
AMERICA'S
UNWRITTEN
CONSTITUTION

*The Precedents and Principles
We Live By*

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CHAPTER 1

READING
BETWEEN THE LINES

America's Implicit Constitution



THE IMPEACHMENT TRIAL OF ANDREW JOHNSON (1868).

The United States Senate deciding the fate of President Andrew Johnson, in a trial presided over by Chief Justice Salmon P. Chase.



ON THE AFTERNOON OF MARCH 5, 1868, as the nation's capital saw its first fair day in nearly a month, the Senate galleries filled to capacity. According to one press account, the ladies in the audience sparkled "with all the bright colors of brilliant toilettes." Sitting in the presiding officer's chair, Chief Justice Salmon P. Chase solemnly summoned each senator to step forward and take an oath to do "impartial justice."¹

Usually, the chief justice does not chair Senate proceedings. Typically, senators take no special judicial oath. On many a day, elegant spectators do not throng the Capitol galleries. But this was no ordinary day. For the first time in history, the Senate was convening as a court of presidential impeachment. Andrew Johnson, the seventeenth president of the United States, stood formally accused of high crimes and misdemeanors warranting his ouster from office.²

No one knew who would prevail in the days ahead. An overwhelming majority of the House of Representatives had put forth eleven articles of impeachment, indicting Johnson for his wild anticongressional rhetoric and fierce defiance of congressional legislation—but conviction would require a two-thirds vote in the Senate. Johnson had many allies in the upper chamber. But did he have enough?

One by one, senators approached the chair and were sworn in. Rhode Island's Henry B. Anthony went first, followed by Delaware's James A. Bayard Jr. In 1801, Congressman James A. Bayard Sr. had brokered a deal making Thomas Jefferson president. Back then, Bayard Jr. had been an infant. Now he would have his own chance to shape a president's fate.

As Bayard Jr. took his oath, some in the chamber likely thought back to the legendary Bayard-Jefferson affair. They may have also recalled that Jefferson, as the vice president of the United States from 1797 to 1801, had himself presided over the Senate, thus occupying the very chair now filled by Chase. Johnson, too, had once sat in this seat, as Abraham Lincoln's vice president in early 1865. Did any of these stray thoughts cross Chase's mind as he sat in the Jefferson/Johnson chair? Did it further cross Chase's mind that, if he played his part well in the impeachment trial, he might himself

win the presidency in November, and thereafter fill an even more powerful chair once occupied by Jefferson and Johnson?

Chase continued to go down the alphabet. Several dozen senators—including Thomas Hendricks, Reverdy Johnson (no relation to Andrew), John Sherman, William Sprague (Chase's own son-in-law), Charles Sumner, and Peter Van Winkle—stepped forward and took their judicial oaths. Then came the moment many had been waiting for: The secretary called the name of Ohio's senior senator, Benjamin Franklin Wade, the official Senate president pro tempore. As Wade approached the chair, Hendricks—the senior senator from Indiana and a supporter of President Johnson—rose to his feet to object. The crowd hushed.

It took Hendricks less than two minutes to explain why Wade could not properly take the requisite oath. Under the presidential-succession statute then on the books, the Senate president pro tempore stood next in line after Johnson. (No vice president existed in 1868. When Lincoln was killed at war's end, Vice President Johnson had become President Johnson, and his old seat had thereafter remained empty.) Thus, were the Senate to convict Johnson, Wade would move into the White House. With so much to gain from a guilty verdict, Wade should not sit in judgment over Johnson. "I submit," intoned Hendricks, that "he [Wade] is not competent to sit as a member of the court."

Sherman immediately leaped to Wade's defense. As unflinching in debate as his famous older brother, General William Tecumseh Sherman, was in warfare, Ohio's junior senator gave no quarter: "This question... is answered by the Constitution of the United States, which declares that each State shall be entitled to two senators on this floor, and that the court or tribunal for the trial of all impeachments shall be the Senate of the United States. My colleague [Wade] is one of the senators from the State of Ohio; he is a member of this Senate, and is therefore made one of the tribunal to try all cases of impeachment." Sherman bluntly added that no one had objected moments earlier to the swearing-in of President Johnson's son-in-law, Tennessee Senator David Patterson.³

The constitutional game was now afoot. For the rest of that day and well into the next, senators did what they did best—speechify—on the nice constitutional questions before them: Should Wade sit in judgment

when he obviously had an enormous personal stake in the outcome? But wouldn't his recusal effectively deprive Ohio of its equal share in the Senate on the most momentous issue then facing America?

