chief Justice of the United States Supreme Court. A conviction requires a two-thirds vote of those present, assuming a quorum is present.[53]

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[51] U.S. Constitution, Art. 2, Sec. 4.

[52] Ibid., Art. 1, Sec. 2, para. 5.

[53] Ibid., Art. 1, Sec. 3, para. 6, 7.

Part of the impeachment and removal process is clear but it is vague in certain vital aspects. The conflict over interpretation came to a climax with the impeachment of President Johnson.

The Radical Republicans, in attempting to formulate a new concept of impeachment, were concerned with two facets of the process. The normal procedure in impeachment proceedings was that, after charges were made, the House established a committee to investigate these charges. The committee's report and recommendation were submitted to the House for its consideration and vote. If it were adopted by a majority, articles of impeachment then would be voted to specify the charges.

There are a number of significant differences in the procedure used in President Johnson's case. The first Radical attempt at impeachment occurred on January 7, 1867, when Ashley's resolution, containing accusations against President Johnson, was adopted by the House of Representatives. The House Judiciary Committee was instructed to investigate these charges. This was an accepted necessary preliminary to an impeachment resolution.

The committee, after concluding their investigation, voted 5-4 to recommend that the House impeach the President. It did not, however, prepare any specific articles of impeachment. Their accusations were based primarily upon general

concepts of executive usurpations of power and omissions of duty which were not indictable offenses. The committee's belief was that a criminal offense was not the only justification for impeachment, but that it was also a method to settle the political differences between the President and Congress. The House voted down the committee's resolution 57-108.[54] Most Representatives were not yet able to accept the idea that political grounds were a legitimate cause for impeachment.

When Johnson later violated the Tenure-of-Office Acts, many House members believed that he gave them proper grounds for impeachment. There were many irregularities in the impeachment of President Johnson, basically resulting from the new Radical impeachment philosophy. The House resolved on February 24, 1868, that Johnson be impeached for "high crimes and misdemeanors." This was done without any charges or any investigation to substantiate the justification for impeachment. The unprecedented feature in the House action was the absence of any specific accusations on which to base the impeachment articles. The House merely adopted a broad resolution of impeachment without previous investigation or listing any specific violations.[55] Following House adoption

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[54]James Randall, The Civil War and Reconstruction, (Boston: D. C. Heath and Company, 1953), p. 763.

[55]Robert Selph Henry, The Story of Reconstruction, (New York: Bobbs-Merrill Company, 1938), p. 302.

of the impeachment resolution, it appointed a committee to draft the articles of impeachment. The committee formulated the articles which were presented to and adopted by the House.[56]

The second new facet of the Radical impeachment theory was the justification for impeachment. The grounds in the Constitution for impeachment are both clear and vague. Treason and bribery are explicit grounds for impeachment; treason is defined in the Constitution and bribery is easily understood.[57] The problem arises over the meaning of "other high crimes and misdemeanors." This vagueness encouraged the development of two conflicting theories over the proper bases for impeachment. The narrow interpretation was that only indictable offenses could be used as a justification for impeachment. The broad interpretation was that the phrase was purposely left vague to cover those instances in which removal was needed, including on political grounds, but no law had been broken. The Radical Republicans accepted the latter interpretation which would increase congressional power during this troubled period.

Representative Thaddeus Stevens was typical of the Radicals who wanted to adopt the new and broad interpretation

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[56] Ibid.

[57] U.S. Constitution, Art. III, Sec. 4, para. 1.

of "high crimes and misdemeanors." His feeling was that:

> Instead of alleging that impeachment can only be instituted where there is an indictable offense, I contend that the great object of impeachment was to punish for malfeasance in office-where there was no actual crime committed-no malfeasance against which an indictment would hold, and against which no allegation of evil intention need be made. In other words, that proceedings in impeachment should be had mainly where the true distinction was made between a charge against with no evil intention, but with great injury to the country; in short, that they could be had for political offenses.[58]

If his view had prevailed, there would have been a fundamental change in the custom of impeachment. Any politically unacceptable president would be subject to removal. Although this was a proposed change in the custom, it was not illegal or unconstitutional. The impeachment of Johnson was a legitimate attempt to remove the president by constitutional means.

The Senate faced two major issues over the trial; it had to determine whether to sit as a court or as a political body and what type of offenses justified conviction. The Radical Republicans argued that the Senate was a political body in all circumstances. Chief Justice Salmon P. Chase maintained, however, that the Senate was a court in the judicial sense in an impeachment trial.[59]

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[58]Ralph Korngold, Thaddeus Stevens, (New York: Harcourt, Brace and Company, 1955), p. 428.

[59]David Miller DeWitt, Impeachment and Trial of Andrew Johnson, (New York: The Macmillan Company, 1903), p. 388.

Representative Benjamin F. Butler (R-Mass.), an impeachment manager, stressed the theory that the Senate was a political body which had the power to try and to determine President Johnson's political fitness. At the beginning of the trial, Butler defined an impeachable offense according to the Radicals.

> We define an impeachable high crime or misdemeanor to be one in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudicial to the public interest; and this may consist of a violation of the Constitution, of law, of an official oath; or without violating a positive law, by the abuse of discretionary power from improper motives or for any improper purpose.[60]

If the Senate had accepted the above definition, the President could have been convicted on the offenses listed in the articles.

One theory advanced by House manager John A. Bingham (R-Ohio) went further than a loose interpretation of "high crimes and misdemeanors" which would have eliminated a fundamental executive power. He thought the President's offense was:

> that he [Johnson] has assumed to himself the executive perogative of interpreting the Constitution and deciding upon the validity of laws at his pleasure and suspending them and dispensing with their execution.[61]

If this reasoning had prevailed there would have been a

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[60] Haynes, Senate, II, p. 858.

[61] William Brock, An American Crisis, (London: Macmillan and Company, 1963), p. 261.

fundamental reorganization in the power relationships between the president and Congress. Bingham would deny the president power to interpret the Constitution. This would have been a major institutional change within the American political system. The president had to examine and interpret the laws he executed in order to determine their intent and meaning. The chief executive also judged the constitutionality of a bill when he signed or vetoed a measure. Executive orders also required forethought as to their constitutionality. These powers would be denied the president. The Bingham theory could have resulted in legislative supremacy.

Johnson's defense council also had many able arguments. Benjamin R. Curtis[62] insisted upon a strict construction of "other high crimes and misdemeanors" consistent with the indictable crime theory of impeachment. His definition of the phrase was:

> Noscitur a sociis. High crimes and misdemeanors; so high that they belong in this company with treason and bribery. That is plain on the face of the Constitution, in the very first step it takes on the subject of impeachment. High crimes and misdemeanors against what law? There can be no crime, there can be no misdemeanor without a law written or unwritten, express or implied. There must be some law, otherwise there can be no crime. My interpretation of it is that the language, high

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[62]Randall, The Civil War and Reconstruction, pp. 155-56. A former member of the United States Supreme Court, Curtis (Mass.) was one of the two dissenting judges in the Dred Scott decision. He resigned from the bench following this decision and returned to his law practice.

> crimes and misdemeanors means offenses against the laws of the United States.[63]

The necessary number of Senators accepted this interpratation of impeachment grounds thereby ensuring the continuation of the presidential system. The Radical Republicans believed they made a legitimate attempt to remove the chief executive from office. Although the president's supporters looked upon the episode as an attempted "coup d'etat," according to the letter of the Constitution the Radicals were as correct in their interpretation as their opponents.

The Radicals also wanted to nullify the president's veto power. James Ashley, who was probably Congress' most active member in offering reorganizational propositions, was the chief advocate of this idea. Although he wanted to abolish the veto, he proposed only to modify it. He introduced a constitutional amendment on February 13, 1869, which would:

> Strike out clauses two and three in section seven of the Constitution and insert the following: Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it with his objections to the House in which it originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration, a majority of all the members elected and qualified in that House shall agree to pass the bill, it shall be sent, together with the President's objections, to the other House, by which it shall likewise be reconsidered, and if approved by a majority of all the members elected and qualified in that House it shall become a law. But in all

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[63]Haynes, Senate, II, p. 859.

> cases the votes of both Houses shall be determined by the yeas and nays, and the name of the person voting for and against the bill shall be entered on the journal in each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him the same shall become a law in like manner as if he had signed it, unless the Congress by adjournment prevents its return, in which case it shall not be a law. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or being disapproved by him shall be repassed by the Senate and House of Representatives according to the rules and limitations prescribed in the case of a bill.[64]

This proposed amendment would require only a simple majority of both Houses to override a veto. This would be easy to obtain because only a majority was necessary to pass the bill originally. The supporters of the veto contended that it was a necessary and vital presidential power. Only the president represented the entire nation. A hard to override veto was necessary to fully represent the people, to protect minority rights and to check hasty legislation. The two-thirds requirement to override, therefore, was vital to the executive supporters.

Ahsley's opinion was that the veto was a dangerous power to grant any man, and it was inconsistent with the true principles of American Government. No single individual should have the power to overrule a majority of the senators

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[64]Cong., Globe, 40th Cong., 3rd Sess., p. 207 (appendix).

and representatives. This, to Ashley, was undemocratic. His contention was that the veto power did not necessarily protect minority rights. If any political party was strong enough to elect a majority to Congress, it usually also elected the president. Under these circumstances, the way to protect the minority with the veto would be for the majority to concede the presidency to the minority. This would never be done. The veto never protected minority rights. This objective could be achieved only by these groups having power in the governmental administration. Ashley's arguments did not impress enough of his colleagues and this plan met the same fate as most of his reorganizational schemes.

The president's authority as commander-in-chief was yet another executive power which the Radical Republicans thought necessary to reduce. This the House of Representatives did with a vote of 90-32 in an army appropriation bill which became law on March 2, 1867.[65] This act contained provisions which, for all practical purposes, deprived President Johnson of command of the army. This act stipulated that:

> all military orders emanating from the President or the secretary of war should be issued by the general of the army, whose headquarters were to be at Washington and who was not to be removed nor assigned to duty outside Washington without the approval of the Senate. Contrary orders were declared void and officers issuing

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[65] Ibid., 39th Cong., 2nd Sess., p. 1404.

them or heeding them were made heavily punishable as guilty of misdemeanors.[66]

There was further curtailment of the president's military power in the Third Reconstruction Act which became law July 19, 1867. There were many provisions in this act diminishing the commander-in-chief's power. The most important were those reaffirming the authority of administration in the general of the armies. It also provided that no military officer involved in the work or Reconstruction should be bound "by any opinion of any civil officer of the United States."[67] The objective of this act was to concentrate all power within the War Department without any possible restraint by the executive branch. This would make the Department responsible to Congress with respect to Reconstruction. These acts clearly infringed upon Johnson's constitutional power as commander-in-chief. These acts were passed under the strain of political bitterness and had partisan ends, not the improvement of governmental organization.

The fourth major executive power to come under Radical Republican scrutiny was the pardoning power. This power, conferred by Article II, Section 2 of the Constitution, gives the president "power to grant reprieves and pardons." Although it does not seem there could be a dispute over this power, it

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[66]Randall, The Civil War and Reconstruction, p. 750.

[67]Henry, The Story of Reconstruction, p. 251.

was the cause of a major controversy with political and constitutional implications. Politically, the pardoning power was related to the Reconstruction. The Radical Republicans accused the President of using this power to return the South to the rebels. The legal dispute stemmed from the fact that the Constitution, which seems clear on the topic, is actually vague in some respects. The Constitution gives the president the authority to grant pardons without defining them. The dispute, therefore, evolved around defining pardons and amnesties. Some Congressmen thought they were synonymous, but the Radicals claimed that the words had different meanings and the president should not have the authority to issue amnesties.

