INDEPENDENT COUNSEL REPORT

HEARING

BEFORE THE

COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

H. RES. 525

PROVIDING FOR A DELIBERATIVE REVIEW BY THE COMMITTEE ON THE JUDICIARY OF A COMMUNICATION FROM AN INDEPENDENT COUNSEL, AND FOR THE RELEASE THEREOF, AND FOR OTHER PURPOSES

September 10, 1998

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H.RES. 525, PROVIDING FOR A DELIBERATIVE REVIEW BY THE COMMITTEE ON THE JUDICIARY OF A COMMUNICATION FROM AN INDEPENDENT COUNSEL AND FOR THE RELEASE THEREOF, AND FOR OTHER PURPOSES

Thursday, September 10, 1998

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to call, at 5:43 p.m. in Room H–313, The Capitol, Hon. Gerald B.H. Solomon [chairman of the committee] presiding.

Present: Representatives Solomon, Dreier, Goss, Linder, Diaz–Balart, McInnis, Hastings, Myrick, Moakley, Frost, Hall and Slaughter.

The CHAIRMAN. The committee will come to order. The matter before the committee today is House Resolution 525, providing for a deliberative review by the Committee on the Judiciary of a communication from an independent counsel and for the release thereof and for other purposes. Before my brief opening statement, let me yield to the Vice Chairman, Mr. Dreier and to tell you he is a new–generation Congressman, even though he has been here for 18 years, and he will tell you how to call this up on the Rules Web site.

Mr. DREIER. Thank you, Mr. Chairman. For those interested in getting a copy of this resolution, it is available at www.house.gov/rules/hres525.htm.

For those who want to have a copy of this brilliant statement that the Chairman is about to present, they can go to www.house.gov/rules/gbsstate.htm.

Do you understand all of that, Mr. Chairman?

STATEMENT OF HON. GERALD B.H. SOLOMON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

The CHAIRMAN. That is why I call him the next generation.

I do have a brief opening statement after which I will yield for any statement from Mr. Moakley, and then I will yield to any members of the committee for any statement that they might have as well.

Today, ladies and gentlemen, the Rules Committee embarks on one of the most unfortunate and difficult tasks that many of us

have faced in public service, certainly mine in the last 20 years. The committee must set forth a procedure by which the House of Representatives may fulfill its constitutional duties under Article 1 of Section 2 of the Constitution, which is the sole power of impeachment. This is a responsibility that none of us took lightly when we swore to uphold the Constitution of the United States, and we do not take it lightly now.

The framers of the Constitution deliberately designed our system of government to make this a constitutional responsibility and not a partisan one. To whatever end these deliberations may lead us, it is imperative that this Rules Committee and ultimately the House of Representatives adopt procedures which best allow for a fair, not only bipartisan but nonpartisan, determination of the facts involved.

Yesterday the independent counsel delivered a communication to the House of Representatives pursuant to the independent counsel law. He was required to do that by law, that law which was first enacted in 1978 under different leadership of this House, Democrat leadership, and it was reauthorized in three instances since then, most recently in 1994. The law requires an independent counsel to advise the House of Representatives of any substantial or credible information which the independent counsel receives which may constitute grounds for an impeachment. That is the law. That is the law of the land, and the independent counsel was required by that law to submit the communication that we are considering here now.

Without question in some sense we are in uncharted waters. There has never been a report from an independent counsel detailing possible impeachment offenses by a President. Indeed, the independent counsel statute itself was an outgrowth of the Watergate era. However, we are guided very much by precedent and by history in this matter, as is often the case in the House of Representatives. We always try to follow precedent.

The resolution before us will enable the House, through the deliberations of the House Judiciary Committee, to responsibly review this important material and to discharge its duty, particularly with respect to the availability of the contents of this communication to Members of this Congress, to the public and to the media.

It is important that we American people learn the facts regarding this matter, and that isn't just Members of Congress, that is we, the American people. As directed by the Speaker, no one, no Member or congressional staffer, has seen the transmission which arrived yesterday, not one page, not one word. However, it is the understanding of the Rules Committee that the communication contains the following: 445 pages of a communication which is divided into an introduction, a narrative, and a socalled grounds. Another 2,000 pages of supporting material is contained in the appendices, which may contain grand jury testimony, telephone records, videotape testimony and other sensitive material; and 17 other boxes of supporting material.

The method of dissemination and potential restrictions on access to this very, very critical information is outlined in the resolution before the Rules Committee today, which as of this moment does appear on the Web site for the American people to look at.

The resolution provides the Judiciary Committee with the ability to review the communication, to determine whether sufficient grounds exist to recommend to this House, and that is what they will be charged with, to recommend to this House that an impeachment inquiry be commenced. The resolution provides for an immediate release of the approximately 445 pages comprising, again, an introduction, a narrative and a statement of so–called grounds. This will be printed as a House document, and it will be made available to Members, to the press and to the public after House passage on Friday morning.

Now, there are technical difficulties involved because we are waiting for the computerized transmittal document so that we can begin to print this immediately after the Congress acts on Friday.

The balance of the material will have been deemed to have been received in executive session, but will be released from that status on September 23, 1998. That is a much longer time than some of us felt was necessary. However, from the very persuasive arguments of Mr. Hyde and Mr. Conyers, we have extended that time, again trying to be as fair and open as we possibly can.

Again, the balance of the material will have been deemed to have been received in executive session and will be released on that date unless the Judiciary Committee votes not to release portions of it. Materials released will immediately be printed as a House document. That means that it will be available to all of the Members, to the press, and to the American public.

As to the receipt by the House of transcripts and other records protected by the rules of grand jury secrecy, committees of the House have received such information on at least five occasions, and this is important to recall, all in the context of impeachment actions. These precedents date all the way back to 1811, and occured as recently as the impeachment of federal judges, I believe, in the late 1980s.

The resolution further provides that additional material compiled by the Judiciary Committee during the review will be deemed to have been received in executive session unless it is received in an open session of the committee. That is up to you gentlemen.

Also, access to the executive session material will be restricted to members of the Judiciary Committee and such employees of the committee as may be designated by the Chairman after consultation with the Ranking Minority Member, Mr. Conyers.

Finally, the resolution provides that each meeting, that each hearing or deposition of the Judiciary Committee will be in executive session unless otherwise determined by the committee, and again, that is at your discretion, gentlemen. The executive sessions may be attended only by Judiciary Committee members, not by other Members of the Congress, and employees of the committee designated by the Chairman, again after consultation with the Ranking Minority Member.

The resolution before us attempts to strike an appropriate balance between House Members' and the public's interest in reviewing this material and the need to protect innocent persons, and that is very, very important.

It is anticipated that the Judiciary Committee may require additional procedures or investigative authorities to adequately review

this communication in the future. It is anticipated that those authorities will be the subject of another resolution before this committee next week, and we will again consult with the Ranking Member of this committee and with the Ranking Members on your committee, Mr. Hyde, in trying to arrive at a resolution that will allow you to do that.

It is important to note that this resolution does not authorize or direct an impeachment inquiry, and I hope that is perfectly clear. It is not the beginning of an impeachment process in the House of Representatives. It merely provides the appropriate parameters for the Committee on the Judiciary, the historically proper place to examine these matters, to review this communication and to make a recommendation to the House as to whether to commence an impeachment inquiry. That is what you are being charged with by this resolution.

If this communication from Independent Counsel Starr should form the basis for future proceedings, it is important for the Rules Committee to be mindful that Members may need to cast public, recorded and extremely profound votes in the coming weeks or months. It is our responsibility to ensure that Members have enough information about the contents of the communication to cast informed votes and explain their decisions based on their conscience to their constituents.

In summation, let me say that Democrats and Republicans disagree about many things in this institution, and that is probably as it should be, but no one disagrees about the honor and the integrity of our great friend Henry Hyde. He is one of the most judicious Members of this House of Representatives, and I have often said on several occasions, as I said to my great hero and yours, Henry, Ronald Reagan, that you would make an excellent Supreme Court judge. I am very happy that he did not have the opportunity to follow through on that because we need you here today, desperately, in this capacity.

Likewise, the gentleman from Michigan, Mr. Conyers, has many years of experience on the Judiciary Committee, including service in 1974, which was one of the critical years of this Congress. He is extremely knowledgeable. He is tenacious, to say the least. I have had encounters with him in the past, and he usually wins, and we look forward to his leadership in this very important matter.

This is a very grave day for the House of Representatives. It is a solemn time in our Nation. Today we will do what we are compelled to do under the Constitution, not because we desire it, but because, my friends, it is our duty to do it. In order to most judiciously fulfill these Constitutional duties, I encourage all Members to approach this sensitive matter with the dignity and the decorum that befits the most deliberative body in the history of this world of ours.

Speaker Gingrich spoke of it on the floor. I would encourage all Members that they control themselves. I, for one, am an emotional person. I have been known to speak out sometimes without using proper decorum, and I pledge not to do that. We need to treat the Presidency with respect and treat this body with respect.

The CHAIRMAN. Having said that, I would yield to my good friend, the ranking member Mr. Moakley, for any statement he might have.

STATEMENT OF HON. JOHN JOSEPH MOAKLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. MOAKLEY. Thank you, Mr. Chairman. Today it is this committee's responsibility to decide how to release the information contained in the independent counsel's report to the public.

As we all know, Mr. Chairman, there is a lot of information contained in these 36 boxes, but none of us know anything about what is in those boxes. But our job is to put politics aside and decide how to release this information as wisely and as fairly as possible.

Yesterday Speaker Gingrich and Minority Member Gephardt agreed that today's hearing would deal only with how to release the information. They agreed that questions about which special authorities to give the Judiciary Committee would be decided next week.

I am sad to say, and I hope it has been corrected, that the early draft resolution that I saw violated that resolution.

The CHAIRMAN. If the gentleman would yield, your recommendation was followed, and so the word "ancillary" was removed, and most of your concerns were removed, if not all of them.

Mr. MOAKLEY. Well, we have some other concerns. It brings up the issue of granting witnesses immunity and compiling additional material, as well as depositions, hearings and meetings.

Mr. HYDE. We are not asking for that.

Mr. MOAKLEY. I know that you are not, but in the original draft it was in there.

Mr. HYDE. Well, it is not anymore. That will be a separate rule next week.

Mr. MOAKLEY. All right.

Today's hearing, and as Mr. Hyde corrected, is only to learn how to release the information, so I would ask my colleagues to honor that agreement and stay within that question of how to release the report.

There are ways to make the report public, and today we will hear other varying procedures on how to release this confidential information that none of us have even seen yet.

Regardless of whether you think we should release it all at once or bit by bit, I would ask as a matter of fairness that the President's counsel be given a chance to review the materials before they are released to the public.

Last fall this Congress passed an ethics reform package, as you may recall, setting the standards for considering ethics charges against Members of Congress. That package allowed congressional people accused of ethics violations to hear the allegations and to see the evidence 10 days before they are made public. I think it is only fair that we allow President Clinton the same opportunity that we would give ourselves.

On a related issue, when the committee meets again next week on what authorities should be given to the Judiciary Committee, I believe we should look very, very closely to the Watergate hearings as a model. The impeachment authority is contained in Article 1,

Section 2 of our Constitution. It states that the House of Representatives shall have the sole power of impeachment. As Democratic Leader Gephardt said, next to declaring war, this may be the most important thing that we do. There are certain precedents and procedures that must be followed, and we should begin this process slowly and soberly.

So I commend my Chairman and my good friend Gerald Solomon for his measured comments, and I urge my colleagues to set aside their personal opinions and carry out the responsibilities set forth in the Constitution as carefully as possible. We swore that we would uphold that Constitution, and today we have a grave responsibility, so let us proceed reasonably, and let us proceed fairly. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Moakley.

The CHAIRMAN. On the question of the President receiving the 445 pages 48 hours before Members of Congress receive it, as you know, there are divided positions in your own party. The dean of the House, John Dingell, believes that all of the information, not just the 445 pages, should be made public immediately at the same time it would be given to the President and to you and me.

Mr. MOAKLEY. Mr. Chairman, I hope you follow Mr. Dingell's advice on this like you do on everything else around here.

The CHAIRMAN. Because of that, the information will be made available to the public and to the President at the same time.

You were talking about 445 pages. You are not talking about 2,000 pages of appendices. You are not talking about 17 boxes. The President will get that information at the same time we do. And with a battery of lawyers, I am sure that I could go through those 445 pages within a period of a very few hours. By the time this is disseminated to the press, I think as Larry Walsh, the independent counsel in the Iran–Contra affair, said on CNN a few minutes ago, they already know what is in the 445 pages, and they will have a response and be able to review it in a short period.

Now I yield to the Vice Chairman of the committee for any statement he might have.

STATEMENT OF HON. DAVID DREIER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. DREIER. Thank you very much. Let me congratulate you on your statement and the statement of Mr. Moakley and to say that there are a number of things that have been indicated already that I think do bear repeating.

As the Chairman said, we are moving into uncharted water. We have never gotten to this point on a situation quite like this, and this is truly a grave day and a very solemn time for the House of Representatives.

Chairman Hyde made it clear that we are not approaching this with a great deal of enthusiasm or glee. This is a challenge, and as Mr. Moakley said, it is our constitutional duty to do this as responsibly as possible.

I would also like to say that there has been a tremendous level of bipartisanship. It has really been a nonpartisan approach. I have heard from many, many Democrats who have been insisting that they don't want to face this next weekend without having this in-

formation as they go home. So both Democrats and Republicans alike are desirous of having this information out, and many people who have contacted my office and have called in on the different news programs have indicated that release of as much information as possibly is the proper way to go.

At the same time we do want to protect investigations in other areas that may be moving ahead, and we do not want to hurt anyone by the release of documents. So I think that the 445–page report coming forward and being made available online tomorrow would be the best approach to take.

So I think we are doing this as fairly as possible and in as nonpartisan a way as possible, and I am hoping that we will be able to get this resolved sooner rather than later. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

STATEMENT OF HON. TONY HALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

The CHAIRMAN. The gentleman from Ohio, Mr. Hall.

Mr. HALL. Thank you. Today the Rules Committee begins a process to examine grounds for impeaching the President. It is a somber moment in our history, and as Members of the Congress, we are being asked to sit in judgment of the President of the United States. This is a time when we must set aside partisan concerns. Our actions must be fair, deliberate and in the best interests of the American people.

I urge members of the committee and of the House to be open–minded and to weigh all information objectively. Also, we must proceed with sensitivity to the President and his family. As a man who has served in our Nation's highest office, the President deserves the respect.

Impeachment is an extraordinary and painful process for our Nation, and we need to take each step with great caution to ensure that all of our actions are necessary and justified for the good of the Nation.

In conclusion, the time will come for us to consider the legal questions we are sworn to answer, and this legal process should work itself out. However, we as a Congress and as a Nation should not rush to judgment. We need to review the evidence carefully and thoroughly while remembering that we ourselves are not without faults. Thank you.

PREPARED STATEMENT OF HON. TONY P. HALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

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However, we as a Congress and as a nation should not rush to judgement. We need to review the evidence carefully and thoroughly while remembering that we ourselves are not without faults.

The CHAIRMAN. I thank the gentleman, and now we will yield to the gentleman from Sanibel, Florida, Mr. Goss.

STATEMENT OF HON. PORTER GOSS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. GOSS. Thank you very much, Mr. Chairman. I would like to associate myself with your remarks and Mr. Dreier's remarks. I think they are right on target, along with the sober advice that we have just received from Mr. Hall.

In a representative form of government, it is very important to remember the people we represent, and I have no problem remembering the people that I represent in the past few days because our phone is ringing off the hook.

The gist of what I am hearing, and I want to share this with Mr. Hyde and Mr. Conyers very much, is that as much as can be made public without damage to innocent bystanders or damage to any further actions that your committee might take or feel necessary to take should be made available to the public.

I come from the Sunshine State. We find doing the business in public is a pretty darn good idea, and at least I have always seen to adhere to that, and I am sure that you do as well. I am convinced that we serve the country well when the people know what we are doing, and I think that we need to make sure that people understand that in this process there is a way to guarantee the public's right to know. It is not just an interest, I think it is a right in this matter which is of such seriousness.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The CHAIRMAN. Now the gentlelady from Rochester, New York.

STATEMENT OF HON. LOUISE SLAUGHTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Ms. SLAUGHTER. Thank you.

Receiving the report from the independent counsel is the first step in an impeachment inquiry which we approach very solemnly. The House of Representatives is charged under the Constitution with examining these allegations against the President as presented by the independent counsel. We will determine whether the evidence from the independent counsel meets the constitutional impeachment standard of "treason, bribery or other high crimes and misdemeanors." It is our obligation to examine these allegations in a fair and unbiased manner.

In my 12 years here in the House, we have had votes for war, and now we consider the impeachment of a President. Very few Members who have served in this House have been confronted with either of these responsibilities. I face this duty most solemnly. I am completely aware of the obligation that I have to represent the people who sent me here, to the best of my ability, in accordance with the trust that they invested in me.

We also have an obligation to the people of the United States to undertake this task carefully and judiciously. Our system of government is based upon the will of the people. Ultimately an impeachment conviction overturns that will as expressed in the last election. We begin the process in the Rules Committee with the acceptance of the report. Our resolution will set the parameters of how this investigation will be conducted. It is my hope that the agreement that has been made in good faith between the Speaker of the House and the Minority Leader will be reflected in this resolution. We need to protect the rights of citizens against the release of confidential grand jury testimony which could cause them ridicule, embarrassment and shame.

I urge this committee and the full House to act solely on the evidence and with no thought of partisan advantage. This is far too serious for that. We owe no less to the people that we represent and to the President that they elected.

Thank you, Mr. Chairman.

The CHAIRMAN. Next let me speak on behalf of the gentlelady from Rochester, New York, when I recognize the next Member who is from a new economic hub in America, a place called Atlanta, Georgia. They have been stealing jobs from New York State, but we have a great Governor in New York today called George Pataki, who is beginning to steal them back. But I would recognize John Linder.

STATEMENT OF HON. JOHN LINDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. LINDER. We are delighted to have the jobs, Mr. Chairman.

Mr. Chairman, Congress has a right and a solemn responsibility to investigate the executive branch and investigate criminal conduct. The Rules Committee is here today to pass a resolution to fulfill the oversight obligation from the Constitution we took an oath to defend.

Chief Justice Warren stated that "the power of Congress to conduct investigations is inherent in the legislative process. That power is broad." Supreme Court Justice John Harlan observed in 1959 that "the scope of the power of inquiry, in short, is as penetrating and far–reaching as the potential power to enact and appropriate under the Constitution." More recently James Hamilton, Watergate committee counsel, argued in his book, The Power to Probe, that Congress's oversight function "is implicit in our tripartite system of government, because without it Congress cannot properly meet its lawmaking and informing responsibility."

We have an oversight responsibility that is supported by the Constitution, public law and House rules, and this responsibility is an indispensable part of the system of checks and balances between the Legislative and the Executive.

Serious charges have been made against this President and this administration. Not one of us wants to be here talking about perjury, suborning perjury or obstructing justice, but it is our constitutional duty to look into the charges. By ceding our oversight responsibility to watch over the government, the Committee on Rules and every Member of the House would be abdicating one of our most important obligations charged to us by our Founding Fathers.

We are carrying out our duties as the representative branch of government to insure that the executive branch does not use the great powers at its disposal to undermine justice.

The Supreme Court warned in Watkins v. United States in 1957 that it clearly recognized "the dangers to effective and honest conduct of government if the Legislature's power to probe corruption in the executive branch is unduly hampered."

I will end by quoting the late Senator Sam Ervin, Chairman of the Watergate Committee, who stated that "the Constitution and the statutes give Congress a solemn duty to oversee the activities of the executive branch. All branches of government must fully appreciate the oversight function is a vital tool for keeping the Nation free. It is a shield against creeping executive imperialism. Congress also has the duty and the right to publicize its findings on corruption and maladministration. Indeed, fulfilling its responsibility to inform the public about the state of the government is one of Congress's most significant functions." Under our sworn duty to protect the Constitution, it is our obligation to move forward without partisanship and with a resolution that allows Congress to get to the truth. This is a very sad duty, but it is a duty, and we must do it.

Thank you, Mr. Chairman.

[The prepared statement is as follows:]

Statement of the Honorable John Linder
House Committee on Rules
September 10, 1998

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Serious charges have been made against this President and this Administration. Not one of us wants to be here talking about perjury, suborning perjury, and obstruction of justice. But it is our Constitutional duty. By ceding our oversight responsibility to watch over the government, the Committee on Rules – and every member of the House – would be abdicating one of the most important obligations charged to us by our Founding Fathers.

We are carrying out our duties as the representative branch of our government to ensure that the executive branch does not use the great powers at its disposal to undermine justice. The Supreme Court warned in Watkins vs. United States in 1957 that it clearly recognized "the dangers to effective and honest conduct of the government if the legislature's power to probe corruption in the executive branch [is] unduly hampered."

I will end by quoting the late Senator Sam Ervin, Chairman of the Watergate Committee, who stated that "the Constitution and the statutes give Congress a solemn duty to oversee the activities of the executive branch.... All branches of government must fully appreciate that the oversight function is a vital tool for keeping the nation free. It is a shield against creeping executive imperialism.... Congress also has the duty and the right to publicize its findings on corruption and maladministration. Indeed, fulfilling its responsibility to inform the public about the state of government is one of Congress's most significant functions."

Under our sworn duty to protect the Constitution, it is our obligation to move forward, without partisanship or prejudice, with a resolution that allows Congress to get the truth.

The CHAIRMAN. The gentleman from Miami, Florida, Mr. Diaz–Balart.

STATEMENT OF HON. LINCOLN DIAZ–BALART, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. DIAZ–BALART. Thank you, Mr. Chairman.

The founders of this extraordinary constitutional republic created a system of government which is as resilient as it is protective of the rights of the American people.

I am proud of the manner in which this Congress has conducted itself in the time period since the receipt of this report pursuant to a statute from the independent counsel. And I am proud, Mr. Chairman, of the way in which this resolution has been framed in consultation with the Judiciary Committee, the leadership of this House, and both parties representing the American people in this House, this resolution and the one next week that we will vote on and submit to the full House for its consideration that are meant to guarantee fairness for all involved in this process, to protect the right of the American people to begin to learn the facts in this matter, and to protect the right of due and deliberative process for the President and all other citizens who may be affected by these very solemn proceedings that we are, in effect, today authorizing. Thank you.

The CHAIRMAN.Thank you. And now let me yield to the gentleman from Grand Junction, Colorado.

STATEMENT OF HON. SCOTT MCINNIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. MCINNIS. I have a feeling of excitement today, and that is because we are witnessing the system that is working. This system by its process, by its own design, allows for the kind of problem or challenge that we face. It allows for us to have a hearing such as this, that is open to the public so everyone can watch, and it allows that we can have a distinguished committee which deals with this from both parties. It allows us, in my opinion, to have one of the most distinguished gentleman not only in the Congress, but in the history of the Congress, Mr. Hyde, as the presiding officer.

I can remember when I first came here, Mr. Hyde, I stood in awe when you walked by. I couldn't believe I was a Congressman like you were a Congressman.

And I think also the important thing to remember that is refreshing is that we have an opportunity for the Ranking Member, who is also a very distinguished gentleman, to guide us through this. But while everybody talks, and respectfully so and properly so, about the seriousness of the matter, we should all be refreshed that this system is working, that our country is not on the verge of collapse.

While we are talking today, you can turn on the TV and see what is happening in Russia. The economy is on the verge of collapse. When we reach a crisis in this country, we approach it in a fair, bipartisan manner, and for that this Constitution deserves a compliment. Thank you, Mr. Chairman.

The CHAIRMAN.Thank you. Let me yield to the gentleman from Pasco, Washington, Mr. Hastings.

STATEMENT OF HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HASTINGS. Thank you, Mr. Chairman. Unlike my friend from Colorado, I am not sure I am elated to be here. I can say when I first ran for this office, I would never have pictured myself in this body having to take up this issue. But nevertheless, we are here, and we have to fulfill our duties.

I just want to make one point because it has been said—it hasn't been said here, fortunately, but I have heard some of my colleagues and media say that we are entering a time of constitutional crisis. I want to disagree with that very strongly. I would suggest that the potential crisis may be a crisis in governance. It may be a potential crisis in the confidence of the people that sent us here, but it is not a constitutional crisis, and it is for that reason that as I serve in this body, I am continually in awe of how smart our Founding Fathers were because they have laid out a clearcut procedure for us to deal with these issues when they come up in order to prevent a constitutional crisis.

We do not know where this is going to lead, obviously. It is going to be very, very difficult for all of us, and I know that the Chairman and Ranking Member of the Judiciary Committee will do the best that they can do as the Constitution has laid out.

With that, Mr. Chairman, while I wish that I were not here taking this up, we do have that duty, and I will do my best to fulfill my obligations under the Constitution.

The CHAIRMAN. I thank the gentleman from Washington, and now I yield to the gentlelady from Charlotte, North Carolina, Mrs. Myrick.

STATEMENT OF HON. SUE MYRICK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mrs. MYRICK. Thank you, Mr. Chairman. I want to congratulate you and Chairman Hyde and Mr. Conyers for your fair and bipartisan treatment of this issue. No one has to be reminded that this is a solemn duty, and I would like to associate myself with your remarks regarding the decorum of Congress and encourage everybody to keep that in mind as to how we need to conduct ourselves in this solemn time in our history.

The CHAIRMAN. Thank you.

I thank our first panel for waiting. It was necessary to lay out the parameters of the debate for our Rules Committee. You have heard the esteem for which we hold the two of you. We can recall back in the mid–1970s when your predecessor, Mr. Hyde, was a man named Peter Rodino, an outstanding Member from New Jersey, and still an outstanding individual.

There was a Ranking Member, a Republican at the time, Congressman Hutchinson from Michigan, and there was a man named Hamilton Fish. He was my neighbor. He was a Republican. You all served with him, and he was a marvelous individual. He strikes me as being similar to the two of you, being fair at all times, and we miss him dearly. He is no longer with us, as you know. But he

voted for articles of impeachment against his own party, the President of his party, and I know that this is extremely difficult for all of us, and we wish you Godspeed and courage in carrying out your duties.

Having said that, let me now recognize the very distinguished gentleman from Illinois, Mr. Henry Hyde, for whatever remarks he may have.

STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. HYDE. Thank you so much, Mr. Chairman. Mr. Conyers and I are prepared to yield more time. You have said so many wonderful things that we ought to quit while we are ahead. I appreciate your extraordinary generosity. Thank you very much.

I have a prepared statement that I would like to deliver, at least a part of it, but before—

The CHAIRMAN. Without objection the entire statement will appear in the record.

Mr. HYDE. Thank you.

Before I do that, I would like to cut to the chase on one issue that seems to be in contention. Let me say that Mr. Conyers and I are not only working in a bipartisan, nonpartisan way, but we are working with collegiality. We both understand the solemnity, the gravity, the seriousness of this endeavor, this mountain climb that we are beginning. And we understand if we do it well, the House of Representatives will be enriched and strengthened, and our country will be proud of this institution. If we don't do it well, if we fall into partisan bickering, we will disgrace this institution, and we are not about to do that, God willing. So Mr. Conyers and I are getting along very well, and we are going to make every effort to continue to do that.

Now, as to the one issue that there is some concern about, we are guided by the letter sent to the Speaker and Mr. Gephardt by the independent counsel dated September 9. One of the lines in the letter says, "many of the supporting materials contain information of a personal nature that I respectfully urge the House to treat as confidential."

Now, the package sent over from the independent counsel is a referral. It is one three–ring binder of 445 pages consisting of an introduction, 25 pages; a narrative, 280 pages; and a statement of grounds or charges, 140 pages. That is the document that we propose upon adoption of this resolution to disseminate to the public and to the world.

Also sent over were appendices. Those are six three–ring binders of 2,600 pages, which contain information on the Paula Jones case, telephone logs and other material. We are informed that that is part of what the independent counsel is referring to as matters of a personal nature that he respectfully urged us to treat as confidential.

In addition, there is another element called "everything else." That consists of grand jury transcripts, audiotapes and videotapes. So the appendices and everything else requires some sensitivity in dealing with.

Now, Mr. Conyers and I are mindful that people's reputations are at risk here. We think it appropriate and decent that we go through the material included in the appendices and everything else to winnow out irrelevancies, material that does not relate to the core issue and will unduly damage innocent people. We have no idea of the bulk, the complexity, any of that, but it is our proposal and it is the proposal of this resolution to immediately get out to the public the introduction, the narrative and the grounds, that is 445 pages, and then give us some time.

You have generously given us 2 weeks to review this other material. The bias is to release it all. The urge is to release it all, but mindful of people's reputations, we pray for the flexibility to give us time to review it, inventory it and winnow out matters that we think are more harmful than helpful.

We would like the trust of the body to trust Mr. Conyers and myself and our staffs to do the right thing. We are not withholding anything from anybody that goes to the grand issue, the macro issue here, but we are trying to do it in a decent, responsible way.

Now, how is that review proposed to take place? Mr. Conyers and I thought and still think that it would be more expeditious if he and I had that responsibility and were permitted to designate some of our staff, who, by dividing the labor, can do this fairly quickly, make the inventory and make recommendations to us. We then report back to you folks and tell you what we found and what we propose to do, again with our bias, not only our bias, but our directive under this rule, to disseminate everything to the people, but try to protect innocent people.

Now, there is a controversy. Other members of the committee want to do that, too. They want access. It is very hard for Mr. Conyers and me to tell a member of the Judiciary Committee that we are going to look at it and you can't, but it is an effort of practicality to try to limit the circle of people so that privacy may be preserved. I can live with either system, but I do prefer, and Mr. Conyers and I both agree, to limit access to these things inasmuch as we are mandated to deliver them anyway. We will deliver them to the people, but we want to try and protect innocent reputations.

If that is the will of this committee, if that is the will of the House, fine. If it is not, and you want the whole committee to do that, that is okay, too. I can live with that, but I just want to go on record as saying that Mr. Conyers and I prefer to have a small, limited group do this quick inventory and winnow it out.

Now, that said, if you will indulge me, I do have a few things to say, and I will try to be brief.

The CHAIRMAN. Take as much time as you want.

Mr. HYDE. Thank you. As we all know, this begins a process of immense consequence, a process that our Constitution thrusts on the House of Representatives. The solemn duty confronting us requires that we attain a heroic level of bipartisanship and we conduct our deliberations in full, fair and an impartial manner. This may prove to be a lofty challenge, but I believe the gravity of our responsibilities will overwhelm the petty partisanships that infect us all.

I intend to work closely and have been working closely with my Democratic colleagues on the committee, and particularly the

Ranking Member Mr. Conyers. I want to commend everyone for pursuing this matter in such a professional and nonpartisan manner, and I want to mention Mr. Gephardt. We have had two meetings with him. He has been conciliatory and helpful, as has the Speaker. And I think one good aspect of this otherwise dreary prospect has been the understanding of the need for us to work together, and so far, so good.

The American people deserve a competent, independent and bipartisan review of the independent counsel's referral. They have to have confidence. We must be credible. Politics should be checked at the door, party affiliation secondary, and America's future must become our only concern.

I will not participate in a political witch hunt. If the evidence does not justify a full impeachment investigation, I won't recommend one to the House. However, if the evidence does justify an inquiry, I will unhesitatingly recommend a further inquiry. But in exercising this responsibility, our committee will not take at face value the assertions or conclusions of any particular party. It is not the responsibility of the independent counsel under the statute to declare this impeachable or that impeachable. He is to report to us activities, actions, elements that may be impeachable, and we will make that decision. We understand that.