HOW SHOULD THE SENATE HAVE decided the deep questions raised on March 5, 1868? It is tempting to say that senators should simply have followed the plain meaning of the written Constitution. But constitutional quicksand awaits all who insist on reading every clause of the document literally. Seemingly firm textual ground at times simply dissolves underfoot. For example, Article I, section 3, declares that "the Vice President of the United States shall be the President of the Senate" and that the Senate enjoys the "sole Power to try all Impeachments." There are only two textual exceptions. First, "when the President of the United States is tried, the Chief Justice shall preside" over the Senate impeachment trial. Second, when the vice president is "Absen[t]" from the Senate or acting as America's chief executive (because, say, of a temporary presidential disability), a Senate-chosen officer—a "Senate...President pro tempore"—may substitute. Read literally, all this seems to say that whenever the *vice president* is impeached, he *himself* may chair this Senate trial. But can it really be true that a man may sit in judgment of his own case?⁴

Clause-bound literalism cannot provide the infallible constitutional compass we crave. Yet surely faithful interpreters should not simply toss the written Constitution aside or treat it as an infinitely malleable plaything. How, then, should we proceed?

For starters, we must learn to read between the lines—to discern America's implicit Constitution nestled behind the explicit clauses. In short, we must come to understand the difference between reading the Constitution *literally* and reading the document *faithfully*.

The best way for us to get a feel for this difference is through a series of detailed historical case studies and hypotheticals. Later in this chapter, we shall return to the events of March 5, 1868, but before we do, let's tweak the actual facts of this episode so that we may better understand the underlying constitutional issues.

“President of the Senate”

SUPPOSE THAT ANDREW JOHNSON had been impeached exactly three years earlier. On March 5, 1865, Johnson was the newly installed vice president and thus the Senate's ordinary presiding officer. Abraham Lincoln still lived. Could Vice President Johnson have properly insisted in 1865, as Senator Wade would insist in 1868, that the Constitution explicitly authorized him to wield power in impeachment proceedings? How should the Senate have responded if Johnson, stubbornly standing on the literal language of the Constitution, had proclaimed that as the nation's vice president (and thus the “President of the Senate” according to Article I, section 3), he was entitled to chair his own impeachment trial?

The key that unlocks the door is the simple idea that no clause of the Constitution exists in textual isolation. We must read the document as a whole. Doing so will enable us to detect larger structures of meaning—rules and principles residing between the lines. Often, these implicit rules and principles supplement the meaning of individual clauses. For example, although no single clause explicitly affirms a “separation of powers,” or a system of “checks and balances,” or “federalism,” the document writ large does reflect these constitutional concepts. This much is old hat. But as we shall now see, there are times when the document, read holistically and with attention to what it implies alongside what it expresses, means almost the *opposite* of what a specific clause, read in autistic isolation, at first seems to say.

IN CLOSE PROXIMITY TO THE declaration in Article I, section 3, that “the Vice President of the United States shall be President of the Senate,” we find the following language in Article I, section 5: “Each House may determine the Rules of its Proceedings.” These two clauses should be harmonized in a way that does justice to the central purpose of each. For instance, were the Senate to pass a rule that “no vice president may ever preside over the Senate,” then the Senate-proceedings clause would simply swallow up the Senate-president clause. We should not allow this to happen. But neither should we allow the reverse: We should not permit the Senate-president clause to swallow up the Senate-proceedings clause.

Here, then, is a sensible synthesis: The Senate should adopt a rule pro-

hibiting the vice president from chairing *any vice-presidential impeachment proceeding*. This rule would not categorically bar all vice presidents from ever presiding over the Senate. This rule would not even bar vice presidents from ordinarily presiding over the Senate. The rule would merely say that in certain unusual situations, the chamber's usual presiding officer must absent himself from the chair as a matter of ethics and first principles.⁵