The Radical Republicans, offended by what they called Johnson's wholesale abuse of the power, were determined to restrict him. They wanted to repeal section 13 of the Confiscation Act of July 17, 1862. This war-time law gave the president authority to grant pardons and amnesties by proclamation. The Radicals wanted this "questionable" statutory authority rescinded immediately. In December 1866, the House of Representatives passed a bill repealing the controversial section. The bill evoked heated debate in the Senate, but was finally passed by a vote of 27-7 on January 4. President Johnson vetoed the bill, but Congress overrode it. The measure became law on January 17, 1867.

The executive supporters and Radicals disagreed on the constitutional issues in section 13 of the 1862 Act and its repeal. The executive supporters argued that the 1862 Act was irrelevant because the Constitution did not give Congress the authority to bestow pardons or amnesties or to confer the power to another. If the Act meant nothing, the repeal of section 13 was merely a gesture without authority.

President Johnson, when asked his authority for issuing amnesties by proclamation, declared:

> that his [the President's] authority was the Federal Constitution . . . the second section of the second article of which provided that the President "shall have power to grant reprieves and pardons," and, also, the precedent established by Washington in 1795, and followed by President Adams in 1800, Madison in 1815, Lincoln in 1863, and himself in 1865, 1867 and 1868.[68]

Senator Reverdy Johnson (D-Md.) stated, in his support of the President's interpretation, that:

> the power conferred upon the President by the Constitution is as comprehensive as words can make it. Since this power is conferred upon him absolutely in general terms it is for him to decide the manner in which

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[68]DeWitt, Impeachment and Trial of Andrew Johnson, pp. 608-9.; Jonathan Truman Dorris, Pardon and Amnesty Under Lincoln and Johnson, (Chapel Hill: University of North Carolina Press, 1953), pp. 327-28. These precedents, without specific congressional authority, include those extended by President George Washington to the individuals who had taken part in the Whiskey Rebellion. The Fries Rebellion of 1799 brought an amnesty from John Adams to the offenders, and James Madison issued one to excuse disloyal acts on the Island of Barataria during the War of 1812.; Randall, The Civil War and Reconstruction, p. 699. Lincoln's proclamation offered pardons, with specified exceptions, to individuals engaged in the rebellion and stipulated conditions by which

> he will execute it. He may execute it by granting individual pardons or by extending amnesty to groups of individuals at his own discretion.[69]

The president's amnesty power was also upheld by the Supreme Court in Ex parte Garland December, 1866. The Court stated that the "power of the President is not subject to legislative control, Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders."[70]

Ashley was very active in the drive to limit and restrict the president's pardoning power. On January 7, 1867, Ashley submitted a resolution calling for the impeachment of President Johnson because among other alleged offenses he had used the pardoning power corruptly. His resolution failed.[71] Ashley made a new attempt to prevent the possible abuse of the pardoning power through a constitutional amendment offered on February 13, 1869. The amendment stated that section two of article two should be amended to read:

> And he [the President] shall have power, with the approval in writing of a majority of the Executive council [cabinet], to grant reprieves and pardons for offenses committed against the United States after trial and conviction, except in cases of impeachment; but he shall grant no general amnesty of pardons to persons who are or who may have been engaged in insurrection or

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seceeded states could be restored to the Union.

[69]Dorris, Pardon and Amnesty Under Lincoln and Johnson, p. 327.

[70]Ibid., pp. 331-32.

[71]DeWitt, Impeachment and Trial of Andrew Johnson, pp. 152-53.

> rebellion against the United States until he shall have first obtained the advice and consent of the Senate.[72]

Ashley offered this amendment because:

> no one man in any government ought to be clothed with unlimited power to grant pardons. It is a power liable to great abuse in the hands of any man, however able or upright. In the hands of a bad man it is a power which defeats the ends of justice and gives immunity to crime.[73]

He thought his amendment would prevent any possible misuse of the pardoning power. The president must have the written approval of a cabinet majority for all pardons or reprieves and have congressional approval in cases of rebellion against the government. The amendment failed and was the last attempt to curtail the pardoning power.

Between 1865-1869, the Radical Republicans advanced a great number of proposals to restructure the executive branch and reduce presidential powers. Had their proposals been enacted, there would have resulted everything from minor changes to extreme readjustments in both the structural and the power relationships within the Federal Government.

Following the Civil War, the Radicals came to the conclusion that the executive branch was giving away the hard-won victory. It also appeared to them as if the president were intent upon encroachments upon the functions and powers

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[72] Cong. Globe, 40th Cong., 3rd Sess., p. 209 (appendix).

[73] Ibid.

of Congress. The Radicals were prepared to basically alter the American political system to prevent this. Radical propositions included drastic curtailment of the presidential powers of appointments, removals, vetoes, and pardons. The typical Radical attitude toward the executive branch was expressed by Ashley who believed that:

> If the question were now submitted to me whether to continue the executive office with the power now lodged in the hands of the President or to abolish the office altogether, I would vote to abolish it. For years I have believed that the executive power was the rock on which as a nation we should eventually be broken to pieces.[74]

The Reconstruction controversy was not the only impetus for many Radical propositions. They were attempting to remedy basic and chronic deficiencies within the executive branch. Their proposals involved changes in presidential elections, the executive term, presidential eligibility, and resolution of presidential vacancy and succession. There was nothing extreme or revolutionary about some of these reorganizational schemes. President Johnson himself advocated many of these reforms.[75]

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[74] Ibid., p. 210.

[75] Senate Journal, pp. 692-93; Cong., Globe, 40th Cong., 2nd Sess., p. 4210. President Johnson in a special message to Congress July 18, 1868, advocated election of the President by direct popular vote by district, one six-year term only and cabinet succession in case of the death or removal of the President and Vice-President. Senate Journal, p. 35. On December 9, 1868, Johnson, in his annual message to Congress, recommended the same measures.

Whether the impetus was altruism or political expediency, the Radical propositions generally met the same fate, rejection. Some of them, such as a more comprehensive succession law and a limitation upon the number of eligible presidential terms have had success. Many of their proposals still erupt periodically into heated debates. A close presidential election generates discussion over the obvious weaknesses in the Electoral College, but the furor soon subsides and will eventually erupt again. Ashley aptly summarized this American characteristic when he reflected on how "reluctantly the mass of mankind consent to reforms or changes of any kind, especially in matters of government."[76]

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[76]Cong. Globe, 40th Cong., 3rd Sess., p. 207 (appendix).

CHAPTER III

JUDICIAL REORGANIZATION

Between 1865-1869 there was a popular and sometimes heated debate over the organization and powers of the Federal judiciary. This was nothing new as every political generation has had a similar controversy. Because of Reconstruction tension and bitterness, many proposals designed to reorganize the Federal courts received much more approval than they would ordinarily.

The Radicals believed there should be basic judicial reorganization extending to the court's voting procedure, jurisdiction, number of justices and their tenure. The Radicals presented many reorganizational schemes which would affect broad areas of the judicial apparatus.

Article III of the Constitution requires that a Supreme Court be established, but the size and appellate jurisdiction of the court were left to Congressional discretion. The legislative branch could, therefore, determine these matters by mere statute. Congress could even abolish all lower Federal courts, withhold their operating funds or impeach the justices. The Congress has awesome statutory powers over the Court's organization, jurisdiction, and procedures. The Radicals could always use the amendment route if the changes they wanted should be in conflict with the Constitution.

Reducing the size of the Supreme Court was a major Radical program. The membership of the court was increased to ten on March 3, 1863.[77] Many Congressmen believed that this many judges would be ineffective. Furthermore, ten was an even number which increased the opportunities for ties and continual stalemate. An uneven number of judges was needed to prevent equal divisions on the Court.

James Wilson (R-Iowa) of the House Judiciary Committee, reported a bill to reduce the Court's membership to nine as it was prior to 1863. Wilson personally wanted the Court membership reduced more than one, but he supported the committee's version which easily passed the House.[78] The Senate also approved the proposition but with one major amendment which called for an ultimate reduction to seven justices. This would be done by not filling two vacancies when they occurred. This amended bill was repassed by the House and it became law on July 23, 1866. It provided that:

> No vacancy in the office of associate justice of the Supreme shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the said Supreme Court shall consist of a Chief Justice of the United States and six associate justices, any four of whom shall be a quorum; and the said court shall hold one term annually at the seat of government,

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[77] Randall, Civil War and Reconstruction, p. 804.

[78] Cong. Globe, 39th Cong., 1st Sess., p. 1259.

and such adjourned or special terms as it may find necessary for the dispatch of business.[79]

The impetus behind this reorganizational scheme was a desire to improve the Supreme Court's efficiency. It was not intended to intimidate the justices. There is much evidence to support this conclusion. First, Johnson signed the bill. If it had only been the outgrowth of vindictive motives, he would have undoubtedly vetoed the measure. Furthermore, the Supreme Court had not yet given the Radicals qualms about its positions on Reconstruction policies.

With one vacancy already existing on the court, the immediate result of the new legislation was to reduce its membership to nine. The court membership never fell to seven but the death of Judge James Wayne reduced it to eight from July 5, 1867 to February 18, 1870.

Later efforts by the Radical Republicans to reorganize the membership of the Supreme Court reflected the desire to lighten the load of the justices and, thereby, facilitate the handling of cases. Many of the proposals were to focus upon an increase rather than a reduction of the Court's membership.

The fundamental problem was that the Supreme Court was greatly overworked and far behind in its docket. This was primarily the result of the Court's broad jurisdiction and the justices' circuit duties. There were many possible

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[79] Ibid., 40th Cong., 2nd Sess., p. 2127.

solutions to the problem including elimination of the circuit duties, creation of appeals courts, or increasing the membership to allow for rotation between Supreme Court and circuit duties. All the plans had objectionable features to the opponents of reorganization. They opposed the first solution on the grounds that elimination of the judges' circuit duties would remove them from the flow of everyday life and they would lose touch with practical knowledge of litigation. The plan to establish intermediate courts of appeal raised the possibility of judicial conflicts from giving different courts final jurisdiction over the same type of case. Two courts might give different decisions in cases involving the same principle. This would result in legal chaos.[80] Most of the Radicals favored the third idea of increasing the number of justices which would enable the Court to handle its work more efficiently, including circuit duties. Radical leaders in the move to expand the Court membership included Henry Wilson (R-Mass.), Charles Drake (R-Mo.), and George Williams (R-Ore.).

Wilson advanced a plan to restructure the Supreme Court. It provided for fifteen judges with a chief justice and seven associate justices, chosen by lot, to sit in Washington, D.C.,

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[80]Felix Frankfurter & James Landis, The Business of the Supreme Court, (New York: The Macmillan Company, 1928), pp. 69-75.

while the remaining seven members served on circuit duty.[81] Drake presented the Wilson proposal on February 23, 1869, as an amendment to a judiciary bill. Those parts of the amendment which pertained to reorganization included:

> Sec. 1. The Supreme Court shall consist of a Chief Justice of the United States and fourteen associate justices.
>
> Sec. 2. That the Chief Justice and seven associate justices, to be annually chosen by lot, shall hold one term annually at the seat of government, and such adjourned and special terms as they may find necessary for the dispatch of the business of the said court; and the associate justices not drawn to hold the term of said court at the seat of government shall annually hold one term in each circuit and such adjourned and special terms as the business of the several circuits may require.[82]

The proposition generated extensive debate. The opponents made two main arguments against the bill. One argument was based on constitutional grounds. Most opponents argued that an individual appointed to the Supreme Court had a right to participate in its proceedings; Congress had no power to divide the "one Supreme Court" provided for by the Constitution. To have a fifteen member court with the congressional restriction that only eight take part in a decision was unconstitutional.[83]

The second objection to the Drake amendment was upon practical grounds. The opponents believed that the proposal

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[81] Ibid., p. 74.

[82] Cong. Globe, 40th Cong., 3rd Sess., p. 1484.