We will undertake a full, fair, independent review of the evidence, and we will arrive at our own conclusions. In any impeachment proceeding, the House does not determine the guilt or innocence of the subject. We function like a grand jury. We determine whether there is sufficient evidence to charge an executive branch officer with high crimes and misdemeanors. Thus, the Senate must try that official on those charges. We have not reached that point, and no one should jump to conclusions or assume the worst.

At this stage we don't know what information the independent counsel has sent to the House, but given the gravity to this situation we must act now. The Rules Committee must lead, and I certainly appreciate your willingness to address this task expeditiously.

Our first challenge is to ensure that the American people are given what is rightly theirs, information, if there is any, that may constitute grounds for impeachment of their duly elected President while ensuring that the House's constitutional duty to conduct a full, fair and independent review is not jeopardized.

Mr. Chairman, I agree with the considered judgment of Speaker Gingrich and Minority Leader Gephardt that the full House should authorize the immediate release to the public of the introduction, the narrative and the statement or rationale of the grounds. This initial release, insofar as practicable, would not include raw evidentiary material which might contain information about individuals unrelated to this investigation.

The resolution should grant to the Committee on the Judiciary the authority to release this latter material, if release is warranted, after the committee has had a chance to review this material.

Because of the importance of the material, the resolution should contain a presumption of release and a date certain for the Judiciary Committee to report its findings and plans for ultimate release.

This referral belongs to the American people. They have a right to know its contents. They have patiently waited as rumors and speculation have substituted for fact and information. It is time we move this process ahead, and the public release of the referral will further this goal.

Mr. Chairman, we are not yet beginning a full impeachment inquiry, but I want to take a moment to address the issue of impeachment. Constitutional scholars disagree as to what an impeachable offense is, but there are some principles we should keep in mind. Peter Rodino, when he was Chairman of the Judiciary Committee during the Nixon inquiry, and Mr. Conyers was privileged to serve on that committee, another great argument against term limits, I might say parenthetically, had a review of the constitutional impeachment authority, and had a very good staff of lawyers do a fine review of it, and I have attached that as an appendix to my statement, and so I will not read it now.

The CHAIRMAN. Without objection that will appear in the record as well.

[The information follows:]

93d Congress
2d Session } HOUSE COMMITTEE PRINT

CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT

REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
SECOND SESSION

FEBRUARY 1974

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Foreword

I am pleased to make available a staff report regarding the constitutional grounds for presidential impeachment prepared for the use of the Committee on the Judiciary by the legal staff of its impeachment inquiry.

It is understood that the views and conclusions contained in the report are staff views and do not necessarily reflect those of the committee or any of its members.

PETER W. RODINO, JR.

FEBRUARY 22, 1974.

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I. Introduction

The Constitution deals with the subject of impeachment and conviction at six places. The scope of the power is set out in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Other provisions deal with procedures and consequences. Article I, Section 2 states:

> The House of Representatives . . . shall have the sole Power of Impeachment.

Similarly, Article I, Section 3, describes the Senate's role:

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

The same section limits the consequences of judgment in cases of impeachment:

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

Of lesser significance, although mentioning the subject, are: Article II, Section 2:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article III, Section 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

Before November 15, 1973 a number of Resolutions calling for the impeachment of President Richard M. Nixon had been introduced in the House of Representatives, and had been referred by the Speaker of the House, Hon. Carl Albert, to the Committee on the Judiciary for consideration, investigation and report. On November 15, anticipating the magnitude of the Committee's task, the House voted

funds to enable the Committee to carry out its assignment and in that regard to select an inquiry staff to assist the Committee.

On February 6, 1974, the House of Representatives by a vote of 410 to 4 "authorized and directed" the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America."

To implement the authorization (H. Res. 803) the House also provided that "For the purpose of making such investigation, the committee is authorized to require ... by subpoena or otherwise ... the attendance and testimony of any person ... and ... the production of such things; and ... by interrogatory, the furnishing of such information, as it deems necessary to such investigation."

This was but the second time in the history of the United States that the House of Representatives resolved to investigate the possibility of impeachment of a President. Some 107 years earlier the House had investigated whether President Andrew Johnson should be impeached. Understandably, little attention or thought has been given the subject of the presidential impeachment process during the intervening years. The Inquiry Staff, at the request of the Judiciary Committee, has prepared this memorandum on constitutional grounds for presidential impeachment. As the factual investigation progresses, it will become possible to state more specifically the constitutional, legal and conceptual framework within which the staff and the Committee work.

Delicate issues of basic constitutional law are involved. Those issues cannot be defined in detail in advance of full investigation of the facts. The Supreme Court of the United States does not reach out, in the abstract, to rule on the constitutionality of statutes or of conduct. Cases must be brought and adjudicated on particular facts in terms of the Constitution. Similarly, the House does not engage in abstract, advisory or hypothetical debates about the precise nature of conduct that calls for the exercise of its constitutional powers; rather, it must await full development of the facts and understanding of the events to which those facts relate.

What is said here does not reflect any prejudgment of the facts or any opinion or inference respecting the allegations being investigated. This memorandum is written before completion of the full and fair factual investigation the House directed be undertaken. It is intended to be a review of the precedents and available interpretive materials, seeking general principles to guide the Committee.

This memorandum offers no fixed standards for determining whether grounds for impeachment exist. The framers did not write a fixed standard. Instead they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.

The House has set in motion an unusual constitutional process, conferred solely upon it by the Constitution, by directing the Judiciary Committee to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach." This action was not partisan. It was supported by the overwhelming majority of both political parties. Nor was it intended to obstruct or weaken the presidency. It was supported

by Members firmly committed to the need for a strong presidency and a healthy executive branch of our government. The House of Representatives acted out of a clear sense of constitutional duty to resolve issues of a kind that more familiar constitutional processes are unable to resolve.

To assist the Committee in working toward that resolution, this memorandum reports upon the history, purpose and meaning of the constitutional phrase, "Treason, Bribery, or other high Crimes and Misdemeanors."

II. The Historical Origins of Impeachment

The Constitution provides that the President ". . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The framers could have written simply "or other crimes"—as indeed they did in the provision for extradition of criminal offenders from one state to another. They did not do that. If they had meant simply to denote seriousness, they could have done so directly. They did not do that either. They adopted instead a unique phrase used for centuries in English parliamentary impeachments, for the meaning of which one must look to history.

The origins and use of impeachment in England, the circumstances under which impeachment became a part of the American constitutional system, and the American experience with impeachment are the best available sources for developing an understanding of the function of impeachment and the circumstances in which it may become appropriate in relation to the presidency.

A. The English Parliamentary Practice

Alexander Hamilton wrote, in No. 65 of *The Federalist*, that Great Britain had served as "the model from which [impeachment] has been borrowed." Accordingly, its history in England is useful to an understanding of the purpose and scope of impeachment in the United States.

Parliament developed the impeachment process as a means to exercise some measure of control over the power of the King. An impeachment proceeding in England was a direct method of bringing to account the King's ministers and favorites—men who might otherwise have been beyond reach. Impeachment, at least in its early history, has been called "the most powerful weapon in the political armoury, short of civil war." [1] It played a continuing role in the struggles between King and Parliament that resulted in the formation of the unwritten English constitution. In this respect impeachment was one of the tools used by the English Parliament to create more responsive and responsible government and to redress imbalances when they occurred.[2]

The long struggle by Parliament to assert legal restraints over the unbridled will of the King ultimately reached a climax with the execution of Charles I in 1649 and the establishment of the Commonwealth under Oliver Cromwell. In the course of that struggle, Parliament sought to exert restraints over the King by removing those of his ministers who most effectively advanced the King's absolutist pur-

[1] Pinckneyt, "Presidential Address" reproduced in 3 *Transactions, Royal Historical Society*, 5th Series, 145 (1952).

[2] See generally C. Roberts, *The Growth of Responsible Government in Stuart England* (Cambridge 1966).

poses. Chief among them was Thomas Wentworth, Earl of Strafford. The House of Commons impeached him in 1640. As with earlier impeachments, the thrust of the charge was damage to the state.[3] The first article of impeachment alleged [4]

> That he . . . hath traiterously endeavored to subvert the Fundamental Laws and Government of the Realms . . . and in stead thereof, to introduce Arbitrary and Tyrannical Government against Law. . . .

The other articles against Strafford included charges ranging from the allegation that he had assumed regal power and exercised it tyrannically to the charge that he had subverted the rights of Parliament.[5]

Characteristically, impeachment was used in individual cases to reach offenses, as perceived by Parliament, against the system of government. The charges, variously denominated "treason," "high treason," "misdemeanors," "malversations," and "high Crimes and Misdemeanors," thus included allegations of misconduct as various as the kings (or their ministers) were ingenious in devising means of expanding royal power.

At the time of the Constitutional Convention the phrase "high Crimes and Misdemeanors" had been in use for over 400 years in impeachment proceedings in Parliament.[6] It first appears in 1386 in the impeachment of the King's Chancellor, Michael de la Pole, Earl of Suffolk.[7] Some of the charges may have involved common law offenses.[8] Others plainly did not: de la Pole was charged with breaking a promise he made to the full Parliament to execute in connection with a parliamentary ordinance the advice of a committee of nine lords regarding the improvement of the estate of the King and the realm; "this was not done, and it was the fault of himself as he was then chief officer." He was also charged with failing to expend a sum that Parliament had directed be used to ransom the town of Ghent, because of which "the said town was lost." [9]

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[3] Strafford was charged with treason, a term defined in 1352 by the Statute of Treasons, 25 Edw. 3, stat. 5, c. 2 (1352). The particular charges against him presumably would have been within the compass of the general, or "salvo," clause of that statute, but did not fall within any of the enumerated acts of treason. Strafford rested his defense in part on that failure; his eloquence on the question of retrospective treasons ("Beware you do not awake these sleeping lions, by the searching out some neglected moth-eaten records, they may one day tear you and your posterity in pieces: 'it was your ancestors' care to chain them up within the barricadoes of statutes; be not you ambitious to be more skilful and curious than your forefathers in the art of killing.'" *Celebrated Trials* 518 (Phila. 1837) may have dissuaded the Commons from bringing the trial to a vote in the House of Lords; instead they caused his execution by bill of attainder.

[4] J. Rushworth, *The Tryal of Thomas Earl of Strafford*, in 8 Historical Collections 8 (1686).

[5] Rushworth, *supra* n. 4, at 8–9. R. Berger, *Impeachment: The Constitutional Problems* 80 (1973), states that the impeachment of Strafford ". . . constitutes a great watershed in English constitutional history of which the Founders were aware."

[6] *See generally* A. Simpson, *A Treatise on Federal Impeachments* 81–190 (Philadelphia, 1916) (Appendix of English Impeachment Trials); M. V. Clarke, "The Origin of Impeachment" in *Oxford Essays in Medieval History* 164 (Oxford, 1934). Reading and analyzing the early history of English impeachments is complicated by the paucity and ambiguity of the records. The analysis that follows in this section has been drawn largely from the scholarship of others, checked against the original records where possible.

The basis for what became the impeachment procedure apparently originated in 1341, when the King and Parliament alike accepted the principle that the King's ministers were to answer in Parliament for their misdeeds. C. Roberts, *supra* n. 2, at 7. Offenses against Magna Carta, for example, were failing for technicalities in the ordinary courts, and therefore Parliament provided that offenders against Magna Carta be declared in Parliament and judged by their peers. Clarke, *supra*, at 173.

[7] Simpson, *supra* n. 6, at 86; Berger, *supra* n. 5, at 61; Adams and Stevens, *Select Documents of English Constitutional History* 148 (London 1927).

[8] For example, de la Pole was charged with purchasing property of great value from the King while using his position as Chancellor to have the lands appraised at less than they were worth, all in violation of his oath, in deceit of the King and in neglect of the need of the realm. Adams and Stevens, *supra* n. 7, at 148.

[9] Adams and Stevens, *supra* n. 7, at 148–150.

The phrase does not reappear in impeachment proceedings until 1450. In that year articles of impeachment against William de la Pole, Duke of Suffolk (a descendant of Michael), charged him with several acts of high treason, but also with "high Crimes and Misdemeanors." [10] including such various offenses as "advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws," "procuring offices for persons who were unfit, and unworthy of them" and "squandering away the public treasure." [11]

Impeachment was used frequently during the reigns of James I (1603–1625) and Charles I (1628–1649). During the period from 1620 to 1649 over 100 impeachments were voted by the House of Commons.[12] Some of these impeachments charged high treason, as in the case of Strafford; others charged high crimes and misdemeanors. The latter included both statutory offenses, particularly with respect to the Crown monopolies, and non-statutory offenses. For example, Sir Henry Yelverton, the King's Attorney General, was impeached in 1621 of high crimes and misdemeanors in that he failed to prosecute after commencing suits, and exercised authority before it was properly vested in him.[13]

There were no impeachments during the Commonwealth (1649–1660). Following the end of the Commonwealth and the Restoration of Charles II (1660–1685) a more powerful Parliament expanded somewhat the scope of "high Crimes and Misdemeanors" by impeaching officers of the Crown for such things as negligent discharge of duties [14] and improprieties in office.[15]

The phrase "high Crimes and Misdemeanors" appears in nearly all of the comparatively few impeachments that occurred in the eighteenth century. Many of the charges involved abuse of official power or trust. For example, Edward, Earl of Oxford, was charged in 1701 with "violation of his duty and trust" in that, while a member of the King's privy council, he took advantage of the ready access he had to the King to secure various royal rents and revenues for his own use, thereby greatly diminishing the revenues of the crown and subjecting the people of England to "grievous taxes." [16] Oxford was also charged with procuring a naval commission for William Kidd, "known to be a person of ill fame and reputation," and ordering him "to pursue the intended voyage, in which Kidd did commit diverse piracies . . ., being thereto encouraged through hopes of being protected by the high station and interest of Oxford, in violation of the law of nations, and the interruption and discouragement of the trade of England." [17]

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[10] 4 Hatsell 67 (Shannon, Ireland, 1971, reprint of London 1796, 1818).

[11] 4 Hatsell, *supra* n. 10, at 67, charges 2, 6 and 12.

[12] The Long Parliament (1640–48) alone impeached 98 persons. Roberts, *supra* n. 2, at 132.

[13] 2 Howell *State Trials* 1125, 1126–67 (*charges 1, 2 and 6*). *See generally* Simpson, *supra* n. 6, at 91–127; Berger, *supra* n. 5, at 67–72.

[14] Peter Pett, Commissioner of the Navy, was charged in 1668 with negligent preparation for an invasion by the Dutch, and negligent loss of a ship. The latter charge was predicated on alleged willful neglect in failing to insure that the ship was brought to a mooring. 6 Howell *State Trials* 863, 864–67 (*charges 1, 6*).

[15] Chief Justice Scroggs was charged in 1680, among other things, with browbeating witnesses and commenting on their credibility, and with cursing and drinking to excess, thereby bringing "the highest scandal on the public justice of the kingdom." 8 Howell *State Trials* 197, 200 (*charges 7, 8*).

[16] Simpson, *supra* n. 6, at 144.

[17] Simpson, *supra* n. 6, at 144.

The impeachment of Warren Hastings, first attempted in 1786 and concluded in 1795,[18] is particularly important because contemporaneous with the American Convention debates. Hastings was the first Governor-General of India. The articles indicate that Hastings was being charged with high crimes and misdemeanors in the form of gross maladministration, corruption in office, and cruelty toward the people of India.[19]

Two points emerge from the 400 years of English parliamentary experience with the phrase "high Crimes and Misdemeanors." First, the particular allegations of misconduct alleged damage to the state in such forms as misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and betrayal of trust.[20] Second, the phrase "high Crimes and Misdemeanors" was confined to parliamentary impeachments; it had no roots in the ordinary criminal law,[21] and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes.

B. The Intention of the Framers

The debates on impeachment at the Constitutional Convention in Philadelphia focus principally on its applicability to the President. The framers sought to create a responsible though strong executive; they hoped, in the words of Elbridge Gerry of Massachusetts, that "the maxim would never be adopted here that the chief Magistrate could do [no] wrong."[22] Impeachment was to be one of the central elements of executive responsibility in the framework of the new government as they conceived it.

The constitutional grounds for impeachment of the President received little direct attention in the Convention; the phrase "other high Crimes and Misdemeanors" was ultimately added to "Treason" and "Bribery" with virtually no debate. There is evidence, however, that the framers were aware of the technical meaning the phrase had acquired in English impeachments.

Ratification by nine states was required to convert the Constitution from a proposed plan of government to the supreme law of the land. The public debates in the state ratifying conventions offer evidence of the contemporaneous understanding of the Constitution equally as compelling as the secret deliberations of the delegates in Philadelphia. That evidence, together with the evidence found in the debates during the First Congress on the power of the President to discharge an executive officer appointed with the advice and consent of the Senate,

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[18] *See generally* Marshall, *The Impeachment of Warren Hastings* (Oxford, 1965).

[19] Of the original resolutions proposed by Edmund Burke in 1786 and accepted by the House as articles of impeachment in 1787, both criminal and non-criminal offenses appear. The fourth article, for example, charging that Hastings had confiscated the landed income of the Begums of Oudh, was described by Pitt as that of all others that bore the strongest marks of criminality. Marshall, *supra*, n. 19, at 53.

The third article, on the other hand, known as the Benares charge, claimed that circumstances imposed upon the Governor-General a duty to conduct himself "on the most distinguished principles of good faith, equity, moderation and mildness." Instead, continued the charge, Hastings provoked a revolt in Benares, resulting in "the arrest of the rajah, three revolutions in the country and great loss, whereby the said Hastings is guilty of a high crime and misdemeanor in the destruction of the country aforesaid." The Commons accepted this article, voting 119–79 that these were grounds for impeachment. Simpson, *supra* n. 6, at 168–170; Marshall, *supra* n. 19, at xv, 46.

[20] *See, e.g.*, Berger, *supra* n. 5, at 70–71.

[21] Berger, *supra* n. 5, at 62.

[22] *The Records of the Federal Convention* 66 (M. Farrand ed. 1911) (brackets in original). Hereafter cited as Farrand.

shows that the framers intended impeachment to be a constitutional safeguard of the public trust, the powers of government conferred upon the President and other civil officers, and the division of powers among the legislative, judicial and executive departments.

1. THE PURPOSE OF THE IMPEACHMENT REMEDY

Among the weaknesses of the Articles of Confederation apparent to the delegates to the Constitutional Convention was that they provided for a purely legislative form of government whose ministers were subservient to Congress. One of the first decisions of the delegates was that their new plan should include a separate executive, judiciary, and legislature.[23] However, the framers sought to avoid the creation of a too-powerful executive. The Revolution had been fought against the tyranny of a king and his council, and the framers sought to build in safeguards against executive abuse and usurpation of power. They explicity rejected a plural executive, despite arguments that they were creating "the foetus of monarchy," [24] because a single person would give the most responsibility to the office.[25] For the same reason, they rejected proposals for a council of advice or privy council to the executive.[25a]

The provision for a single executive was vigorously defended at the time of the state ratifying conventions as a protection against executive tyranny and wrongdoing. Alexander Hamilton made the most carefully reasoned argument in Federalist No. 70, one of the series of *Federalist Papers* prepared to advocate the ratification of the Constitution by the State of New York. Hamilton criticized both a plural executive and a council because they tend "to conceal faults and destroy responsibility." A plural executive, he wrote, deprives the people of "the two greatest securities they can have for the faithful

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[23] 1 Farrand 322.

[24] 1 Farrand 66.

[25] This argument was made by James Wilson of Pennsylvania, who also said that he preferred a single executive "as giving most energy dispatch and responsibility to the office." 1 Farrand 65.

[25a] A number of suggestions for a Council to the President were made during the Convention. Only one was voted on, and it was rejected three states to eight. This proposal, by George Mason, called for a privy council of six members—two each from the eastern, middle, and southern states—selected by the Senate for staggered six-year terms, with two leaving office every two years. 2 Farrand 537, 542.

Gouverneur Morris and Charles Pinckney, both of whom spoke in opposition to other proposals for a council, suggested a privy council composed of the Chief Justice and the heads of executive departments. Their proposal, however, expressly provided that the President "shall in all cases exercise his own judgment, and either conform to [the] opinions [of the council] or not as he may think proper." Each officer who was a member of the council would "be responsible for his opinion on the affairs relating to his particular Department" and liable to impeachment and removal from office "for neglect of duty malversation, or corruption." 2 Farrand 342–44.

Morris and Pinckney's proposal was referred to the Committee on Detail, which reported a provision for an expanded privy council including the President of the Senate and the Speaker of the House. The council's duty was to advise the President "in matters respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." 2 Farrand 367. This provision was never brought to a vote or debated in the Convention.

Opponents of a council argued that it would lessen executive responsibility. A council, said James Wilson, "oftener serves to cover, than prevent malpractices." 1 Farrand 97. And the Committee of Eleven, consisting of one delegate from each state, to which proposals for a council to the President as well as other questions of policy were referred, decided against a council, on the ground that the President, "by persuading his Council—to concur in his wrong measures, would acquire their protection for them." 2 Farrand 542.

Some delegates thought the responsibility of the President to be "chimerical": Gunning Beford because "he could not be punished for mistakes." 2 Farrand 43; Elbridge Gerry, with respect to nomination for offices, because the President could "always plead ignorance." 2 Farrand 539. Benjamin Franklin favored a Council because it "would not only be a check on a bad President but a relief to a good one." He asserted that the delegates had "too much . . . fear [of] cabals in appointments by a number," and "too much confidence in those of single persons." Experience, he said, showed that "caprice, the intrigues of favorites & mistresses, &c." were "the means most prevalent in monarchies." 2 Farrand 542.

exercise of any delegated power"—"[r]esponsibility . . . to censure and to punishment." When censure is divided and responsibility uncertain, "the restraints of public opinion . . . lose their efficacy" and "the opportunity of discovering with facility and clearness the misconduct of the persons [the public] trust, in order either to their removal from office, or to their actual punishment in cases which admit of it" is lost.[26] A council, too, "would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself."[27] It is, Hamilton concluded, "far more safe [that] there should be a single object for the jealousy and watchfulness of the people; . . . all multiplication of the Executive is rather dangerous than friendly to liberty."[28]

James Iredell, who played a leading role in the North Carolina ratifying convention and later became a justice of the Supreme Court, said that under the proposed Constitution the President "is of a very different nature from a monarch. He is to be . . . personally responsible for any abuse of the great trust reposed in him."[29] In the same convention, William R. Davie, who had been a delegate in Philadelphia, explained that the "predominant principle" on which the Convention had provided for a single executive was "the more obvious responsibility of one person." When there was but one man, said Davie, "the public were never at a loss" to fix the blame.[30]

James Wilson, in the Pennsylvania convention, described the security furnished by a single executive as one of its "very important advantages":

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes. . . . Add to all this, that officer is placed high, and is possessed of power far from being contemptible, yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*.[31]

As Wilson's statement suggests, the impeachability of the President was considered to be an important element of his responsibility.

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[26] *The Federalist* No. 70, at 459–61 (Modern Library ed.) (A. Hamilton) (hereinafter cited as *Federalist*). The "multiplication of the Executive," Hamilton wrote, "adds to the difficulty of detection":

> The circumstances which may have led to any national miscarriage of misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

If there should be "collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?" *Id.* at 460.

[27] *Federalist* No. 70 at 461. Hamilton stated:

> A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad, and are almost always a cloak to his faults. *Id.* at 462–63.

[28] *Federalist* No. 70 at 462.

[29] 4 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 74 (reprint of 2d ed.) (hereinafter cited as Elliot.)

[30] Elliot 104.

[31] 2 Elliot 480 (emphasis in original).

Impeachment had been included in the proposals before the Constitutional Convention from its beginning.[52] A specific provision, making the executive removable from office on impeachment and conviction for "mal-practice or neglect of duty," was unanimously adopted even before it was decided that the executive would be a single person.[53]

The only major debate on the desirability of impeachment occurred when it was moved that the provision for impeachment be dropped, a motion that was defeated by a vote of eight states to two.[54]

One of the arguments made against the impeachability of the executive was that he "would periodically be tried for his behavior by his electors" and "ought to be subject to no intermediate trial, by impeachment." [55] Another was that the executive could "do no criminal act without Coadjutors [assistants] who may be punished." [56] Without his subordinates, it was asserted, the executive "can do nothing of consequence," and they would "be amenable by impeachment to the public Justice." [57]

This latter argument was made by Gouveneur Morris of Pennsylvania, who abandoned it during the course of the debate, concluding that the executive should be impeachable.[58] Before Morris changed his position, however, George Mason had replied to his earlier argument:

> Shall any man be above justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.[59]

James Madison of Virginia argued in favor of impeachment stating that some provision was "indispensible" to defend the community against "the incapacity, negligence or perfidy of the chief Magistrate." With a single executive, Madison argued, unlike a legislature whose collective nature provided security, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic." [60] Benjamin Franklin supported

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[52] The Virginia Plan, fifteen resolutions proposed by Edmund Randolph at the beginning of the Convention, served as the basis of its early deliberations. The ninth resolution gave the national judiciary jurisdiction over "impeachments of any National officers." 1 Farrand 22.

[53] 1 Farrand 88. Just before the adoption of this provision, a proposal to make the executive removable from office by the legislature upon request of a majority of the state legislatures had been overwhelmingly rejected. *Id.* 87. In the course of debate on this proposal, it was suggested that the legislature "should have power to remove the Executive at pleasure"—a suggestion that was promptly criticized as making him "the mere creature of the Legislature" in violation of "the fundamental principle of good Government," and was never formally proposed to the Convention. *Id.* 85–86.

[54] 2 Farrand 64, 69.

[55] 2 Farrand 67 (Rufus King). Similarly, Gouverneur Morris contended that if an executive charged with a criminal act were reelected, "that will be sufficient proof of his innocence." *Id.* 64.

It was also argued in opposition to the impeachment provision, that the executive should not be impeachable "whilst in office"—an apparent allusion to the constitutions of Virginia and Delaware, which then provided that the governor (unlike other officers) could be impeached only after he left office. *Id.* See 7 Thorpe, *The Federal and State Constitutions* 3818 (1909) and 1 *id.* 566. In response to this position, it was argued that corrupt elections would result, as an incumbent sought to keep his office in order to maintain his immunity from impeachment. He will "spare no efforts or no means whatever to get himself reelected," contended William R. Davie of North Carolina. 2 Farrand 64. George Mason asserted that the danger of corrupting electors "furnished a peculiar reason in favor of impeachments whilst in office": "Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?" *Id.* 65.

[56] 2 Farrand 64.

[57] 2 Farrand 54.

[58] "This Magistrate is not the King but the prime-Minister. The people are the King." 2 Farrand 69.

[59] 2 Farrand 65.

[60] 2 Farrand 65–66.

impeachment as "favorable to the executive"; where it was not available and the chief magistrate had "rendered himself obnoxious," recourse was had to assassination. The Constitution should provide for the "regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.[41] Edmund Randolph also defended "the propriety of impeachments":

> The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided it will be irregularly inflicted by tumults & insurrections.[42]

The one argument made by the opponents of impeachment to which no direct response was made during the debate was that the executive would be too dependent on the legislature—that, as Charles Pinckney put it, the legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence." [43] That issue, which involved the forum for trying impeachments and the mode of electing the executive, troubled the Convention until its closing days. Throughout its deliberations on ways to avoid executive subservience to the legislature, however, the Convention never reconsidered its early decision to make the executive removable through the process of impeachment.[44]

2. ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

Briefly, and late in the Convention, the framers addressed the question how to describe the grounds for impeachment consistent with its intended function. They did so only after the mode of the President's election was settled in a way that did not make him (in the words of James Wilson) "the Minion of the Senate." [45]

The draft of the Constitution then before the Convention provided for his removal upon impeachment and conviction for "treason or bribery." George Mason objected that these grounds were too limited:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.[46]

Mason then moved to add the word "maladministration" to the other two grounds. Maladministration was a term in use in six of the thirteen state constitutions as a ground for impeachment, including Mason's home state of Virginia.[47]

When James Madison objected that "so vague a term will be

[41] 2 Farrand 65.
[42] 2 Farrand 67.
[43] 2 Farrand 66.
[44] See Appendix B for a chronological account of the Convention's deliberations on impeachment and related issues.
[45] 2 Farrand 528.
[46] 2 Farrand 550.
[47] The grounds for impeachment of the Governor of Virginia were "mal-administration, corruption, or other means, by which the safety of the State may be endangered." 7 Thorpe, *The Federal and State Constitution* 3818 (1909).

equivalent to a tenure during pleasure of the Senate," Mason withdrew "maladministration" and substituted "high crimes and misdemeanors agst. the State," which was adopted eight states to three, apparently with no further debate.[48]

That the framers were familiar with English parliamentary impeachment proceedings is clear. The impeachment of Warren Hastings, Governor-General of India, for high crimes and misdemeanors was voted just a few weeks before the beginning of the Constitutional Convention and George Mason referred to it in the debates.[49] Hamilton, in the *Federalist* No. 65, referred to Great Britain as "the model from which [impeachment] has been borrowed." Furthermore, the framers were well-educated men. Many were also lawyers. Of these, at least nine had studied law in England.[50]

The Convention had earlier demonstrated its familiarity with the term "high misdemeanor." [51] A draft constitution had used "high misdemeanor" in its provision for the extradition of offenders from one state to another.[52] The Convention, apparently unanimously struck "high misdemeanor" and inserted "other crime," "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." [53]

The "technical meaning" referred to is the parliamentary use of the term "high misdeameanor." Blackstone's *Commentaries on the Laws of England*—a work cited by delegates in other portions of the Convention's deliberations and which Madison later described (in the Virginia ratifying convention) as "a book which is in every man's hand" [54]—included "high misdemeanors" as one term for positive offenses "against the king and government." The "first and principal" high misdemeanor, according to Blackstone, was "mal-administration of such high officers, as are in public trust and employment," usually punished by the method of parliamentary impeachment." [55]

"High Crimes and Misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due process." The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the farmers meant when they adopted them.[56] Chief Justice Marshall wrote of another such phrase:

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[48] 2 Farrand 550. Mason's wording was unanimously changed later the same day from "agst. the State" to "against the United States" in order to avoid ambiguity. This phrase was later dropped in the final draft of the Constitution prepared by the Committee on Style and Revision, which was charged with arranging and improving the language of the articles adopted by the Convention without altering its substance.

[49] *Id.*

[50] R. Berger, *Impeachment: The Constitutional Problems* 87, 89 and accompanying notes (1973).

[51] As a technical term, a "high" crime signified a crime against the system of government, not merely a serious crime. "This element of injury to the commonwealth—that is, to the state itself and to its constitution—was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one. The distinction goes back to the ancient law of treason, which differentiated 'high' from 'petit' treason." Bestor, Book Review, 49 Wash. L. Rev. 255, 263–64 (1973). *See* 4 W. Blackstone, Commentaries* 75.

[52] The provision (article XV of Committee draft of the Committee on Detail) originally read: "Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence." 2 Farrand 187–88.

This clause was virtually identical with the extradition clause contained in article IV of the Articles of Confederation, which referred to "any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state. . . ."

[53] 2 Farrand 443.

[54] 3 Elliott 501.

[55] 4 Blackstone's Commentaries* 121 (emphasis omitted).

[56] *See* Murray v. Hoboken Land Co., 52 U.S. (18 How.) 272 (1856); Davidson v. New Orleans, 96 U.S. 97 (1878); Smith v. Alabama, 124 U.S. 465 (1888).