The long-standing practice of federal courts—which, like the practices of other branches can inform our understanding of first principles—confirms the soundness of this proposed reconciliation of the two clauses. The Constitution explicitly envisions a chief justice and implicitly authorizes this figure to preside over the Supreme Court, as a rule. However, in a case directly involving his own financial interests, the chief justice should step aside. In the landmark 1816 case of *Martin v. Hunter's Lessee*, involving competing claimants to a tract of valuable Virginia real estate, Chief Justice John Marshall properly absented himself from the bench because he had a stake in some of the land at issue. Had Marshall not stepped aside, his colleagues would have been justified in demanding his recusal—not across the board, but in the case at hand. Centuries before *Martin*, the celebrated English chief justice Sir Edward Coke had famously ruled, in a lawsuit known as *Bonham's Case*, that adjudicators must be free from financial self-interest. According to Coke, no man should be a judge in his own case.⁶

Exactly where, a skeptic might ask, does America's Constitution say that? Even if senators (or justices) are constitutionally permitted to follow the venerable legal maxim *nemo iudex in causa sua*, are they constitutionally obliged to do so? If so, what is the source of this constitutional obligation?

To answer these questions, we will need to weave together several threads of law, history, and logic.

ONE THREAD MAY BE FOUND in Sir William Blackstone's Commentaries on the Laws of England, a canonical four-volume treatise first published in the late 1760s. Both before and after Independence, American lawyers and activists of all stripes relied heavily and preeminently on the Commentaries for instruction on basic English legal principles, many of which applied with full force in America. Sifting through nearly a thou-

sand American political tracts printed between 1760 and 1805, one scholar has found that no European authorities were cited more frequently than Montesquieu and Blackstone, each of whom was invoked almost three times as often as the next man on the list, John Locke.⁷

Near the outset of the *Commentaries*, Blackstone explained that even seemingly absolute legislative language sometimes contained implicit exceptions. Certain things simply went without saying. To be sure, Blackstone made clear that judges must never ignore the “main object” of a law, however misguided that object might appear to them. “[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it...[W]here the main object of a statute is unreasonable the judges are [not] at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.” Blackstone then introduced a key qualification: Judges (and other interpreters) should construe laws so as to avoid absurdity or unreasonableness when dealing with exceptional situations that the legislature did not envision when it crafted general language. “Where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* [as to this collateral matter] disregard it.”

Elsewhere in the opening section of the *Commentaries*, Blackstone elaborated this venerable canon of legal interpretation. “[T]he rule is, where words bear...a very absurd signification, if literally understood, we must a little deviate from the received sense of them...[S]ince in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.”

To illustrate these basic ground rules of legislation and interpretation, Blackstone offered an elegant—and for our purposes, stunningly apt—example. “Thus if an act of parliament gives a man power to try all causes [cases], that arise within his manor of Dale; *yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel.*”⁸

A SECOND THREAD RELEVANT TO the proper rules of constitutional interpretation may be found in a fascinating verbal exchange that occurred in mid-August 1787 at the Philadelphia Convention that framed the U.S. Constitution. Delegates Elbridge Gerry and James McHenry proposed the insertion of an explicit clause forbidding Congress to enact ex-post-facto laws—laws, that is, seeking to retroactively criminalize actions that were wholly innocent when done. Two of the Convention's best lawyers, both of whom would eventually be named to the Supreme Court by George Washington, bristled at the proposal. An explicit constitutional prohibition, they argued, was unnecessary and would reflect poorly on the legal sophistication of the draftsmen. The impermissibility of punishing conduct that was innocent when done was a first principle of justice and the rule of law. As such, it went without saying, they claimed.

Oliver Ellsworth, who would later serve as America's third chief justice, "contended that there was no lawyer...who would not say that ex post facto laws were void of themselves. It cannot be necessary to prohibit them." Future associate justice James Wilson agreed. The insertion of such an artless reminder would invite negative "reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so." Fellow lawyers Gouverneur Morris and William Samuel Johnson concurred that the insertion of an ex-post-facto clause would be an "unnecessary" precaution.

On the other side of the issue stood, among others, delegates Daniel Carroll, Hugh Williamson, and John Rutledge. (Rutledge was yet another lawyer and future Supreme Court justice.) Various state constitutions had included express prohibitions of ex-post-facto laws, and Williamson declared that an explicit clause in the federal document "may do good here, because the Judges can take hold of it." Ultimately the Philadelphia delegates voted with these men to include an express prohibition on ex-post-facto laws. If some future Congress ever tried to violate first principles, this explicit clause would give judges something hard and concrete—something textual and specific—to "take hold of."⁹

Yet no one at Philadelphia was recorded as challenging Ellsworth's and Wilson's emphatic legal claim, in the Blackstonian tradition, that even without the clause, the best reading of the Constitution would construe the document as *implicitly* prohibiting all congressional statutes seeking

to impose retroactive criminal punishment. As Blackstone had explained to his legions of readers on both sides of the Atlantic, unless the supreme legislature made crystal clear its specific intent to command an absurd or unjust result, the supreme law was to be interpreted so as to avoid patent absurdity or gross injustice.