[83] Ibid.

seemed to insure that Supreme Court dicisions would be erratic. Court interpretations would be uncertain and always open to doubt because of the constantly changing court composition. It was possible that from the eight judges named to sit on the Supreme Court, only the Chief Justice would be on the bench from year to year. Because the seven associate justices were to be chosen by lot, there could be a complete turnover every year. A continuously new Court might make decisions which varied greatly from year to year. Conflicting principles would be established by the highest court in the land with no decision to be permanent because of the constantly changing membership.[84]

Drake did not feel that these objections could justify the rejection of his amendment. In defending its constitutionality, Drake stressed that the Constitution imposed only two conditions relative to the Court. These were that there was to be a Supreme Court and that judges would hold office for a period of good behavior. Everything else concerning the Court's organization was left to congressional discretion. Drake's opinion, therefore, was that Congress had the right to stipulate both the number of judges and when and where they were to sit.[85]

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[84] Ibid.

[85] Ibid.

The Senator's argument against the contention of possible Court instability was weak; he merely indicated there was value in changing the Court's composition as there was in changing the character of Congress from term to term. Drake did suggest that the chance of a complete turnover in the associate justices was almost nil and, therefore, was an invalid objection to his plan.[86] His arguments, however, did not change many minds and his proposal was easily defeated 39-6.[87]

Williams introduced the next major Radical proposition in the Senate on March 23, 1869. His plan called for a Supreme Court of eighteen members with nine judges sitting in Washington and nine on circuit duty. Each year three justices would shift from Washington to circuit duty and three circuit judges would take their place on the Washington bench. This plan would classify judges into three groups just as Senators were divided into three classes. In Williams' opinion, this plan would provide the increase in Court justices needed to handle both its duties in Washington and the circuit without causing extreme changes in the membership with the annual shift.[88] The critics used essentailly the same arguments

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[86] Ibid.

[87] Ibid., p. 1487.

[88] Ibid., 41st Cong., 1st Sess., p. 209.

against Williams' bill as against Drake's scheme. The absence of clear constitutional authority to divide the Court and the fear of inconsistency in interpretations were effective arguments and the proposal was rejected.[89]

These were the only major Radical Republican proposals to increase the membership of the Supreme Court. Although the Radicals were unsuccessful, they showed concern and understanding of the judicial problems during Reconstruction.

Tenure and removal of judges were the other facets of the judicial establishment considered by the Radicals. They thought that certain fundamental changes in these areas would enable the judicial branch to be more efficient. The Constitution indicates that the tenure of judges is for good behavior but they can be removed by the impeachment process. A change in tenure would have to be accomplished by constitutional amendment.

Amasa Cobb (R-Wis.) introduced a constitutional amendment in the House of Representatives on May 18, 1868 by which Federal judges would be appointed for specific terms. The proposal, providing for an eight-year term for Federal judges upon their selection by a joint convention of Congress, died in committee.[90]

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[89] Ibid., p. 218.

[90] Ibid., 40th Cong., 2nd Sess., p. 2527; House Journal p. 703.

Representative James Loughridge (R-Iowa) was author of an amendment for a ten-year term for all Federal judges. It was presented on December 14, 1868, and referred to the Committee on the Judiciary where it was buried.[91]

A comprehensive constitutional amendment on judicial organization was introduced by Ashley on February 13, 1869. He believed that there were many weaknesses within the judicial system and that his amendment would improve its organization. The proposal was to:

> Strike out section one of article three and insert the following: The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and District courts, shall hold their offices for twenty years: Provided, That no judge shall act as a member of the Supreme Court nor any district court of the United States after he shall have reached the age of seventy years. After their appointment and qualification they shall be ineligible to any office under the national government. They shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office. After the expiration of the term of service of each judge of the Supreme or any district court of the United States, the Congress shall, by law, provide such annual compensation as they may deem proper for each retiring judge during life, which compensation shall not be diminished.[92]

Ashley's opinion was that "with one third of its Supreme Court members sleeping upon the bench and dying with age and the other third crazed with the glitter of the Presidency"

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[91] Ibid., 40th Cong., 3rd Sess., p. 70; House Journal, p. 56.

[92] Ibid., 40th Cong., 3rd Sess., p. 210 (appendix).

certain fundamental reforms were needed in the judicial organization.[93] His proposal would remedy what he considered to be two primary weaknesses in the Federal court system.

One of Ashley's objectives was to guard against the possibility that a judge would remain upon the bench after he had lost his acumen and vigor. To prevent this, his amendment provided for judges to retire at 70 with a pension for life. All judges would be removed from active service who had not already served their full 20 year term. These provisions would solve the problem of a court with "members sleeping upon the bench and dying with age." Ashley's measure was the last during 1865-69, that would impose an age limit on judges.

He was also concerned with the "other third" of the Court membership "crazed with the glitter of the Presidency." This problem would be solved by his amendment which stipulated that "after their appointment and qualification" Federal judges "shall be ineligible to any office under the national government." Judges would be concerned only with their judicial functions because political ambitions would be futile. Ashley's amendment was never reported from committee.

The problem of removing judges was a crucial matter to the Radicals, especially with the tension and bitterness which

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[93] Ibid., p. 211 (appendix).

arose from Reconstruction. They discussed the removal issue a great deal but made very few propositions to revise the process. Representative Thomas Williams (R-Penn.) was the Radical most vitally concerned with removal. On two different occasions, February 18 and July 15, 1867, he presented constitutional amendments which dealt with judicial removal. Both amendments provided for the removal of Federal judges by the president on the request or approval of two-thirds of both Houses of Congress. Neither amendment received much support and both died in committee.[94]

Removal of judges through retirement schemes was more commonly discussed and was the basis for a number of propositions. In addition to Ashley's amendment, Senator Sumner presented two retirement proposals. The first provided:

> That any judge of any court of the United States who is now seventy years of age, or whenever he shall become seventy years of age, may upon his written application to the President, be retired from active service as such judge, and thereafter he shall, during his natural life, be entitled to receive from the United States the annual salary that was paid and received by him at the application as aforesaid.[95]

His second proposition presented on April 7, 1869, stated:

> That if the Chief Justice of the United States of any associate justice, or any judge of any court of the United States, shall file with the Secretary of State a certificate of the Supreme Court of the United States

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[94]Ibid., 39th Cong., 2nd Sess., p. 1313 & 40th Cong., 1st Sess., p. 655.

[95]Ibid., 41st Cong., 1st Sess., p. 218.

> that he has attained the age of sixty-five years, or has served at least twelve years as Chief Justice, associate justice, or judge, and is not able by reason of age or infirmity to perform with the due efficiency the duty of such office, and shall thereupon resign the same, it shall be the duty of the President of the United States to accept such resignation; and the vacancy thereby created shall be filled as in other cases, and the compensation to which such justice was previously entitled shall continue to be paid, notwithstanding such resignation.[96]

Sumner had two objectives. He wanted the courts to be more efficient, and to provide an honorable retirement for those judges who had earned this privilege.

There were a number of differences between Sumner's proposals. The second measure was much more comprehensive. The first merely provided that a judge could retire at 70 and receive full pay. Sumner's later proposition lowered the retirement age to 65 and, if a judge served at least 12 years but because of age or health could not continue in the position, he too was eligible for retirement. Another difference between them was that the latter measure required a justice to resign his position when he retired. This would prevent a "retired" justice from returning to the bench. Both propositions permitted a justice to retire with full pay for life.

Opponents of the retirement plans argued that because Congress had no power, barring impeachment, to remove judges,

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[96] Ibid., p. 574.

it also had no power to retire them. This overlooked the fact that retirement was optional. The plans' supporters did not intend to force the justices into retirement, but leave it to their own judgment whether to remain or retire from the bench. Because they would receive full pay upon retirement, financial worries would not force them to remain.

On April 10, 1869, a law was passed encompassing many of the above features. This act allowed any judge who had held his commission for at least ten years and who had attained the age of 70 to retire by resigning and receive full pay for the remainder of his life.[97]

The most heated debates were over the Supreme Court's power of judicial review. The major impetus behind the controversy was the Radical fear of the court's attitude toward Reconstruction legislation. Many Radicals had sincere doubts whether the courts could constitutionally nullify legislation, and they believed that the courts must be restricted in their use of this power. In regulating the power of judicial review, the Radicals realized that two specific aspects of the Court would have to be modified. The first was the majority rule in Court decisions. It was not logical to the Radicals that the Supreme Court should have the power to reject the will of the legislative and executive branches.

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[97] Ibid., p. 50 (appendix).

This seemed especially illogical when a measure was voided by a five to four vote. Possible remedies of the usurpation of this legislative and executive power were paramount in Radical reorganizational schemes.

A major effort to revise the simple majority rule of the Court occurred on January 13, 1868, in the House of Representatives. James Wilson, from the Committee on the Judiciary, reported a bill "declaring what shall constitute a quorum of the Supreme Court." The bill provided "that any number of the justices of the Supreme Court of the United States not less than five, being a majority thereof, shall constitute a quorum."[98] There was also a committee's amendment to the bill stating:

> Sec. 2. That no cause pending before the Supreme Court of the United States which involves the action or effect of any law of the United States shall be decided adversely to the validity of such law without the concurrance of two thirds of all members of said court in the decision upon the several points in which said law or any part thereof may be deemed invalid.[99]

The objective of the amendment was to require an extraordinary two-thirds majority of the Supreme Court to invalidate a law.

Although this measure had substantial support among the House members, some of the Radicals were convinced that it did

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[98] Ibid., 40th Cong., 2nd Sess., p. 478.

[99] Ibid.

not go far enough. Typical of this group was Thomas Williams. He offered the following amendment as a substitute for the committee's amendment.

> That in all cases of writs of error from and appeals to the Supreme Court of the United States, where is drawn in question the validity of a statute of or an authority exercised by the United States, or the construction of any clause of the Constitution of the United States, or the validity of a statute of or an authority exercised under any State on the ground of repugnance to the Constitution or laws of the United States, the hearing shall be had only before a full bench of the judges of said court, and no judgment shall be reduced or decision made against the validity of any statute or of any authority exercised by the United States, except with the concurrance of all the judges of said court.[100]

The major difference between Williams' and the committee's amendment was that the former required unanimity by the judges whereas the latter required only two-thirds concurrance to void a Federal law. Unanimity alone, in Williams' opinion, could fully check judicial irresponsibility in reviewing legislation. A two-thirds majority would only provide partial security against the court. Williams argued that:

> no act of the law-making power should ever be declared invalid upon constitutional grounds unless it be a clear case. Now . . . whenever, with a bench composed of eight judges, there is one dissenting member, the case is to be regarded as by no means a clear one. That dissent on the part of one member of the court implies doubt.[101]

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[100] Ibid.

[101] Ibid., p. 479.

Representative Horace Maynard (R-Tenn.) tried to convince Williams that the bill's concurrence requirements should be modified. Maynard thought that a three-fourths concurrance plan would be sufficient. Williams was unwilling to change his proposal and Maynard's suggestion was rejected.

Another change was proposed when Wilson moved to amend the amendment of the committee by adding:

> That if any circuit or district court of the United States shall adjudge any Act of Congress to be unconstitutional or invalid, the judgment, before any further proceedings shall be had upon it, shall be certified up to the Supreme Court of the United States and shall be considered therein; and if upon the consideration thereof two thirds of all the members of the Supreme Court shall not affirm said judgment below the same shall be declared and reversed.[102]

This proposal concerned the appellate jurisdiction of the Supreme Court. It provided that all inferior court decisions involving constitutional questions would be unenforceable until after the Supreme Court consideration of the measure. Then a two-thirds majority, as provided for by the committee's original amendment, would be needed to nullify a statute.

In studying the debates on the various majority rule propositions, there were two recurring and closely allied themes in the Radical arguments. The people's confidence in judicial decisions and; the question of reasonable doubt pertaining to the constitutionality of a law. It was

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[102] Ibid., p. 483.

principally upon these two arguments that the Radicals sought to win support for the reorganizational scheme.