> It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.[57]

3. GROUNDS FOR IMPEACHMENT

Mason's suggestion to add "maladministration," Madison's objection to it as "vague," and Mason's substitution of "high crimes and misdemeanors agst the State" are the only comments in the Philadelphia convention specifically directed to the constitutional language describing the grounds for impeachment of the President. Mason's objection to limiting the grounds to treason and bribery was that treason would "not reach many great and dangerous offences" including "[a]ttempts to subvert the Constitution."[58] His willingness to substitute "high Crimes and Misdemeanors," especially given his apparent familiarity with the English use of the term as evidenced by his reference to the Warren Hastings impeachment, suggests that he believed "high Crimes and Misdemeanors" would cover the offenses about which he was concerned.

Contemporaneous comments on the scope of impeachment are persuasive as to the intention of the framers. In *Federalist* No. 65, Alexander Hamilton described the subject of impeachment as

> those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[59]

Comments in the state ratifying conventions also suggest that those who adopted the Constitution viewed impeachment as a remedy for usurpation or abuse of power or serious breach of trust. Thus, Charles Cotesworth Pinckney of South Carolina stated that the impeachment power of the House reaches "those who behave amiss, or betray their public trust."[60] Edmund Randolph said in the Virginia convention that the President may be impeached if he "misbehaves."[61] He later cited the example of the President's receipt of presents or emoluments from a foreign power in violation of the constitutional prohibition of Article I, section 9.[62] In the same convention George Mason argued that the President might use his pardoning power to "pardon crimes which were advised by himself" or, before indictment or conviction, "to stop inquiry and prevent detection." James Madison responded:

> [I]f the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will

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[57] *United States v. Burr*, 25 Fed. Cas. 1, 159 (No. 14, 693) (C.C.D. Va. 1807).
[58] 2 Farrand 550.
[59] *The Federalist* No. 65 at 423-24 (Modern Library ed.) (A. Hamilton) (emphasis in original).
[60] 4 Elliot 281.
[61] 3 Elliot 201.
[62] 3 Elliot 486.

> shelter him, the House of Representatives can impeach him; they can remove him if found guilty. . . .[63]

In reply to the suggestion that the President could summon the Senators of only a few states to ratify a treaty, Madison said,

> Were the President to commit any thing so atrocious . . . he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor.[64]

Edmund Randolph referred to the checks upon the President:

> It has too often happened that powers delegated for the purpose of promoting the happiness of a community have been perverted to the advancement of the personal emoluments of the agents of the people; but the powers of the President are too well guarded and checked to warrant this illiberal aspersion.[65]

Randolph also asserted, however, that impeachment would not reach errors of judgment: "No man ever thought of impeaching a man for an opinion. It would be impossible to discover whether the error in opinion resulted from a wilful mistake of the heart, or an involuntary fault of the head." [66]

James Iredell made a similar distinction in the North Carolina convention, and on the basis of this principle said, "I suppose the only instances, in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other." [67] But he went on to argue that the President

> must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them,—in this case, I ask whether, upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him.[68]

In short, the framers who discussed impeachment in the state ratifying conventions, as well as other delegates who favored the Constitution,[69] implied that it reached offenses against the government, and

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[63] 3 Elliot 497–98. Madison went on to say, contrary to his position in the Philadelphia convention, that the President could be suspended when suspected, and his powers would devolve on the Vice President, who could likewise be suspended until impeached and convicted, if he were also suspected. *Id.* 498.

[64] 3 Elliot 500. John Rutledge of South Carolina made the same point, asking "whether gentlemen seriously could suppose that a President, who has a character at stake, would be such a fool and knave as to join with ten others [two-thirds of a minimal quorum of the Senate] to tear up liberty by the roots, when a full Senate were competent to impeach him." 4 Elliot 263.

[65] 3 Elliot 117.

[66] 3 Elliot 401.

[67] 4 Elliot 126.

[68] 4 Elliot 127.

[69] For example, Wilson Nicholas in the Virginia convention asserted that the President "is personally amenable for his mal-administration" through impeachment, 3 Elliot 17; George Nicholas in the same convention referred to the Presidents impeachability if he "deviates from his duty," *Id.* 240. Archibald MacLaine in the South Carolina convention also referred to the President's impeachability for "any maladministration in his office." 4 Elliot 47; and Reverend Samuel Stillman of Massachusetts referred to his impeachability for "misconduct," asking, "With such a prospect, who will dare to abuse the powers vested in him by the people?" 2 Elliot 169.

especially abuses of constitutional duties. The opponents did not argue that the grounds for impeachment had been limited to criminal offenses.

An extensive discussion of the scope of the impeachment power occurred in the House of Representatives in the First Session of the First Congress. The House was debating the power of the President to remove the head of an executive department appointed by him with the advice and consent of the Senate, an issue on which it ultimately adopted the position, urged primarily by James Madison, that the Constitution vested the power exclusively in the President. The discussion in the House lends support to the view that the framers intended the impeachment power to reach failure of the President to discharge the responsibilities of his office.[70]

Madison argued during the debate that the President would be subject to impeachment for "the wanton removal of meritorious officers."[71] He also contended that the power of the President unilaterally to remove subordinates was "absolutely necessary" because "it will make him in a peculiar manner, responsible for [the] conduct" of executive officers. It would, Madison said,

> subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.[72]

Elbridge Gerry of Massachusetts, who had also been a framer though he had opposed the ratification of the Constitution, disagreed with Madison's contentions about the impeachability of the President. He could not be impeached for dismissing a good officer, Gerry said, because he would be "doing an act which the Legislature has submitted to his discretion."[73] And he should not be held responsible for the acts of subordinate officers, who were themselves subject to impeachment and should bear their own responsibility.[74]

Another framer, Abraham Baldwin of Georgia, who supported Madison's position on the power to remove subordinates, spoke of the President's impeachability for failure to perform the duties of the executive. If, said Baldwin, the President "in a fit of passion" removed "all the good officers of the Government" and the Senate were unable to choose qualified successors, the consequence would be that the President "would be obliged to do the duties himself; or, if he did not, we would impeach him, and turn him out of office, as he had done others."[75]

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[70] Chief Justice Taft wrote with reference to the removal power debate in the opinion for the Court in *Myers v. United States*, that constitutional decisions of the First Congress "have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." 272 U.S. 52, 174–75 (1926).

[71] 1 Annals of Cong. 498 (1789).

[72] *Id.* 372–73.

[73] *Id.* 502.

[74] *Id.* 536–36. Gerry also implied, perhaps rhetorically, that a violation of the Constitution was grounds for impeachment. If, he said, the Constitution failed to include provision for removal of executive officers, an attempt by the legislature to cure the omission would be an attempt to amend the Constitution. But the Constitution provided procedures for its amendment, and "an attempt to amend it in any other way may be a high crime or misdemeanor, or perhaps something worse." *Id.* 503.

[75] *Id.* John Vining of Delaware commented:

"The President. What are his duties? To see the laws faithfully executed: if he does not do this effectually, he is responsible. To whom? To the people. Have they the means of calling him to account, and punishing him for neglect? They have secured it in the Constitution, by impeachment, to be presented by their immediate representatives; if they fail here, they have another check when the time of election comes round." *Id.* 572.

Those who asserted that the President has exclusive removal power suggested that it was necessary because impeachment, as Elias Boudinot of New Jersey contended, is "intended as a punishment for a crime, and not intended as the ordinary means of re-arranging the Departments." [78] Boudinot suggested that disability resulting from sickness or accident "would not furnish any good ground for impeachment; it could not be laid as treason or bribery, nor perhaps as a high crime or misdemeanor." [79] Fisher Ames of Massachusetts argued for the President's removal power because "mere intention [to do a mischief] would not be cause of impeachment" and "there may be numerous causes for removal which do not amount to a crime." [80] Later in the same speech Ames suggested that impeachment was available if an officer "misbehaves" [81] and for "mal-conduct." [82]

One further piece of contemporary evidence is provided by the *Lectures on Law* delivered by James Wilson of Pennsylvania in 1790 and 1791. Wilson described impeachments in the United States as "confined to political characters, to political crimes and misdemeanors, and to political punishment." [83] And, he said:

> The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the constitution and the laws: every one should be secure while he observes them.[84]

From the comments of the framers and their contemporaries, the remarks of the delegates to the state ratifying conventions, and the removal power debate in the First Congress, it is apparent that the scope of impeachment was not viewed narrowly. It was intended to provide a check on the President through impeachment, but not to make him dependent on the unbridled will of the Congress.

Impeachment, as Justice Joseph Story wrote in his *Commentaries on the Constitution* in 1833, applies to offenses of "a political character":

> Not but that crimes of a strictly legal character fall within the scope of the power . . .; but that it has a more enlarged operation, and reaches, what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and

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[78] *Id.* 373.
[79] *Id.*
[80] *Id.* 474.
[81] *Id.* 475.
[82] *Id.* 477. The proponents of the President's removal power were careful to preserve impeachment as a supplementary method of removing executive officials. Madison said impeachment will reach a subordinate "whose bad actions may be connived at or overlooked by the President." *Id.* 372. Abraham Baldwin said:
"The Constitution provides for—what? That no bad man should come into office . . . But suppose that one such could be got in, he can be not out again in despite of the President. We can impeach him, and drag him from his place . . . ." *Id.* 538.
[83] Wilson, *Lectures on Law*, in 1 *The Works of James Wilson* 426 (R. McCloskey ed. 1967).
[84] *Id.* 425.

duty. They must be judged of by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations of foreign as well as domestic political movements; and in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.[83]

C. The American Impeachment Cases

Thirteen officers have been impeached by the House since 1787: one President, one cabinet officer, one United States Senator, and ten Federal judges.[84] In addition there have been numerous resolutions and investigations in the House not resulting in impeachment. However, the action of the House in declining to impeach an officer is not particularly illuminating. The reasons for failing to impeach are generally not stated, and may have rested upon a failure of proof, legal insufficiency of the grounds, political judgment, the press of legislative business, or the closeness of the expiration of the session of Congress. On the other hand, when the House has voted to impeach an officer, a majority of the Members necessarily have concluded that the conduct alleged constituted grounds for impeachment.[85]

Does Article III, Section 1 of the Constitution, which states that judges "shall hold their Offices during good Behaviour," limit the relevance of the ten impeachments of judges with respect to presidential impeachment standards as has been argued by some? It does not. The argument is that "good behavior" implies an additional ground for impeachment of judges not applicable to other civil officers. However, the only impeachment provision discussed in the Convention and included in the Constitution is Article II, Section 4, which by its express terms, applies to all civil officers, including judges, and defines impeachment offenses as "Treason, Bribery, and other high Crimes and Misdemeanors."

In any event, the interpretation of the "good behavior" clause adopted by the House has not been made clear in any of the judicial impeachment cases. Whichever view is taken, the judicial impeachments have involved an assessment of the conduct of the officer in terms of the constitutional duties of his office. In this respect, the impeachments of judges are consistent with the three impeachments of non-judicial officers.

Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder.

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[83] 1 *J. Story Commentaries on the Constitution of the United States*, § 764, at 559 (5th ed. 1905).

[84] Eleven of these officers were tried in the Senate. Articles of impeachment were presented to the Senate against a twelfth (Judge English), but he resigned shortly before the trial. The thirteenth (Judge Delahay) resigned before articles could be drawn.

See Appendix B for a brief synopsis of each impeachment.

[85] Only four of the thirteen impeachments—all involving judges—have resulted in conviction in the Senate and removal from office. While conviction and removal show that the Senate agreed with the House that the charges on which conviction occurred stated legally sufficient grounds for impeachment, acquittals offer no guidance on this question, as they may have resulted from a failure of proof, other factors, or a determination by more than one third of the Senators (as in the Blount and Belknap impeachments) that trial or conviction was inappropriate for want of jurisdiction.

This conduct falls into three broad categories: (1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or for personal gain.[86]

1. EXCEEDING THE POWERS OF THE OFFICE IN DEROGATION OF THOSE OF ANOTHER BRANCH OF GOVERNMENT

The first American impeachment, of Senator William Blount in 1797, was based on allegations that Blount attempted to incite the Creek and Cherokee Indians to attack the Spanish settlers of Florida and Louisiana, in order to capture the territory for the British. Blount was charged with engaging in a conspiracy to compromise the neutrality of the United States, in disregard of the constitutional provisions for conduct of foreign affairs. He was also charged, in effect, with attempting to oust the President's lawful appointee as principal agent for Indian affairs and replace him with a rival, thereby intruding upon the President's supervision of the executive branch.[87]

The impeachment of President Andrew Johnson in 1868 also rested on allegations that he had exceeded the power of his office and had failed to respect the prerogatives of Congress. The Johnson impeachment grew out of a bitter partisan struggle over the implementation of Reconstruction in the South following the Civil War. Johnson was charged with violation of the Tenure of Office Act, which purported to take away the President's authority to remove members of his own cabinet and specifically provided that violation would be a "high misdemeanor," as well as a crime. Believing the Act unconstitutional, Johnson removed Secretary of War Edwin M. Stanton and was impeached three days later.

Nine articles of impeachment were originally voted against Johnson, all dealing with his removal of Stanton and the appointment of a successor without the advice and consent of the Senate. The first article, for example, charged that President Johnson,

> unmindful of the high duties of this office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, order in writing the removal of Edwin M. Stanton from the office of Secretary for the Department of War.[88]

Two more articles were adopted by the House the following day. Article Ten charged that Johnson, "unmindful of the high duties of his office, and the dignity and proprieties thereof," had made inflammatory speeches that attempted to ridicule and disgrace the Congress.[89] Article Eleven charged him with attempts to prevent the

[86] A procedural note may be useful. The House votes both a resolution of impeachment against an officer and articles of impeachment containing the specific charges that will be brought to trial in the Senate. Except for the impeachment of Judge Delahay, the discussion of grounds here is based on the formal articles.

[87] After Blount had been impeached by the House, but before trial of the impeachment, the Senate expelled him for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator."

[88] Article one further alleged that Johnson's removal of Stanton was unlawful because the Senate had earlier rejected Johnson's previous suspension of him.

[89] Quoting from speeches which Johnson had made in Washington, D.C., Cleveland, Ohio

execution of the Tenure of Office Act, an Army appropriations act, and a Reconstruction act designed by Congress "for the more efficient government of the rebel States." On its face, this article involved statutory violations, but it also reflected the underlying challenge to all of Johnson's post-war policies.

The removal of Stanton was more a catalyst for the impeachment than a fundamental cause.[20] The issue between the President and Congress was which of them should have the constitutional—and ultimately even the military—power to make and enforce Reconstruction policy in the South. The Johnson impeachment, like the British impeachments of great ministers, involved issues of state going to the heart of the constitutional division of executive and legislative power.

2. BEHAVING IN A MANNER GROSSLY INCOMPATIBLE WITH THE PROPER FUNCTION AND PURPOSE OF THE OFFICE

Judge John Pickering was impeached in 1803, largely for intoxication on the bench.[21] Three of the articles alleged errors in a trial in violation of his trust and duty as a judge; the fourth charged that Pickering, "being a man of loose morals and intemperate habits," had appeared on the bench during the trial in a state of total intoxication and had used profane language. Seventy-three years later another judge, Mark Delahay, was impeached for intoxication both on and off the bench but resigned before articles of impeachment were adopted.

A similar concern with conduct incompatible with the proper exercise of judicial office appears in the decision of the House to impeach Associate Supreme Court Justice Samuel Chase in 1804. The House alleged that Justice Chase had permitted his partisan views to influence his conduct of two trials held while he was conducting circuit court several years earlier. The first involved a Pennsylvania farmer who had led a rebellion against a Federal tax collector in 1789 and was later charged with treason. The articles of impeachment alleged that "unmindful of the solemn duties of his office, and contrary to the sacred obligation" of his oath, Chase "did conduct himself in a manner highly arbitrary, oppressive, and unjust," citing procedural rulings against the defense.

Similar language appeared in articles relating to the trial of a Virginia printer indicted under the Sedition Act of 1798. Specific examples of Chase's bias were alleged, and his conduct was characterized as "an indecent solicitude . . . for the conviction of the accused, unbecoming even a public prosecutor but highly disgraceful to the character of a judge, as it was subversive of justice." The eighth article charged that Chase, "disregarding the duties . . . of his judicial character. . . . did . . . prevert his official right and duty to address the grand jury" by delivering "an intemperate and inflammatory political harangue." His conduct was alleged to be a serious breach of his duty

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and St. Louis, Missouri, article ten pronounced these speeches "censurable in any, [and] peculiarly indecent and unbecoming in the Chief Magistrate of the United States." By means of these speeches, the article concluded, Johnson had brought the high office of the presidency "into contempt, ridicule, and disgrace, to the great scandal of all good citizens."

[20] The Judiciary Committee had reported a resolution of impeachment three months earlier charging President Johnson in its report with omissions of duty, usurpations of power, and violations of his oath of office, the laws and the Constitution in his conflict of Reconstruction. The House voted down the resolution.

[21] The issue of Pickering's insanity was raised at trial in the Senate, but was not discussed by the House when it voted to impeach or to adopt articles of impeachment.

to judge impartially and to reflect on his competence to continue to exercise the office.

Judge West H. Humphreys was impeached in 1862 on charges that he joined the Confederacy without resigning his federal judgeship.[82] Judicial prejudice against Union supporters was also alleged.

Judicial favoritism and failure to give impartial consideration to cases before him were also among the allegations in the impeachment of Judge George W. English in 1926. The final article charged that his favoritism had created distrust of the disinterestedness of his official actions and destroyed public confidence in his court.[83]

3. EMPLOYING THE POWER OF THE OFFICE FOR AN IMPROPER PURPOSE OR PERSONAL GAIN

Two types of official conduct for improper purposes have been alleged in past impeachments. The first type involves vindictive use of their office by federal judges; the second, the use of office for personal gain.

Judge James H. Peck was impeached in 1826 for charging with contempt a lawyer who had publicly criticized one of his decisions, imprisoning him, and ordering his disbarment for 18 months. The House debated whether this single instance of vindictive abuse of power was sufficient to impeach, and decided that it was, alleging that the conduct was unjust, arbitrary, and beyond the scope of Peck's duty.

Vindictive use of power also constituted an element of the charges in two other impeachments. Judge George W. English was charged in 1926, among other things, with threatening to jail a local newspaper editor for printing a critical editorial and with summoning local officials into court in a non-existent case to harangue them. Some of the articles in the impeachment of Judge Charles Swayne (1903) alleged that he maliciously and unlawfully imprisoned two lawyers and a litigant for contempt.

Six impeachments have alleged the use of office for personal gain or the appearance of financial impropriety while in office. Secretary of War William W. Belknap was impeached in 1876 of high crimes and misdemeanors for conduct that probably constituted bribery and certainly involved the use of his office for highly improper purposes—receiving substantial annual payments through an intermediary in return for his appointing a particular post trader at a frontier military post in Indian territory.

The impeachments of Judges Charles Swayne (1903), Robert W. Archbald (1912), George W. English (1926), Harold Louderback (1932) and Halsted L. Ritter (1936) each involved charges of the use of office for direct or indirect personal monetary gain.[84] In the Archbald and Ritter cases, a number of allegations of improper conduct were combined in a single, final article, as well as being charged separately.

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[82] Although some of the language in the articles suggested treason, only high crimes and misdemeanors were alleged, and Humphrey's offenses were characterized as a failure to discharge his judicial duties.

[83] Some of the allegations against Judges Harold Louderback (1932) and Halsted Ritter (1936) also involved judicial favoritism affecting public confidence in their courts.

[84] Judge Swayne was charged with falsifying expense accounts and using a railroad car in the possession of a receiver he had appointed. Judge Archbald was charged with using his office to secure business favors from litigants and potential litigants before his court. Judges English, Louderback, and Ritter were charged with misusing their power to appoint and set the fees of bankruptcy receivers for personal profit.

In drawing up articles of impeachment, the House has placed little emphasis on criminal conduct. Less than one-third of the eighty-three articles the House has adopted have explicitly charged the violation of a criminal statute or used the word "criminal" or "crime" to describe the conduct alleged, and ten of the articles that do were those involving the Tenure of Office Act in the impeachment of President Andrew Johnson. The House has not always used the technical language of the criminal law even when the conduct alleged fairly clearly constituted a criminal offense, as in the Humphreys and Belknap impeachments. Moreover, a number of articles, even though they may have alleged that the conduct was unlawful, do not seem to state criminal conduct—including Article Ten against President Andrew Johnson (charging inflammatory speeches), and some of the charges against all of the judges except Humphreys.

Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions. Recitals that a judge has brought his court or the judicial system into disrepute are commonplace. In the impeachment of President Johnson, nine of the articles allege that he acted "unmindful of the high duties of his office and of his oath of office," and several specifically refer to his constitutional duty to take care that the laws be faithfully executed.

The formal language of an article of impeachment, however, is less significant than the nature of the allegations that it contains. All have involved charges of conduct incompatible with continued performance of the office; some have explicitly rested upon a "course of conduct" or have combined disparate charges in a single, final article. Some of the individual articles seem to have alleged conduct that, taken alone, would not have been considered serious, such as two articles in the impeachment of Justice Chase that merely alleged procedural errors at trial. In the early impeachments, the articles were not prepared until after impeachment had been voted by the House, and it seems probable that the decision to impeach was made on the basis of all the allegations viewed as a whole, rather than each separate charge. Unlike the Senate, which votes separately on each article after trial, and where conviction on but one article is required for removal from office, the House appears to have considered the individual offenses less significant than what they said together about the conduct of the official in the performance of his duties.

Two tendencies should be avoided in interpreting the American impeachments. The first is to dismiss them too readily because most have involved judges. The second is to make too much of them. They do not all fit neatly and logically into categories. That, however, is in keeping with the nature of the remedy. It is intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office.

Past impeachments are not precedents to be read with an eye for an article of impeachment identical to allegations that may be currently under consideration. The American impeachment cases demonstrate a common theme useful in determining whether grounds for impeachment exist—that the grounds are derived from understanding the nature, functions and duties of the office.

III. The Criminality Issue

The phrase "high Crimes and Misdemeanors" may connote "criminality" to some. This likely is the predicate for some of the contentions that only an indictable crime can constitute impeachable conduct. Other advocates of an indictable-offense requirement would establish a criminal standard of impeachable conduct because that standard is definite, can be known in advance and reflects a contemporary legal view of what conduct should be punished. A requirement of criminality would require resort to familiar criminal laws and concepts to serve as standards in the impeachment process. Furthermore, this would pose problems concerning the applicability of standards of proof and the like pertaining to the trial of crimes.[1]

The central issue raised by these concerns is whether requiring an indictable offense as an essential element of impeachable conduct is consistent with the purposes and intent of the framers in establishing the impeachment power and in setting a constitutional standard for the exercise of that power. This issue must be considered in light of the historical evidence of the framers' intent.[2] It is also useful to consider whether the purposes of impeachment and criminal law are such that indictable offenses can, consistent with the Constitution, be an essential element of grounds for impeachment. The impeachment of a President must occur only for reasons at least as pressing as those needs of government that give rise to the creation of criminal offenses. But this does not mean that the various elements of proof, defenses, and other substantive concepts surrounding an indictable offense control the impeachment process. Nor does it mean that state or federal criminal codes are necessarily the place to turn to provide a standard under the United States Constitution. Impeachment is a constitutional remedy. The framers intended that the impeachment language they employed should reflect the grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify impeachment.

This view is supported by the historical evidence of the constitutional meaning of the words "high Crimes and Misdemeanors." That evidence is set out above.[3] It establishes that the phrase "high Crimes and Misdemeanors"—which over a period of centuries evolved into the English standard of impeachable conduct—has a special historical meaning different from the ordinary meaning of the terms "crimes" and "misdemeanors."[4] "High misdemeanors" referred to a

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[1] See A. Simpson, *A Treatise on Federal Impeachments* 28-29 (1916). It has also been argued that because Treason and Bribery are crimes, "other high Crimes and Misdemeanors" must refer to crimes under the *ejusdem generis* rule of construction. But *ejusdem generis* merely requires a unifying principle. The question here is whether that principle is criminality or rather conduct subversive of our constitutional institutions and form of government.

[2] The rule of construction against redundancy indicates an intent not to require criminality. If criminality is required, the word "Misdemeanors" would add nothing to "high Crimes."

[3] See part II.B, *supra*, pp. 7-17.

[4] See part II.B.2, *supra*, pp. 11-13.

category of offenses that subverted the system of government. Since the fourteenth century the phrase "high Crimes and Misdemeanors" had been used in English impeachment cases to charge officials with a wide range of criminal and non-criminal offenses against the institutions and fundamental principles of English government.[5]

There is evidence that the framers were aware of this special, non-criminal meaning of the phrase "high Crimes and Misdemeanors" in the English law of impeachment.[6] Not only did Hamilton acknowledge Great Britain as "the model from which [impeachment] has been borrowed," but George Mason referred in the debates to the impeachment of Warren Hastings, then pending before Parliament. Indeed, Mason, who proposed the phrase "high Crimes and Misdemeanors," expressly stated his intent to encompass "[a]ttempts to subvert the Constitution."[7]

The published records of the state ratifying conventions do not reveal an intention to limit the grounds of impeachment to criminal offenses.[8] James Iredell said in the North Carolina debates on ratification:

> . . . , the person convicted is further liable to a trial at common law, and may receive such common-law punishment as belongs to a description of such offences if it be punishable by that law.[9]

Likewise, George Nicholas of Virginia distinguished disqualification to hold office from conviction for criminal conduct:

> If [the President] deviates from his duty, he is responsible to his constituents. . . . He will be absolutely disqualified to hold any place of profit, honor, or trust, and liable to further punishment if he has committed such high crimes as are punishable at common law.[10]

The post-convention statements and writings of Alexander Hamilton, James Wilson, and James Madison—each a participant in the Constitutional Convention—show that they regarded impeachment as an appropriate device to deal with offenses against constitutional government by those who hold civil office, and not a device limited to criminal offenses.[11] Hamilton, in discussing the advantages of a single rather than a plural executive, explained that a single executive gave the people "the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it."[12] Hamilton further wrote: "Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment."[13]

The American experience with impeachment, which is summarized above, reflects the principle that impeachable conduct need not be

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[5] See part II.A. *supra*, pp. 5–7.
[6] See part II.B.2. *supra*, pp. 12–13.
[7] See *Id.*, p. 11.
[8] See part II.B.3. *supra*, pp. 13–15.
[9] 4 Elliot 114.
[10] 3 Elliot 240.
[11] See part II.B.1. *supra* p. 9; part II.B.3. *supra*, pp. 13–15, 16.
[12] *Federalist* No. 70, at 461.
[13] *Id.* at 459.

criminal. Of the thirteen impeachments voted by the House since 1789, at least ten involved one or more allegations that did not charge a violation of criminal law.[14]

Impeachment and the criminal law serve fundamentally different purposes. Impeachment is the first step in a remedial process—removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment;[15] its function is primarily to maintain constitutional government. Furthermore, the Constitution itself provides that impeachment is no substitute for the ordinary process of criminal law since its specifies that impeachment does not immunize the officer from criminal liability for his wrongdoing.[16]

The general applicability of the criminal law also makes it inappropriate as the standard for a process applicable to a highly specific situation such as removal of a President. The criminal law sets a general standard of conduct that all must follow. It does not address itself to the abuses of presidential power. In an impeachment proceeding a President is called to account for abusing powers that only a President possesses.

Other characteristics of the criminal law make criminality inappropriate as an essential element of impeachable conduct. While the failure to act may be a crime, the traditional focus of criminal law is prohibitory. Impeachable conduct, on the other hand, may include the serious failure to discharge the affirmative duties imposed on the President by the Constitution. Unlike a criminal case, the cause for the removal of a President may be based on his entire course of conduct in office. In particular situations, it may be a course of conduct more than individual acts that has a tendency to subvert constitutional government.

To confine impeachable conduct to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government. Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law.

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[14] See Part II.C. *supra*, pp. 13–17.

[15] It has been argued that "[i]mpeachment is a special form of punishment for crime," but that gross and willful neglect of duty would be a violation of the oath of office and "[s]uch violation, by criminal acts of commission or omission, is the only nonindictable offense for which the President, Vice President, judges or other civil officers can be impeached." I. Brant, *Impeachment, Trials and Errors* 18, 20, 23 (1972). While this approach might in particular instances lead to the same results as the approach to impeachment as a constitutional remedy for action incompatible with constitutional government and the duties of constitutional office, it is, for the reasons stated in this memorandum, the latter approach that best reflects the intent of the framers and the constitutional function of impeachment. At the time the Constitution was adopted, "crime" and "punishment for crime" were terms used far more broadly than today. The seventh edition of Samuel Johnson's dictionary, published in 1785, defines "crime" as "an act contrary to right, an offense; a great fault; an act of wickedness." To the extent that the debates on the Constitution and its ratification refer to impeachment as a form of "punishment" it is punishment in the sense that today would be thought a non-criminal sanction, such as removal of a corporate officer for misconduct breaching his duties to the corporation.

[16] It is sometimes suggested that various provisions in the Constitution exempting cases of impeachment from certain provisions relating to the trial and punishment of crimes indicate an intention to require an indictable offense as an essential element of impeachable conduct. In addition to the provision referred to in the text (Article I, Section 3), cases of impeachment are exempted from the power of pardon and the right to trial by jury in Article II, Section 2 and Article III, Section 2 respectively. These provisions were placed in the Constitution in recognition that impeachable conduct *may* entail criminal conduct and to make it clear that even when criminal conduct is involved, the trial of an impeachment was not intended to be a criminal proceeding. The sources quoted at notes 8–12, *supra*, show the understanding that impeachable conduct may, but need not, involve criminal conduct.

If criminality is to be the basic element of impeachable conduct, what is the standard of criminal conduct to be? Is it to be criminality as known to the common law, or as divined from the Federal Criminal Code, or from an amalgam of State criminal statutes? If one is to turn to State statutes, then which of those of the States is to obtain? If the present Federal Criminal Code is to be the standard, then which of its provisions are to apply? If there is to be new Federal legislation to define the criminal standard, then presumably both the Senate and the President will take part in fixing that standard. How is this to be accomplished without encroachment upon the constitutional provision that "the sole power" of impeachment is vested in the House of Representatives?

A requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government. Impeachment is a constitutional safety valve; to fulfill this function, it must be flexible enough to cope with exigencies not now foreseeable. Congress has never undertaken to define impeachable offenses in the criminal code. Even respecting bribery, which is specifically identified in the Constitution as grounds for impeachment, the federal statute establishing the criminal offense for civil officers generally was enacted over seventy-five years after the Constitutional Convention.[17]

In sum, to limit impeachable conduct to criminal offenses would be incompatible with the evidence concerning the constitutional meaning of the phrase "high Crimes and Misdemeanors" and would frustrate the purpose that the framers intended for impeachment. State and federal criminal laws are not written in order to preserve the nation against serious abuse of the presidential office. But this is the purpose of the constitutional provision for the impeachment of a President and that purpose gives meaning to "high Crimes and Misdemeanors."

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[17] It appears from the annotations to the Revised Statutes of 1873 that bribery was not made a federal crime until 1790 for judges, 1853 for Members of Congress, and 1863 for other civil officers. *U.S. Rev. Stat.*, Title LXX, Ch. 6, §§ 5499–502. This consideration strongly suggests that conduct not amounting to statutory bribery may nonetheless constitute the constitutional "high Crime and Misdemeanor" of bribery.

IV. Conclusion

Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high" offenses in the sense that word was used in English impeachments.