Ellsworth and Wilson understood that this well-settled English rule of legal interpretation properly applied to America as well, but with a twist. In England, the supreme legislature was Parliament, and the supreme law was the corpus of parliamentary statutes. In America, the supreme law-maker would be the American people themselves, who were being asked by the Philadelphia framers to ordain and enact the supreme law of the Constitution. Unless that supreme law—the Constitution—specifically and pointedly authorized Congress to pass ex-post-facto criminal laws, the proper presumption would be that the document withheld this authority from Congress. Such unjust congressional enactments would simply fall outside the ambit of proper “legislative Power” vested in Congress by the Constitution. Blackstone’s own language on ex-post-facto laws harmonized perfectly with Ellsworth’s and Wilson’s remarks. In a chapter on “the Nature of Laws in General,” Blackstone had suggested that ex-post-facto statutes were not even laws, “properly” speaking.¹⁰

As finally proposed by the Philadelphia framers and eventually enacted by the American people, the Constitution’s opening sentence proclaimed that one of the document’s paramount objects was “to establish Justice.” Here was additional textual support in the written Constitution itself for the Ellsworth-Wilson position, following Blackstone, that all the document’s clauses had to be construed against the backdrop of the first principles of justice. Such principles could only be contravened by pointed textual language or undeniably clear enacting intent.

LET’S NOW WEAVE TOGETHER THE threads on the table. Given the constitutional clauses and bits of historical evidence that we have considered thus far, the Constitution as a whole should not be construed to allow a vice president to preside over his own impeachment trial. The image shocks our widely shared sense of fairness and justice. No one should be a judge in his own case. The result seems absurd. The point is elementary and elemental. It goes without saying.

Had the Constitution specifically commanded such a result in pointed language—say, in a clause proclaiming that “the vice president shall preside over the Senate *even in cases of his own impeachment*”—then there would be conclusive textual evidence that America’s sovereign, the people, had specifically focused on the matter and had decided that the result was neither unjust nor absurd. But Article I, section 3, does not speak with this kind of unmistakable specificity.

If it could be shown that the Constitution’s framers and ratifiers generally understood its bland rule about the Senate’s regular presiding officer to apply even when that regular presiding officer was himself being impeached, then deference to this widespread understanding might be warranted. However, there is no evidence that Americans envisioned and embraced this result while drafting and ratifying this clause. On the contrary, there is strong reason to presume that they thought that Blackstone’s approach—summarizing and illustrating the background interpretive canons of Anglo-American law—would obviously apply here. There is no relevant difference between Blackstone’s lord of the manor Dale and America’s vice president. In neither case should nonspecific language be construed to authorize a grotesque perversion of fair procedure.

ONE MORE THREAD ADDS FURTHER strength and texture to our emerging argument against vice-presidential self-dealing. It turns out that Article I, section 3, contains yet another relevant passage: “When the President of the United States is tried [in the Senate, sitting as an impeachment court], the Chief Justice shall preside.”

True, these words say nothing explicit about the vice president. But if we give the matter even the slightest thought, it quickly dawns on us that the central purpose of this passage was to oust the vice president from the chair. In presidential impeachment trials, the chief justice should preside *precisely because the vice president should not*. This central purpose lay visible on the surface of the earliest version of this clause at Philadelphia, before the clause was rewritten for stylistic and organizational reasons: “The Vice President shall be ex officio President of the Senate, except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside.”¹¹

The reason that the vice president should never preside in a presiden-

tial impeachment also springs to mind upon a moment's reflection: The vice president would have an intolerable conflict of interest. The problem would not be, as some modern observers might initially assume, that the vice president would be unduly inclined to favor his running mate, the president. Rather, the problem at the Founding was the exact opposite: The vice president was apt to be the leading *rival* of the president. Under the framers' version of the electoral college, presidential and vice-presidential candidates did not formally run as a partisan ticket. (That system emerged only after the ratification of the Twelfth Amendment in 1804.) Whoever came in second in the presidential election automatically became vice president—and would in turn automatically move into the top spot upon an impeachment court's conviction of the president. No man with so much to gain by a guilty verdict should preside over the trial.¹²

If the vice president may not sit in the chair when the president is on trial, surely it follows even more strongly—a *fortiori*, as lawyers would say—that the vice president may not properly preside over his own trial.¹³

Granted, a brazen legalistic counterargument might be made on behalf of this gross impropriety, as follows: The Constitution could have explicitly provided that the vice president would be ineligible to preside whenever *either* the president *or the vice president himself* was on trial, but the document did not so provide. The framers apparently did focus on the conflict-of-interest problem, and they decided that the problem existed only in cases of *presidential* impeachment.