How, the Radicals asked, could the people have real confidence in the Court's judgment when it decided constitutional issues by a close vote? A law's constitutionality could depend upon the vote of only one justice. This one judge could thwart both the will of Congress and the president. The Radicals thought this was undemocratic. They believed that a law which violated the Constitution should be so evident that judicial unanimity was certain and, therefore, close decisions should never be a problem.

The same arguments used by Radicals were also used by their opponents. The latter believed that public reaction to a vote decided in favor of the minority could mean a total loss of public confidence in the Supreme Court. More important, the Radical arrangement would allow a minority upon the Supreme Court bench to control the operations of the entire Court. Such a situation could never result in public faith.[103] The opponents applied a different interpretation to the idea that a law should be free of all reasonable doubt before it was voided upon constitutional grounds. They agreed that there should be no reasonable doubt but this was an individual matter, not one for the entire bench as a group.

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[103] Ibid., pp. 478-89.

Thus, a justice should not base his vote upon the doubt of another member of the court. Each justice must decide the question for himself.

The House, voting on the committee's amendment and the proposed changes to it, shows the mood and the strength of the members who desired a reorganization. Williams' amendment, which required concurrence of all justices for invalidating a law, was soundly defeated by a vote of 25 to 124.[104] Many members felt that it was too extreme and that it was neither workable or wise to require unanimous agreement. The Wilson amendment was approved 111 to 38.[105]

As amended, the committee bill was approved 116 to 39.[106] The House members felt that it was not unreasonable to require a higher degree of unanimity in cases involving constitutional questions, and that a dissent by one-third of the court was enough to protect against possible rashness by the other two-thirds.

These Radical proposals were an attempt to distinguish between the methods to be followed in cases involving statutory interpretation and judicial review. In cases not challenging the validity of laws, nothing would be changed and

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[104] Ibid., p. 489.

[105] Ibid.

[106] Ibid.

majority rule would continue. The cases involving constitutional questions and the validity of laws, a two-thirds majority would now be required instead of a simple majority. The proposal was sent to the Senate for action but it never came to a vote.

The Radicals also attempted to regulate the Court's power of judicial review by restricting its jurisdiction. One of the first attempts was made by Representative Thaddeus Stevens who proposed that the Supreme Court be deprived of jurisdiction in all Reconstruction cases but the House took no action.[107]

In the Senate, on March 26, 1868, Lyman Trumbull introduced a bill "forbidding the Supreme Court to take jurisdiction in any case arising out of the Reconstruction Acts."[108] The Senate was as unreceptive as the House and the bill was forgotten.

An opportunity to achieve the Radical objective came when the House called up a Senate bill enlarging Supreme Court jurisdiction in cases involving the rights of property. The bill defined a uniform method for appealing to the high bench to review erroneous decisions made by inferior tribunals in certain types of property cases. Wilson introduced an

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[107]Randall, Civil War and Reconstruction, p. 804.

[108]Charles Warren, The Supreme Court in United States History, II, (Boston: Little, Brown and Company, 1926), p. 471.

amendment which added the following section to the Senate bill.

> That so much of the act of February 5, 1867, entitled "An Act to amend an Act to Establish the Judicial Courts of the United States, approved September 24, 1789," as authorizes an appeal from the judgment of a Circuit Court of the United States to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be and the same is hereby, repealed.[109]

The addition was accepted and the amended bill was passed by the House. It was then returned to the Senate where it was easily passed.

Opponents of the Radicals did not realize the political implications of passage until later and then they claimed that the measure was a shabby parliamentary maneuver. The real importance of Wilson's addition was that it repealed a vital section of the 1867 act. This section had confirmed the right to appeal to United States Circuit Courts for a writ of habeas corpus and had authorized direct appeals from the Circuit Courts to the Supreme Court. It was originally passed to protect loyalists from injustices in Southern courts. It now appeared that the same legislation would benefit rebel appeals and indirectly ensure judicial opinions on Reconstruction legislation. The Radical objective was to prevent this.

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[109] Cong. Globe, 40th Cong., 2nd Sess., p. 2165.

President Johnson vetoed the bill because of the addition. His reasoning was that it might start a trend which could "eventually sweep aside every check on arbitrary and unconstitutional legislation."[110] Actually, Johnson was being inconsistent because he also vetoed the bill which the Radicals were attempting to repeal. The needed two-thirds vote in each House to override the veto was easily obtained and the measure became law on March 27, 1868. The new law denied jurisdiction to the Supreme Court in appeals from inferior Federal courts when the right of habeas corpus was involved.

The law was neither unconstitutional nor revolutionary as its opponents claimed. The restriction was clearly conferred within the constitutional power of Congress.[111] This power was explicitly delegated to Congress in the Constitution and reaffirmed by the Supreme Court.

Opponents who accepted the bill's constitutionality, nevertheless argued against it. First, although they believed that wide discretion should be left to inferior tribunals, these courts would have conflicting decisions as to the proper protection given by a writ of habeas corpus, and the Supreme

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[110] Ibid.

[111] Article III of the Constitution states "The Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Court would be unable to give uniformity to those decisions. Second, they believed that the sections of the 1867 Act should not be repealed retroactively. They insisted that it should have been simply repealed as was done with other laws, not in a way to make it retroactive. In the opinion of the Radicals, however, repeal made no great difference since, as it was pointed out in the debates, the nation had existed from 1789 to 1867 without the quick remedy under a writ of habeas corpus.

The next major stage in contracting the judicial authority occurred when Drake introduced a bill to define and regulate the jurisdiction and powers of the courts of the United States. His proposal was:

> That no court created by an act of Congress, or judge thereof, shall have power in any case to adjudge or hold any act or joint resolution of Congress invalid, in whole or in part, for any supposed repugnancy between such act or joint resolution and the Constitution of the United States, or for any supposed want of authority in said Constitution for the same; nor shall the appellate jurisdiction of the Supreme Court of the United States be construed to authorize that court in any case now pending or hereafter brought before it to affirm any order, judgment, or decree of any inferior United States court, or of any State court, which shall appear to have been based upon any such adjudging or holding; but every such order, judgment, or decree shall for that cause be reversed, vacated, and annulled; nor shall any justice of said Supreme Court, in furtherance of the exercise of such appellate jurisdiction, make any order or authorize or issue any writ or process or take any proceedings based upon any such adjudging or holding by him or by the said Supreme Court.[112]

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[112] Cong. Globe, 41st Cong., 2nd Sess., p. 2.

The Drake proposition had two major objectives: (1) to insure that no court created by congressional law could invalidate any act of Congress; and (2) prohibit the Supreme Court in its appellate capacity from sustaining invalidation by a lower court. From a constitutional view point, it was obvious that Congress possessed the power to abolish judicial review, except for cases of original jurisdiction. The first part of the measure applied to those courts created by Congress. There was no doubt that these courts had only the jurisdiction which Congress conferred upon them. The measure also circumscribed the appellate jurisdiction of the Supreme Court. Under the Constitution, the appellate jurisdiction of the court was to be exercised "with such exceptions and under such regulations as the Congress shall make."[113] It was, therefore, clearly within the discretion of Congress to determine the Supreme Court's appellate jurisdiction.

Drake's idea was to deny power to the inferior Federal courts to declare legislation unconstitutional. In his opinion, it was an unrealistic situation that:

> these courts, deriving not only its jurisdiction and powers but its very existence, from Congress, supported by appropriations by Congress, and organized mainly to administer the laws of Congress, claims the right to sit in judgment upon those laws and to refuse them force in its forum whenever its single judge entertains the opinion that they conflict with the Constitution.[114]

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[113] U.S. Constitution, Art. III, Sec., 2, para. 2.

[114] Cong. Globe, 41st Cong., 2nd Sess., p. 92.

Few of Drake's associates had the same obsession to restrict the courts and his bill went unsupported.

There have been many crises in the strained relationship between the legislative and judicial branches. All produced legislative wrath and cries of judicial usurpation. The Congress has responded, depending upon the instance, with reorganizational proposals directed toward the Federal judiciary. During the years 1865-1869, the Supreme Court found itself in a similar situation. There were many congressional proposals to reorganize various aspects of the Federal court system. In proposing even extreme changes, it must be remembered that criticism of the court was an American privilege, and the power to make many of the changes was within congressional authority. There was nothing revolutionary or unconstitutional in their proposals.

Radical dissatisfaction with the Court resulted from three primary beliefs. The first was that many features of the judicial organization were antiquated and were in great need of change to make the courts more efficient and competent. The second was their opinion that the judicial branch was guilty of encroaching upon legislative perogatives. The Radicals felt it was very strange that a power of such importance was not expressly conferred upon the judicial branch by the Constitution, but was arrogated by the Court to itself. The third cause of Radical dissatisfaction with the courts

was their commonly held view that only the legislative branch truly represented the people. It was only logical, therefore, that the legislative branch should be supreme with the executive and judicial branches subordinate.

These beliefs were the impetus for many Radical proposals to reorganize the judicial branch. The results from the major Radical propositions would have restricted the Court's jurisdiction, established a new system of removal and impeachment of judges, rendered judges forever ineligible to other Federal offices, provided a fixed term for judges and changed the majority rule concept.

Nothing of lasting importance came from the attempt to pass various proposals. Most Radical bills died in committee and the others expired at various stages of the legislative process. Only two propositions had what could be called a degree of success. One proposal passed the House of Representatives only to die in a Senate committee. The other reorganizational measure, limiting the appellate jurisdiction of the Supreme Court, passed both Houses.

CHAPTER IV

CONCLUSIONS AND SUMMARY

Governmental reorganization is an ever-present political topic. Although the subject usually generates little controversy, it did between 1865 to 1869. The Radical Republicans advanced many propositions to change the national political structure. They had three reasons to change the government: (1) to gain legislative ascendancy in determining Reconstruction programs; (2) to make government more responsive to the people, more efficient and more powerful and to prevent corruption and fraud in the government; and (3) to curtail growing executive and judicial power and influence. Both altruism and political expediency were motivating forces for political reorganization. Regardless of the motivation behind the proposals, they generally were rejected. The failure of most Radical Republican proposals can be attributed to: (1) post-war bitterness and suspicions; and (2) the difficulty of altering popular habits of government.

The Radical proposals were defended on the grounds that the only way basic deficiencies in the governmental system could be overcome was by a quasi-parliamentary system.

In order to make a judgment of the validity of the Radical argument, it is necessary to look at the national political situation from 1865 to 1869. The Radicals were

confronted by discord and bitterness in the post-war period. The social and political changes which resulted from the war presented new questions and demanded immediate answers. This caused a severe strain on the system of checks and balances. The separation of powers, instead of allowing the nation to solve its problems, resulted in deadlock and delay. This was the objection to the system.

The theory of separation of powers is suitable if the three branches can work in harmony. Such, however, was not the case in the late 1860's. These circumstances coupled with long-standing weaknesses which were in the executive and judicial branches, led the Radicals to conclude that only legislative supremacy could ensure a strong and capable government.

The Radical Republicans had an indirect method by which they hoped to achieve legislative supremacy. They would ideally change the national political structure from a presidential to a parliamentary system. This was not practical because the American people would view the change as too extreme. Therefore, the Radicals would modify the existing structure by arrogating the powers needed for legislative supremacy to the Congress but keeping enough of the present structure to prevent a public reaction against themselves.

The Radicals proposed many measures which would either restrict or destroy the major executive and judicial powers

and basically alter their structure. Although the outcomes of their proposals frequently appeared favorable, the Radical Republicans failed to permanently modify the separation of powers. In evaluating the episode it would seem obvious to conclude that the Constitution and the precedents of the past, which favored the retention of the existing political system, overpowered the expediency and concern for the future, which gave a strong basis to the Radical's schemes for reorganization.