The framers of our Constitution consciously adopted a particular phrase from the English practice to help define the constitutional grounds for removal. The content of the phrase "high Crimes and Misdemeanors" for the framers is to be related to what the framers knew, on the whole, about the English practice—the broad sweep of English constitutional history and the vital role impeachment had played in the limitation of royal prerogative and the control of abuses of ministerial and judicial power.

Impeachment was not a remote subject for the framers. Even as they labored in Philadelphia, the impeachment trial of Warren Hastings, Governor-General of India, was pending in London, a fact to which George Mason made explicit reference in the Convention. Whatever may be said on the merits of Hastings' conduct, the charges against him exemplified the central aspect of impeachment—the parliamentary effort to reach grave abuses of governmental power.

The framers understood quite clearly that the constitutional system they were creating must include some ultimate check on the conduct of the executive, particularly as they came to reject the suggested plural executive. While insistent that balance between the executive and legislative branches be maintained so that the executive would not become the creature of the legislature, dismissible at its will, the framers also recognized that some means would be needed to deal with excesses by the executive. Impeachment was familiar to them. They understood its essential constitutional functions and perceived its adaptability to the American contest.

While it may be argued that some articles of impeachment have charged conduct that constituted crime and thus that criminality is an essential ingredient, or that some have charged conduct that was not criminal and thus that criminality is not essential, the fact remains that in the English practice and in several of the American impeachments the criminality issue was not raised at all. The emphasis has been on the significant effects of the conduct—undermining the integrity of office, disregard of consitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. Clearly, these effects can be brought about in

ways not anticipated by the criminal law. Criminal standards and criminal courts were established to control individual conduct. Impeachment was evolved by Parliament to cope with both the inadequacy of criminal standards and the impotence of courts to deal with the conduct of great public figures. It would be anomalous if the framers, having barred criminal sanctions from the impeachment remedy and limited it to removal and possible disqualification from office, intended to restrict the grounds for impeachment to conduct that was criminal.

The longing for precise criteria is understandable; advance, precise definition of objective limits would seemingly serve both to direct future conduct and to inhibit arbitrary reaction to past conduct. In private affairs the objective is the control of personal behavior, in part through the punishment of misbehavior. In general, advance definition of standards respecting private conduct works reasonably well. However, where the issue is presidential compliance with the constitutional requirements and limitations on the presidency, the crucial factor is not the intrinsic quality of behavior but the significance of its effect upon our constitutional system or the functioning of our government.

It is useful to note three major presidential duties of broad scope that are explicitly recited in the Constitution: "to take Care that the Laws be faithfully executed," to "faithfully execute the Office of President of the United States" and to "preserve, protect, and defend the Constitution of the United States" to the best of his ability. The first is directly imposed by the Constitution; the second and third are included in the constitutionally prescribed oath that the President is required to take before he enters upon the execution of his office and are, therefore, also expressly imposed by the Constitution.

The duty to take care is affirmative. So is the duty faithfully to execute the office. A President must carry out the obligations of his office diligently and in good faith. The elective character and political role of a President make it difficult to define faithful exercise of his powers in the abstract. A President must make policy and exercise discretion. This discretion necessarily is broad, especially in emergency situations, but the constitutional duties of a President impose limitations on its exercise.

The "take care" duty emphasizes the responsibility of a President for the overall conduct of the executive branch, which the Constitution vests in him alone. He must take care that the executive is so organized and operated that this duty is performed.

The duty of a President to "preserve, protect, and defend the Constitution" to the best of his ability includes the duty not to abuse his powers or transgress their limits—not to violate the rights of citizens, such as those guaranteed by the Bill of Rights, and not to act in derogation of powers vested elsewhere by the Constitution.

Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.

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Appendixes

APPENDIX A

Proceedings of the Constitutional Convention, 1787

SELECTION, TERM AND IMPEACHMENT OF THE EXECUTIVE

The Convention first considered the question of removal of the executive on June 2, in Committee of the Whole in debate of the Virginia Plan for the Constitution, offered by Edmund Randolph of Virginia on May 29. Randolph's *seventh* resolution provided: "that a National Executive be instituted; to be chosen by the National Legislature for the term of [ ] years . . . and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation." [1] Randolph's *ninth* resolution provided for a national judiciary, whose inferior tribunals in the first instance and the supreme tribunal in the last resort would hear and determine (among other things) "impeachments of any National officers." (I:22)

On June 1, the Committee of the Whole debated, but postponed the question whether the executive should be a single person. It then voted, five states to four, that the term of the executive should be seven years. (I:64) In the course of the debate on this question, Gunning Bedford of Delaware, who "was strongly opposed to so long a term as seven years" and favored a triennial election with ineligibility after nine years, commented that "an impeachment would reach misfeasance only, not incapacity," and therefore would be no cure if it were found that the first magistrate "did not possess the qualifications ascribed to him, or should lose them after his appointment." (I:69)

On June 2, the Committee of the Whole agreed, eight states to two, that the executive should be elected by the national legislature. (I:77) Thereafter, John Dickenson of Delaware moved that the executive be made removable by the national legislature on the request of a majority of the legislatures of the states. It was necessary, he argued, "to place the power of removing somewhere," but he did not like the plan of impeaching the great officers of the government and wished to preserve the role of the states. Roger Sherman of Connecticut suggested that the national legislature should be empowered to remove the executive at pleasure (I:85), to which George Mason of Virginia replied that "[s]ome mode of displacing an unfit magistrate" was indispensable both because of "the fallibility of those who choose" and "the corruptibility of the man chosen." But Mason strongly opposed making the executive "the mere creature of the Legislature" as violation of the fundamental principle of good government. James Madison of Virginia and James Wilson of Pennsylvania argued against Dickenson's motion because it would put small states on an

[1] 1 *The Records of the Federal Convention* 21 (M. Farrand ed. 1911). All references hereafter in this appendix are given parenthetically in the text and refer to the volume and page of Farrand (e.g., I:21).

equal basis with large ones and "enable a minority of the people to prevent ye removal of an officer who had rendered himself justly criminal in the eyes of a majority; open the door for intrigues against him in states where his administration, though just, was unpopular; and tempt him to pay court to particular states whose partisans he feared or wished to engage in his behalf. (I:86) Dickenson's motion was rejected, with only Delaware voting for it. (I:87).

The Committee of the Whole then voted, seven states to two, that the executive should be made ineligible after seven years (I:88).

On motion of Hugh Williamson of North Carolina, the Committee agreed, apparently without debate, to add the clause "and to be removable on impeachment & conviction of mal-practice or neglect of duty." (I:88)

SINGLE EXECUTIVE

The Committee then returned to the question whether there should be a single executive. Edmund Randolph argued for a plural executive, primarily because "the permanent temper of the people was adverse to the very semblance of Monarchy." (I:88) (He had said on June 1, when the question was first discussed, that he regarded a unity in the executive as "the foetus of monarchy." (I:66)). On June 4, the Committee resumed debate of the issue, with James Wilson making the major argument in favor of a single executive. The motion for a single executive was agreed to, seven states to three. (I:97).

George Mason of Virginia was absent when the vote was taken; he returned during debate on giving the executive veto power over legislative acts. In arguing against the executive's appointment and veto power, he commented that the Convention was constituting "a more dangerous monarchy" than the British government, "an elective one." (I:101). He never could agree, he said "to give up all the rights of the people to a single Magistrate. If more than one had been fixed on, greater powers might have been entrusted to the Executive"; and he hoped that the attempt to give such powers would have weight later as an argument for a plural executive. (I:102).

On June 13, the Committee of the Whole reported its actions on Randolph's propositions to the Convention. (I:228–32) On June 15, William Patterson of New Jersey proposed his plan as an alternative. Patterson's resolution called for a federal executive elected by Congress, consisting of an unstated number of persons, to serve for an undesignated term and to be ineligible for a second term, removable by Congress on application by a majority of the executives of the states. The major purpose of the Patterson plan was to preserve the equality of state representation provided in the Articles of Confederation, and it was on this issue that it was rejected. (II:242–45) The Randolph resolutions called for representation on the basis of population in both houses of the legislature. (I:229–30) The Patterson resolution was debated in the Committee of the Whole on June 16, 18, and 19. The Committee agreed seven states to three, to re-report Randolph's resolutions as amended, thereby adhering to them in preference to Patterson's. (I:322)

SELECTION OF THE EXECUTIVE

On July 17, the Convention began debate on Randolph's ninth resolution as amended and reported by the Committee of the Whole. The consideration by the Convention of the resolution began with unanimous agreement that the executive should consist of a single person. (II: 29) The Convention then turned to the mode of election. It voted against election by the people instead of the legislature, proposed by Gouverneur Morris of Pennsylvania, one state to nine. (II: 32) Gouverneur Morris had argued that if the executive were appointed and impeachable by the legislature, he "will be the mere creature" of the legislature (II: 29), a view which James Wilson reiterated, adding that "it was notorious" that the power of appointment to great offices "was most corruptly managed of any that had been committed to legislative bodies." (II: 32)

Luther Martin of Maryland then proposed that the executive be chosen by electors appointed by state legislators, which was rejected eight states to two, and election by the legislature was passed unanimously. (II: 32)

TERM OF THE EXECUTIVE

The Convention voted six states to four to strike the clause making the President ineligible for reelection. In support of reeligibility, Gouverneur Morris argued that ineligibility "tended to destroy the great motive to good behaviour, the hope of being rewarded by a re-appointment. It was saying to him, make hay while the sun shines." (II: 33)

The question of the President's term was then considered. A motion to strike the seven year term and insert "during good behavior" failed by a vote of four states to six. (II: 36) In his Journal of the Proceedings, James Madison suggests that the "probable object of this motion was merely to enforce the argument against re-eligibility of the Executive Magistrate, by holding out a tenure during good behavior as the alternative for keeping him independent of the Legislature." (II: 33) After this vote, and a vote not to strike seven years, it was unanimously agreed to reconsider the question of the executive's re-eligibility. (II: 36)

JURISDICTION OF JUDICIARY TO TRY IMPEACHMENTS

On July 18, the Convention considered the resolution dealing with the Judiciary. The mode of appointing judges was debated, George Mason suggesting that this question "may depend in some degree on the mode of trying impeachments, of the Executive." If the judges were to try the executive, Mason contended, they surely ought not be appointed by him. Mason opposed executive appointment; Gouverneur Morris, who favored it, agreed that it would be improper for the judges to try an impeachment of the executive, but suggested that this was not an argument against their appointment by the executive. (II: 41–42) Ultimately, after the Convention divided evenly on a

proposal for appointment by the Executive with advice and consent of the second branch of the legislature, the question was postponed. (II: 44) The Convention did, however, unanimously agree to strike the language giving the judiciary jurisdiction of "impeachments of national officers." (II: 46)

REELECTION OF THE EXECUTIVE

On July 19, the Convention again considered the eligibility of the executive for reelection. (II: 51) The debate on this issue reintroduced the question of the mode of election of the executive, and it was unanimously agreed to reconsider generally the constitution of the executive. The debate suggests the extent of the delegates' concern about the independence of the executive from the legislature. Gouverneur Morris, who favored reeligibility, said:

> One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny.... (II: 52)

The ineligibility of the executive for reelection, he argued, "will destroy the great incitement to merit public esteem by taking away the hope of being rewarded with a reappointment.... It will tempt him to make the most of the Short space of time allotted him, to accumulate wealth and provide for his friends.... It will produce violations of the very Constitution it is meant to secure," as in moments of pressing danger an executive will be kept on despite the forms of the Constitution. And Morris described the impeachability of the executive as "a dangerous part of the plan. It will hold him in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest. He will be the tool of a faction, of some leading demagogue in the Legislature." (II: 53)

Morris proposed a popularly elected executive, serving for a two year term, eligible for reelection, and not subject to impeachment. He did "not regard ... as formidable" the danger of his unimpeachability:

> There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice. Without these ministers the Executive can do nothing of consequence. (II:53–54)

The remarks of other delegates also focused on the relationship between appointment by the legislature and reeligibility, and James Wilson remarked that "the unanimous sense" seemed to be that the executive should not be appointed by the legislature unless he was ineligible for a second time. As Elbridge Gerry of Massachusetts remarked, "[Making the executive eligible for reappointment] would make him absolutely dependent." (II:57) Wilson argued for popular election, and Gerry for appointment by electors chosen by the state executives.

SELECTION, REELECTION AND TERM OF THE EXECUTIVE

Upon reconsidering the mode of appointment, the Convention voted six States to three for appointment by electors and eight States to two that the electors should be chosen by State legislatures. (The ratio of electors among the States was postponed.) It then voted eight States to two against the executive's ineligibility for a second term. (II:58) A seven-year term was rejected, three States to five; and a six-year term adopted, nine States to one (II:58–59).

IMPEACHMENT OF THE EXECUTIVE

On July 20, the Convention voted on the number of electors for the first election and on the apportionment of electors thereafter. (II:63) It then turned to the provision for removal of the executive on impeachment and conviction for "mal-practice or neglect of duty." After debate, it was agreed to retain the impeachment provision, eight states to two. (II:69) This was the only time during the Convention that the purpose of impeachment was specifically addressed.

Charles Pinckney of South Carolina and Gouverneur Morris moved to strike the impeachment clause, Pinckney observing that the executive "[ought not to] be impeachable whilst in office." (A number of State constitutions then provided for impeachment of the executive only after he had left office.) James Wilson and William Davie of North Carolina argued that the executive should be impeachable while in office, Davie commenting:

> If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected.

Davie called his impeachability while in office "an essential security for the good behaviour of the Executive." (II:64)

Gouverneur Morris, reiterating his previous argument, contended that the executive "can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence." He also questioned whether impeachment would result in suspension of the executive. If it did not, "the mischief will go on"; if it did, "the impeachment will be nearly equivalent to a displacement, and will render the Executive dependent on those who are to impeach." (II:64–65)

As the debate proceeded, however, Gouverneur Morris changed his mind. During the debate, he admitted "corruption & some few other offenses to be such as ought to be impeachable," but he thought they should be enumerated and defined. (II: 65) By the end of the discussion, he was, he said, "now sensible of the necessity of impeachments, if the Executive was to continue for any time in office." He cited the possibility that the executive might "be bribed by a greater interest to betray his trust." (II:68) While one would think the King of England well secured against bribery, since "[h]e has as it were a fee simple in the whole Kingdom," yet, said Morris, "Charles II was bribed by Louis XIV. The Executive ought therefore to be impeachable for treachery." (II: 68–69) Other causes of impeachment were "[c]orrupting his electors" and "incapacity," for which "he should be punished not as a man, but as an officer, and punished only by degradation from his office." Morris concluded: "This Magistrate is not the King

but the prime-Minister. The people are the King." He added that care should be taken to provide a mode for making him amenable to justice that would not make him dependent on the legislature. (II : 69)

George Mason of Virginia was a strong advocate of the impeachability of the executive; no point, he said, "is of more importance than that the right of impeachment should be continued":

> Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.

(This comment was in direct response to Gouverneur Morris's original contention that the executive could "do no criminal act without Coadjutors who may be punished.") Mason went on to say that he favored election of the executive by the legislature, and that one objection to electors was the danger of their being corrupted by the candidates. This, he said, "furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?" (II :65)

Benjamin Franklin supported impeachment as "favorable to the Executive." At a time when first magistrates could not formally be brought to justice, "where the chief Magistrate rendered himself obnoxious. . . . recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character." It was best to provide in the Constitution "for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused." (II : 65)

James Madison argued that it was "indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate." A limited term "was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." (II : 65–66) It could not be presumed that all or a majority of a legislative body would lose their capacity to discharge their trust or be bribed to betray it, and the difficulty of acting in concert for purposes of corruption provided a security in their case. But in the case of the Executive to be administered by one man, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic." (II : 66)

Charles Pinckney reasserted that he did not see the necessity of impeachments and that he was sure "they ought not to issue from the Legislature who would . . . hold them as a rod over the Executive and by that means effectually destroy his independence," rendering his legislative revisionary power in particular altogether insignificant. (II : 66)

Elbridge Gerry argued for impeachment as a deterrent: "A good magistrate will not fear them. A bad one ought to be kept in fear of them." He hoped that the maxim that the chief magistrate could do no wrong "would never be adopted here." (II : 66)

Rufus King argued against impeachment from the principle of the separation of powers. The judiciary, it was said, would be impeach-

able, but that was because they held their place during good behavior and "[i]t is necessary therefore that a forum should be established for trying misbehaviour." (II:66) The executive, like the legislature and the Senate in particular, would hold office for a limited term of six years; "he would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it." Like legislators, therefore, "he ought to be subject to no intermediate trial, by impeachment." (II: 67) Impeachment is proper to secure good behavior of those holding their office for life; it is unnecessary for any officer who is elected for a limited term, "the periodical responsibility to the electors being an equivalent security." (II: 68)

King also suggested that it would be "most agreeable to him" if the executive's tenure in office were good behaviour; and impeachment would be appropriate in this case, "provided an independent and effectual forum could be advised." He should not be impeachable by the legislature, for this "would be destructive of his independence and of the principles of the Constitution." (II:67)

Edmund Randolph agreed that it was necessary to proceed "with a cautious hand" and to exclude "as much as possible the influence of the Legislature from the business." He favored impeachment, however:

> The propriety of impeachments was a favorite principle with him; Guilt wherever found ought to be punished. The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections. (II: 67)

Charles Pinckney rejoined that the powers of the Executive "would be so circumscribed as to render impeachment unnecessary," (II:68)

SELECTION OF THE EXECUTIVE

On July 24, the decision to have electors choose the executive was reconsidered, and the national legislature was again substituted, seven states to four. (II:101) It was then moved to reinstate the one-term limitation, which led to discussion and motions with respect to the length of his term—eleven years, fifteen years, twenty years ("the medium life of princes"—a suggestion possibly meant, according to Madison's journal, "as a caricature of the previous motions"), and eight years were offered. (II:102) James Wilson proposed election for a term of six years by a small number of members of the legislature selected by lot. (II:103) The election of the executive was unanimously postponed. (II:106) On July 25, the Convention rejected, four states to seven, a proposal for appointment by the legislature unless the incumbent were reeligible in which case the choice would be made by electors appointed by the state legislatures. (II:111) It then rejected, five states to six, Pinckney's proposal for election by the legislature, with no person eligible for more than six years in any twelve. (II:115)

The debate continued on the 26th, and George Mason suggested reinstituting the original mode of election and term reported by the Committee of the Whole (appointment by the legislature, a seven-year term, with no reeligibility for a second term). (II:118–19) This was

agreed to, seven states to three. (II:120) The entire resolution on the executive was then adopted (six states to three) and referred to a five member Committee on Detail to prepare a draft Constitution. (II:121)

PROVISIONS IN THE DRAFT OF AUGUST 6

The Committee on Detail reported a draft on August 6. It included the following provisions with respect to impeachment:

> The House of Representatives shall have the sole power of impeachment. (Art. IV, sec. 6)
>
> [The President] shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment. . . . He [The President] shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption. (Art. X, sec. 2)
>
> The Jurisdiction of the Supreme Court shall extend . . . to the trial of impeachments of Officers of the United States. . . . In cases of impeachment . . . this jurisdiction shall be original. . . . The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) . . . to . . . Inferior Courts. . . . (Art. XI, sec. 3)
>
> The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury. (Art. XI; sec. 4)
>
> Judgment, in cases of Impeachment, shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States. But the party convicted shall, nevertheless be liable and subject to indictment, trial, judgment and punishment according to law. (Art. XI, sec. 5) (II: 178–79, 185–87)

The draft provided, with respect to the executive:

> The Executive Power of the United States shall be vested in a single person. His stile shall be "The President of the United States of America;" and his title shall be, "His Excellency". He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time. (Art. X, sec. 1) (II: 185)

Article IV, section 6 was unanimously agreed to by the Convention on August 9. (II: 231) On August 22, a prohibition of bills of attainder and ex post facto laws was voted, the first unanimously and the second seven states to three. (II: 376) On August 24, the Convention considered Article X, dealing with the Executive. It unanimously approved vesting the power in a single person. (II: 401) It rejected, nine states to two, a motion for election "by the people" rather than by the Legislature. (II:402) It then amended the provision to provide for "joint ballot" (seven states to four), rejected each state having one vote (five states to six), and added language requiring a majority of the votes of the members present for election (ten states to one). (II:403) Gouverneur Morris proposed election by "Electors to be chosen by the people of the several States," which failed five states

to six; then a vote on the "abstract question" of selection by electors failed, the States being evenly divided (four states for, four opposed, two divided, and Massachusetts absent). (II: 404)

On August 25, the clause giving the President pardon power was unanimously amended so that cases of impeachment were excepted, rather than a pardon not being pleadable in bar of impeachment. (II: 419–20)

On August 27, the impeachment provision of Article X was unanimously postponed at the instance of Gouverneur Morris, who thought the Supreme Court an improper tribunal. (II: 427) A proposal to make judges removable by the Executive on the application of the Senate and House was rejected, one state to seven. (II: 429)

EXTRADITION: "HIGH MISDEMEANOR"

On August 28, the Convention unanimously amended the extradition clause, which referred to any person "charged with treason, felony or high misdemeanor in any State, who shall flee from justice" to strike "high misdemeanor" and insert "other crime." The change was made "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." (II: 443)

FORUM FOR TRIAL OF IMPEACHMENTS

On August 31, these parts of the Constitution that had been postponed were referred to a committee with one member from each state—the Committee of Eleven. (II: 473) On September 4, the Committee reported to the Convention. It proposed that the Senate have power to try all impeachments, with concurrence of two-thirds of the members present required for a person to be convicted. The provisions concerning election of the President and his term in office were essentially what was finally adopted in the Constitution, except that the Senate was given the power to choose among the five receiving the most electoral votes if none had a majority. (II: 496–99) The office of Vice President was created, and it was provided that he should 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." (II:498) The provision for impeachment of the President was amended to delete "corruption" as a ground for removal, reading:

> He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason, or bribery.... (II:499)

The Convention postponed the Committee's provision making the Senate the tribunal for impeachments "in order to decide previously on the mode of electing the President." (II:499)

SELECTION OF THE PRESIDENT

Gouverneur Morris explained "the reasons of the Committee and his own" for the mode of election of the President:

> The 1st was the danger of intrigue & faction if the appointmt. should be made by the Legislature. 2 the inconveniency of an ineligibility required by that mode in order to lessen its evils.

> 3 The difficulty of establishing a Court of Impeachments, other than the Senate which would not be so proper for the trial nor the other branch for the impeachment of the President, if appointed by the Legislature, 4 No body had appeared to be satisfied with an appointment by the Legislature. 5. Many were anxious even for an immediate choice by the people—6—the indispensible necessity of making the Executive independent of the Legislature. (II:500)

The "great evil of cabal was avoided" because the electors would vote at the same time throughout the country at a great distance from each other: "[i]t would be impossible also to corrupt them." A conclusive reason, said Gouverneur Morris, for having the Senate the judge of impeachments rather than the Supreme Court was that the Court "was to try the President after the trial of the impeachment." (II:500) Objections were made that the Senate would almost always choose the President. Charles Pinckney asserted, "It makes the same body of men which will in fact elect the President his Judges in case of an impeachment." (II:501) James Wilson and Edmund Randolph suggested that the eventual selection should be referred to the whole legislature, not just the Senate; Gouverneur Morris responded that the Senate was preferred "because fewer could then, say to the President, you owe your appointment to us. He thought the President would not depend so much on the Senate for his re-appointment as on his general good conduct." (II:502) Further consideration on the report was postponed until the following day.

On September 5 and 6, a substantial number of amendments were proposed. The most important, adopted by a vote of ten states to one, provided that the House, rather than the Senate, should choose in the event no person received a majority of the electoral votes, with the representation from each state having one vote, and a quorum of two-thirds of the states being required. (II: 527–28) This amendment was supported as "lessening the aristocratic influence of the Senate," in the words of George Mason. Earlier, James Wilson had criticized the report of the Committee of Eleven as "having a dangerous tendency to aristocracy: as throwing a dangerous power into the hands of the Senate," who would have, in fact, the appointment of the President, and through his dependence on them the virtual appointment to other offices (including the judiciary), would make treaties, and would try all impeachments. "[T]he Legislative, Executive & Judiciary powers are all blended in one branch of the Government. . . . [T]he President will not be the man of the people as he ought to be, but the Minion of the Senate." (II: 522–23)

ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

On September 8, the Convention considered the clause referring to impeachment and removal of the President for treason and bribery. George Mason asked, "Why is the provision restrained to Treason & bribery only?" Treason as defined by the Constitution, he said, "will not reach many great and dangerous offenses. . . . Attempts to subvert the Constitution may not be Treason . . ." Not only was treason limited, but it was "the more necessary to extend: the power of impeachments" because bills of attainder were forbidden. Mason moved to add "maladministration" after "bribery". (II:550)

James Madison commented, "So vague a term will be equivalent to a tenure during pleasure of the Senate," and Mason withdrew "maladministration" and substituted "high crimes & misdemeanors . . . agst. the State." This term was adopted, eight states to three. (II: 550)

TRIAL OF IMPEACHMENTS BY THE SENATE

Madison then objected to trial of the President by the Senate and after discussion moved to strike the provision, stating a preference for a tribunal of which the Supreme Court formed a part. He objected to trial by the Senate, "especially as [the President] was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeanor. The President under these circumstances was made improperly dependent." (II: 551)

Gouverneur Morris (who had said of "maladministration" that it would "not be put in force and can do no harm"; an election every four years would "prevent maladministration" II: 550) argued that no tribunal other than the Senate could be trusted. The Supreme Court, he said, "were too few in number and might be warped or corrupted." He was against a dependence of the executive on the legislature, and considered legislative tyranny the great danger. But, he argued, "there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out." (II: 551)

Charles Pinckney opposed the Senate as the court of impeachments because it would make the President too dependent on the legislature. "If he opposes a favorite law, the two Houses will combine against him, and under the influence of heat and faction throws him out of office." Hugh Williamson of North Carolina replied that there was "more danger of too much lenity than of too much rigour towards the President," considering the number of respects in which the Senate was associated with the President. (II: 51)

After Madison's motion to strike out the provision for trial by the Senate failed, it was unanimously agreed to strike "State" and insert "United States" after "misdemeanors against," "in order to remove ambiguity." (II:551) It was then agreed to add: "The vice-President and other Civil officers of the U.S. shall be removed from office on impeachment and conviction as aforesaid."

Gouverneur Morris moved to add a requirement that members of the Senate would be on oath in an impeachment trial, which was agreed to, and the Convention then voted, nine states to two. to agree to the clause for trial by the Senate. (II: 552–53)

COMMITTEE ON STYLE AND ARRANGEMENT

A five member Committee on Style and Arrangement was appointed by ballot to arrange and revise the language of the articles agreed to by the Convention. (II:553) The Committee reported a draft on September 12. The Committee, which made numerous changes to shorten and tighten the language of the Constitution, had dropped the expression "against the United States" from the description of grounds for impeachment, so the clause read, "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high Crimes and Misdemeanors." (II: 600)

SUSPENSION UPON IMPEACHMENT

On September 14, John Rutledge and Gouverneur Morris moved "that persons impeached be suspended from their office until they be tried and acquitted. (II: 612) Madison objected that the President was already made too dependent on the legislature by the power of one branch to try him in consequence of an impeachment by the other. Suspension he argued, "will put him in the power of one branch only," which can at any moment vote a temporary removal of the President in order "to make way for the functions of another who will be more favorable to their views." The motion was defeated, three states to eight. (II: 613).

No further changes were made with respect to the impeachment provision or the election of the President. On September 15, the Constitution was agreed to, and on September 17 it was signed and the Convention adjourned. (II: 650)

APPENDIX B

American Impeachment Cases

1. SENATOR WILLIAM BLOUNT (1797–1799)

a. Proceedings in the House

The House adopted a resolution in 1797 authorizing a select committee to examine a presidential message and accompanying papers regarding the conduct of Senator Blount.[1] The committee reported a resolution that Blount "be impeached for high crimes and misdemeanors," which was adopted without debate or division.[2]

b. Articles of Impeachment

Five articles of impeachment were agreed to by the House without amendment (except a "mere verbal one").[3]

Article I charged that Blount, knowing that the United States was at peace with Spain and that Spain and Great Britain were at war with each other, "but disregarding the duties and obligations of his high station, and designing and intending to disturb the peace and tranquillity of the United States, and to violate and infringe the neutrality thereof," conspired and contrived to promote a hostile military expedition against the Spanish possessions of Louisiana and Florida for the purpose of wresting them from Spain and conquering them for Great Britain. This was alleged to be "contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof."

Article II charged that Blount knowing of a treaty between the United States and Spain and "disregarding his high station, and the stipulations of the . . . treaty, and the obligations of neutrality," conspired to engage the Creek and Cherokee nations in the expedition against Louisiana and Florida. This was alleged to be contrary to Blount's duty of trust and station as a Senator, in violation of the treaty and of the obligations of neutrality, and against the laws, peace, and interest of the United States.

Article III alleged that Blount, knowing that the President was empowered by act of Congress to appoint temporary agents to reside among the Indians in order to secure the continuance of their friendship and that the President had appointed a principal temporary agent, "in the prosecution of his criminal designs and of his conspiracies" conspired and contrived to alienate the tribes from the President's agent and to diminish and impair his influence with the tribes, "contrary to the duty of his trust and station as a Senator and the peace and interests of the United States."

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[1] 5 Annals of Cong. 440–41 (1797).
[2] *Id.* 458.
[3] *Id.* 951.

Article IV charged that Blount, knowing that the Congress had made it lawful for the President to establish trading posts with the Indians and that the President had appointed an interpreter to serve as assistant post trader, conspired and contrived to seduce the interpreter from his duty and trust and to engage him in the promotion and execution of Blount's criminal intentions and conspiracies, contrary to the duty of his trust and station as a Senator and against the laws, treaties, peace and interest of the United States.

Article V charged that Blount, knowing of the boundary line between the United States and the Cherokee nation established by treaty, in further prosecution of his criminal designs and conspiracies and the more effectually to accomplish his intention of exciting the Cherokees to commence hostilities against Spain, conspired and contrived to diminish and impair the confidence of the Cherokee nation in the government of the United States and to create discontent and disaffection among the Cherokees in relation to the boundary line. This was alleged to be against Blount's duty and trust as a Senator and against impeachment was dismissed.

c. Proceedings in the Senate

Before Blount's impeachment, the Senate had expelled him for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator." [4] At the trial a plea was interposed on behalf of Blount to the effect that (1) a Senator was not a "civil officer," (2) having already been expelled, Blount was no longer impeachable, and (3) no crime or misdemeanor in the execution of the office had been alleged. The Senate voted 14 to 11 that the plea was sufficient in law that the Senate ought not to hold jurisdiction.[5] The impeachment was dismissed.

2. DISTRICT JUDGE JOHN PICKERING (1803–1804)

a. Proceedings in the House

A message received from the President of the United States, regarding complaints against Judge Pickering, was referred to a select committee for investigation in 1803.[6] A resolution that Pickering be impeached "of high crimes and misdemeanors" was reported to the full House the same year and adopted by a vote of 45 to 8.[7]

b. Articles of Impeachment

A select committee was appointed to draft articles of impeachment.[8] The House agreed unanimously and without amendment to the four articles subsequently reported.[9] Each article alleged high crimes and misdemeanors by Pickering in his conduct of an admiralty proceeding by the United States against a ship and merchandise that allegedly had been landed without the payment of duties.