Arguments like this give legal reasoning a bad name. There is simply no evidence that the framers or ratifiers clearly envisioned and specifically endorsed the ridiculous image of a vice president presiding over his own trial.

At Philadelphia, the impeachment debate centered almost entirely on issues of *presidential* impeachment. The very idea of creating the position of vice president did not emerge until the last days of the Convention, and what little attention this office did receive was often subsidiary to other issues of more pressing concern to the delegates. Even without access to then-secret Philadelphia records, a careful eighteenth-century reader could deduce from the final text itself that the vice presidency had received incomplete attention in the drafting process. While expressly providing for compensation of House and Senate members in Article I, for presidents in

Article II, and for Supreme Court (and other federal) judges in Article III, the document failed to even mention compensation for the vice president. Surely we should place no weight on this thoughtless omission; it would be silly to deny compensation to vice presidents on the theory that the document demands this odd result by negative implication. So, too, we should place no weight on the omission of an explicit recusal clause for vice presidential impeachments; it would be silly to read the chief-justice clause as authorizing, by mere negative implication, a vice president to sit in judgment of himself.¹⁴

In the year-long ratification process, there is no record of anyone saying that the vice president would be obliged to vacate the Senate chair *only* in cases of presidential impeachment. At no point did the Constitution's friends champion the odd idea that although a vice president should obviously not preside when he stood to gain an office, he nevertheless should preside when he stood to lose one.

Instead, leading Federalists explicitly invoked the *nemo iudex in causa sua* principle in a variety of contexts and with a forcefulness that confirmed that this principle was a premise of the entire constitutional project. In *The Federalist* No. 10, James Madison, writing under the pen name "Publius," declared that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." In *The Federalist* No. 80, Alexander Hamilton (also writing as "Publius") reiterated and broadened the claim: "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."¹⁵

Had the specific issue of vice-presidential impeachment procedure ever come into sharp focus in the ratification debates, an able lawyer such as Wilson or Ellsworth would have had at his disposal a decisive Blackstonian defense of the constitutional text as actually drafted—a defense running something like this: In the case of a man literally presiding over his own case, it obviously went without saying that such a thing was impermissible. *Nemo iudex in causa sua* was a foundational feature of civilized legal systems—not merely in late eighteenth-century America and England, but across the planet and over the centuries. The very image of a man presiding at his own trial bordered on the ludicrous: No one could be in two places at

once—both in the chair and in the dock. Even if such eccentric geometry were physically possible, it would be legally absurd. To have explicitly prohibited such a thing would have been worse than a waste of ink. Had the draftsmen at Philadelphia dignified this scenario with an explicit textual prohibition, they would have invited public ridicule and needlessly cluttered the document. In the case of a *presidential* impeachment, however, the matter was not so self-evident. Strictly speaking, a vice president in the Senate chair would not be judging his own case, but someone else's. Here, the impropriety might be somewhat more debatable, and the application of the *nemo iudex in causa sua* principle perhaps more contestable. So it made good sense for the Constitution to specifically resolve that issue in an explicit clause ousting the vice president from the chair and filling it instead with a more impartial officer, the chief justice.¹⁶

ON MARCH 5, 1868, WHEN AMERICANS FIRST WITNESSED Chief Justice Salmon P. Chase presiding over the Senate in a presidential impeachment trial, some may have wondered whether the framers had specified the best officer for such an occasion. As many of the politicians and spectators who packed the Senate chamber understood, Chase himself yearned to be president and had long bent his enormous energies toward that end. At the 1860 Republican Convention in Chicago, Chase had finished third in the presidential balloting. Early in 1861, Lincoln had tapped Chase to be his treasury secretary. But even while serving under Lincoln, Chase had dreamed of displacing him. The ubiquitous one-dollar greenbacks issued by the wartime Treasury Department had featured Chase's visage, not Lincoln's. In the opening months of 1864, Chase had angled, unsuccessfully, to position himself atop the November ticket.