The changes proposed by the Radicals were fundamental but there was nothing unconstitutional or revolutionary about them. Each generation has the right to modify the Constitution to fit the times as long as the changes are achieved by constitional methods. These modifications are not necessarily attacks on the Constitution but attempts to make the document more applicable to contemporary needs as envisioned by the Radicals. It was only logical that as the United States evolved and new needs arose, changes in the Constitution might need to be made. An oddity in American political thought is that when the Supreme Court modifies the Constitution, it is usually accepted. But, if Congress suggests changes in the Constitution, the response is that the document will be destroyed and the nation exposed to grave danger.

The Radicals were determined to modify the structure of the executive branch by revising presidential elections;

precedents to follow in removing a chief executive on political grounds. An impartial judgement of the Radicals exonerates them from the usual charges.

In view of the traditional opposition to any extreme changes in either the Constitution or the government, it is not surprising that the Radical Republicans have been indiscriminately disparaged by the public and historians while their opponents have, for the most part, received accolades.

The Radical's attempted transformation of the American political system failed. They came closer to success than any similar movement, but the nation's political institutions and processes emerged almost untouched. The Radical objective to subjugate the executive and judicial branches was unachieved. As conditions returned to normal and the bitterness and hatred subsided, many important Radicals who were interested in political reorganization, such as James Ashley of Ohio, fell from power. This ensured the continuance of the presidential system with its deficiencies. The furor over the governmental system increases and subsides continually, depending upon the particular crisis. As most who would make basic alterations in the Constitution will find, it is almost impossible to gain public acceptance. Proposed changes will be viewed with alarm and suspicion. This was the obstacle to governmental reorganization between 1865 to 1869, and is generally true of any period in American history.

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APPENDIX

APPENDICES

APPENDIX A

VOTING RECORD ON SELECTED EXECUTIVE REORGANIZATION PROPOSALS

The political affiliations of Congressmen during the troubled years of 1865-1869 are not always easy to determine. The party labels used in the voting statistics and charts; therefore, are only approximate for certain Congressmen.

The appendix is divided into two sections: (1) the Senate and (2) the House of Representatives. In each section, issues and voting results by political parties are first analyzed, followed by voting chart of individual members.

Symbols

R = Republican
D = Democrat
X = Yea vote
O = Nay vote
A = Did not vote
= If blank not a member of Congress at time of vote

SENATE: ISSUES AND VOTING RESULTS

Vote 1 January 4, 1867

Vote on bill to repeal section 13 of the Confiscation Act of 1863. This section had given the President, according to Congress, his only legal authority to grant pardons and amnesties by proclamation. The Radicals wanted to rescind the authority given to the President under this section of the

act. (Congressional Globe, 39th Cong., 2nd Sess., p. 277.)

	For	Against	No Vote	Total
R	26	3	11	40
D	1	4	7	12
Total	27	7	18	52

Vote 2 January 18, 1867

Vote on Charles Sumner's amendment to the Tenure of Office Act of 1867 providing for the extension of the Senate authority to "advise and consent" to the appointment of any executive official, except clerks, whose salary exceeded $1,000. (Ibid., p. 541.)

	For	Against	No Vote	Total
R	15	14	11	40
D	1	7	4	12
Total	16	21	15	52

Vote 3 January 18, 1867

Vote on amendment to withdraw the exemption clause concerning the presidential cabinet in the Tenure Act of 1867. (Ibid., p. 548.)

	For	Against	No Vote	Total
R	12	19	9	40
D	1	8	3	12
Total	13	27	12	52

Vote 4 January 18, 1867

Vote on passage of the Tenure of Office Act of 1867. (Ibid., p. 550.)

	For	Against	No Vote	Total
R	27	3	10	40
D	2	6	4	12
Total	29	9	14	52

Vote 5 February 23, 1867

Vote on conference committee's version of the Tenure Act of 1867 with its amended first section. (Ibid., p. 1518.)

	For	Against	No Vote	Total
R	20	4	16	40
D	2	6	4	12
Total	22	10	20	52

Vote 6 March 2, 1867

Vote to override President Andrew Johnson's veto of the Tenure of Office Act of 1867. (Ibid., p. 1966.)

	For	Against	No Vote	Total
R	34	4	2	40
D	1	7	4	12
Total	35	11	6	52

Vote 7 February 26, 1867

Vote on amendment to strike out the 2nd section of the bill making appropriations for the support of the army for the year ending June 30, 1868. This amendment would remove

from the act those provisions which deprived President Andrew Johnson of the command of the army. (Ibid., p. 1855.)

	For	Against	No Vote	Total
R	3	28	9	40
D	5	0	7	12
Total	8	28	16	52

Vote 8 February 7, 1868

Vote on bill to vacate in thirty days many Federal offices and make appointments to these positions thereafter subject to the "advice and consent" of the Senate. (Ibid., 40th Cong., 2nd Sess., p. 780.)

	For	Against	No Vote	Total
R	30	3	11	44
D	2	6	1	9
Total	32	9	12	53

Vote 9 February 9, 1869

Vote on constitutional amendment which would guarantee the direct election of the presidential electors by the people. (Ibid., 40th Cong. 3rd Sess., p. 1042.)

	For	Against	No Vote	Total
R	33	14	8	45
D	4	5	2	11
Total	37	19	10	56

SENATE

INDIVIDUAL VOTING RECORD

NAME	PARTY	STATE	1	2	3	4	5	6	7	8	9
Abbott, J. C.	R	N.C.									0
Anthony, H.	R	R.I.	A	O	O	X	X	X	O	X	A
Bayard, J.	D	Del.								O	A
Brown, B.	D	Mo.	A	X	X	X	X	A	A		
Buckalew, C.	D	Penn.	A	O	O	O	O	O	X	O	X
Cameron, S.	R	Penn.								X	X
Cattell, A.	R	N.J.	X	A	O	X	A	X	A	A	X
Chandler, Z.	R	Mich.	X	X	X	X	X	X	O	X	O
Cole, C.	R	Cal.								O	X
Conkling, R.	R	N.Y.								X	X
Conness, J.	R	Cal.	X	X	O	X	X	X	O	X	X
Corbett, H.	R	Ore.								A	X
Cowan, C.	R	Penn.	A	O	O	O	A	O	A		
Cragen, A.	R	N.H.	X	O	A	X	A	X	O	X	O
Creswell, J.	R	Md.	X	A	A	A	A	A	O		
Davis, G.	R	Ky.	A	A	A	A	O	O	A	O	O
Dixon, J.	R	Conn.	O	O	O	O	O	O	X	O	X
Doolittle, J.	R	Wis.	O	O	O	O	O	O	X	A	X
Drake, C.	R	Mo.								X	O
Edmunds, G.	R	Ver.	X	O	O	X	A	X	O	X	O
Ferry, O.	R	Conn.								X	X
Fessenden, W.	R	Me.	X	O	O	X	A	X	O	A	X
Fogg, G.	R	N.H.	A	O	X	X	X	X	O		
Foster, L.	R	Conn.	X	O	O	X	A	X	O		
Fowler, J.	R	Tenn.	X	A	A	A	X	X	A	A	X
Frelinghuysen, F.	R	N.J.	A	A	O	X	A	X	O	X	O
Grimes, J.	R	Iowa	A	X	X	X	A	X	A	A	X
Guthrie, J.	D	Ky.	A	A	A	A	A	A	A	A	
Harlan, J.	R	Iowa								X	X
Harris, I.	R	N.Y.	A	X	O	X	A	X	A		O
Henderson, J.	D	Mo.	X	A	O	X	X	X	X	X	A
Hendricks, T.	D	Ind.	O	O	O	O	O	O	X	O	O
Howard, J.	R	Mich.	X	X	X	X	X	X	A	X	A
Howe, T.	R	Wis.	X	X	X	X	X	A	A	X	X
Johnson, R.	D	Md.	O	O	O	A	O	O	X	O	
Kellogg, W. P.	R	La.									X
Kirkwood, S.	R	Iowa	X	A	A	A	A	X	O		
Lane, H.	R	Ind.	X	X	X	A	X	X	A		
McCeery, T. C.	D	Ky.									O
McDonald, A.	R	Ark.									X
McDougall, J.	D	Cal.	A	A	A	A	O	A	A		X
Morgan, E.	R	N.Y.	X	X	O	X	X	X	O	X	O

NAME	PARTY	STATE	1	2	3	4	5	6	7	8	9
Morrill, L.	R	Me.	X	X	X	X	X	X	A	X	X
Morrill, J.	R	Vt.								X	O
Morton, O.	R	Ind.								A	X
Nesmith, J.	R	Ore.	A	O	O	O	A	O	A		
Norton, D.	R	Minn.	O	A	O	A	A	O	X	A	A
Nye, J.	R	Nev.	A	A	A	A	A	X	O	X	A
Osborn, T. W.	R	Fla.									X
Patterson, D.	D	Tenn.	O	O	O	O	O	O	X	O	O
Patterson, J.	D	N.H.								X	X
Poland, L.	R	Vt.	X	O	O	X	A	X	O		
Pomeroy, S.	R	Kans.	A	A	A	A	A	X	O	X	A
Pool, J.	R	N.C.									X
Ramsey, A.	R	Minn.	X	X	X	X	X	X	O	X	X
Rice, B. F.	R	Ark.									X
Riddle, G.	D	Del.	A	O	O	O	A	A	A		
Robertson, T. J.	R	S.C.									X
Ross, E.	R	Kans.	X	A	A	A	X	X	O	O	
Saulsbury, W.	D	Del.	O	O	O	O	A	O	A	A	O
Sawer, F. A.	R	S.C.									X
Sherman, J.	R	Ohio	X	O	O	X	X	X	O	X	O
Spencer, G.	R	Ala.									X
Sprague, W.	R	R.I.	A	X	X	X	A	X	O	A	A
Steward, W.	R	Nev.	X	A	A	A	X	X	O	X	O
Sumner, C.	R	Mass.	X	X	X	X	X	X	O	X	A
Thayer, J.	R	Neb.								X	X
Tipton, T.	R	Neb.								X	A
Trumbull, L.	R	Ill.	X	A	A	A	X	X	O	X	O
Van Winkle, P.	R	W.Va.	A	O	O	X	O	X	O	X	O
Vickers, G.	D	Md.									X
Wade, B.	R	Ohio	X	X	X	X	X	X	O	X	X
Warner, W.	R	Ala.									X
Welch, A. S.	R	Fla.									X
Whyte, W.	D	Md.									X
Willey, W.	R	W.Va.	X	O	O	X	O	X	O	X	X
Williams, G.	R	Ore.	X	O	O	X	X	X	O	X	X
Wilson, H.	R	Mass.	X	X	X	X	X	X	O	A	X
Yates, R.	R	Ill.	A	X	O	X	X	X	O	X	O

HOUSE OF REPRESENTATIVES: ISSUES AND VOTING RESULTS

Vote 1 July 23, 1866

Vote to table proposal by James Ashley of Ohio that a select committee be appointed to consider all submitted bills

and resolutions on the subject of the executive term and the mode and manner of his election. (Ibid., 39th Cong., 1st Sess., p. 4048.)

	For	Against	No Vote	Total
R	45	41	53	139
D	26	1	15	42
Total	71	42	68	181

Vote 2 December 12, 1866

Vote on bill to repeal section 13 of the Confiscation Act of 1863. This section had given the President, according to Congress, his authority to grant pardons and amnesties by proclamation. The Radicals wanted to rescind the authority given to the President under this section of the act. (Ibid., 39th Cong., 2nd Sess., p. 4.)

	For	Against	No Vote	Total
R	109	3	30	142
D	3	26	18	47
Total	112	29	48	189

Vote 3 February 1, 1867

Vote on the first attempt to withdraw the exemption clause concerning the presidential cabinet in the proposed Tenure of Office Act of 1867. (Ibid., p. 943.)