Article I charged that Judge Pickering, "not regarding, but with intent to evade" an act of Congress, had ordered the ship and merchandise delivered to its owner without the production of any certifi-

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[4] *Id.* 43–44.
[5] *Id.* 2819 (1799).
[6] 12 ANNALS OF CONG. 460 (1803).
[7] *Id.* 642.
[8] 13 ANNALS OF CONG. 380 (1803).
[9] *Id.* 794–95.

cate that the duty on the ship or the merchandise had been paid or secured, "contrary to [Pickering's] trust and duty as judge . . ., and to the manifest injury of [the] revenue." [10]

Article II charged that Pickering, "with intent to defeat the just claims of the United States," refused to hear the testimony of witnesses produced on behalf of the United States and, without hearing testimony, ordered the ship and merchandise restored to the claimant "contrary to his trust and duty, as judge of the said district court, in violation of the laws of the United States, and to the manifest injury of their revenue." [11]

Article III charged that Pickering, "disregarding the authority of the laws, and wickedly meaning and intending to injure the revenues of the United States, and thereby to impair the public credit, did absolutely and positively refuse to allow" the appeal of the United States on the admiralty proceedings, "contrary to his trust and duty as judge of the said district court, against the laws of the United States, to the great injury of the public revenue, and in violation of the solemn oath which he had taken to administer equal and impartial justice." [12]

Article IV charged:

> That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge, yet the said John Pickering, being a man of loose morals and intemperate habits, . . . did appear upon the bench of the said court, for the purpose of administering justice [on the same dates as the conduct charged in articles I–III], in a state of total intoxication, . . . and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States, and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge, and degrading to the honor and dignity of the United States.[13]

c. Proceedings in the Senate

The Senate convicted Judge Pickering on each of the four articles by a vote of 19 to 7.[14]

d. Miscellaneous

The Senate heard evidence on the issue of Judge Pickering's sanity, but refused by a vote of 19 to 9 to postpone the trial.[15]

3. JUSTICE SAMUEL CHASE (1804–1805)

a. Proceedings in the House

In 1804 the House authorized a committee to inquire into the conduct of Supreme Court Justice Chase.[16] On the same day that Judge Pickering was convicted in the Senate, the House adopted by a vote of

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[10] *Id.* 819.
[11] *Id.* 820–21.
[12] *Id.* 821–22.
[13] *Id.* 822.
[14] *Id.* 366–67.
[15] *Id.* 362–63.
[16] *Id.* 875.

73 to 32 a resolution reported by the committee that Chase be impeached of "high crimes and misdemeanors."

b. Articles of Impeachment

After voting separately on each, the House adopted eight articles.[18]

Article I charged that, "unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them 'faithfully and impartially, and without respect to persons' [a quotation from the judicial oath prescribed by statute]," Chase, in presiding over a treason trial in 1800, "did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust" by:

(1) delivering a written opinion on the applicable legal definition of treason before the defendant's counsel had been heard;

(2) preventing counsel from citing certain English cases and U.S. statutes; and

(3) depriving the defendant of his constitutional privilege to argue the law to the jury and "endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law, as well as the question of fact" in reaching their verdict.

In consequence of this "irregular conduct" by Chase, the defendant was deprived of his Sixth Amendment rights and was condemned to death without having been represented by counsel "to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which ultimately, rest the liberty and safety of the people."[19]

Article II charged that, "prompted by a similar spirit of persecution and injustice," Chase had presided over a trial in 1800 involving a violation of the Sedition Act of 1798 (for defamation of the President, and, "with intent to oppress and procure the conviction" of the defendant, allowed an individual to serve on the jury who wished to be excused because he had made up his mind as to whether the publication involved was libelous.[20]

Article III charged that, "with intent to oppress and procure the conviction" of the defendant in the Sedition Act prosecution, Chase refused to permit a witness for the defendant to testify "on pretense that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact."[21]

Article IV charged that Chase's conduct throughout the trial was "marked by manifest injustice, partiality, and intemperance":

> (1) in compelling defendant's counsel to reduce to writing for the court's inspection the questions they wished to ask the witness referred to in article III;
>
> (2) in refusing to postpone the trial although an affidavit had been filed stating the absence of material witnesses on behalf of the defendant;
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> (3) in using "unusual, rude and contemptuous expressions" to defendant's counsel and in "falsely insinuating" that they wished

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[18] *Id.* 1180.
[19] 14 ANNALS OF CONG. 747–62 (1804).
[20] *Id.* 728–29.
[21] *Id.* 729.
[22] *Id.*

to excite public fears and indignation and "to produce that insubordination to law to which the conduct of the judge did, at the same time, manifestly tend";

(4) in "repeated and vexatious interruptions of defendant's counsel, which induced them to withdraw from the case"; and

(5) in manifesting "an indecent solicitude" for the defendant's conviction, "unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice." [22]

Article V charged that Chase had issued a bench warrant rather than a summons in the libel case, contrary to law.[23]

Article VI charged that Chase refused a continuance of the libel trial to the next term of court, contrary to law and "with intent to oppress and procure the conviction" of the defendant.[24]

Article VII charged that Chase, "disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer" by refusing to discharge a grand jury and by charging it to investigate a printer for sedition, with intention to procure the prosecution of the printer, "thereby degrading his high judicial functions and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare." [25]

Article VIII charged that Chase, "disregarding the duties and dignity of his judicial character," did "pervert his official right and duty to address" a grand jury by delivering "an intemperate and inflammatory political harangue with intent to excite the fears and resentment" of the grand jury and the people of Maryland against their state government and constitution, "a conduct highly censurable in any, but peculiarly indecent and unbecoming" in a Justice of the Supreme Court. This article also charged that Chase endeavored "to excite the odium" of the grand jury and the people of Maryland against the government of the United States "by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion and in a proper manner, were at that time, and as delivered by him, highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partisan." [26]

c. Proceedings in the Senate

Justice Chase was acquitted on each article by votes ranging from 0–34 not guilty on Article V to 19–15 guilty on Article VIII.[27]

4. DISTRICT JUDGE JAMES H. PECK (1830–1831)

a. Proceedings in the House

The House adopted a resolution in 1830 authorizing an inquiry respecting District Judge Peck.[28] The Judiciary Committee reported a resolution that Peck "be impeached of high misdemeanors in office" to the House, which adopted it by a vote of 123 to 49.[29]

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[22] *Id.* 729–30.
[23] *Id.* 730.
[24] *Id.*
[25] *Id.* 730–31.
[26] *Id.* 731.
[27] *Id.* 665–69 (1805).
[28] H.R. Jour., 21st Cong., 1st Sess. 188 (1830).
[29] 6 Cong. Deb. 819 (1830).

b. Article of Impeachment

After the House voted in favor of impeachment, a committee was appointed to prepare articles. The single article proposed and finally adopted by the House charged that Peck, "unmindful of the solemn duties of his station," and "with interest in wrongfully and unjustly to oppress, imprison, and otherwise injure" an attorney who had published a newspaper article criticizing one of the judge's opinions, had brought the attorney before the court and, under "the color and pretences" of a contempt proceeding, had caused the attorney to be imprisoned briefly and suspended from practice for eighteen months. The House charged that Peck's conduct resulted in "the great disparagement of public justice, the abuse of judicial authority, and . . . the subversion of the liberties of the people of the United States." [80]

c. Proceedings in the Senate

The trial in the Senate focused on two issues. One issue was whether Peck, by punishing the attorney for writing a newspaper article, had exceeded the limits of judicial contempt power under Section 17 of the Judiciary Act of 1789. The other contested issue was the requirement of proving wrongful intent.

Judge Peck was acquitted on the single article with twenty-one Senators voting in favor of conviction and twenty-two Senators against.[81]

5. DISTRICT JUDGE WEST H. HUMPHREYS (1862)

a. Proceedings in the House

A resolution authorizing an inquiry by the Judiciary Committee respecting District Judge Humphreys was adopted in 1862.[82] Humphreys was subsequently impeached at the recommendation of the investigating committee.[83]

b. Articles of Impeachment

Soon after the adoption of the impeachment resolution, seven articles of impeachment were agreed to by the House without debate.[84]

Article I charged that in disregard of his "duties as a citizen . . . and unmindful of the duties of his . . . office" as a judge, Humphreys "endeavor[ed] by public speech to incite revolt and rebellion" against the United States; and publicly declared that the people of Tennessee had the right to absolve themselves of allegiance to the United States.

Article II charged that, disregarding his duties as a citizen, his obligations as a judge, and the "good behavior" clause of the Constitution, Humphreys advocated and agreed to Tennessee's ordinance of secession.

Article III charged that Humphreys organized armed rebellion against the United States and waged war against them.

Article IV charged Humphreys with conspiracy to violate a civil war statute that made it a criminal offense "to oppose by force the authority of the Government of the United States."

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[80] *Id.* 869. For text of article, see H.R. Jour., 21st Cong., 1st Sess. 591–96 (1830).
[81] 7 Cong. Deb. 45 (1831).
[82] Cong. Globe, 37th Cong., 2d Sess. 229 (1862).
[83] *Id.* 1966–67.
[84] *Id.* 2205.

Article V charged that, with intent to prevent the administration of the laws of the United States and to overthrow the authority of the United States, Humphreys had failed to perform his federal judicial duties for nearly a year.

Article VI alleged that Judge Humphreys had continued to hold court in his state, calling it the district court of the Confederate States of America. Article VI was divided into three specifications, related to Humphreys' acts while sitting as a Confederate judge. The first specification charged that Humphreys endeavored to coerce a Union supporter to swear allegiance to the Confederacy. The second charged that he ordered the confiscation of private property on behalf of the Confederacy. The third charged that he jailed Union sympathizers who resisted the Confederacy.

Article VII charged that while sitting as a Confederate judge, Humphreys unlawfully arrested and imprisoned a Union supporter.

c. Proceedings in the Senate

Humphreys could not be personally served with the impeachment summons because he had fled Union territory.[35] He neither appeared at the trial nor contested the charges.

The Senate convicted Humphreys of all charges except the confiscation of property on behalf of the Confederacy, which several Senators stated had not been properly proved.[36] The vote ranged from 38–0 guilty on Articles I and IV to 11–24 not guilty on specification two of Article VI.

6. PRESIDENT ANDREW JOHNSON (1867–1868)

a. Proceedings in the House

The House adopted a resolution in 1867 authorizing the Judiciary Committee to inquire into the conduct of President Johnson.[37] A majority of the committee recommended impeachment,[38] but the House voted against the resolution, 108 to 57.[39] In 1868, however, the House authorized an inquiry by the Committee on Reconstruction, which reported an impeachment resolution after President Johnson had removed Secretary of War Stanton from office. The House voted to impeach, 128–47.[40]

b. Articles of Impeachment

Nine of the eleven articles drawn by a select committee and adopted by the House related solely to the President's removal of Stanton. The removal allegedly violated the recently enacted Tenure of Office Act,[41] which also categorized it as a "high misdemeanor."[42]

The House voted on each of the first nine articles separately; the tenth and eleventh articles were adopted the following day.

Article I charged that Johnson,

> unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should

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[35] *Id.* 2617.
[36] *Id.* 2950.
[37] CONG. GLOBE, 39th Cong., 2d Sess. 320–21 (1867).
[38] H.R. REP. No. 7, 40th Cong., 1st Sess. 59 (1867).
[39] CONG. GLOBE, 40th Cong., 2d Sess. 88 (1867).
[40] CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868).
[41] Act of March 2, 1867, 14 Stat. 430.
[42] *Id.* § 6.

> take care that the laws be faithfully executed, did unlawfully and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton.

Article I concluded that President Johnson had committed " a high misdemeanor in office." [43]

Articles II and III characterized the President's conduct in the same terms but charged him with the allegedly unlawful appointment of Stanton's replacement.

Article IV charged that Johnson, with intent, unlawfully conspired with the replacement for Stanton and Members of the House of Representatives to "hinder and prevent" Stanton from holding his office.

Article V, a variation of the preceding article, charged a conspiracy to prevent the execution of the Tenure of Office Act, in addition to a conspiracy to prevent Stanton from holding his office.

Article VI charged Johnson with conspiring with Stanton's designated replacement, "by force to seize, take and possess" government property in Stanton's possession, in violation of both an "act to define and punish certain conspiracies" and the Tenure of Office Act.

Article VII charged the same offense, but as a violation of the Tenure of Office Act only.

Article VIII alleged that Johnson, by appointing a new Secretary of War, had, "with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War," violated the provisions of the Tenure of Office Act.

Article IX charged that Johnson, in his role as Commander in Chief, had instructed the General in charge of the military forces in Washington that part of the Tenure of Office Act was unconstitutional, with intent to induce the General, in his official capacity as commander of the Department of Washington, to prevent the execution of the Tenure of Office Act.

Article X, which was adopted by amendment after the first nine articles, alleged that Johnson,

> unmindful of the high duties of his office and the dignity and proprieties thereof, . . . designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach, the Congress of the United States, [and] to impair and destroy the regard and respect of all good people . . . for the Congress and legislative power thereof . . .

by making "certain intemperate, inflammatory, and scandalous harangues." In addition the same speeches were alleged to have brought the high office of the President into "contempt, ridicule, and disgrace, to the great scandal of all good citizens."

Article XI combined the conduct charged in Article X and the nine other articles to allege that Johnson had attempted to prevent the execution of both the Tenure of Office Act and an act relating to army appropriations by unlawfully devising and contriving means by which he could remove Stanton from office.

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[43] For text of articles, see CON. GLOBE, 40th Cong., 2d Sess. 1602–18, 1642 (1868).

c. Proceedings in the Senate

The Senate voted only on Articles II, III, and XI, and President Johnson was acquitted on each, 35 guilty—19 not guilty, one vote short of the two-thirds required to convict.[44]

d. Miscellaneous

All of the articles relating to the dismissal of Stanton alleged indictable offenses. Article X did not allege an indictable offense, but this article was never voted on by the Senate.

7. DISTRICT JUDGE MARK H. DELAHAY (1873)

a. Proceedings in the House

A resolution authorizing an inquiry by the Judiciary Committee respecting District Judge Delahay was adopted by the House in 1872.[45] In 1873 the committee proposed a resolution of impeachment for "high crimes and misdemeanors in office," which the House [46] adopted.

b. Subsequent Proceedings

Delahay resigned before articles of impeachment were prepared, and the matter was not pursued further by the House. The charge against him had been described in the House as follows:

> The most grevious charge, and that which is beyond all question, was that his personal habits unfitted him for the judicial office, that he was intoxicated off the bench as well as on the bench.[47]

8. SECRETARY OF WAR WILLIAM W. BELKNAP (1876)

a. Proceedings in the House

In 1876 the Committee on Expenditures in the War Department [48] unanimously recommended impeachment of Secretary Belknap "for high crimes and misdemeanors while in office," and the House unanimously adopted the resolution.[49]

b. Articles of Impeachment

Five articles of impeachment were drafted by the Judiciary Committee [50] and adopted by the House, all relating to Belknap's allegedly corrupt appointment of a military post trader. The House agreed to the articles as a group, without voting separately on each.[51]

Article I charged Belknap with "high crimes and misdemeanors in office" for unlawfully receiving sums of money, in consideration for the appointment, made by him as Secretary of War.[52]

Article II charged Belknap with a "high misdemeanor in office" for "willfully, corruptly, and unlawfully" taking and receiving money in return for the continued maintenance of the post trader.[53]

Article III charged that Belknap was "criminally disregarding his duty as Secretary of War, and basely prostituting his high office to

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[44] CONG. GLOBE SUPP., 40th Cong., 2d Sess. 415 (1868).
[45] CONG. GLOBE, 42d Cong., 2d Sess. 1808 (1872).
[46] CONG. GLOBE, 42d Cong., 3d Sess. 1900 (1873).
[47] *Id.*
[48] The Committee was authorized to investigate the Department of the Army generally. 13 CONG. REC. 414 (1876).
[49] 14 CONG. REC. 1426–28 (1876).
[50] 15 CONG. REC. 2081–82 (1676).
[51] *Id.* 2160.
[52] *Id.* 2159.
[53] *Id.*

his lust for private gain," when he "unlawfully and corruptly" continued his appointee in office, "to the great injury and damage of the officers and soldiers of the United States" stationed at the military post. The maintenance of the trader was also alleged to be "against public policy, and to the great disgrace and detriment of the public service." [54]

Article IV alleged seventeen separate specifications relating to Belknap's appointment and continuance in office of the post trader.[55]

Article V enumerated the instances in which Belknap or his wife had corruptly received "divert large sums of money." [56]

c. Proceedings in the Senate

The Senate failed to convict Belknap on any of the articles, with votes on the articles ranging from 35 guilty—25 not guilty to 37 guilty—25 not guilty.[57]

d. Miscellaneous

In the Senate trial, it was argued that because Belknap had resigned prior to his impeachment the case should be dropped. The Senate, by a vote of 37 to 29, decided that Belknap was amenable to trial by impeachment.[58] Twenty-two of the Senator voting not guilty on each article, nevertheless indicated that in their view the Senate had no jurisdiction.[59]

9. DISTRICT JUDGE CHARLES SWAYNE (1903–1905)

a. Proceedings in the House

The House adopted a resolution in 1903 directing an investigation by the Judiciary Committee of District Judge Swayne.[60] The committee held hearings during the next year, and reported a resolution that Swayne be impeached "of high crimes and misdemeanors" in late 1904.[61] The House agreed to the resolution unanimously.

b. Articles of Impeachment

After the vote to impeach, thirteen articles were drafted and approved by the House in 1905.[62] However, only the first twelve articles were presented to the Senate.[63]

Article I charged that Swayne had knowingly filed a false certificate and claim for travel expenses while serving as a visiting judge, "whereby he has been guilty of a high crime and misdemeanor in said office."

Articles II and III charged that Swayne, having claimed and received excess travel reimbursement for other trips, had "misbehaved himself and was and is guilty of a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office."

Articles IV and V charged that Swayne, having appropriated a private railroad car that was under the custody of a receiver of his court

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[54] *Id.*
[55] *Id.*
[56] *Id.* 2160.
[57] 19 Cong. Rec. 343–57 (1876).
[58] *Id.* 76.
[59] *Id.* 342–57.
[60] 38 Cong. Rec. 103 (1903).
[61] 39 Cong. Rec. 347–48 (1904).
[62] H.R. Rep. No. 3477, 58th Cong., 3d Sess. (1905).
[63] 39 Cong. Rec. 1056–58 (1905).

and used the car, its provisions, and a porter without making compensation to the railroad, "was and is guilty of an abuse of judicial power and of a high misdemeanor in office."

Articles VI and VII charged that for periods of six years and nine years, Judge Swayne had not been a bona fide resident of his judicial district, in violation of a statute requiring every federal judge to reside in his judicial district. The statute provided that "for offending against this provision [the judge] shall be deemed guilty of a high misdemeanor." The articles charged that Swayne "willfully and knowingly violated" this law and "was and is guilty of a high misdemeanor in office."

Articles VIII, IX, X, XI and XII charged that Swayne improperly imprisoned two attorneys and a litigant for contempt of court. Articles VIII and X alleged that the imprisonment of the attorneys was done "maliciously and unlawfully" and Articles IX and XI charged that these imprisonments were done "knowingly and unlawfully." Article XI charged that the private person was imprisoned "unlawfully and knowingly." Each of these five articles concluded by charging that by so acting, Swayne had "misbehaved himself in his office as judge and was and is guilty of an abuse of judicial power and a high misdemeanor in office."

c. Proceedings in the Senate

A majority of the Senate voted acquittal on all articles.[64]

10. CIRCUIT JUDGE ROBERT W. ARCHBALD (1912–1913)

a. Proceedings in the House

The House authorized an investigation by the Judiciary Committee on Circuit Judge Archbald of the Commerce Court in 1912.[65] The Committee unanimously reported a resolution that Archbald be impeached for "misbehavior and for high crimes and misdemeanors." and the House adopted the resolution, 223 to 1.[66]

b. Articles of Impeachment

Thirteen Articles of impeachment were presented and adopted simultaneously with the resolution for impeachment.

Article I charged that Archbald "willfully, unlawfully, and corruptly took advantage of his official position . . . to induce and influence the officials" of a company with litigation pending before his court to enter into a contract with Archbald and his business partner to sell them assets of a subsidiary company. The contract was allegedly profitable to Archbald.[67]

Article II also charged Archbald with "willfully, unlawfully, and corruptly" using his position as judge to influence a litigant then before the Interstate Commerce Commission (who on appeal would be before the Commerce Court) to settle the case and purchase stock.[68]

Article III charged Archbald with using his official position to obtain a leasing agreement from a party with suits pending in the Commerce Court.[69]

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[64] *Id.* 2467–72.
[65] 48 Cong. Rec. 5242 (1912).
[66] *Id.* 8922.
[67] *Id.* 8904.
[68] *Id.* 8905.
[69] *Id.*

Article IV alleged "gross and improper conduct" in that Archbald had (in another suit pending in the Commerce Court) "secretly, wrongfully, and unlawfully" requested an attorney to obtain an explanation of certain testimony from a witness in the case, and subsequently requested argument in support of certain contentions from the same attorney, all "without the knowledge or consent" of the opposing party.[70]

Article V charged Archbald with accepting "a gift, reward or present" from a person for whom Archbald had attempted to gain a favorable leasing agreement with a potential litigant in Archbald's court.[71]

Article VI again charged improper use of Archbald's influence as a judge, this time with respect to a purchase of an interest in land.

Articles VII through XII referred to Archbald's conduct during his tenure as district court judge. These articles alleged improper and unbecoming conduct constituting "misbehavior" and "gross misconduct" in office stemming from the misuse of his position as judge to influence litigants before his court, resulting in personal gain to Archbald. He was also charged with accepting a "large sum of money" from people likely "to be interested in litigation" in his court, and such conduct was alleged to "bring his . . . office of district judge into disrepute."[72] Archbald was also charged with accepting money "contributed . . . by various attorneys who were practitioners in the said court"; and appointing and maintaining as jury commissioner an attorney whom he knew to be general counsel for a potential litigant.[73]

Article XIII summarized Archbald's conduct both as district court judge and commerce court judge, charging that Archbald had used these offices "wrongfully to obtain credit," and charging that he had used the latter office to affect "various and diverse contracts and agreements," in return for which he had received hidden interests in said contracts, agreements, and properties.[74]

c. Proceedings in the Senate

The Senate found Archbald guilty of the charges in five of the thirteen articles, including the catch-all thirteenth. Archbald was removed from office and disqualified from holding any future office.[75]

11. DISTRICT JUDGE GEORGE W. ENGLISH (1925–1926)

a. Proceedings in the House

The House adopted a resolution in 1925 directing an inquiry into the official conduct of District Judge English. A subcommittee of the Judiciary Committee took evidence in 1925 and recommended impeachment.[76] In March 1926, the Judiciary Committee reported an impeachment resolution and five articles of impeachment.[77] The House adopted the impeachment resolution and the articles by a vote of 306 to 62.[78]

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[70] *Id.*
[71] *Id.*
[72] *Id.* 8906.
[73] *Id.*
[74] *Id.*
[75] S. Doc. No. 1140, 62d Cong., 3d Sess. 1620–49 (1913).
[76] H.R. Doc. No. 145, 69th Cong., 1st Sess. (1925).
[77] 67 Cong. Rec. 6280 (1926).
[78] *Id.* 6735.

Judge English resigned six days before the date set for trial in the Senate. The House Managers stated that the resignation in no way affected the right of the Senate to try the charges, but recommended that the impeachment proceedings be discontinued.[79] The recommendation was accepted by the House, 290 to 23.[80]

b. Articles of Impeachment

Article I charged that Judge English "did on divers and various occasions so abuse the powers of his high office that he is hereby charged with tyranny and oppression, whereby he has brought the administration of justice in [his] court . . . into disrepute, and . . . is guilty of misbehavior falling under the constitutional provision as ground for impeachment and removal from office." The article alleged that the judge had "willfully, tyrannically, oppressively and unlawfully" disbarred lawyers practicing before him, summoned state and local officials to his court in an imaginary case and denounced them with profane language, and without sufficient cause summoned two newspapermen to his court and threatened them with imprisonment. It was also alleged that Judge English stated in open court that if he instructed a jury that a man was guilty and they did not find him guilty, he would send the jurors to jail.

Article II charged that Judge English knowingly entered into an "unlawful and improper combination" with a referee in bankruptcy, appointed by him, to control bankruptcy proceedings in his district for the benefit and profit of the judge and his relatives and friends, and amended the bankruptcy rules of his court to enlarge the authority of the bankruptcy receiver, with a view to his own benefit.

Article III charged that Judge English "corruptly extended favoritism in diverse matters," "with the intent to corruptly prefer" the referee in bankruptcy, to whom English was alleged to be "under great obligations, financial and otherwise."

Article IV charged that Judge English ordered bankruptcy funds within the jurisdiction of his court to be deposited in banks of which he was a stockholder, director and depositor, and that the judge entered into an agreement with each bank to designate the bank a depository of interest-free bankruptcy funds if the bank would employ the judge's son as a cashier. These actions were stated to have been taken "with the wrongful and unlawful intent to use the influence of his . . . office as judge for the personal profit of himself" and his family and friends.

Article V alleged that Judge English's treatment of members of the bar and conduct in his court during his tenure had been oppressive to both members of the bar and their clients and had deprived the clients of their rights to be protected in liberty and property. It also alleged that Judge English "at diverse times and places, while acting as such judge, did disregard the authority of the laws, and . . . did refuse to allow . . . the benefit of trial by jury, contrary to his . . . trust and duty as judge of said district court, against the laws of the United States and in violation of the solemn oath which he had taken to administer equal and impartial justice." Judge English's conduct in making decisions and orders was alleged to be such "as to excite fear and distrust and to inspire a widespread belief, in and beyond his judicial district

[79] 68 Cong. Rec. 297 (1926).
[80] *Id.* 302.

. . . that causes were not decided in said court according to their merits," "[a]ll to the scandal and disrepute" of his court and the administration of justice in it. This "course of conduct" was alleged to be "misbehavior" and "a misdemeanor in office."

c. Proceedings in the Senate

The Senate, being informed by the Managers for the House that the House desired to discontinue the proceedings in view of the resignation of Judge English, approved a resolution dismissing the proceedings by a vote of 70 to 9.[81]

12. DISTRICT JUDGE HAROLD LOUDERBACK (1932–1933)

a. Proceedings in the House

A resolution directing an inquiry into the official conduct of District Judge Louderback was adopted by the House in 1932. A subcommittee of the Judiciary Committee took evidence. The full Judiciary Committee submitted a report in 1933, including a resolution that the evidence did not warrant impeachment, and a brief censure of the Judge for conduct prejudicial to the dignity of the judiciary.[82] A minority consisting of five Members recommended impeachment and moved five articles of impeachment from the floor of the House.[83] The five articles were adopted as a group by a vote of 183 to 143.[84]

b. Articles of Impeachment

Article I charged that Louderback "did . . . so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior." It alleged that Louderback used "his office and power of district judge in his own personal interest" by causing an attorney to be appointed as a receiver in bankruptcy at the demand of a person to whom Louderback was under financial obligation. It was further alleged that the attorney had received "large and exorbitant fees" for his services; and that these fees had been passed on to the person whom Louderback was to reimburse for bills incurred on Louderback's behalf.

Article II charged that Louderback had allowed excessive fees to a receiver and an attorney, described as his "personal and political friends and associates," and had unlawfully made an order conditional upon the agreement of the parties not to appeal from the allowance of fees. This was described as "a course of improper and unlawful conduct as a Judge." It was further alleged that Louderback "did not give his fair, impartial, and judicial consideration" to certain objections; and that he "was and is guilty of a course of conduct oppressive and unjudicial."

Article III charged the knowing appointment of an unqualified person as a receiver, resulting in disadvantage to litigants in his court.

Article IV charged that "misusing the powers of his judical office for the sole purpose of enriching" the unqualified receiver mentioned in Article III, Louderback failed to give "fair, impartial, and judicial

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[81] *Id.* 344, 348.
[82] 76 Cong. Rec. 4913 (1933); H.R. Rep. No. 2065, 72d Cong., 2d Sess. 1 (1933).
[83] 76 Cong. Rec. 4914 (1933); H.R. Rep. No. 2065, 72d Cong., 2d Sess. 13 (1933).
[84] 76 Cong. Rec. 4925 (1933).

consideration" to an application to discharge the receiver; that "sitting in a part of the court to which he had not been assigned at the time," he took jurisdiction of a case although knowing that the facts and law compelled dismissal; and that this conduct was "filled with partiality and favoritism" and constituted "misbehavior" and a "misdemeanor in office."

Article V, as amended, charged that "the reasonable and probable result" of Louderback's actions alleged in the previous articles "has been to create a general condition of widespread fear and distrust and disbelief in the fairness and disinterestedness" of his official actions. It further alleged that the "general and aggregate result" of the conduct had been to destroy confidence in Louderback's court, "which for a Federal judge to destroy is a crime and misdemeanor of the highest order." [85]

c. Proceedings in the Senate

A motion by counsel for Judge Louderback to make the original Article V more definite was consented to by the Managers for the House, resulting in the amendment of that Article.[86]

Some Senators who had not heard all the testimony felt unqualified to vote upon Articles I through IV, but capable of voting on Article V, the omnibus or "catchall" article.[87]

Judge Louderback was acquitted on each of the first four articles, the closest vote being on Article I (34 guilty, 42 not guilty). He was then acquitted on Article V, the vote being 45 guilty, 34 not guilty—short of the two-thirds majority required for conviction.

13. DISTRICT JUDGE HALSTED L. RITTER (1933–1936)

a. Proceedings in the House

A resolution directing an inquiry into the official conduct of District Judge Ritter was adopted by the House in 1933.[88] A subcommittee of the Judiciary Committee took evidence in 1933 and 1934. A resolution that Ritter "be impeached for misbehavior, and for high crimes and misdemeanors," and recommending the adoption of four articles of impeachment, was reported to the full House in 1936, and adopted by a vote of 181 to 146.[89] Before trial in the Senate, the House approved a resolution submitted by the House Managers, replacing the fourth original articles with seven amended ones, some charging new offenses.[90]

b. Articles of Impeachment

Article I charged Ritter with "misbehavior" and "a high crime and misdemeanor in office," in fixing an exorbitant attorney's fee to be paid to Ritter's former law partner, in disregard of the "restraint of propriety . . . and . . . danger of embarrassment"; and in "corruptly and unlawfully" accepting cash payments from the attorney at the time the fee was paid.

Article II charged that Ritter, with others, entered into an "arrangement" whose purpose was to ensure that bankruptcy property

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[85] 77 Cong. Rec. 1857, 4086 (1933).
[86] *Id.* 1852, 1857.
[87] *Id.* 4082.
[88] *Id.* 4575.
[89] 80 Cong. Rec. 3066–3092 (1936).
[90] *Id.* 4597–4601.

would continue in litigation before Ritter's court. Rulings by Ritter were alleged to have "made effective the champertous undertaking" of others, but Ritter was not himself explicitly charged with the crime of champerty or related criminal offenses. Article II also repeated the allegations of corrupt and unlawful receipt of funds and alleged that Judge Ritter "profited personally" from the "excessive and unwarranted" fees, that he had received a free room at a hotel in receivership in his court, and that he "wilfully failed and neglected to perform his duty to conserve the assets" of the hotel.

Article III, as amended, charged Ritter with the practice of law while on the bench, in violation of the Judicial Code. Ritter was alleged to have solicited and received money from a corporate client of his old law firm. The client allegedly had large property interests within the territorial jurisdiction of Ritter's court. These acts were described as "calculated to bring his office into disrepute," and as a "high crime and misdemeanor."