Before naming Chase to the Court in late 1864, Lincoln had expressed "only one doubt" about Chase's fitness for the job. "He is a man of unbounded ambition, and has been working all his life to become President. That he can never be; and I fear that if I make him chief-justice he will simply become more restless and uneasy and neglect the place in his strife and intrigue to make himself President. If I were sure that he would go on the bench and give up his aspirations and do nothing but make himself a great judge, I would not hesitate a moment."¹⁷

Lincoln knew his man. Chase continued to hunger for the top executive post after he had secured the highest judicial job. Even as Johnson's trial was unfolding, its presiding officer was making plans to seek the upcoming Democratic nomination for the presidency—the very spot that the defendant was hoping to secure for himself.¹⁸

Was Chase, therefore, under an unwritten constitutional obligation to recuse himself at Johnson's impeachment trial? Should the Senate have tried to muscle him out when he did not stand down? Had we only an unwritten maxim, *nemo iudex in causa sua*, to guide us, the answer might seem uncertain.

But the letter and spirit of the written Constitution made plain that Chase did not need to step aside. Merely harboring presidential ambitions—even intense and plausible presidential ambitions—was not a constitutionally disqualifying conflict of interest. Rather, this abstract sort of conflict of interest was obviously built into the very structure of the impeachment machinery designed by the framers. *This* kind of conflict of interest *was* something that America's supreme legislature, the people, *had* doubtless envisioned and embraced as a *necessary* part of the *main object* of Article I's impeachment clauses.

While the Constitution structured presidential impeachment as a judicialized proceeding—rife with the language of “Trial,” “Case,” “Judgment,” and “convict[ion],” and to be presided over by the nation's highest judicial officer—the document also placed power to administer this judicialized system in the hands of regular politicians in the House and Senate. In the impeachment process, the president's trial bench and jury would consist not of professional judges or common citizens, but of uncommon political leaders, many of whom would likely harbor strong political ambitions—including, in some cases, presidential aspirations. From the outset, the Senate was expected to function as a nursery for future presidents and presidential aspirants. As the Founders' system predictably played out, most of the early presidents (including Johnson himself) had previously served as senators.¹⁹

Nor were chief justices expected to be men wholly uncontaminated by presidential hopes and dreams. At the Founding, presidents were widely seen as executive magistrates akin to judicial magistrates. Before the Philadelphia framers finally hit upon the idea of creating a standing office of

vice president, delegate Gouverneur Morris had proposed that in case of presidential death or disability, presidential powers should devolve upon the chief justice. The men who eventually became America's first two chief justices, John Jay and John Rutledge, had both received substantial support in the presidential election of 1789, finishing third and fourth, respectively—directly behind George Washington and John Adams. America's fourth chief justice, John Marshall, was probably the Federalists' most eligible presidential prospect at the time of his nomination and confirmation. Recent scholarship suggests that, only days before his nomination to the Court in early 1801, Marshall, who was then secretary of state, had schemed to secure the presidency for himself in the constitutional confusion created by the tangled Adams-Jefferson-Burr election of 1800. If we consider more recent history, it is worth remembering that Chief Justice William Howard Taft was an ex-president, that Chief Justice Charles Evans Hughes had been the Republican Party nominee for the presidency, and that Chief Justice Earl Warren had been the Republican Party nominee for the vice presidency.²⁰

Thus, in constituting senators and the chief justice as the president's impeachment court, the Founders surely envisioned presidential aspirants as proper judges of sitting presidents. The decisive difference between such figures and the vice president was that a senator or a chief justice would become chief executive only through a standard presidential election, whereas the vice president would *automatically* ascend upon the president's conviction—he would gain power *solely* because of the judicial verdict of the impeachment court. Giving the gavel to the vice president would therefore create an intolerable conflict of interest; giving the gavel to the chief justice would not.

GAVELS ASIDE, WHAT ABOUT THE role that Ohio Senator Benjamin Wade, the Senate president pro tempore, sought play as an impeachment judge and juror at Johnson's trial? In the event of Johnson's conviction, who would automatically ascend to the powers of the presidency solely because of that verdict? Benjamin Wade.

Recall that, from the moment President Lincoln died and Vice President Johnson moved up to replace him, the vice presidency stood vacant,