	For	Against	No Vote	Total
R	75	40	26	141
D	1	38	10	49
Total	76	78	36	190

Vote 4 February 2, 1867

Vote on the second attempt to withdraw the exemption clause concerning the presidential cabinet in the proposed Tenure Act of 1867. (Ibid., p. 970.)

	For	Against	No Vote	Total
R	81	28	31	140
D	1	35	13	49
Total	82	63	45	190

Vote 5 February 2, 1867

Vote on the passage of the Tenure of Office Act of 1867. (Ibid.)

	For	Against	No Vote	Total
R	109	2	31	142
D	2	36	10	48
Total	111	38	41	190

Vote 6 February 19, 1867

Vote on the Conference committee's version of the Tenure Act of 1867 with its amended first section. (Ibid., p. 1340.)

	For	Against	No Vote	Total
R	111	2	28	141
D	0	39	10	49
Total	111	41	38	190

Vote 7 March 2, 1867

Vote to override President Andrew Johnson's veto of the Tenure of Office Act of 1867. (Ibid., p. 1739.)

	For	Against	No Vote	Total
R	131	0	12	143
D	2	37	9	48
Total	133	37	21	191

Vote 8 February 20, 1867

Final vote on the bill making appropriations for the support of the army for the year ending June 30, 1868. The second section of this bill deprived President Andrew Johnson of the command of the army. (Ibid., p. 1404.)

	For	Against	No Vote	Total
R	89	0	53	142
D	1	32	15	48
Total	90	32	68	190

HOUSE OF REPRESENTATIVES

INDIVIDUAL VOTING RECORD

NAME	PARTY	STATE	1	2	3	4	5	6	7	8
Alley, J. B.	R	Mass.	X	A	O	X	X	X	X	X
Allison, W. B.	R	Iowa	X	X	X	X	X	X	X	X
Ames, O.	R	Mass.	O	X	X	X	X	X	X	X
Ancona, S. E.	D	Penn.	X	O	O	O	O	O	O	O
Anderson, G. W.	R	Mo.	O	A	X	X	X	X	X	X
Arnell, S. M.	R	Tenn.		X	A	A	A	X	X	X
Ashley, D. R.	R	Nev.	A	A	O	O	A	X	X	A
Ashley, J. M.	R	Ohio	O	X	X	X	A	X	X	X
Baker, J.	R	Ill.	X	X	X	X	X	A	X	X
Baldwin, J. D.	R	Mass.	A	X	O	A	A	X	X	X
Banks, N. P.	R	Mass.	O	X	O	A	A	X	X	A
Barker, A. A.	R	Penn.	A	X	A	A	A	A	X	X
Baxter, P.	R	Vt.	O	X	X	X	X	X	X	X
Beaman, F. C.	R	Mich.	A	X	X	X	X	X	X	X
Benjamin, J. F.	R	Mo.	X	X	A	A	A	X	X	A
Bergen, T. G.	D	N.Y.	X	A	O	O	O	O	O	O
Bidwell, J.	R	Calif.	O	X	X	X	X	X	X	X
Bingham, J. A.	R	Ohio	O	X	X	X	A	A	X	X
Blaine, J. G.	R	Me.	A	X	X	X	X	X	X	A
Blow, H. T.	R	Mo.	A	X	A	X	X	X	A	X
Boutwell, G. S.	R	Mass.	O	X	X	X	X	X	X	X
Boyer, B. M.	D	Penn.	A	O	O	O	O	O	O	A
Brandegee, A.	R	Conn.	A	X	A	A	A	X	X	A
Bromall, H. P. H.	R	Ill.	O	X	X	X	X	X	X	A
Broomall, J. M.	R	Penn.	O	X	X	X	X	X	X	X
Buckland, R. P.	R	Ohio	A	X	X	X	X	X	X	A
Bundy, H. S.	R	Ohio	A	A	O	A	X	A	X	X
Campbell, W. B.	D	Tenn.		O	O	O	O	O	O	O
Chanler, J. W.	D	N.Y.	A	O	A	A	A	O	O	A
Clarke, R. W.	R	Ohio	O	X	X	X	X	X	X	X
Clarke, S.	R	Kans.	O	X	X	X	X	X	X	X
Cobb, A.	R	Wis.	O	X	X	X	X	X	X	A
Colfax, S.	R	Ind.				SPEAKER				
Conkling, R.	R	N.Y.	O	A	X	X	X	A	X	A
Cook, B. C.	R	Ill.	A	A	X	X	X	X	X	X
Cooper, E.	D	Tenn.		A	O	O	O	O	O	O
Cullom, S. M.	R	Ill.	A	X	X	X	X	X	X	A
Culver, C. V.	R	Penn.	A	A	A	A	A	A	A	A
Darling, W.	R	N.Y.	A	X	O	A	A	X	X	A
Davis, T. T.	R	N.Y.	X	A	O	O	X	A	X	X
Dawes, H. L.	R	Mass.	A	A	O	O	X	A	X	A
Dawson, J. L.	D	Penn.	X	O	O	O	O	O	O	O
Defrees, J. H.	R	Ind.	X	X	A	O	X	A	X	A

NAME	PARTY	STATE	1	2	3	4	5	6	7	8
Delano, C.	R	Ohio	A	A	X	A	A	A	X	A
Deming, H. C.	R	Conn.	A	A	X	O	X	X	X	X
Denison, C.	D	Penn.	A	A	O	A	A	O	A	O
Dixon, N. F.	R	R.I.	O	X	A	X	X	A	X	A
Dodge, W. E.	R	N.Y.	A	A	A	A	X	X	X	X
Donnelly, I.	R	Minn.	O	X	X	X	X	X	X	X
Driggs, J. F.	R	Mich.	X	X	O	X	X	X	A	A
Dumont, E.	R	Ind.	A	A	X	X	X	X	X	A
Eckley, E. R.	R	Ohio	O	X	X	X	X	A	X	A
Eggleston, B.	R	Ohio	O	X	A	X	X	X	X	X
Eldridge, C.	D	Wisc.	X	O	O	O	O	O	O	O
Eliot, T. D.	R	Mass.	O	X	X	X	X	X	X	X
Farnsworth, J. F.	R	Ill.	O	X	A	O	X	X	X	X
Farquhar, J.	R	Ind.	X	X	O	O	X	X	X	A
Ferry, T. W.	R	Mich.	A	X	O	X	X	X	X	A
Finck, W. E.	D	Ohio	X	A	O	O	O	O	O	A
Garfield, J. A.	R	Ohio	X	X	X	X	X	A	X	A
Glossbrenner, A.	D	Penn.	X	O	O	O	O	O	O	O
Goodyear, C.	D	N.Y.	A	A	O	O	O	A	O	O
Grider, H.	R	Ky.	A							
Grinnell, J. B.	R	Iowa	A	X	X	X	X	X	X	X
Griswold, J. A.	R	N.Y.	A	A	O	O	X	A	X	A
Hale, R. S.	R	N.Y.	A	O	O	O	X	A	X	A
Harding, Aaron	D	Ky.	X	O	O	O	O	O	O	O
Harding, Abner	R	Ill.	X	X	X	X	X	X	X	X
Harris, B. G.	D	Md.	A	A	O	O	O	O	A	O
Hart, R.	R	N.Y.	O	X	X	A	X	X	X	A
Hawkins, I. R.	D	Tenn.		X	O	O	X	O	X	A
Hayes, R. B.	R	Ohio	O	X	X	X	X	X	X	A
Henderson, J. H. D.	R	Ore.	A	X	X	X	X	X	X	X
Higby, W.	R	Calif.	O	X	X	X	X	X	X	X
Hill, R.	R	Ind.	A	X	X	X	X	X	X	X
Hise, E.	D	Ky.		O	O	O	O	O	O	O
Hogan, J.	D	Mo.	X	A	O	O	O	A	O	A
Homes, S. T.	R	N.Y.	O	X	O	O	X	X	X	X
Hooper, S.	R	Mass.	X	X	O	X	X	X	X	X
Hotchkiss, G. W.	R	N.Y.	A	A	X	X	X	X	X	A
Hubbard, A. W.	R	Iowa	A	A	A	A	A	A	X	A
Hubbard, C. D.	R	W.Va.	X	X	O	O	X	A	X	A
Hubbard, D.	R	N.Y.	A	A	A	A	A	X	A	X
Hubbard, J. H.	R	Conn.	X	X	X	X	X	X	X	X
Hubbell, E.	D	N.Y.	A	A	O	O	O	A	O	A
Hubbell, J. R.	R	Ohio	O	X	O	O	X	A	X	A
Hulburd, C.	R	N.Y.	A	X	A	X	X	X	X	A
Humphrey, J. M.	D	N.Y.	A	A	O	O	O	O	O	O
Hunter, J. W.	D	N.Y.			O	O	O	O	O	O
Ingersol, E.	R	Ill.	X	X	O	O	X	X	X	X

NAME	PARTY	STATE	1	2	3	4	5	6	7	8
Jenckes, T. A.	R	R.I.	A	X	A	O	X	A	X	A
Johnson, P.	D	Penn.	X	A						
Jones, M.	D	N.Y.	A	A	A	A	A	A	O	A
Julian, G. W.	R	Ind.	O	X	X	X	X	X	X	X
Kasson, J. A.	R	Iowa	X	X	O	O	X	X	X	X
Kelley, W.	R	Penn.	X	X	X	X	X	X	X	X
Kelso, J. R.	R	Mo.	A	X	X	A	A	X	A	X
Kerr, M. C.	D	Ind.	A	O	A	A	A	O	A	A
Ketsham, J.	R	N.Y.	X	X	O	A	A	X	X	X
Koontz, W. H.	R	Penn.	O	X	X	X	X	X	X	X
Kuykendall, A. J.	R	Ill.	X	X	O	O	X	X	A	A
Laflin, A. H.	R	N.Y.	X	X	O	X	X	X	X	X
Latham, G. R.	D	W.Va.	X	X	A	A	A	O	A	X
Lawrence, G.	R	Penn.	O	X	O	O	X	X	X	X
Lawrence, W.	R	Ohio	X	X	X	X	X	X	X	X
LeBlond, F.	D	Ohio	X	O	O	O	O	O	O	O
Leftwich, J. W.	D	Tenn.		O	O	O	O	O	O	A
Loan, B. F.	R	Mo.	X	X	X	X	X	X	X	X
Longyear, J. W.	R	Mich.	A	A	O	O	X	X	X	X
Lynch, J.	R	Me.	A	X	X	X	X	X	X	X
Marquette,	R	Neb.							X	
Marshall, S.	D	Ill.	A	O	O	A	A	A	O	O
Marson, G.	R	N.H.	X	A	O	A	A	A	X	A
Marvin, J. M.	R	N.Y.	A	A	O	O	X	X	X	X
Maynard, H.	R	Tenn.		X	O	O	X	X	X	X
McClurg, J. W.	R	Mo.	A	X	X	A	A	A	X	X
McCullough, H.	D	Md.	X	A	A	O	O	O	O	O
McIndoe, W. D.	R	Wisc.	A	X	A	A	A	X	X	A
McKee, S.	R	Ky.	A	X	X	X	X	X	X	A
McRuer, D.	R	Calif.	O	X	X	X	X	X	X	X
Mecur, U.	R	Penn.	O	X	X	A	A	X	X	A
Miller, G.	R	Penn.	X	X	A	X	X	X	X	X
Moorhead, J. K.	R	Penn.	X	X	O	X	X	A	X	X
Morrill, J. S.	R	Vt.	X	A	X	X	X	A	X	A
Morris, D.	R	N.Y.	A	X	A	A	A	A	X	A
Moulton, S.	D	Ill.	O	X	X	X	X	A	X	X
Myers, L.	R	Penn.	X	X	A	X	X	X	X	X
Newell, W. A.	R	N.J.	X	X	A	A	A	X	X	X
Niblack, W. E.	D	Ind.	X	O	O	O	O	O	O	O
Nicholson, J.	D	Del.	X	O	A	O	O	O	O	O
Noell, T. E.	D	Mo.	X	O	O	O	O	A	A	O
O'Niell, C.	R	Penn.	X	X	X	X	X	A	X	X
Orth, G. S.	R	Ind.	O	X	X	X	X	X	X	X
Paine, H.	R	Wisc.	O	X	X	X	X	X	X	X
Patterson, J.	R	N.H.	A	X	X	A	X	X	X	X
Perham, S.	R	Me.	O	X	X	X	X	X	X	A
Phelps, C. E.	D	Md.	X	O	O	O	O	A	A	A
Pike, F. A.	R	Me.	X	X	X	X	X	X	X	A