Article IV, added by the Managers of the House, also charged practice of law while on the bench, in violation of the Judicial Code.

Articles V and VI, also added by the Managers, alleged that Ritter had violated the Revenue Act of 1928 by willfully failing to report and pay tax on certain income received by him—primarily the sums described in Articles I through IV. Each failure was described as a "high misdemeanor in office."

Article VII (*former Article IV amended*) charged that Ritter was guilty of misbehavior and high crimes and misdemeanors in office because "the reasonable and probable consequence of [his] actions or conduct . . . as an individual or . . . judge, is to bring his court into scandal and disrepute," to the prejudice of his court and public confidence in the administration of justice in it, and to "the prejudice of public respect for and confidence in the Federal judiciary," rendering him "unfit to continue to serve as such judge." There followed four specifications of the "actions or conduct" referred to. The first two were later dropped by the Managers at the outset of the Senate trial; the third referred to Ritter's acceptance (not alleged to be corrupt or unlawful) of fees and gratuities from persons with large property interests within his territorial jurisdiction. The fourth, or omnibus, specification was to "his conduct as detailed in Articles I, II, III and IV hereof, and by his income-tax evasions as set forth in Articles V and VI hereof."

Before the amendment of Article VII by the Managers, the omnibus clause had referred only to Articles I and II, and not to the criminal allegations about practice of law and income tax evasion.

c. Proceedings in the Senate

Judge Ritter was acquitted on each of the first six articles, the guilty vote on Article I falling one vote short of the two-thirds needed to convict. He was then convicted on Article VII—the two specifications of that Article not being separately voted upon—by a single vote, 56 to 28.[21] A point of order was raised that the conviction under Article VII was improper because on the acquittals on the substantive charges of Articles I through VI. The point of order was overruled by the Chair, the Chair stating, "A point of order is made as to Article VII

[21] S. Doc. No. 200, 74th Cong., 2d Sess. 637–38 (1936).

in which the respondent is charged with general misbehavior. It is a separate charge from any other charge." [97]

d. Miscellaneous

After conviction, Judge Ritter collaterally attacked the validity of the Senate proceedings by bringing in the Court of Claims an action to recover his salary. The Court of Claims dismissed the suit on the ground that no judicial court of the United States has authority to review the action of the Senate in an impeachment trial.[98]

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[97] *Id.* 638.
[98] Ritter v. United States, 84 Ct. Cl. 293, 300, *cert denied*, 300 U.S. 668 (1936).

APPENDIX C

Secondary Sources on the Criminality Issue

The Association of the Bar of the City of New York, *The Law of Presidential Impeachment and Removal* (1974). The study concludes that impeachment is not limited to criminal offenses but extends to conduct undermining governmental integrity.

Bayard, James, *A Brief Exposition of the Constitution of the United States*, (Hogan & Thompson, Philadelphia, (1833). A treatise on American constitutional law concluding that ordinary legal forms ought not to govern the impeachment process.

Berger, Raoul, *Impeachment: The Constitutional Problems*, (Harvard University Press, Cambridge, 1973). A critical historical survey of English and American precedents concluding that criminality is not a requirement for impeachment.

Bestor, Arthur, "Book Review, Berger, *Impeachment: The Constitutional Problems*," 49 *Wash. L. Rev.* 225 (1973). A review concluding that the thrust of impeachment in English history and as viewed by the framers was to reach political conduct injurious to the commonwealth, whether or not the conduct was criminal.

Boutwell, George, *The Constitution of the United States at the End of the First Century*, (D. C. Heath & Co., Boston, 1895). A discussion of the Constitution's meaning after a century's use, concluding that impeachment had not been confined to criminal offenses.

Brant, Irving, *Impeachment: Trials & Errors*, (Alfred Knopf, New York, 1972). A descriptive history of American impeachment proceedings, which concludes that the Constitution should be read to limit impeachment to criminal offenses, including the common law offense of misconduct in office and including violations of oaths of office.

Bryce, James, *The American Commonwealth*, (Macmillan Co., New York, 1931) (reprint). An exposition on American government concluding that there was no final decision as to whether impeachment was confined to indictable crimes. The author notes that in English impeachments there was no requirement for an indictable crime.

Burdick, Charles, *The Law of the American Constitution*, (G. T. Putnam & Sons, New York, 1922). A text on constitutional interpretation concluding that misconduct in office by itself is grounds for impeachment.

Dwight, Theodore, "Trial by Impeachment." 6 *Am. L. Reg.* (*N.S.*) 257 (1867). An article on the eve of President Andrew Johnson's impeachment concluding that an indictable crime was necessary to make out an impeachable offense.

Etridge, George, "The Law of Impeachment." 8 *Miss. L. J.* 283 (1936). An article arguing that impeachable offenses had a definite meaning discoverable in history, statute and common law.

Feerick, John, "Impeaching Federal Judges: A Study of the Constitutional Provisions," 39 *Fordham L. Rev.* 1 (1970). An article concluding that impeachment was not limited to indictable crimes but extended to serious misconduct in office.

Fenton, Paul, "The Scope of the Impeachment Power," 65 *Nw. U. L. Rev.* 719 (1970). A law review article concluding that impeachable offenses are not limited to crimes, indictable or otherwise.

Finley, John and John Sanderson, *The American Executive and Executive Methods*, (Century Co., New York, 1908). A book on the presidency concluding that impeachment reaches misconduct in office, which was a common law crime embracing all improprieties showing unfitness to hold office.

Foster, Roger, *Commentaries on the Constitution of the United States*, (Boston Book Co., Boston, 1896), vol. I. A discussion of constitutional law concluding that in light of English and American history any conduct showing unfitness for office is an impeachable offense.

Lawrence, William, "A Brief of the Authorities upon the Law of Impeachable Crimes and Misdemeanors," *Congressional Globe Supplement*, 40th Congress, 2d Session, at 41 (1868). An article at the time of Andrew Johnson's impeachment concluding that indictable crimes were not needed to make out an impeachable offense.

Note, "The Exclusiveness of the Impeachment Power under the Constitution," 51 *Harv. L. Rev.* 330 (1937). An article concluding that the Constitution included more than indictable crimes in its definition of impeachable offenses.

Note, "Vagueness in the Constitution: The Impeachment Power," 25 *Stan. L. Rev.* 908 (1973). This book review of the Berger and Brant books concludes that neither author satisfactorily answers the question whether impeachable offenses are limited to indictable crimes.

Pomeroy, John, *An Introduction to the Constitutional Law of the United States*, (Hurd and Houghton, New York 1870). A consideration of constitutional history which concludes that impeachment reached more than ordinary indictable offenses.

Rawle, William, *A View of the Constitution of the United States*, (P. H. Nicklin, Philadelphia, 1829, 2 vol. ed.). A discussion of the legal and political principles underlying the Constitution, concluding on this issue that an impeachable offense need not be a statutory crime, but that reference should be made to non-statutory law.

Rottschaefer, Henry, *Handbook of American Constitutional Law*, (West, St. Paul, 1939). A treatise on the Constitution concluding that impeachment reached any conduct showing unfitness for office, whether or not a criminal offense.

Schwartz, Bernard, *A Commentary on the Constitution of the United States*, vol. I, (Macmillan, New York, 1963). A treatise on various aspects of the Constitution which concludes that there was no settled definition of the phrase "high Crimes and Misdemeanors," but that it did not extend to acts merely unpopular with Congress. The author suggests that criminal offenses may not be the whole content of the Constitution on this point, but that such offenses should be a guide.

Sheppard, Furman, *The Constitutional Textbook*, (George W. Childs, Philadelphia, 1855). A text on Constitutional meaning concluding that impeachment was designed to reach any serious violation of public trust, whether or not a strictly legal offense.

Simpson, Alex., *A Treatise on Federal Impeachments*, (Philadelphia Bar Association, Phila., 1916) (reproduced in substantial part in 64 *U.Pa.L.Rev.* 651 (1916)). After reviewing English and American impeachments and available commentary, the author concludes that an indictable crime is not necessary to impeach.

Story, Joseph, *Commentaries on the Constitution of the United States*, vol. 1, 5th edition, (Little, Brown & Co., Boston 1891). A commentary by an early Supreme Court Justice who concludes that impeachment reached conduct not indictable under the criminal law.

Thomas, David, "The Law of Impeachment in the United States," 2 *Am. Pol. Sci. Rev.* 378 (1908). A political scientist's view on impeachment concluding that the phrase "high Crimes and Misdemeanors" was meant to include more than indictable crimes. The author argues that English parliamentary history, American precedent, and common law support his conclusion.

Tucker, John, *The Constitution of the United States*, (Callaghan & Co., Chicago, 1899), vol. 1. A treatise on the Constitution concluding that impeachable offenses embrace willful violations of public duty whether or not a breach of positive law.

Wasson, Richard, *The Constitution of the United States: Its History and Meaning* (Bobbs-Merrill, Indianapolis, 1927). A short discussion of the Constitution concluding that criminal offenses do not exhaust the reach of the impeachment power of Congress. Any gross misconduct in office was thought an impeachable offense by this author.

Watson, David, *The Constitution of the United States*. (Callaghan & Co., Chicago, 1910), volumes I and II. A treatise on Constitutional interpretation concluding that impeachment reaches misconduct in office whether or not criminal.

Wharton, Francis, *Commentaries on Law*, (Kay & Bro., Philadelphia, 1884). A treatise by an author familiar with both criminal and Constitutional law. He concludes that impeachment reached willful misconduct in office that was normally indictable at common law.

Willoughby, Westel. *The Constitutional Law of the United States*, vol. III, 2nd edition. (Baker, Voorhis & Co., New York, 1929). The author concludes that impeachment was not limited to offenses made criminal by federal statute.

Yankwich, Leon, "Impeachment of Civil Officers under the Federal Constitution," 26 *Geo. L. Rev.* 849 (1938). A law review article concluding that impeachment covers general official misconduct whether or not a violation of law.

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Mr. HYDE. Thank you, Mr. Chairman.

A word, if I may, in conclusion about the significance of the oath each of us swore to uphold when we became Members of Congress. We raised our right arms and said, "I do solemnly swear I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter so help me God."

Traditionally an oath means a solemn calling on God to witness the truth of what you are saying. We all know well the story of Sir Thomas More, who was beheaded in the Tower of London for refusing to take the oath of supremacy that acknowledged Henry VIII as head of the Church of England. In the great drama of his life, "A Man for All Seasons", Sir Thomas tells his daughter, when you take an oath, you hold your soul in your hands, and if you break that oath, you open up your fingers, and your soul runs through them and is lost.

I believe with all my heart that each of us took that oath of office seriously, that we will so conduct ourselves that when this ordeal is over, we will have vindicated the rule of law and brought credit to this institution in which we are so privileged to serve.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Hyde, for those eloquent remarks.

The CHAIRMAN. And now we will go to the other equally distinguished member of the Judiciary Committee, John Conyers, and you may take whatever time you want. Your entire statement will appear in the record.

STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. CONYERS. Thank you, Chairman Solomon and members of the committee.

I want to thank Henry Hyde, the Chairman of the Judiciary Committee, for, along with the Speaker at our meeting of 24 hours ago, it seems like a lot longer than that now, in which I was very pleased to hear the Speaker make a couple of observations that bear repeating here. He said, I will take stringent action against any Member who speaks in an unseemly fashion against the President of the United States off or on the floor. He didn't say that for the benefit of Democrats or the public. He said that because he believed that this should be the kind of environment in which the materials of the independent counsel be brought to us.

He also pledged that he realized the value of bipartisanship, and that without it any politicization of these hearings squander the great mandate that we have in the Congress, all of us.

And so we meet here this evening for the very first test of the fairness doctrine that all of us in that meeting yesterday morning in the Speaker's office pledged ourselves to. And so I want to ask you all to concern yourself with me as to whether we are going to meet the fairness test or not.

Now, there is an initial question that I cannot leave this hearing without putting forward, and that is the very simple fact that the House of Representatives is not the U.S. Postal Service. We are not a delivery system for Kenneth W. Starr. We ought not, we cannot, we should not release anything to anybody unless we know what it is we are releasing. This cannot be an, oops, I am sorry, we didn't know. And so inadvertently in our discussions we have now sanctified the first 445 pages that we are now going to release to the planet Earth and nobody here has any idea of what is contained. We do know that there are prosecutorial comments, that there are allegations, that there are assertions. Obviously we haven't been 5 years and waiting for a report that would not contain these kinds of assertions.

But as to their validity and accuracy, Mr. Chairman and Members, nobody knows. Nobody. We don't know. And so I would hope that there may be sympathy within this hearing today to recognize that for us to dump the first 445 pages and then tell everybody about how carefully we are going to scrutinize the other several thousand pages does not comport to the lofty goals that we should have, in my view.

Now, there is one other small detail, and it is probably semantical, but this is not the beginning of an impeachment inquiry. The Chairman very accurately made it clear. For those of you who think we are going into an impeachment inquiry, there are several possibilities. One of them is you may be profoundly disappointed or relieved that nothing like that ever happens because every word, every sentence, every assertion, every allegation in all of the thousands of pages, the 17 boxes included, are going to be carefully reviewed and scrutinized.

Now, there is, as likely as any other scenario, a possibility that there is nothing that comes within 500 miles of an article of impeachment in any of this material. Maybe. We don't know.

And so what the independent counsel has done is his duty under the law that was written in the Judiciary Committee that he deliver these materials, whatever they may say, whatever views he may have, and that is his duty and privilege to send them to us.

It does not indicate that we go—as a matter of fact, there has to be a vote in the Judiciary Committee after we inquire into this, whether we hold executive sessions or whatever methods yet to be determined that we resort to, how we will come to a conclusion of what it is we are to do. So I think it is very important that that be understood.

Now, I referred to the dean of the House of Representatives in a very personal way. I have known John Dingell and his family long before I came to Congress, and I agree that we should make—as he does—that we should make all of the materials available as immediately as possible. I do not share the view that we should not look at anything because Kenneth W. Starr, a person with whom I have had from the floor of the House many discussions, I have never had the pleasure of meeting him, and it may not be unlikely that we may have to meet him before these proceedings are through, but he said two things in his transmittal letter. One, this is not a report, this is a referral. And he said this referral contains

confidential material and material protected from disclosure by rule 6(e) of the Rules of Federal Criminal Procedure.

He additionally said that many of the supporting materials contain information of a personal nature that I respectfully urge the House to treat as confidential.

Ladies and gentlemen, what he has told us is that we have to review everything to make sure that we observe the conditions that he has set when he sent the letter of transmittal. That is not my theory, that is his statement. And I think that if there is any way we can review the fact of getting out the 445 pages, every Member and every one of the 270 million people in America have waited into the fifth year for this report. Now, can somebody explain to me what danger will befall a Member of Congress if we adhere to what the independent counsel himself has told us to do, that we review the 445 pages? We are not looking to excise anything. We can look at those in less than a 24–hour–day period, and hopefully there is nothing objectionable. I am not looking for reasons to delete or excise, but I have the same concerns that have been so skillfully and eloquently articulated by Chairman Henry Hyde.

So I am urging that we do two things: That we consider the agreements that we have made already between the Speaker and the Minority Leader and the Chairman and the Ranking Member; that we appreciate that as this rule is written, we are not comporting to the agreements that have already been entered into. I am sorry, I wish I could say it in some other way.

This—if we start off with a broken promise, I can tell you quite frankly what I fear. I would like the first vote that we have on this subject to be as bipartisan as possible. That is my hope. I want to support the rule. I want it to be on record. If we decide that the President of the United States is not to receive the 10–day rule to find out what's going on before everyone, then he doesn't even get the 2–day rule, and now we have had them asking for a 1–hour rule. They—I mean what are we here for?

I urge my colleagues, with the greatest sincerity that I have, as equal to the statements that you have all made about your recognition of the gravity of this matter, but to tell the President of the United States that he can find out what the charges are on the Internet seems to me to forget the—I don't call it generosity that was given to the Speaker of the House before the Ethics Committee in which he got 7 days to respond. We give this to everybody as a matter of courtesy. I can't tell my constituents that want to know what happened that the President doesn't need to know, he can read it the same time you read it.

I think this is a breach of fairness, and I would hope that you would consider it in the spirit in which I'm sharing it with you. The fact of the matter is that fundamental fairness is the guide to what we are going to be doing here.

Now fairness isn't something that is just good and moral and decent. Fairness also leads to a wider understanding of the issues that are before us. After all, we are going to hear the other side, and they are entitled to hear the other side.

And so I think that this problem can be resolved. I hope that it is resolved so that the Members here that have been proud to indicate this as an example of the system working will help us lead to

the fairness that will make the system work. Because if the first vote is not bipartisan, I think it sends a signal that is not what we desire. It doesn't say that we're shot or—I don't predict dire consequences.

But I think that the history of the beginning of this, Chairman Solomon, and you served here for a couple decades, this is a historic moment for those Members who may not be serving any longer. And I would like to say as many good things about you and your career, as you have benefited us with your kindness and your confidence as we appear here today, and I thank you for the time very much.

The CHAIRMAN. Well, thank you, John Conyers, and thank you, Henry Hyde, for your very professional testimony, but more than that your sincere testimony, and we know it comes from both your hearts.

Let me just respond briefly. You both spoke of decorum in the House and the committees. You both spoke of Speaker Gingrich's statement on the floor of the House urging and demanding, as a matter of fact, Members show proper decorum and proper respect for the presidency.

In light of that, I had prepared an additional statement which I would ask unanimous consent to submit for the record—without objection, it will be—which sets forth many of the things that have been said where Members' words were taken down, going all the way back to the year 1811, as examples of what you cannot say. And then it cites some of the things that were upheld by the Chair that could be said, and we would make that available for the record.

[The information follows:]

CONGRESSMAN JERRY SOLOMON

New York

Rules Committee Chairman,

House of Representatives

Decorum in the House and in Committees

Members should remember that under clause 1(a)(1) of Rule XI, the rules of the House are the rules of its committees so far as applicable. This means that Members should comport themselves with the rules of decorum and debate in the House and in Committees specifically with regard to references to the President of the United States as stated in Sec. 370 of the House Rules and Manual.

As stated in the Speaker's announcement, with the concurrence of the Minority Leader, on the House floor this morning, Members engaging in debate must abstain from language that is personally offensive toward the President, including references to various types of ethical behavior.

As stated in Cannon's Precedents, on January 27, 1909, the House adopted a report in response to improper references in debate to the President. That report read in part as follows:

"It is... the duty of the House to require its Members in speech or debate to preserve that proper restraint which will permit the House to conduct its business in an orderly manner and without unnecessarily and unduly exciting animosity among its Members or antagonism from those other branches of the Government with which the House is correlated."

As a guide for debate, it is permissible in debate to challenge the President on matters of policy. The difference is one between political criticism and personally offensive criticism. For example, a Member may assert in debate that an incumbent President is not worthy of re-election, but in doing so should not allude to personal misconduct. By extension, a Member may assert in debate that the House should conduct an inquiry, or that a President should not remain in office.

Under section 370 of the House Rules and Manual it has been held that a Member could:

- refer to the government as "something hated, something oppressive."
- refer to the President as "using legislative or judicial pork."
- refer to a Presidential message as a "disgrace to the country."
- refer to unnamed officials as "our half-baked nitwits handling foreign affairs."

Likewise, it has been held that a Member could not:

- **call the President a "liar."**
- **call the President a "hypocrite."**
- **describe the President's veto of a bill as "cowardly."**
- **charge that the President has been "intellectually dishonest."**
- **refer to the President as "giving aid and comfort to the enemy."**
- **refer to alleged "sexual misconduct on the President's part."**

In order to most judiciously fulfill our duties, I encourage all Members to abide by these rules of decorum in this debate.

The CHAIRMAN. We want to assure both of you that we certainly will be consulting with you, as I said during my opening statement, with you, both majority and minority, and as well as the Rules Committee, majority and minority, as we develop the second resolution which probably will come on the floor some time next week.

You spoke, John, of the concern about other members of the Judiciary Committee having access to material and suggesting, as did Henry Hyde, that it be confined to just the two of you, and we could do that, we could consider that. But we have differences of opinion in both political parties in doing that.

We have Members who feel that if they are going to make a conclusion, ratify your conclusion of whether to go forward or whether not to go forward, they—and when I say they, more than 40 Democrats have come to me, John Dingell being one. I think we had a Member, Peter Deutsch sitting here from Florida, who will testify a little bit later that he wants an amendment to our resolution that would require that the entire communication received, and including all appendices and related material, be made available immediately.

What we are trying to do is to reach a bipartisan compromise, which you have spoken to, so that we can please as many Members as we can so that when we go to the floor it will truly be a bipartisan resolution. And I believe that from the concessions that I personally have made, Members on both sides of the aisle have made, some as recently as an hour ago when we removed terms like "ancillary" from the resolution, we have tried to cooperate in every way possible to make it a truly bipartisan resolution, and I believe it will pass overwhelmingly on the floor with very few dissenting votes.

The reason I would not hesitate to make it available to other members of your committee is that they are proud, distinguished Members on both sides of the aisle. I have had the privilege for the last 15 or 16 years of serving on the Steering Committee of the Republican Party in choosing members to serve on committees, and we do so the same as the Democratic Party does. I think Martin Frost has served on a similar committee on your side, and we choose Members because of their background, because of their qualifications and because of their talents to serve on these committees.

I see Bobby Scott from Newport News in the back, a distinguished lawyer, was chosen by your party, just for an example. I see Amo Houghton, who was a very distinguished business leader before he came to this Congress, and I personally nominated him and was successful in placing him on the Ways and Means Committee because he probably is the most knowledgeable person in the entire Congress. So we do not hesitate to make that information available to your members of your committee in order that they can make the same kind of decisions that allowed you to come to your conclusion.

And by the same token, I just have to say in closing that all of the 435 Members feel very strongly that they should be able to have the same information available to them that caused you as members of the Judiciary Committee to draw your conclusion. To

give them less puts them at a disadvantage on being able to cast an informed vote.

And that is why you are charged in this resolution to make available the maximum amount of information that is being given to you exclusively and not made available to the public, and we know of your concerns, which are our concerns, about innocent people. We know that there are ongoing criminal investigations, perhaps. All of these things have to be scrutinized by you, and we feel for you in knowing that is a difficult job.

But I personally will take your recommendations into consideration when you come back and you ask to have certain information expunged. We will go along with your recommendations because of the great respect we have for you two gentlemen and your committee.

So I want you to know that as we process this resolution today, and I deeply appreciate your testimony.

Mr. Moakley of Boston, Massachusetts.

Mr. MOAKLEY. Thank you Mr. Chairman.

Mr. Chairman, and I would like to address this to Chairman Hyde and to Mr. Conyers: It is my understanding that the Speaker and the Minority Leader, along with you and Mr. Conyers and others, had an agreement that the Chairman and the Ranking Member would go through this material before they decided whether it was relevant or not, before they would expose it to the rest of the Judiciary Committee.

Am I correct?

The CHAIRMAN. No.

Mr. HYDE. I don't want to say it was an agreement. That was my understanding of how—how it would work. That has been a moveable feast, and discussions have gone on to which I was not a party and I don't think John was, between Mr. Gephardt and Mr. Gingrich, and I don't know what they came up with.

The advantage of having Mr. Conyers and myself and our designated staff is one of expedition, one of minimizing the opportunities for leaks. I know that sounds hyperbolic about members of our committee and I don't like to say that, but the more people in the loop, the more opportunities for unintentional leaks. But I can live with the other provision. I just—

Mr. MOAKLEY. Mr. Hyde, I know what you can live with but I thought the agreement last night was what I just stated.

Mr. HYDE. I don't gainsay that, but maybe it was.

Mr. MOAKLEY. You were there.

Mr. HYDE. Well, sure, I was there.

The CHAIRMAN. He was there for most of the meeting—for all of the meeting.

Mr. MOAKLEY. All right; do you agree?

The CHAIRMAN. No. As a matter of fact, I don't like to speak for other Members especially—

Mr. MOAKLEY. No, I just want your opinion.

The CHAIRMAN. —Other Members of the other party. But I just have to say that Mr. Gephardt, when he left the meeting, said that he could not agree to anything at that point because he had to go back and he had to talk to members from both opinions on the Judiciary Committee and members of the leadership, and no decision

was made. But I was in that conversation all during the meeting and I can tell you that no decision was made.

Mr. FROST. Will the gentleman yield?

Mr. MOAKLEY. Glad to yield.

Mr. FROST. As the gentleman knows, the gentleman from Massachusetts was not able to be present last night because he had to be in Massachusetts to attend a funeral. I was there on his behalf. The people in the room were the Speaker, the Majority Leader, the Minority Leader, the two gentlemen at this table, myself and Mr. Solomon.

The Speaker at that meeting said that this was what he was proposing. Mr. Gephardt went back to the members of the Judiciary Committee. Mr. Gephardt had to leave town today to attend his son's wedding. When he—when he left town—when he left town it was Mr. Gephardt's understanding that the agreement was as described by Mr. Hyde; that the two Members at the table would review the documents, not the entire committee.

The Speaker appeared on television at noon today. I watched his appearance, and the Speaker said at noon today that it would be the two gentlemen who would review the material, not the entire committee.

Some time after that the majority on this committee changed the agreement between the Speaker and the Minority Leader. It is very important that we act in a bipartisan manner. The two gentlemen at the table have attempted to do so, Mr. Gephardt has attempted to do so, I believe the Speaker was attempting to do so, but for some reason unexplained the majority on this committee has changed the agreement made between Mr. Gephardt and the Speaker.

The CHAIRMAN. Would the gentleman yield at that point?

Mr. MOAKLEY. I yield.

The CHAIRMAN. I would just have to differ with my very good friend, Mr. Martin Frost of Texas. The fact is that there is divided opinion on this in both parties. You are going to hear testimony, again, from my good friend Peter Deutsch who will return in a moment, a Democrat who disagrees with that and who thinks we ought to make all the information available immediately. We are trying to arrive at a bipartisan agreement that will receive the strongest vote possible, as I alluded to before, and I believe that it will.

Now if you want to test this, you know first of all, and this is confusing to perhaps the listening audience, but we are not considering a rule here today, we are considering a privileged resolution. We will go to the floor not with a rule but with a privileged resolution, and we do so under existing rules of the House.

The privileged resolution is not amendable when you take it to the floor, and therefore any change that we were to make up here would have to be with a vote of this— a majority vote of this committee would then take that amendment to the floor and have it ratified separately on the floor. We will not do that. We will take this resolution to the floor.

Should the opposition party want to make a change, they could attempt to defeat the previous question to try to offer an amendment. And if you want to test this on the floor to see if your party,

if they agree with you, fine, and we certainly would not hesitate to have you do that.

Mr. MOAKLEY. Mr. Chairman, I thank you for informing the people what the procedure is, and we agree. And we don't want to test anything. I just want to get my own mind, my feeling— my information was that we had an agreement, and if we don't have that agreement any longer— of course I know if it comes to a vote up here, we lose, but I thought this was the agreement that was entered into.

Mr. Conyers.

Mr. CONYERS. Mr. Moakley, let me point out to you why that agreement was entered into repeatedly by the Speaker, the leaders and myself and the Chairman. It is because you cannot talk about excising material, if that need arises, with 35 Members of Congress. I don't care how much integrity they have. This is a simple administrative procedure.

It is tough enough. We have already worked out what happens if we disagree, and the agreement was we would take it to the Speaker for resolution. We wouldn't even subject the committee to what could be rancorous votes.

So it is not that the Chairman and I are trying to devise ways to get more work and have more responsibility and be eligible for more criticism. It is just the simplest way to proceed.

Mr. MOAKLEY. I understand exactly what the purpose of the agreement was, and that is why I am making it here today, because I know that if we have to do this by an amendment before this committee, of course it is a 9 to 4 vote against us. But I am just trying to uphold the will of the Speaker as I heard it and as I assumed it was.

The CHAIRMAN. Would the gentleman yield?

Mr. MOAKLEY. I think Mr. Hyde—

Mr. HYDE. Might I just make this quick suggestion?

It is very important that we have a pre–release review of the supporting material if we are to protect innocent people. Now what we are arguing about is the makeup of the reviewers. Whether it is Mr. Conyers and myself and our designated staff— I don't propose to put blue jeans on and stay there for 2 weeks going through cartons, but I would have staff help. That is why we hired them, that is why they get those big bucks. But the dispute is whether 35 members of the committee would have equal access and we would stumble over each other trying to do this, or whether we do it effectively and efficiently, and at the end of that period release everything and make everything available to the other Members.

Now what will pass the floor? Maybe Mr. Deutsch's remarks, which would have Mr. Dingell's support, Mr. Pombo's support. I could name several who want to go that route, and we lose the— entirely the pre–release review. That would be the worst scenario. So maybe we debate it on the floor and whoever wins, wins. But we don't want to lose the pre–release review if we want to be responsible in protecting—

Mr. MOAKLEY. Yes, I yield, Mr. Chairman.

The CHAIRMAN. Well, I am just going to have to object to all of you talking about an agreement. There has been no agreement. And, again, I don't like to put words in other people's mouths, but

Mr. Gephardt near the end of the meeting was of the opinion that the majority of his party was in favor of the Deutsch approach, which was to release all of the information. You all sat there, you heard him say that. And that is why a little while after that he said, "Well, there is no agreement, we'll have to go talk to our Members." And that is why we have proceeded as we have.

I can assure you that from all of the Democratic Members that have contacted this office and all of the Republicans, a majority of the Republicans who would like to make all of this information available immediately, we just cannot do that because of the very reasons that you have stated. And by the same token, Mr. Gingrich, the Speaker is of the opinion that you two, being the type of individuals you are, will influence the Members of your party and they will take your advice as far as information that is going to be released or not released. And that is why we have you gentleman where you are today and we hold you in that great respect.

Mr. Dreier.

Mr. DREIER. Thank you very much, Mr. Chairman.

If I could just make a brief comment on this: in your opening statement, Henry, you talked about a bias for openness, and we really should pursue that. As every member of this committee praised you as Chairman, we know how influential you are, and we are convinced that you would clearly be able to ensure—go ahead.

Mr. HYDE. This is known as the perfumed ice pick.

Mr. DREIER. Henry, you used to always teach me to smile as you stick the needle in, as you used to put it. Right. Yes, you taught me this.

So I am convinced, as one of your protegees, Henry, that you obviously will be able to prevail on those Members. And then of course, as was said by the Chairman in his opening remarks, we are in uncharted waters here, and it seems to me that your bias for openness is obviously the route for us to take.

The CHAIRMAN. Mr. Frost.

Mr. FROST. Mr. Solomon, I am very concerned because at the beginning of this proceeding today everyone talked about bipartisanship. Bipartisanship is essential if we are to have a fair proceeding and a proceeding that is accepted by the American public.

The Speaker at noon today on CNN announced that an agreement had been made and that the two gentlemen at this table would be reviewing the documents. The Minority Leader, Mr. Gephardt, left town with that understanding, that that was the agreement. The majority on this committee has taken it upon itself to supersede the agreement between Mr. Gephardt and the Speaker. That is a terrible way to start this proceeding. We must act in a bipartisan manner.

Henry Hyde is an extraordinarily honorable man and it was very clear that Chairman Hyde prefers, though is not insisting, that the agreement—that we execute the agreement as made by the two leaders and that he and Mr. Conyers have the opportunity to review this material. For some reason the majority on this committee does not want to see that happen.

And I would plead with my colleagues on this committee on the other side that this must be a bipartisan proceeding. We had an agreement between the leaders of the two parties, between Minor-

ity Leader Gephardt and Speaker Gingrich, and we should not reverse that agreement in this proceeding this evening.