NAME	PARTY	STATE	1	2	3	4	5	6	7	8
Plants, T.	R	Ohio	A	X	X	O	X	X	X	X
Pomeroy, T.	R	N.Y.	A	A	O	O	X	X	X	X
Price, H.	R	Iowa	O	X	X	X	X	X	X	X
Radford, W.	D	N.Y.	X	A	A	A	A	O	O	A
Randall, S. J.	D	Penn.	A	O	O	O	O	O	A	A
Randall, W. H.	R	Ky.	X	X	A	X	X	X	X	X
Raymond, H. J.	R	N.Y.	X	A	O	O	X	X	X	A
Rice, A. H.	R	Mass.	X	X	O	A	X	X	X	X
Rice, J. H.	R	Me.	O	X	O	X	X	X	X	A
Ritter, B.	D	Ky.	A	O	O	A	O	O	O	O
Rogers, A. J.	D	N.J.	X	O	A	O	O	O	O	O
Rollins, E.	R	N.H.	X	X	X	X	X	X	X	X
Ross, L. W.	D	Ill.	X	A	O	O	O	O	O	O
Rousseau, L.	D	Ky.			A	A	O	O	A	A
Sawer, P.	R	Wisc.	A	X	X	X	X	X	X	A
Schenck, R.	R	Ohio	X	X	O	O	X	X	X	A
Scofield, G.	R	Penn.	X	X	X	X	X	X	X	X
Shanklin, G. S.	D	Ky.	X	O	O	O	O	O	O	O
Shellabarger, S.	R	Ohio	X	X	X	X	X	X	X	X
Sitgreaves, C.	D	N.J.	X	O	O	A	A	O	O	A
Sloan, I. C.	R	Wisc.	A	A	X	X	X	X	X	X
Smith, G. C.	R	Ky.	A							
Spalding, R. P.	R	Ohio	O	X	X	X	X	X	X	X
Starr, J. F.	R	N.J.	A	X	A	A	A	X	X	A
Stevens, T.	R	Penn.	X	X	X	X	A	X	A	X
Stiwell, T. N.	R	Ind.	A	O	O	O	O	O	A	A
Stokes, W.	R	Tenn.		X	X	X	X	X	X	X
Strouse, M.	D	Penn.	X	A	O	O	O	A	O	O
Taber, S.	D	N.Y.	X	A	O	A	A	O	O	O
Taylor, N. G.	D	Tenn.	X	O	O	O	O	O	A	O
Taylor, N.	D	N.Y.		O	O	A	A	O	O	A
Thayer, M. R.	R	Penn.	A	O	A	A	A	X	X	X
Thomas, F.	R	Md.	A	X	O	A	X	A	X	A
Thomas, J. L. Jr.	R	Md.	X	X	A	A	A	X	A	X
Thornton, A.	D	Ill.	X	A	O	O	O	O	O	O
Trimble, L. S.	D	Ky.	X	O	O	O	O	O	O	O
Trowbridge, R.	R	Mich.	O	X	X	X	X	X	X	X
Upson, C.	R	Mich.	A	X	X	X	X	X	X	X
Van Aernam, H.	R	N.Y.	O	X	X	X	X	X	X	A
Van Horn, B.	R	N.Y.	O	A	O	X	X	X	X	A
Van Horn, R. T.	R	Mo.	X	X	X	A	A	X	X	X
Ward, A. H.	D	Ky.	A	O	O	O	O	O	O	O
Ward, H.	R	N.Y.		A	A	A	A	X	X	X
Warner, S. L.	R	Conn.	A	X	O	O	X	X	X	X
Washburn, H. D.	R	Ind.	A	X	X	X	X	A	X	A
Washburn, W. B.	R	Mass.	A	X	O	O	X	X	X	X
Washburne, E.	R	Ill.	A	A	A	A	A	A	A	A
Welker, M.	R	Ohio	O	X	X	X	X	X	X	X

NAME	PARTY	STATE	1	2	3	4	5	6	7	8
Wentworth, J.	R	Ill.	X	X	X	X	X	X	X	X
Whaley, K.	R	W.Va.	X	X	O	O	O	O	A	A
Williams, T.	R	Penn.	X	X	X	X	X	X	X	X
Wilson, J. F.	R	Iowa	X	A	X	X	X	X	X	X
Wilson, S.	R	Penn.	X	X	X	X	X	X	X	X
Windom, W.	R	Minn.	O	X	X	X	X	X	X	X
Winfield, C.	D	N.Y.	A	A	O	O	O	A	O	O
Woodbridge, F. E.	R	Vt.	X	A	O	A	A	X	X	X
Wright, E. R.	D	N.J.	A	A	A	A	A	O	A	O

APPENDIX B

VOTING RECORD ON SELECTED JUDICIAL REORGANIZATION PROPOSALS

SYMBOLS

R = Republican
D = Democrat
X = Yea Vote
O = Nay Vote
A = Did not vote
= If blank not a member of Congress at time of vote

SENATE: ISSUES AND VOTING RESULTS

Vote 1 March 26, 1868

Vote to override President Johnson's veto of the bill to deny jurisdiction to the Supreme Court in appeals from inferior Federal courts where the right of habeas corpus was involved. (Cong. Globe, 40th Cong., 2nd Sess., p. 2128.)

	For	Against	No Vote	Total
R	31	2	11	44
D	2	7	1	10
Total	33	9	12	54

Vote 2 February 23, 1869

Vote on bill to establish a Supreme Court of fifteen judges. The Chief Justice and seven associate justices to be chosen annually by lot would sit in court at Washington

while the remaining seven members would serve on circuit duty. (Ibid., 40th Cong., 3rd Sess., p. 1487.)

	For	Against	No Vote	Total
R	6	32	16	54
D	0	7	5	12
Total	6	39	21	66

Vote 3 March 23, 1869

Vote on bill to require the Supreme Court to render no decision when it was equally divided but to have a rehearing when an odd number of justices was present. (Ibid., 41st Cong., 1st Sess., p. 219.)

	For	Against	No Vote	Total
R	15	30	9	54
D	0	9	2	11
Total	15	39	11	65

INDIVIDUAL VOTING RECORD

NAME	PARTY	STATE	1	2	3
Abbott, J. C.	R	N.C.		O	O
Anthony, H.	R	R.I.	A	A	O
Bayard, J.	D	Del.	O	A	O
Boreman, A.	R	W.Va.			O
Brownlow, W. G.	R	Tenn.			O
Buckalew, C.	D	Penn.	O	O	
Buckingham, W. A.	R	Conn.			O
Cameron, S.	R	Penn.	X	X	X
Carpenter, M. H.	R	Wis.			O
Casserly, E.	D	Calif.			O
Cattell, A.	R	N.J.	X	O	O
Chandler, Z.	R	Mich.	X	A	O
Cole, C.	R	Calif.	X	O	O

NAME	PARTY	STATE	1	2	3
Conkling, R.	R	N.Y.	X	A	X
Conness, J.	R	Calif.	A	A	
Corbett, H.	R	Ore.	A	O	A
Cragin, A.	R	N.H.	X	A	X
Davis, G.	D	Ky.	O	O	O
Dixon, J.	R	Conn.	O	A	
Doolittle, J. R.	R	Wis.	A	O	
Drake, C. D.	R	Mo.	A	X	X
Edmunds, G.	R	Ver.	X	X	A
Fenton, R.	R	N.Y.			O
Ferry, O.	R	Conn.	X	A	A
Fessenden, W.	R	Me.	A	O	A
Fowler, J.	R	Tenn.	A	A	A
Frelinghuysen, W.	R	N.J.	X	O	
Gilbert, A.	R	Fla.			O
Grimes, J.	R	Iowa	A	O	A
Hamlin, H.	R	Me.			X
Harlan, J.	R	Iowa	X	A	O
Harris, J.	R	La.		O	O
Henderson, J.	D	Mo.	X	A	
Hendricks, T.	D	Ind.	O	A	
Howard, J.	R	Mich.	X	O	A
Howe, T.	R	Wis.	X	O	O
Johnson, R.	R	Md.	A		
Kellogg, W. P.	R	La.		A	O
McCreery, T.	D	Ky.	O	O	O
McDonald, A.	R	Ark.		O	O
Morgan, E.	R	N.Y.	X	O	
Morrill, J.	R	Vt.	X	A	X
Morrill, L.	R	Me.	X	O	
Morton, D.	R	Ind.	X	X	O
Norton, D.	R	Minn.	O	O	X
Nye, J.	R	Nev.	X	O	X
Osborn, T.	R	Fla.		O	X
Patterson, D. T.	D	Tenn.	O	O	
Patterson, J.	D	N.H.	X	A	O
Pomeroy, S.	R	Kans.	X	A	O
Pool, J.	D	N.C.		O	A
Pratt, D.	R	Ind.			X
Ramsey, A.	R	Minn.	X	A	O
Rice, B. F.	R	Ark.		O	O
Robertson, T. J.	R	S.C.		O	O
Ross, E.	R	Kans.	X	A	O
Saulsbury, W.	D	Del.	O	A	A
Sawer, F. A.	R	S.C.		O	O
Schurz, C.	R	Mo.			X
Scott, J.	R	Penn.			O
Sherman, J.	R	Ohio	A	O	O

NAME	PARTY	STATE	1	2	3
Spencer, G. E.	R	Ala.		O	X
Sprague, W.	R	R.I.	A	A	X
Stewart, W.	R	Nev.	X	O	O
Stockson, J.	D	N.J.			O
Sumner, C.	R	Mass.	X	O	X
Thayer, J.	R	Neb.	X	O	A
Thurman, A.	D	Ohio			O
Tipton, T.	R	Neb.	X	O	O
Trumbull, L.	R	Ill.	X	O	O
Van Winkle, P. S.	R	W.Va.	X	O	
Vickers, G.	D	Md.	A	O	O
Wade, B.	R	Ohio	X	X	
Warner, W.	R	Ala.		O	O
Welch, A. S.	R	Fla.		O	
Whyte, W. P.	D	Md.		O	
Willey, W. T.	R	W.Va.	X	O	O
Williams, G.	R	Ore.	X	O	X
Wilson, H.	R	Mass.	X	X	O
Yates, R.	R	Ill.	X	A	A

HOUSE: ISSUES AND VOTING RESULTS

Vote 1 January 13, 1868

Vote on amendment which would require concurrence of all Supreme Court justices for invalidating a congressional law instead of two-thirds as suggested by the committee bill. (Ibid., 40th Cong., 2nd Sess., p. 489.)

	For	Against	No Vote	Total
R	25	86	32	143
D	0	38	7	45
Total	25	124	39	188

Vote 2 January 13, 1868

Vote on amendment to provide that all inferior court decisions involving constitutional questions would not be

enforceable until after consideration of the measure by the Supreme Court. (Ibid., 40th Cong., 2nd Sess., p. 489.)

	For	Against	No Vote	Total
R	110	2	31	143
D	1	36	8	45
Total	111	38	39	188

Vote 3 January 13, 1868

Final vote on bill requiring a two-thirds concurrance of the Supreme Court to invalidate a law and the amendment to the bill found in vote 2. (Ibid., 40th Cong., 2nd Sess., p. 489.)

	For	Against	No Vote	Total
R	115	2	26	143
D	1	37	7	45
Total	116	39	33	188

Vote 4 March 27, 1868

Vote to override President Johnson's veto of the bill to deny jurisdiction to the Supreme Court in appeals from inferior Federal courts where the right of habeas corpus was involved. (Ibid., 40th Cong., 2nd Sess., p. 2170.)

	For	Against	No Vote	Total
R	113	3	28	144
D	1	31	13	45
Total	114	34	41	189

INDIVIDUAL VOTING RECORD

NAME	PARTY	STATE	1	2	3	4
Adams, G.	D	Ky.	O	O	O	O
Allison, W.	R	Iowa	A	A	A	A
Ames, O.	R	Mass.	A	X	X	X
Anderson, G.	R	Mo.	O	X	X	X
Archer, S.	D	Md.	O	O	O	O
Arnell, S.	R	Tenn.	X	X	X	X
Ashley, D.	R	Nev.	X	X	X	X
Ashley, J.	R	Ohio	X	X	X	X
Axtell, S.	D	Calif.	A	A	A	O
Bailey, A.	R	N.Y.	O	X	X	X
Baker, J.	R	Ill.	O	X	X	X
Baldwin, J.	R	Mass.	O	X	X	X
Banks, N.	R	Mass.	A	X	X	X
Barnes, D.	D	N.Y.	A	A	A	O
Barnum, W.	D	Conn.	O	O	O	A
Beaman, F.	R	Mich.	O	X	X	X
Beck, J.	D	Ky.	O	O	O	O
Beatty, J.	R	Ohio				X
Benjamin, J.	R	Mo.	O	X	X	X
Benton, J.	R	N.H.	O	X	X	X
Bingham, J.	R	Ohio	X	X	X	X
Blaine, J.	R	Me.	A	A	A	X
Blair, A.	R	Mich.	A	X	X	A
Boutwell, G.	R	Mass.	O	X	X	X
Boyer, B. M.	D	Penn.	A	A	A	A
Bromwell, H.	R	Ill.	O	X	X	X
Brooks, J.	D	N.Y.	O	O	O	O
Broomall, J.	R	Penn.	O	X	X	X
Buckland, R.	R	Ohio	O	X	X	X
Burr, A.	D	Ill.	O	O	O	O
Butler, B.	R	Mass.	A	A	A	A
Cake, H.	R	Penn.	X	X	X	X
Cary, S.	R	Ohio	A	A	A	O
Chander, J.	D	N.Y.	O	O	O	O
Churchill, J.	R	N.Y.	A	X	X	X
Clarke, R.	R	Ohio	O	X	X	X
Clarke, S.	R	Kans.	X	X	X	X
Cobb, A.	R	Wisc.	O	X	X	A
Coburn, J.	R	Ind.	O	X	X	X
Cook, B.	R	Ill.	A	A	A	X
Cornell, T.	R	N.Y.	A	A	A	A
Covode, J.	R	Penn.	X	X	X	X
Cullom, S.	R	Ill.	O	X	X	X
Dawes, H.	R	Mass.	O	X	X	X
Dixon, N.	R	R.I.	O	X	X	X
Dodge, W.	R	N.Y.	O	X	X	X

NAME	PARTY	STATE	1	2	3	4
Donnelly, I.	R	Minn.	O	X	X	A
Driggs, J.	R	Mich.	O	X	X	X
Eckley, E.	R	Ohio	A	A	A	X
Eggleston, B.	R	Ohio	O	X	X	X
Ela, J.	R	N.H.	A	X	X	A
Eldridge, C.	D	Wisc.	A	A	A	O
Eliot, T.	R	Mass.	O	X	X	X
Farnsworth, J.	R	Ill.	X	X	X	X
Ferris, O.	R	N.Y.	O	X	X	X
Ferry, T. W.	R	Mich.	O	X	X	X
Fields, W.	R	N.Y.	A	A	A	X
Finney, D. A.	R	Penn.	A	A	A	A
Fox, J.	D	N.Y.	O	O	O	O
Garfield, J.	R	Ohio	O	X	X	A
Getz, J. L.	D	Penn.	O	O	O	O
Glossbrenner, A.	D	Penn.	O	O	O	O
Golladay, J. S.	D	Ky.	O	O	O	O
Gravely, J. J.	R	Mo.	O	X	X	X
Griswold, J.	R	N.Y.	O	X	X	A
Grover, A.	D	Ky.	O	O	O	A
Haight, C.	D	N.J.	O	O	O	A
Halsey, G. A.	R	N.J.	A	A	A	X
Harding, A.	R	Ill.	X	X	X	A
Hawkins, I.	D	Tenn.	O	O	O	A
Higby, W.	R	Calif.	O	X	X	A
Hill, R.	R	Ind.	O	X	X	X
Holman, W. S.	D	Ind.	O	O	O	O
Hooper, S.	R	Mass.	O	X	X	X
Hopkins, B. F.	R	Wis.	O	X	X	X
Hotchkiss, G.	R	N.Y.	O	O	O	O
Hubbard, A. W.	R	Iowa	A	A	A	A
Hubbard, C. D.	R	W.Va.	O	X	X	X
Hubbard, D.	R	N.Y.	O	O	O	O
Hulbard, C.	R	N.Y.	O	X	X	X
Humphrey, J.	D	N.Y.	O	O	O	O
Hunter, J.	D	N.Y.	O	X	X	X
Ingersoll, E.	R	Ill.	O	X	X	X
Jenckes, T	R	R.I.	O	X	X	X
Johnson, J. A.	D	Calif.	O	O	O	O
Jones, A. H.	R	N.C.	A	A	A	A
Judd, N. B.	R	Ill.	X	X	X	X
Julian, G.	R	Ind.	O	X	X	X
Kelley, W. D.	R	Penn.	O	X	X	X
Kelsey, W.	R	N.Y.	O	X	X	X
Kerr, M.	D	Ind.	O	O	O	O
Ketchum, J.	R	N.Y.	O	A	X	X
Kitchen, B.	R	W.Va.	O	X	X	X
Knott, J. P.	D	Ky.	O	O	O	O

NAME	PARTY	STATE	1	2	3	4
Koontz, W.	R	Penn.	O	X	X	X
Laflin, A.	R	N.Y.	O	X	X	X
Lawrence, G.	R	Penn.	A	A	A	A
Lawrence, W.	R	Ohio	X	X	X	X
Lincoln, W. S.	R	N.Y.	O	X	X	X
Loan, B.	R	Mo.	X	X	X	X
Logan, J.	R	Ill.	X	X	X	X
Loughbridge, W.	R	Iowa	O	X	X	X
Lynch, J.	R	Me.	A	A	A	A
Mallory, R.	R	Ore.	O	X	X	X
Marvin, J.	R	N.Y.	O	X	X	A
Marshall, S.	D	Ill.	O	O	O	O
Maynard, H.	R	Tenn.	X	X	X	X
McCarthy, D.	R	N.Y.	X	X	X	A
McClurg, J. W.	R	Mo.	X	X	X	X
McCormick, J. R.	D	Mo.	O	A	O	O
McCullough, H.	D	Md.	A	A	A	A
Mecur, U.	R	Penn.	O	X	X	X
Miller, G.	R	Penn.	O	X	X	X
Moore, W.	R	N.J.	O	X	X	X
Moorhead, J.	R	Penn.	O	X	X	X
Morgan, G. W.	D	Ohio	A	A	A	A
Morrell, J.	R	Vt.	A	X	X	X
Morrissey, J.	D	N.Y.	O	O	O	A
Mullins, J.	R	Tenn.	X	X	X	X
Mungen, W.	D	Ohio	O	O	O	O
Myers, L.	R	Penn.	O	X	X	X
Newcomb, C. A.	R	Mo.	O	X	X	X
Niblack, W. E.	D	Ind.	O	O	O	O
Nicholson, J.	D	Del.	O	O	O	O
Nunn, D. A.	R	Tenn.	O	X	X	A
O'Neill, C.	R	Penn.	O	X	X	X
Orth, G.	R	Ind.	O	X	X	X
Paine, H.	R	Wis.	O	X	X	X
Perham, S.	R	Me.	O	X	X	X
Peters, J. A.	R	Me.	O	A	X	X
Phelps, C.	D	Md.	O	O	O	A
Pike, F.	R	Me.	O	X	X	X
Pile, W.	R	Mo.	X	X	X	X
Plants, T.	R	Ohio	A	A	A	X
Poland, L.	R	Vt.	A	A	A	X
Polsey, D.	R	W.Va.	A	A	A	X
Pomeroy, T.	R	N.Y.	O	X	X	X
Price, H.	R	Iowa	X	X	X	X
Pruyn, J. V. L.	D	N.Y.	O	O	O	O
Randall, S. J.	D	Penn.	O	O	O	A
Raum, G.	R	Ill.	O	X	X	X
Robertson, W. H.	R	N.Y.	O	X	X	A

NAME	PARTY	STATE	1	2	3	4
Robinson, W. E.	D	N.Y.	O	O	O	A
Ross, L. W.	D	Ill.	O	O	O	O
Sawer, P.	R	Wis.	O	X	X	X
Schenck, R.	R	Ohio	O	X	X	X
Scofield, G.	R	Penn.	O	X	X	X
Selye, L.	R	N.Y.	A	A	A	X
Shanks, J.	R	Ind.	O	X	X	X
Shellabarger, S.	R	Ohio	A	A	A	A
Sitgreanes, C.	D	N.J.	O	O	O	O
Smith, W. C.	R	Vt.	O	X	X	X
Spalding, R. P.	R	Ohio	O	X	X	X
Starkweather, H. H.	R	Conn.	A	A	A	A
Stevens, A.	R	N.H.	O	X	X	X
Stevens, T.	R	Penn.	A	A	A	X
Stewart, T. E.	R	N.Y.	A	A	A	A
Stone, F.	D	Md.	O	O	O	O
Strokes, W.	R	Tenn.	O	X	X	A
Taber, S.	D	N.Y.	O	O	O	O
Taffe, J.	R	Neb.	A	A	A	X
Taylor, C. N.	R	Penn.	O	A	X	X
Thomas, F.	R	Md.	O	X	X	X
Trimble, J.	R	Tenn.	X	X	X	X
Trimble, L.	D	Ky.	O	O	O	O
Trowbridge, R.	R	Mich.	O	X	X	A
Twichell, G.	R	Mass.	O	X	X	X
Upson, C.	R	Mich.	O	X	X	X
Van Aernam, R.	R	N.Y.	X	A	X	A
Van Auken, D.	D	Penn.	O	O	O	O
Van Horn, B.	R	N.Y.	A	A	A	X
Van Horn, R.	R	Mo.	X	X	X	X
Van Trump, P.	D	Ohio	A	A	A	A
Van Wyck, C.	R	N.Y.	A	A	A	X
Ward, H.	R	N.Y.	X	X	X	X
Washburn, C.	R	Wis.	O	X	X	X
Washburn, H.	R	Ind.	O	X	X	A
Washburn, W.	R	Mass.	A	A	A	X
Washburne, E.	R	Ind.	O	X	X	X
Welker, M.	R	Ohio	O	X	X	X
Williams, T.	R	Penn.	X	A	X	X
Williams, W.	R	Ind.	X	X	X	A
Wilson, J. F.	R	Iowa	O	X	X	X
Wilson, J. T.	R	Ohio	O	X	X	X
Wilson, S. F.	R	Penn.	O	X	X	X
Windom, W.	R	Minn.	O	X	X	X
Wood, F.	D	N.J.	O	O	O	A
Woodbridge, F.	R	Vt.	O	X	X	X
Woodard, G. W.	D	Penn.	O	O	O	O