The CHAIRMAN. Mr. Frost, let me just respond by saying that you know very well that if we were to go beyond precedent of the past and we were to give these two gentleman the special authority to review that information and not other members of the committee, I can assure you that there would be criticism similar to what transpired not more than 2 hours ago up in the press gallery over here, when there were two different members of your party saying that the committee was about to restrict other members.

Now I could assure you if we went along with what you are requesting, sure, it would please Mr. Conyers, it would please Mr. Hyde perhaps, but it would not please a number of your committee members who would attack us as being unfair to the minority. We are just not going to do that. We are going to leave it open to every member of that committee and trust their judgment.

Mr. FROST. Mr. Solomon, I would respond that there is no precedent in this particular area for how you proceed. This is not a question of adhering to some past precedent. This is a question of using judgment and acting in a bipartisan manner.

The leaders of the two parties in this House speak for their parties and reached an agreement, and now we would seek to reverse that agreement and that is a bad idea.

Mr. HYDE. If I may just say this—

The CHAIRMAN. Mr. Hyde.

Mr. HYDE. —I am entirely sympathetic with your point of view, and of course I am sympathetic with my point of view. The last thing we want to do is to lose the pre–release review. We could lose it if there is a concern that our way is too restrictive and so the other Members—now there are some other members of the Judiciary here. You might ask them their sentiments. But it is a matter of the votes on the floor, really, in the last analysis, and Mr. Solomon is concerned I think that we could lose the whole thing to a Mr. Deutsch amendment, and that is the worst result in terms of protecting innocent people.

So we ought to consider that. I don't think anybody is trying to stiff anybody. We are trying to pragmatically work this thing through for the best for everyone.

The CHAIRMAN. And I sort of resent the inference that someone is being stiffed.

Mr. Goss.

Mr. GOSS. Mr. Chairman, I didn't have anything further to say on this, except I think that there may be some mistake and some miscommunication on what it was that was going to be reviewed. As a member of the majority of this committee it has always been my understanding that the executive part of it would be released to the public, their right to know, at the time the resolution was passed.

Mr. FROST. No question about that.

Mr. GOSS. That is fine. Then it is just the other stuff, and then the only issue is whether it is going to be Mr. Hyde and Mr. Conyers or whether it is going to be Mr. Hyde, Mr. Conyers, augmented, and how we are going to deal with it next week.

Mr. FROST. If the gentleman will yield, that is in this resolution.

Mr. GOSS. I don't think it is that critical of a point. I mean, whether it is going to be Mr. Hyde and Mr. Conyers or Mr. Hyde, Mr. Conyers, augmented, I don't think matters. I trust it either way. What I am concerned about is the public's right to know.

The CHAIRMAN. Mr. Hyde?

Mr. HYDE. As material becomes available immediately, all of the material, so every Member then is going to get access to it and—

Mr. GOSS. Absolutely.

Mr. FROST. Starting Friday, starting tomorrow, prior to this committee meeting next week.

Mr. HYDE. We lose the advantage of us getting to look at it and—

Mr. CONYERS. Well, we will be in effect violating the admonition of Kenneth W. Starr. I never thought I would quote him to the committee, but, I mean, he was careful and prudent enough to tell us that these materials contain 6(e) information and information that may be prejudicial to innocent parties. That is why he wrote the cover letter. He didn't need to tell us outside of that there was 17 boxes. We counted them as they—or actually 36.

But this just in: The chief of staff of the minority of the Judiciary Committee was in the room with the Minority Leader, who called the Speaker after he went on CNN and voiced his agreement.

Now if we are up against a ruling, an amendment of some Member that we could lose the pre–release review altogether, ladies and gentlemen, we have just slipped down the slippery slope. And I mean we are done for if we are going to vote to throw everything—thousands and thousands of pages and boxes—

The CHAIRMAN. I agree with the gentleman.

Mr. CONYERS. Yes. I thank you.

The CHAIRMAN. Mr. Linder.

Mr. LINDER. My only comment is that I really believe from people I have talked with that everyone wants access to this, and I think a vote on the floor, if we closed it too much, we would lose. I really believe we would lose that. And I think the prudent thing to do is make it as available as possible.

The CHAIRMAN. Mr. Hall.

Mr. Diaz–Balart.

Mr. DIAZ–BALART. Mr. Chairman, in the same manner in which in this committee there is extraordinary deference to you, sir, and your opinions, I am extraordinarily confident, Mr. Dreier made that point previously, that there will be the due deference to the two leaders of the Judiciary Committee.

And so I am confident that the format that is being proposed in the resolution is the appropriate one, and note that there is an apparent discrepancy or has been—there has been a miscommunication with regard to the actual extent of a final agreement on that particular point. So I think, Mr. Chairman, that the resolution that you are proposing at this point is the appropriate one.

The CHAIRMAN. The gentlewoman from Rochester, New York.

Ms. SLAUGHTER. Mr. Chairman, this greatly distresses me. I was not at the meetings, but I certainly talked to people who were, who indicate to me that this agreement was made in good faith. And I don't think it bodes well for the process if we can't even get out of the Rules Committee with a resolution that does not break the

agreement that was made in good faith by the leaders of the two parties of the House.

And I am astonished by proposals to immediately release all the supplementary materials. Surely, we can wait until September 28 and make some decision then on what needs to be done. But I am astonished that we don't even feel that it is necessary to protect the rights of people that Kenneth Starr, who I didn't think was so protective of rights in the first place, wants us to protect.

If we don't even go that far, then I think the Congress of the United States has reached an extraordinarily new low. We started off here with all the good words of bipartisanship, good intention and the seriousness of what we might do: overturning the last election when people in this country choose their President. But now I am very much embarrassed that we can't even allow these two men, with whom we have all said we have extraordinary faith, and their designees, to take their preliminary look at these records. As Mr. Conyers pointed out more than once, we have waited almost 5 years; 2 weeks surely can't hurt us.

The CHAIRMAN. Well, you know we may have debated this a little too long but I will tell you something. If these two gentleman and their selected staff are going to be able to look at that information, I see absolutely no reason why other members of the Judiciary Committee that are Members of the United States House of Representatives should not have the same opportunity as a staff person.

Mr. McInnis.

Mr. MCINNIS. Mr. Chairman, you are absolutely right. At the beginning, as we all went around and made our introductory remarks, we heard the warm words of fairness and bipartisanship, and I think those words are very proper. But what concerns me about the expression of these words is if someone doesn't get their way, all of a sudden it is no longer fair, all of a sudden it is no longer bipartisan.

At some point we have to make a decision, at some point somebody has to be the boss. To my dear colleague Ms. Slaughter—you are not protecting the rights of the constituents when their elected representatives, the people who were elected here, are not allowed the privilege of going in and seeing this report.

Ms. SLAUGHTER. If the gentleman would yield?

Mr. MCINNIS. Not yet.

With all due respect, I think it is critical. Every Member at this committee has said this is the most serious duty or obligation we have probably had. You had the war to vote on, as well. We need to be fully informed, and on that basis these Members should have access in these documents to the extent possible, should be open to the public, and then I would yield.

Ms. SLAUGHTER. If you would yield to me, please.

Mr. MCINNIS. I just did.

Ms. SLAUGHTER. Because perhaps I did not make myself as clear as I should have.

In no way are we implying that everybody in the country is not going to know what is in this report. What we are talking about is a different situation, and that is to protect the privacy of innocent persons, at the request of the Independent Counsel. This is

something that decency requires that we do. We trust these two gentleman here and their staffs to excise material that would cause embarrassment or shame on people that are innocent in this and do not need to have their lives be dragged out on the Internet. They want 2 weeks to do that, Mr. McInnis. Frankly, if you were in there, I would stand as squarely as I am right now for the right for your privacy to be protected.

Mr. MCINNIS. And I am reclaiming my time.

Ms. SLAUGHTER. Surely I would ask you to understand that what Mr. Starr has said is not unreasonable.

Mr. MCINNIS. Reclaiming my time, the members of this committee have a very special charge. That special charge does not rest with the Chairman and the Ranking Member, although certainly they lead the rest of the committee. That entire committee is charged with this special responsibility, and everybody on that committee ought to have complete access to those documents to make the determination that you have just spoken of.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Hastings.

Mrs. Myrick.

Mr. DREIER. Mr. Chairman, if I could just comment very briefly on this: the resolution does state that this is to be done in executive session, and I know that there is this concern about information getting out that could damage Members. But the fact that this is done in executive session, again with the very strong leadership of these two gentlemen, I am convinced that they can prevail on these Members.

And I know we have all been getting a great deal of pressure from other members of the Judiciary Committee who do want to be part of this process. We are simply reflecting those views of those duly elected Members.

The CHAIRMAN. Gentlemen, we—again, I just want to repeat in fact that you are going to have an awesome responsibility on your shoulders in reviewing the information that we are not—that we are not making readily available to the American public, namely the 2,600 pages in the appendices and the other supporting material.

And again, we would charge you with making sure that you are going to make available all of the information that does not deal with individual human beings, that does not deal with the 6(e) testimonies that you were talking about, John, and does not infringe on continuing criminal investigations. We would hope that you would, as the resolution says, make that information available to other members of your committee and then to the entire Congress.

We want to thank you very much for your appearing before us. We have the greatest trust and respect of both of you, and we know that you will do an outstanding job for a very difficult assignment. And we thank you for coming. Thank you very much.

The next order of business is to consider testimony by Ms. Sheila Jackson-Lee of Texas. Is Ms. Lee—is here? And the Honorable Maxine Waters from California. Are you here together?

Separately, all right.

Mr. GOSS. Mr. Chairman, while Ms. Lee is coming to the table, may I ask that we include in the record the congressional use of

grand jury transcripts, historical precedents which I have here, which I would like to see included in the record, which might help a little bit on the confusion about what exactly we are going to review and how it is going to—

The CHAIRMAN. Without objection, it will appear in the record.

[The information follows:]

Congressional Use of Grand Jury Transcripts: Historical Precedents

1. In 1811, a grand jury in Baldwin County in the Mississippi territory forwarded to the House a presentment specifying charges against Washington District Superior Court Judge Harry Toulmin for possible impeachment action. *3 Hind's Precedents of the House of Representatives* § 2488 at 985, 986 (1907).

2. In 1944, the House Committee on the Judiciary received grand jury material pertinent to its investigation into allegations of impeachable offenses committed by Judges Albert W. Johnson and Albert L. Watson. *Conduct of Albert W. Johnson and Albert L. Watson, United States District Judges, Middle District of Pennsylvania: Hearings before the Subcommittee of the Committee on the Judiciary to Investigate the Official Conduct of United States District Court Judges Albert W. Johnson and Albert L. Watson*, 79th Cong., 1st Sess. (1945).

3. In 1974, the House Committee on the Judiciary received grand jury material pertinent to its investigation into allegations of impeachable offenses committed by President Richard Nixon. *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C.), *mandamus denied sub nom. Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974).

4. In 1987 the House Judiciary Committee received grand jury material regarding allegations of impeachable offenses committed by Judge Hastings. *In re request for Access to Grand Jury Materials Grand Jury No. 81-1 (Miami)*, 833 F. 2d 1438 (1987).

5. The House Judiciary Committee also received grand jury material during its impeachment investigation of Judge Walter L. Nixon, Jr. *Impeachment of Walter L. Nixon, Jr.*, H. Rept. 101-36, 101st Cong., 1st Sess. (1989); *Judge Walter L. Nixon, Jr. Impeachment Inquiry: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 100th Cong., 2nd Sess. (1988).

The CHAIRMAN. And Ms. Sheila Jackson–Lee, did you have anyone else you wanted to bring to the table with you, or are you here alone?

Ms. JACKSON–LEE. No, Mr. Chairman.

The CHAIRMAN. Again, Ms. Lee, we want to welcome you to the committee. Your entire statement will appear in the record, as other Members have testified, without objection. And you may proceed.

STATEMENT OF THE HON. SHEILA JACKSON-LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Ms. JACKSON–LEE. Mr. Chairman, I thank you very much, and first of all I thank you for your patience, which will probably be tested in the days and weeks to come. I think the complimentary words that were said were quite appropriate, and let me say how proud I am as a member of the Judiciary Committee to be able to serve with Chairman Hyde and certainly Ranking Member Conyers, who I guess claims a special privilege of having served on that very august body in 1974.

You made an interesting point earlier in our discussion in commenting on Chairman Rodino by mentioning the fact that he did an outstanding job, and if you go through the transcripts or the media comments, he was viewed as a very ordinary person.

The CHAIRMAN. In the beginning.

Ms. JACKSON LEE. In the beginning, and wound up of course as a very extraordinarily person.

Today I had a call from a local media outlet and they said, "A colleague of yours has seen the report." I was able very confidently to say, "I know they have not because the House has received it in a very secure and confidential manner, and in fact we will be discussing its distribution today." I felt good about that because that emphasized the direction in which we are going.

And I think it is important, Mr. Chairman, to acknowledge the sobering and somber task we are about to undertake. Might I refer you to just a few words from Alexander Bickel, who commented in 1973, referring to Watergate: "In the presidency is embodied the continuity and indestructibility of the state. It is not possible for the government to function without a President, and the Constitution contemplates and provides for uninterrupted continuity in office."

You are right. We have not reached any question about procedures. We are here talking about distribution. But I would like to refer us to the Watergate proceedings because we have alluded to it as being one that we can all be proud of.

Certainly allegations dealing with breaking and entering and paying hush money are a concern to everyone, but I think those on the committee handled themselves with great dignity and respect. We might recall that the minority, which was the Republican Party at that time, even suggested in their debate, and Peter Rodino allowed them to debate it, that frankly we should not proceed or that we should ultimately make a decision if we view that a crime was committed but also that it had an impact on the governmental system.

So I think what I am trying to emphasize, Mr. Chairman, is this whole question that there will always be disagreement. People come from different perspectives. This is a political body, I hope not driven by politics because we have a serious job to do.

I say that not in a condescending manner or in trying to in any way suggest that the colleagues of mine who speak passionately do not have the right to do so. But this committee is a gateway, frankly, and you can offer a rule that respects the fact that we may not be able in this time to be driven by politics.

Someone earlier said, as you were citing the web page and the dot coms, that we live in a highly technological society. I would only say to you, again with respect, that the Constitution was not written on the Internet, and that although we are in a different era we may bode well by the fact that our Founding Fathers were very careful in respecting the institution of government, the three branches of government, the need for a stable government, and certainly not in a kingly or queenly way the very high office of the President of the United States.

With that then, Mr. Chairman, I think it is imperative that the President have the opportunity to formulate a response. I think it is imperative that the President has a right, now it is being suggested of the 2–day or 48–hour period, and I believe the American people would fully understand that we were not being political but we were being right.

Let me add, if I might, that as I proceed, and very briefly I will cite the Watergate proceedings recognizing that we are not at the stage of making rules, but I frankly believe that we are wrongly directed in releasing the 445 pages. The Independent Counsel's report, while I am sure it is presented in a high or with a high degree of respect for the responsibility that the Independent Counsel has, is still only one side of the story. Albeit that we have heard so many comments by the media, the American public should have the right to hear both sides of the story. With that in mind, if we are to go the route of releasing the documents, and I have indicated my personal perspective on it and I will share why, I believe that the 48 hours, the 2 days, is imperative.

The Watergate impeachment inquiry followed the same precedent. The Judiciary Committee received evidence in closed–door hearings for 7 weeks with the President's lawyer in the same room; again, under the majority of the Democrats and with the minority the Republicans, working, I would like to say, in a nonpartisan manner. This evidence included the material reported by the Watergate grand jury.

And we have those concerns, those of us who have either practiced before grand juries or dealt with these issues. The materials received by the committee, Mr. Chairman, were not released to the public until the conclusion, conclusion of the 7–week evidentiary presentation. By then the White House had full knowledge of the material being considered by the committee.

Also in the Watergate proceeding subpoenas were issued jointly by the Chairman and Ranking Member, and if either declined to act, by the other acting alone; except that if either declined to act, he or she—well, in this instance two he's—would refer the matter to the full committee for a vote. More importantly, the President's

lawyer was required to be provided with copies of all materials presented to the committee, invited to attend presentations of evidence and to submit additional suggestions for witnesses to be interviewed or materials to be reviewed and to respond to evidentiary presentations.

The rules further provided that the President and his counsel shall be invited to attend all hearings, including any held under executive session. Twenty–four hours advance notice was required, and both the Chairman and the Ranking Minority Member were granted access to all times—at all times with committee materials.

I lay that groundwork recognizing that we have not yet defined or established the rules under which we may proceed, and also that we have not moved to the point of an impeachment inquiry. We are receiving a report.

The CHAIRMAN. Would you repeat the first part of that again, because you make a very cogent point that your committee has not yet met to lay out the parameters of their own investigation.

Ms. JACKSON LEE. That is correct, I understand that, but I am using that as a backdrop for my advocacy that the President have 48 hours to be able to review the 445 pages. And in fact I have already made my personal comment that I am very concerned about the release of these documents to the public in any event, because I think the public would understand that because of the somberness and the importance of the responsibility that we have, that it would not be covering up; it would be to have this particular task that we have to be maintained with the greatest of integrity.

I want to add a couple of other points, Mr. Chairman, if I can. I have said here that I would like to see us think along the lines of the Watergate proceedings because I don't think that the House wants to deny the President—and I would like us to separate the President, President Clinton, from the institution of the presidency—the same right that has been and continues to be enjoyed by our own Members, who receive information when charges are filed against them by the House Ethics Committee.

For example, the Speaker was permitted to review the charges filed by the committee before it issued its public report. The President, the institution of the presidency, should be afforded the same right.

Also the Ethics rules require that the subject of any investigation will have not less than 10 calendar days before a scheduled vote to review alleged violations and a copy of the statement of the alleged violations that the committee intends to adopt, together with all evidence it intends to use to prove these charges. The President, again the institution of the presidency, should not receive any less due process than any Member of Congress.

It is clearly important that we respect the fact that our own Independent Counsel has acknowledged the potentiality of damaging materials against private or independent or individual citizens that we could find in the 2,000 pages and the 17 boxes and the appendices.

Frankly, with all due respect to my colleagues and anyone who comes to this committee to offer an amendment, it is this committee that can carve out the vote or the resolution that we will vote on tomorrow. Frankly, I believe we are doing absolutely the wrong

thing, even if we provided an opportunity to vote on an amendment that asks for the entire outlay of documentation to be presented to the American public.

It is not the intent to deny the American public the full understanding and appreciation of the workings of the Constitution, of this House. It is our job; it is our oath of office. But I will say to you it will not be the American people. It will be the rehashing and the recounting and the questioning and the challenges and the charges, over and over again, by the constitutionally protected press. And I have no intent to accuse or to make accusations against the integrity of the press. What I do say is it will not really be the American people, it will be the rehashing, over and over again, of documentation that will not be under the full light of this Congress.

Let me mention as well, Mr. Chairman, as I come to a close, you have section 2 here that indicates with regard to the balance of the material, the balance of the material will be deemed to have been received in executive session but will be released on September 28, 1998 unless the Judiciary Committee votes not to release it. Frankly, Mr. Chairman, I would offer to say that the materials would not be released until the full evidentiary proceedings have been completed.

I would also say that it is confusing, because in section 4 it provides that access to the executive session material will be restricted to members of the committee and such employees of the committee as may be designated by the Chairman after consultation with the Ranking Minority Member.

Does that mean that the documentation that is released September 28, 1998 will be accessible only by these individuals, or if it is released then it is for everyone to see? Is it that you have noted in this section 2 that it will be received in executive session but it will be released if voted upon to release it, meaning the Judiciary Committee?

If they vote upon it, does that break the executive committee receipt or the status of executive committee, and then it is therefore released and access becomes public? Or does it mean that it is released, but for Members and others to get it out or get the actual original documents in their hand? They are, by section 4, restricted to members of the committee and such employees of the committee as may be designated by the Chairman of— after consultation.

I think it is— at least there seems to be some conflict in my mind as to how we will be interpreting it. And I think we will be cleaner, we would be fairer, we would be highlighting the fundamental fairness of what we are here to do by not looking at the President as the President, President William Jefferson Clinton and all that may be surrounding that, but as the institution of the presidency.

The CHAIRMAN. As a President.

Ms. JACKSON–LEE. That is correct, as the institution of the presidency and not as the particular set of facts that are before us.

I would offer to say with that we would be able to proceed in the nonpartisan way that I think that we should, and we would emphasize more than we would ever know that this Congress is committed, each and every one of us, and I challenge no one committed

to the oath of office that they have taken, and that in the ultimate end of this process we will all have done what we were sworn to do and we will have upheld the Constitution of the United States of America.

I think that is our ultimate responsibility, Mr. Chairman, not to be driven by the politics of the day, by the platitudes of openness, by the right of the American people to see. We are in a proceeding that is in every way impinging and infringing upon the institution of government.

So with that, Mr. Chairman, I thank you for allowing me this time.

The CHAIRMAN. Well, Ms. Jackson–Lee, I have to concur with almost everything you have said because you are right.

Let me just confirm again that nothing in this resolution or a future resolution which we may take up on midweek of next week will prevent the Judiciary Committee from hearing from the President's attorneys or attorney—Mr. Kendall. And I would hope that when you adopt your committee rules in your committee, the same as any committee would under regular rules of the House, that you would certainly take that into consideration. And I am quite sure that Congressman Hyde would agree with what you have just stated.

You and Ms. Waters and Ms. Lofgren and others are distinguished members of one of the very key committees of this Congress, and you were chosen for reasons by your party. It would seem to me that you have been arguing that you should have the same access to the material as any other member of the Judiciary Committee.

Now we get to the point of whether or not this information will be released to the public. We are in a new era of openness in this Congress, as demanded by the American people, and because of that we are going to make available all of the material that does not infringe on three categories, those three categories being, again, innocent people that might be involved, the—again, those areas in 6(e), in the proceedings by the grand jury, and in criminal proceedings that may be ongoing. And we want to leave that up to your good judgment, you, the members of that committee, and hopefully that is the way it will work out.

And I guess I just have to ask you, you are one of the most due diligent members of this Congress because you appear before this committee many times, quite often on varied subjects. You do your homework, and you certainly are knowledgeable, and in my opinion you are qualified and deserve to have this same information available to you that any other member of that Judiciary Committee does, and I am trying to see to that.

Ms. JACKSON–LEE. If I might on that, Mr. Chairman?

The CHAIRMAN. You may respond.

Ms. JACKSON–LEE. I think that what we have exhibited here obviously is a tone that we would like this whole entire time of proceedings to proceed in. And I appreciate your comments, and certainly as a member of the Judiciary Committee would want to have the fullest opportunity.

I do respect my Chairman and Ranking Member for the process which they designed on the 17 boxes and 2,000 pages. I frankly do

respect them. I do believe that I could take the challenge up of reviewing the documents, albeit, as Chairman Hyde said, it would be an unsightly and possibly unpleasant task.

But I do support the concept which they have argued because again my premise here today, and where we might slightly disagree, is that I don't agree with the rendering of the 445 pages. But if that does occur, I certainly argue vigorously, and as I said I use the Watergate proceedings as a backdrop, not to argue rules but to say that those materials were not even released until the completion of evidentiary hearings.

I will then take it to the next step and say that I am concerned about the 17 boxes, 2,000 pages and the appendices, because even with the fineness of detailed review, I am fearful that those documents and the release of them will infringe upon the fairest of review by the Judiciary Committee. Because if you have an implosion inside the committee by pressures from those who interpret whatever they may be reading in some manner, and they begin to do the political surge of, "You must do this," then it is my fear that unlike Chairman Rodino and the nonpartisan work of that committee which saw some Republicans vote for but certainly saw some Republicans hold their ground on their belief that their President, or the President, a President, did not deserve impeachment, I am fearful that what we argue on behalf of the American people as what will be fair, which would in turn or which would ultimately be, Mr. Chairman, unfair because it will be driven totally by politics and politics only. And my concession to the superhighway would be, I would be more than happy to have the fullest exposure on the Internet subsequent to the completion of our work.

Might I, Mr. Chairman, in terms of just refreshing my memory, I thought maybe someone on the committee knows that even now there is some debate or discussion on the Nixon tapes, some of those tapes that were engaged. And so the American people have certainly been around a situation when we have withheld documentation, which has not injured, one, the viability of the Constitution, the process of government, or the freedom that the American people expect.

I only say, Mr. Chairman, that I probably disagree that we should even be releasing it at this point, because I fear being driven by the political atmosphere that we really need to be free of, not that we are not representing politics, but we need to be free of it to make a right decision.

The CHAIRMAN. And you do understand that in this resolution where we are trying to follow precedent, that we would allow the Judiciary Committee to do exactly as the Watergate committee did, the Judiciary Committee did back in 1974, and that is to withhold information from the rest of the Members of Congress and the American people. We allow that in this resolution.

Mr. Moakley, did you have a statement or—

Mr. MOAKLEY. The only thing, where our learned colleague referred to the Watergate, isn't so much of that information that was garnered through the grand jury and the Watergate still undistributed? It is still held in secrecy?

Ms. JACKSON-LEE. That is correct, and I—the counsel at that time was a Special Prosecutor, and the ultimate finisher of the

work was Leon Jaworski. And having associated myself with his firm in Texas, Fulbright and Jaworski, I know full well the high order of which he thought his charge was, and that was not secrecy to destroy the process but secrecy to protect freedom and the process. And so those documents were retained.

Mr. MOAKLEY. And didn't the committee work in a very nonpartisan manner, in that if the minority member or the ranking member, either wanted to issue a subpoena, they could do it individually.

Ms. JACKSON–LEE. That is correct. There was the opportunity for the fullest expression, and of course most if not all those hearings were in executive session, and that worked very well for providing that kind of openness.

Mr. MOAKLEY. Thank you.

The CHAIRMAN. Ladies and gentlemen, if you want to see how times have changed, and I guess I am getting old, but since we announced at the beginning of our hearing, when Mr. Dreier made the announcement about our web page, it has been accessed over 10,000 times in less than 2 hours. Can you imagine that? That is mind–boggling to me.

Mr. Linder.

Mr. Diaz–Balart.

I beg your pardon, my good friend from Rochester?

Mr. Hastings.

Mrs. Myrick.

As always, we are always glad to have you come before us, and your testimony is always enlightening, Ms. Lee, and we appreciate it.

Ms. JACKSON–LEE. Mr. Chairman, I thank you very much, and we will probably see each other throughout this process. I thank you for your kindness.

The CHAIRMAN. The next scheduled witness is the Honorable Maxine Waters. I understand now that she has asked to have Ms. Zoé Lofgren of California join her, since you both are members of the Judiciary Committee. You are welcome to proceed, Ms. Waters, you first. Your entire statements will appear in the record without objection.

STATEMENT OF HON. MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. WATERS. Thank you very much, Mr. Chairman and members of this Rules Committee.

I am here as chairperson of the Congressional Black Caucus, as a member of the Judiciary Committee, and as a member of a coalition of concerned Members of this House who have joined together to do everything that we can to ensure fairness in this process.

As public policymakers, we all find ourselves in the difficult position of having to formulate rules and procedures to receive and proceed with the referral from the Office of the Independent Counsel without statutory laws or rules that dictate procedure for carrying out this very special work of the Judiciary Committee, the work of review and determination to refer or not to refer to the Senate for impeachment purposes.

There are those who will review this report with great political interest because of the pending elections in November. There are those who propose that we model the handling of the referral after the Watergate hearings. Others will simply see this as an opportunity to create mass confusion and distraction from the issues of the day.

The Congressional Black Caucus has made the decision to become the fairness cop. We have assigned to ourselves the role of being the best advocate that we can for ensuring that this process recognizes the rights of everyone involved as we go through the process.

We say, Mr. Chairman and Members, without qualification, that the President of the United States of America deserves the right to review, prior to the release, of a copy of the report that has been written by the independent counsel, who has spent 4–1/2 years investigating the President, with the last 8 months devoted to the Monica Lewinsky matter.

Because this is a constitutional issue, we must be steadfast about handling this with great care, and to ask that the President of the United States of America be given adequate time to review the report is fair and just. It is a simple request that any American would respect.

Even in a court of law, it is a basic right for a defendant to know what they have been accused of and to be given the opportunity for preparation, and it is not unusual for the lawyers to ask for time to prepare a response, and more time if they need it. A release of this report or any portion of this report or referral, however you want to refer to it, to the press on the Internet without an opportunity for the accused to review the charges is unconscionable and quite unreasonable. Americans want fairness first.

Members of the Congressional Black Caucus understand this perhaps better than most. We continue even today in our struggle for justice and equality as we are confronted with the criminal justice system that is still fraught with too many abuses. From the time we were considered three–fifths of a human being under slavery, we have fought for the right to be represented by counsel. We have fought against abusive police, who have tried us in the streets with guns and billy clubs rather than give us our day in court. It is this kind of history which forces us to say this process must be fair.

Mr. Chairman and Members, I would like to draw to your attention the struggle that we recently had on the floor of Congress when the left and the right joined because there was a Member who had been abused in the process. This Member happened to be on the Republican side of the aisle, but this so–called liberal African American Member of Congress took the floor in defense of that Member, and we said that our own Justice Department must be put in check, and I voted to include in that the independent counsel, because again, I come from a people and a history that knows what it means to be denied the right to have your day in court, the right to be represented by counsel, the right to have a voice. And because of that, I come here and I make a plea to you as Members of Congress to give the President of the United States a period of time.

I am not going to ask that it be 2 days or 10 days, because I think you are smart enough, and you have enough integrity, and you do want to have a procedure that will be viewed as fair by the American people. There are some members of my caucus who said, don't even try, they have made up their minds. I have argued with them that I believe that the members of this committee on both sides of the aisle still have their minds open to how we can work not only in a bipartisan way, but in a fair way. And I make that plea without any shame and without any reservations that you give the President of the United States a period of time, as long as you like, as short as you like, but a period of time to respond before making the 445 pages public.

If I had my way, Mr. Chairman and Members, I would make sure that the President and Judiciary Committee have ample time to review the report and its appendices prior to release to the public. I would certainly delay the release of the appendices for a limited time until the Judiciary Committee has wrapped up its work.

The Judiciary Committee members are duly elected to work in the best interests of the American people. We know that the independent counsel has conceded that there are some sensitive materials in this report. As such, we must remember to be fair. The chips can fall where they may, but we must remember to enter this with fairness and proceed at all times with fairness.

In conclusion, the Congressional Black Caucus respectfully asks that you give the President this opportunity to review and respond to the charges against him, and we further ask that this process operate again in complete fairness. We therefore agree with the proposal to have Chairman Hyde and Congressman Conyers review the appendices prior to release to the public.

Now, it is very interesting that we have been in this discussion today about whether or not the Judiciary members will have right to access rather than just the Ranking Member and the Chair, and of course I come down on the side basically of all of us being able to review this material, but think about this. There is a discrepancy that rests in this room today about what was so–called agreed upon between the Chair and the Ranking Member and the Speaker, and it seems to me if we want to get off on a good foot, if we want to start this right, we will demonstrate right here and now our ability to do that.

As I understand it, this agreement was made, but also with the caveat that Judiciary members have the right to review and examine the material under controlled circumstances and conditions. If that is the case, that is a compromise that allows for both sides basically to realize what it would like to realize, that we have these two leaders who will have an opportunity to review and come to the Judiciary Committee with recommendations. At the same time you don't close out the right of Members to see this material under controlled conditions.

And if we are going to really put our actions where our mouths are, we are not going to leave here with that misunderstanding today and just take the opportunity to use whatever majority power we have to decide one way or the other. I think you can work this out so we can have what I consider to be fairness in the process.

In closing let me say that I am worried about agreements that are made even between the Ranking Member and the Chair, the Minority Leader and the Majority, the Speaker. I am worried about that because, again, most of the members of this committee are talking about openness in one shape, form or fashion or another. And when we get too many agreements being made behind closed doors, then we don't have the opportunity to talk this thing through and to have the input from all sides.

I heard today my own Ranking Member say that there was an agreement that if they didn't agree, they would go to the Speaker, and the Speaker would decide. I don't like that. I don't like that. And I think I am not going to like a lot of what will be conceded without the ability for us to have some debate and some input.

Having said all of that, again, I hope that you will take to heart what I am trying to share with you about my experience as an African American fighting for fairness, justice and equality in the criminal justice system, and I want you to know that the right and the left are slowly coming together on this issue.

When you look at our House, and you look at the arguments that were made about Ruby Ridge and Waco, and you look at the arguments that have been made for many years about how African Americans have been treated in the system, what you are ending up with is the fact that people from both sides of the aisle and from different spectrums are coming together saying you had better watch the criminal justice system, and that includes the Justice Department and all, as it exercises power. And when you see it abused, any time, any place anywhere, you better put it in check, because it is somebody today, but it is you tomorrow.

Thank you very much for your patience and for listening to what I wished to share.

I have worked in cooperation with my colleague from the Judiciary Committee today to further attempt to do everything that we can to address this question of fairness and to get the input of other Members of not only our Judiciary Committee, but our caucus to try and impress upon you that this is the reigning issue of the day, will we be fair.

The CHAIRMAN. Thank you, Ms. Waters. As usual you are very eloquent in your presentation, and we appreciate that.

The CHAIRMAN. Now we will go to Ms. Lofgren.

STATEMENT OF HON. ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. LOFGREN. Thank you, Mr. Chairman.

Under our Constitution the House of Representatives has the sole power of impeachment. This is perhaps our single most serious responsibility short of a declaration of war. Given the gravity and magnitude of this undertaking, only a fair and bipartisan approach to this question will ensure that truth is discovered, honest judgments rendered and the constitutional requirement observed.

Our best yardstick is our historical experience. We must compare the procedures used today with what Congress did a generation ago when a Republican President was investigated by a Democratic House. The proposal to release the independent counsel report, 445

pages of allegations, and to publish it on the Internet without bipartisan review falls short of this standard.

In 1974, the report from the special prosecutor, Leon Jaworski, and the grand jury material were kept confidential so the House Judiciary Committee could sift through them thoroughly. The proposal to release the independent counsel report without giving the President's counsel the opportunity to see the report falls short of this standard.

In 1974, the President and his lawyers were permitted to see the evidence and to cross–examine witnesses over weeks of closed sessions. Discussions that the Judiciary Committee be permitted to act using procedures not as fair as those used in 1974 cannot meet the standard.

The proceedings in 1974 were conducted in a manner that ensured a fully bipartisan process by providing, for example, that subpoenas be issued upon joint agreement, or if agreement could not be reached, by either Majority or the Minority acting separately. Proposals that would provide for committee action on the sole authority of the Republican Majority without sharing the decision–making as was done in 1974 falls short of the 1974 yardstick of fairness.

Because of the thorough deliberative procedures used during the Watergate proceedings, the ultimate result was not only fair, but was perceived to be fair. This is the standard by which we, too, will be judged. If we fail to follow this example, we will abdicate the solemn duty that the Constitution entrusts to us and to us alone. If we fall short of the yardstick of fairness, the American people will correctly see the cause as partisanship. The damage done will be to our country and to our system of government.

This statement is agreed to by myself and several Members of the House, including my colleagues Ms. Waters, Ms. Sheila Jackson–Lee, Mr. Bobby Scott, a member of the committee, as well as Ms. Slaughter. There are other signatories, including people who helped draft the statement, so we will have some of their names tomorrow.

I would like to note in reviewing this resolution some additional concerns. I note in section 4 and 5 that action is proposed to be taken by the Chairman after consultation with the Ranking Member, and I would contrast that with H.Res. 803 approved by the House of Representatives February 1, 1974, wherein on the second page, line 9, the authority of the committee is exercised by the Chairman and the Ranking Minority Member acting jointly, or, if either declines to act, by the other acting alone. Either shall have the right to refer decisions to the committee and so forth.

What is proposed here is actually a decision made by the Republicans without equal authority by the Minority. It is far short of what this Congress did in 1974. It is insufficiently bipartisan and will lead to unwise results for this country.

The CHAIRMAN. Thank you very much, and we would repeat the accolades that we had for Ms. Waters as well.

The CHAIRMAN. Let me respond briefly on the fairness issue.

You do understand that if the Rules Committee should not act at all, in other words if the Congress, the House of Representatives, were to receive a report from a President, from the General

Accounting Office, from the Joint Economic Committee, from the Justice Department, or from an independent counsel without this committee acting, the procedure would be, that is if we were to not present to this House of Representatives tomorrow a preferential resolution to set the parameters of what information will be made public, under the rules of the House every word, every page, every grand jury procedure, testimony, every videotape, audiotape, everything in all 17 of those boxes would automatically become a public document and be available to the media and to the public. It would be a public document. That is the rule of the House.

In an act of fairness, because we understand much of your testimony where there are innocent people involved, where there is testimony that might be explicitly sexual that I would not want my granddaughter to see or read about in the paper, that information should be withheld if it is not pertinent, and we are doing everything we can to make sure that that doesn't happen, and I hope you understand that that is the normal procedure, the normal rules of the House.

Speaker Gingrich has been criticized by some, a very, very small number, for having the Rules Committee become involved, but that is exactly what would happen if we did not present a resolution to the Congress tomorrow.

Now, on the question of whether or not the Chairman and the Ranking Member will only have access in the beginning, we have polled our Republican Members, and they are going to abide by the wishes of Chairman Hyde, and that means that Chairman Hyde is going to be able to look at that information.

Now, Mr. Conyers is equally respected on his side of the aisle. You are members of the Judiciary Committee, and I assume that you and other Members are going to allow Mr. Conyers to look at that information and then pass it on to you for your final judgment. That is what was done in Watergate, and that is what we are doing here, but we do not intend to deprive other members of the committee from having the final say on whether or not that information is going to be withheld, and you all should—if I were a member of that committee, I would insist that I have that right representing 600,000 people in the Hudson Valley of the State of New York.

Now, concerning the President's ability to receive the information 24 or 48 hours earlier, Lawrence Walsh of Boston, Massachusetts, who was the Iran–Contra independent counsel, stated clearly earlier today that the President's attorneys already know substantially the information that is contained in the 445 pages, and, therefore, in his opinion, they have already prepared their public relations response. As far as their legal response, that will not come for many days until they are called before your committee. In his infinite wisdom, and I didn't agree with him on the Iran–Contra procedures, but he believes that has already been taken care of by the President's attorneys, and I believe that as well.

Therefore, we appreciate your testimony, and I would yield to Mr. Moakley, perhaps, for any comment that he has.

Mr. MOAKLEY. No questions.

The CHAIRMAN. Any questions from my side of the aisle or the Democrats?

Mr. Frost?

Mr. FROST. I would only point out, and perhaps Ms. Lofgren mentioned this when I was out of the room, she brings a wealth of experience to this because she served on the staff of the committee in 1974 during Watergate.

The CHAIRMAN. Right. The point is well taken.

Mr. Goss?

Mr. GOSS. Mr. Chairman, just further to your point that you made about Mr. Walsh, his counsel and his advice on this matter that the White House has a heads–up, I have seen the White House lawyer on national television making a statement about this material, saying there is nothing of substance in the material, and they have already started the public relations program out at the White House. I believe other Members have seen that, too.

Mr. MOAKLEY. Did you also see Mr. Gingrich say that he agreed with Mr. Hyde on how this should be used in the Judiciary Committee?

Mr. GOSS. I did not happen to see Mr. Gingrich. I do know there is some legitimate confusion about the difference between the boxes and the 445–page report, but I dare say that the President of the United States knows a whole lot more about what is in that report than any Member of Congress.

The CHAIRMAN. I recognize Ms. Lofgren.

Ms. LOFGREN. I think adopting the procedures established in 1974 that were fair have more to do with us than the Presidency. If we cannot assure this country that we will be as bipartisan, that we will yield as much authority to the Minority, if we will give as much right to the President as was done in 1974, then we are already starting off on the wrong foot. This is about us, and if we fall short of the yardstick of fairness, I worry a great deal about our country's future.

The CHAIRMAN. Ms. Lofgren and Ms. Waters, let me say that I concur with your observations, and let me tell you that we have done everything in our power trying to reach a compromise to make sure that we try to follow precedent. As you know, there were rumors, and in earlier drafts the Judiciary Committee, the Republicans, were asking for special powers for the Chairman, Mr. Hyde, on contempt citations that would, in effect, in my opinion, have allowed the Judiciary Committee to take action which would have resulted in an American citizen or citizens being locked up without an action of this House of Representatives.

I flatly put my foot down on allowing that to happen, and it is not happening, and there are many, many other examples along the way, because we want to be absolutely fair, and above all else we do not want to infringe on one single right of any American citizen. So your points are well taken, and we are going to try to make it come true.

Ms. WATERS. Mr. Chairman, I think it is very important for us to leave here with the clear understanding about what this committee understands about the ability of the Ranking Member and the Chairman to make recommendations about that which is to be excluded from those boxes and those over 2,000 or so pages.

It seems to me that on the one hand you are saying that the Judiciary Committee members are being excluded, when my under-

standing is that they will be able to see information under controlled conditions, and we will be able to vote on the recommendations of those. Is that your understanding?

The CHAIRMAN. That is absolutely right.

Ms. WATERS. I think that should be made clear.

The CHAIRMAN. The language in the resolution is going to make the information available to all of you Members. However, there is nothing in the resolution that is going to prevent Mr. Hyde from getting the agreement of other Republicans to take his advice on what he is going to piece out and show in the individual boxes. There is nothing to prevent Mr. Conyers from doing the same thing, and I would hope that would be the case.

But you as individual Members will have the final say over what is going to be expunged. That will be up to you and a vote of your committee, and that is the way that it should be.

Ms. WATERS. That is what I think is fair. And if we have the ability and we want to take the time and put in the effort to do the review so we can have the input, make recommendations to our Ranking Member, et cetera, et cetera, so we can influence the outcome, then I think—

The CHAIRMAN. That is exactly our intent in this resolution, that you have the final say on what is going to be expunged, and it would be left up to you, and that is the way that it should be.

All right, we have heard from all of the Members. We appreciate your coming. We have one more witness to testify. It is the honorable and respected Mr. Peter Deutsch from south Florida. Your entire statement will appear in the record without objection.

STATEMENT OF HON. PETER DEUTSCH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. DEUTSCH. Thank you, Mr. Chairman. I appreciate having the opportunity to close the testimony. And I particularly appreciate Mr. Goss being in the room for my presentation, because in the opening comments I think Mr. Goss's statement was one that I could not have made any better. And I am also happy that Mr. Diaz–Balart is here as well. All three of us are from Florida, where we pride ourselves in government as really literally being the Sunshine State, and all of you will be at some point in your lives from Florida.

But really on a very serious note, we have had a long tradition of open government, and we take it very, very seriously. We believe it has been incredibly successful. Sometimes it is a little bit ugly, and sometimes it is painful, and sometimes elected officials don't like it, but I think it works, and it works very well.

And I think that as we are deliberating as a collective body, and as you are deliberating as a committee this evening, I really hope that you heed these words and you heed Mr. Goss's comments also that we are the public servants. This is the public's House. There is nothing to be afraid of the public knowing what is going on. I think it is critical and it is imperative that the public know what is going on; not just that this meeting be open, as it is, obviously, but that we avoid executive sessions at all times unless for specific, almost national security reasons.

I have spoken with the staff of this committee today, and I have sat through the last several hours of hearings. I have sat through the comments of the Chairman of this committee and the Chairman of the Judiciary Committee, and I want us to stop and reflect. We have talked about some of the problems that could occur by release of information. We have talked about potentially innocent people or sexual material or irrelevant material.

I will tell you that if it was worth investigating, it is worth the public knowing, and it is worth the public making that determination, because sometimes what might seem as innocent individual comment—and there has been discussion what happens in the Linda Tripp tapes if there is a discussion about 20 other people who have no relevancy to the primary issues at hand. It might have credibility as to the two people on the tape. Essentially we are making a judgment, or Mr. Hyde or Mr. Conyers will be making that judgment. They really should not be making that judgment.

Again, yes, there are some innocent people on these tapes, but I ask you all to reflect about this, and very seriously, what are we doing here. What are we talking about. We are talking about the President of the United States of America. We are talking about the most powerful person on the planet. He is not just President of the United States, he is President of the world. And yes, there is some cost in terms of releasing all of the information immediately, but I think the benefit in terms of this process and in terms of our country far outweighs that cost. I don't think it is a close call.

Unfortunately those not from Florida, your experience with open government might not be as much as those of us from Florida, but I hope that you do reflect in terms of what it should mean and what it can mean.

I will also tell you that just the integrity of this process for the American people, this is clearly a disturbing time in America. I don't think that there is a person in this country that really wants us to be here this evening. I know none of us want to be here this evening discussing this, but the reality is that we are where we are. It truly is critical at this point in time that we have integrity in this process. What better way to have integrity in this process than to literally bring the public as part of this process, not to be voyeurs, but to show in a literal sense that we have nothing to hide, that the cards fall where they may, the President has nothing to hide.

There is nothing we can do more to build integrity in this process than to keep this process literally an open process. I implore you to take that very much to heart that that is an option that you have, and I am offering an alternative resolution that hopefully you will take up very seriously.

I will also add in terms of this whole process as it has developed and the specifics as to how it might impede, we are setting up a system where some material that was acquired clearly will not be—hopefully if the resolution as proposed by the Chairman is adopted, there is some information not available to the President's counsel in his own defense, whatever that might be, and if we really want a fair process from that standpoint, that is a mistake.

So again, I would urge my colleagues to support the resolution and to make all of the material available to the American people immediately.

The CHAIRMAN. Thank you, Mr. Deutsch, and let me, first of all, just preface my remarks about you and thank you for joining me in Jerusalem on the West Bank. We had some very interesting and informative meetings. You took the time to join us when you were on vacation, I believe, and we appreciate that.

Having said that, let me say that I would have to disagree with you, although I agree with your philosophy. This is a preferential resolution which will be going to the floor. It is unamendable. Therefore, we would have to change this resolution and put only yours on the floor, and we can't do that.

However, there will be the opportunity to defeat the previous question. I believe that there will be Members on both sides, substantial Members, who feel the way that you do. Although your side, the Democratic side in the minority, normally controls the defeat of the previous question, the right to make the argument against it, and then, should you defeat it, have the right to offer your amendment, that opportunity might be there. And I would just tell you even though we will not—I believe we will not honor your request here tonight, we understand where you are coming from, and we will see what happens on the floor tomorrow.

Any questions to my right?

Any questions to my left?

Mr. Goss first.

Mr. GOSS. Thank you.

I want to thank Mr. Deutsch for his kind comments. I do believe very firmly in the public's right to know, and I think that is what is at stake here. But I also understand that this has been a very difficult process to get to this point, and I think we have worked it out the best that we can. I feel that we have gone about it the way that it will have to go forward.

Mr. DEUTSCH. And I appreciate what Mr. Goss is saying.

I have a concern, though, that really this is not far enough, just the concerns about where the report is, and I know that you share that. And you sit literally in a different place than I sit in this committee room, and I know that as Florida grows, and as more Members of Congress are from Florida, we will work on that.

The CHAIRMAN. I want to assure you I will never move back to Florida. I will be an Adirondacker all my life.

Ms. SLAUGHTER. Here, here.

Mr. DIAZ–BALART. I also wanted to thank Mr. Deutsch for his hard work and for coming before us with this product, but I think Mr. Goss has very succinctly pointed to the reasons why, in my view as well, the resolution, Mr. Chairman, that the committee is proposing, that you have worked so hard on and have led the effort in bringing forth, is the correct approach. Thank you.

The CHAIRMAN. Mr. McInnis from Colorado.

Mr. MCINNIS. Thank you. I appreciate what you say, but one of the other things that shocked the country was the bombing of the Olympics. And before the government had substantial and credible evidence, they released the name of Richard Jewell. They destroyed

that man. They then had to retract everything because they didn't have the evidence.

The 445 pages are drawn from these 2,000 source documents, and to be drawn from those it is my conclusion they had to have substantial and credible evidence. So I completely support your philosophy on the first 445 pages because they are drawn from substantial and credible evidence, but before you disclose the 2,000 pages of documents, I think it is appropriate to say, this is just somebody's name that they threw in there. It came out in the deposition tape. There is no credible evidence. There is no substantial evidence tying this individual to this, and why is that individual's name coming up?

We speak of the rights of this great country, it almost sounds like they preempt the right of an individual. I think it is exactly the opposite. I don't want another Richard Jewell on our hands as a result of releasing those 2,000 documents where the independent counsel did not find substantial and credible evidence to move it from the source documents to the 445–page report.

Mr. DEUTSCH. I think we need to remind ourselves, because it appears that at this point that the Chairman's resolution will be adopted and the procedure that he is proposing will be followed tomorrow morning, and for that the 445–page document will be available. I agree with you completely, it is interpretation of those source documents, and I would remind people that it is also an interpretation of someone who has clearly shown for the last 5 years that he has almost a Captain Ahab approach of getting Bill Clinton. And maybe that is the role that advocates should be playing, but I think we need to remind ourselves that source documents lead to different conclusions. And I think your comments, if not really supporting my position, are not opposed to my position because I think particularly in this case, if we are only giving out the report, in fact it is almost by definition almost a requirement to include the source documents so people can look at those source documents and might come up with totally differing conclusions than Mr. Starr came up with from those things.

I also want to respond to Richard Jewell. That is an unfortunate, tragic situation. But I will tell you we are weighing values, and we have talked about the concern of hurting innocents.

I just go back very quickly to what we are doing here this evening and over the next several days and several weeks. We are talking about the President of the United States, of setting aside an election for the first time in this Nation's history, the oldest democracy in the history of the world. We are not talking about unsubstantial things.

I will tell you that there is a very, very, very paradigm value of our society and our government, and I think by our actions and your resolution, I think you were jeopardizing it to some extent.

The CHAIRMAN. Peter, thank you.

If there are no further questions of the witness, we thank you for coming, and as always, you have made yourself very clear.

Gentlemen, we will stand in a 30–second recess, and then we will take up the resolution.

[Pause.]

The CHAIRMAN. The committee will come back to order.

The committee will now proceed in the markup of the resolution.

The measure before the committee is House Resolution 525 providing for a deliberative review by the Committee on the Judiciary of a communication from the independent counsel and for the release thereof and for other purposes.

The resolution was introduced earlier today and appears on the Web site of the Rules Committee. We have already received over 10,000 accesses to it, Mr. Dreier, so I would say that there is extreme interest by the American people.

The committee has just completed the hearing on the measure, and without objection the resolution is considered as read.

[The information follows:]

IV

House Calendar No. 245

105TH CONGRESS
2D SESSION

H. RES. 525

[Report No. 105–703]

Providing for a deliberative review by the Committee on the Judiciary of a communication from an independent counsel, and for the release thereof, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 10, 1998

Mr. SOLOMON submitted the following resolution; which was referred to the Committee on Rules

SEPTEMBER 10, 1998

Referred to the House Calendar and ordered to be printed

RESOLUTION

Providing for a deliberative review by the Committee on the Judiciary of a communication from an independent counsel, and for the release thereof, and for other purposes.

1 *Resolved,* That the Committee on the Judiciary shall
2 review the communication received on September 9, 1998,
3 from an independent counsel pursuant to section 595(c)
4 of title 28, United States Code, transmitting a determina-

1 tion that substantial and credible information received by
2 the independent counsel in carrying out his responsibilities
3 under chapter 40 of title 28, United States Code, may con-
4 stitute grounds for an impeachment of the President of
5 the United States, and related matters, to determine
6 whether sufficient grounds exist to recommend to the
7 House that an impeachment inquiry be commenced. Until
8 otherwise ordered by the House, the review by the commit-
9 tee shall be governed by this resolution.

10 SEC. 2. The material transmitted to the House by
11 the independent counsel shall be considered as referred to
12 the committee. The portion of such material consisting of
13 approximately 445 pages comprising an introduction, a
14 narrative, and a statement of grounds, shall be printed
15 as a document of the House. The balance of such material
16 shall be deemed to have been received in executive session,
17 but shall be released from the status on September 28,
18 1998, except as otherwise determined by the committee.
19 Material so released shall immediately be submitted for
20 printing as a document of the House.

21 SEC. 3. Additional material compiled by the commit-
22 tee during the review also shall be deemed to have been
23 received in executive session unless it is received in an
24 open session of the committee.

1 SEC. 4. Notwithstanding clause 2(e) of rule XI, ac-
2 cess to executive-session material of the committee relat-
3 ing to the review shall be restricted to members of the
4 committee, and to such employees of the committee as
5 may be designated by the chairman after consultation with
6 the ranking minority member.

7 SEC. 5. Notwithstanding clause 2(g) of rule XI, each
8 meeting, hearing, or deposition of the committee relating
9 to the review shall be conducted in executive session unless
10 otherwise determined by an affirmative vote of the com-
11 mittee, a majority being present. Such an executive session
12 may be attended only by members of the committee, and
13 by such employees of the committee as may be designated
14 by the chairman after consultation with the ranking mi-
15 nority member.

The CHAIRMAN. And without objection, the resolution will be considered for the purposes of amendment under the 5–minute rule.

Are there any amendments to this resolution?

Mr. MOAKLEY. Mr. Chairman?

The CHAIRMAN. Mr. Moakley?

Mr. MOAKLEY. I have a substitute to H.Res. 525. I move the committee report a resolution that would make in order as a base text the substitute resolution in lieu of the text of H.Res. 525 which is currently before us. This substitute reflects the agreement that was reached by the Republican and Democratic leaders last night regarding the release and review of the independent counsel documents. It provides for the immediate release of the initial 445 pages. It provides that the Chairman and Ranking Minority Member of the Judiciary Committee shall review the remaining material to determine which are appropriate for public release by September 20 and which are of a personal nature and should remain confidential. Mr. Chairman, it also allows the Chairman and the Ranking Minority Member of the Judiciary Committee to issue interim committee rules of procedure regarding the material submitted by the independent counsel.

That is the amendment, Mr. Chairman.

The CHAIRMAN. Well, Mr. Moakley, I believe you had returned during the interchange with Maxine Waters and with Zoe Lofgren.

Mr. MOAKLEY. I didn't leave, Mr. Chairman. I was here the whole time.

The CHAIRMAN. Now you have your coat on. I thought you had gone outside.

As you know in the interchange we had, there is nothing in this resolution that will prevent the Chairman and the Ranking Member, with agreement from their respective members from their party on the Judiciary Committee, from allowing the two of them to filter this information, as this is one of the major provisions of your substitute.

I have been satisfied by talking with the Republican members of the Judiciary Committee that they will abide by the wishes of Henry Hyde, and I assume that the Democrat members will abide by the wishes of the Ranking Member, Mr. John Conyers, as well. However, I do not think that it would be prudent of this body to shut out the very professional, qualified members of the Judiciary Committee from having a say in this matter, and in my opinion, your substitute resolution would do just that. And, therefore, I would argue that we would defeat your resolution, but I respect your interest.

If there is no further discussion, all those in favor of the Moakley amendment will say aye.

All those opposed, nay.

The amendment is not agreed to.

Mr. MOAKLEY. Roll call, Mr. Chairman.

The CHAIRMAN. A roll call is requested. The clerk will call the roll.

The CLERK. Mr. Dreier.

Mr. DREIER. No.

The CLERK. Mr. Dreier votes no.

Mr. Goss.
Mr. GOSS. No.
The CLERK. Mr. Goss votes no.
Mr. Linder.
Mr. LINDER. No.
The CLERK. Mr. Linder votes no.
Ms. Pryce.
[No response.]
The CLERK. Mr. Diaz–Balart.
Mr. DIAZ–BALART. No.
The CLERK. Mr. Diaz–Balart votes no.
Mr. McInnis.
Mr. MCINNIS. No.
The CLERK. Mr. McInnis votes no.
Mr. Hastings.
Mr. HASTINGS. No.
The CLERK. Mr. Hastings votes no.
Mrs. Myrick.
Mrs. MYRICK. No.
The CLERK. Mrs. Myrick votes no.
Mr. Moakley.
Mr. MOAKLEY. Yes.
The CLERK. Mr. Moakley votes yes.
Mr. Frost.
Mr. FROST. Yes.
The CLERK. Mr. Frost votes yes.
Mr. Hall.
Mr. HALL. Yes.
The CLERK. Mr. Hall votes yes.
Ms. Slaughter.
Ms. SLAUGHTER. Yes.
The CLERK. Ms. Slaughter votes yes.
Chairman Solomon.
The CHAIRMAN. I respectfully vote no, even though I hate to vote against my Ranking Member.
The clerk will announce the results.
The CLERK. Four yeas and eight nays.
The CHAIRMAN. The amendment is not agreed to.
Are there further amendments to the resolution?
Mr. HALL. Mr. Chairman.
The CHAIRMAN. Mr. Hall of Ohio.
Mr. HALL. I have an amendment to the resolution, and I move that the committee report the amendment in the nature of a substitute offered by the Judiciary Committee Ranking Member Mr. Conyers in lieu of the text of House Resolution 525.
This substitute provides that the 445–page report submitted by the independent counsel to the House shall be released to the President on Friday, September 11, and to the Members and the public on Sunday, September 13. This will give the President a period of 48 hours to review the report before the public release.
I think this is fair. I think this is reasonable, since under the rules of the House, any Member facing ethics charges, has 10 days to review all evidence. So I think this is very relevant to what we have done in the past. I think it is only fair to give the President

a chance to review this for a couple of days, and I offer the amendment.

The CHAIRMAN. Mr. Hall, your amendment to link the ethics rules of the House with the United States Constitution and existing laws of the land I don't think is very well taken, although I don't question your sincerity in doing it. We have rules of ethics that we agree to operate under. It is an entirely different story. These are not rules that the American people have to live under. It is rules that we as Members of Congress live under.

By the same token, when a committee of jurisdiction, such as the Judiciary Committee, considers this kind of information, it is done in executive session. And if any Member leaks any of it, it is in violation of the House rules, and they stand subject to being censured by our ethics committee. Therefore, I have no worry that any Member would go ahead and leak this information.

We have made the arguments about the President receiving the information 48 hours in advance. I share former independent counsel Lawrence Walsh's reasoning that the President already has that information, and before he has to file a legal document with the Justice Department, with the Judiciary, that they will have ample time to do it; and, therefore, I would argue against your resolution.

Mr. HALL. Mr. Chairman, he does not have the written information to look at it. He has been investigated for a number of years now at the cost of about $40 million. For us in the Congress not to give him a couple of days—not even a few hours—to review what the Starr report says I think is extremely unfair.

When we go back and look at Watergate—when that inquiry on the articles of impeachment came to the Congress, I remember reading that Peter Rodino bent over backwards to be fair. In fact, he was so fair that he was criticized by the members of the Democratic Party, but it turned out that he did the right thing by being extremely bipartisan. He gave subpoena powers to the Minority party at that time.

We want to be fair to the President. This is the third time in the history of the country that a President has been investigated for potential misdeeds relative to—and hopefully it doesn't get that far—to articles of impeachment. For us to give the President a couple of days to look at all of the material which has been gathered at a cost of $40 million, I think it is fair and reasonable, and I don't think that we are doing the right thing if we don't pass this amendment.

The CHAIRMAN. Mr. Hall, in my opinion, and I have been very careful to listen to Members from both sides of the aisle, a majority of this Congress does not agree with you. A majority of the Congress believes that they ought to receive the material first and certainly no later than any other individual, including the President of the United States, and we are not going to jeopardize this resolution. Since it has to go one way or the other to the floor, we must pass a bipartisan resolution that is going to be overwhelmingly accepted by this body tomorrow.

Mr. HALL. You just spoke about the argument I brought up regarding Members of Congress and ethics charges. They have 10

days to review ethics charges. You are not even giving the President of the United States 1 hour.

The CHAIRMAN. The President of the United States will have a good 1 hour. He will have access to the first hard copy that is made tomorrow. Certainly by the time the rest of us Members get it, it is going to be 2, 3 or 4 hours later, and I will probably miss my plane until I receive it.

Is there any further discussion? If not, the Chair will put the question on the amendment by Mr. Hall. All those in favor say aye.

All those opposed, nay.

The amendment is not agreed to.

Mr. HALL. Roll call.

The CHAIRMAN. A roll call is requested. The clerk will call the roll.

The CLERK. Mr. Dreier.

Mr. DREIER. No.

The CLERK. Mr. Dreier votes no.

Mr. Goss.

Mr. GOSS. No.

The CLERK. Mr. Goss votes no.

Mr. Linder.

Mr. LINDER. No.

The CLERK. Mr. Linder votes no.

Ms. Pryce.

[No response.]

The CLERK. Mr. Diaz–Balart.

Mr. DIAZ–BALART. No.

The CLERK. Mr. Diaz–Balart votes no.

Mr. McInnis.

Mr. MCINNIS. No.

The CLERK. Mr. McInnis votes no.

Mr. Hastings.

Mr. HASTINGS. No.

The CLERK. Mr. Hastings votes no.

Mrs. Myrick.

Mrs. MYRICK. No.

The CLERK. Mrs. Myrick votes no.

Mr. Moakley.

Mr. MOAKLEY. Yes.

The CLERK. Mr. Moakley votes yes.

Mr. Frost.

Mr. FROST. Yes.

The CLERK. Mr. Frost votes yes.

Mr. Hall.

Mr. HALL. Yes.

The CLERK. Mr. Hall votes yes.

Ms. Slaughter.

Ms. SLAUGHTER. Yes.

The CLERK. Ms. Slaughter votes yes.

Chairman Solomon.

The CHAIRMAN. No.

The CLERK. Mr. Solomon votes no.

The CHAIRMAN. The clerk will announce the results.

The CLERK. Four yeas, eight nays.

The CHAIRMAN. The amendment is not agreed to.

Are there further amendments to the resolution?

If not, without objection the previous question is ordered on the resolution. The question is on agreeing to House Resolution 525 and favorably reporting the resolution to the House. All those in favor will say aye.

All those opposed, nay.

The resolution is agreed to. House Resolution 525 is agreed to, and the resolution is favorably reported to the House, and without objection the motion to reconsider is laid upon the table.

Mr. MOAKLEY. Mr. Chairman, please note my dissenting views in the report.

The CHAIRMAN. Yes. We will be filing later this evening the report, and we will make sure that the dissenting views are attached to it and made a part of the report.

The Chair would like to file the report this evening, and now that we have the additional Minority views, we will hopefully be able to do that in a timely manner.

I might point out that since this is a preferential resolution and we are bound by the rules of the House, it is unamendable on the floor of the House, and it requires only 1 hour of debate.

It would be my intention when I file the report in a few hours or minutes, I would make a unanimous consent request to extend the debate time for 2 hours. That is the only way we can do it. We cannot do it up here, and I would assume that there would be no objection from any member of this committee.

Mr. MOAKLEY. No objection.

The CHAIRMAN. Very good.

Gentlemen, we want to thank you. It was a very informative debate. We certainly were collegial, and we certainly did it with comity, and I want to commend all of you for your participation, and the committee stands adjourned.

[Whereupon, at 8:40 p.m., the committee was adjourned.]

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